ALASKA WORKERS' COMPENSATION BOARD

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

KEITH THOMAS, Employee, Claimant, v. KEITH'S PLUMBING AND HEATING, Employer, and ALASKA NATIONAL INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201218735 AWCB Decision No. 15-0042 Filed with AWCB Anchorage, Alaska on April 13, 2015

Keith Thomas' (Employee) October 7, 2014 claim for a review of the reemployment benefits administrator's designee's (RBA designee) decision finding him ineligible for reemployment benefits was heard on March 4, 2015, in Anchorage, Alaska, a date selected on January 20, 2015. Employee appeared telephonically, represented himself, and testified. Attorney Theresa Hennemann appeared and represented Keith's Plumbing and Heating and Alaska National Insurance Co. (Employer). An oral ruling allowed Cindy Friese to testify for Employee over Employer's objection. The record was left open to allow for filing of supplementary legal authority. The record closed on March 26, 2015, when the panel met to deliberate. This decision examines the oral order allowing Friese to testify and decides Employee's appeal from the RBA designee's eligibility decision on its merits.

ISSUES

Employee contended Ms. Friese should be allowed to testify on his behalf because he timely filed a witness list including "Cindy Friese, girlfriend." Employee conceded the witness list did not provide Friese's address or telephone number, a statement as to whether she was going to testify live or by deposition, and did not include a brief description of the subject matter and substance of Friese's expected testimony.

Employer objected to Friese's testimony because Employee did not establish her credentials or expertise, and Employer had no advance notice of the subject matter or substance of her expected testimony. The panel overruled Employer's objection.

1) Was the oral ruling allowing Employee's witness to testify proper?

Employer contended Employee's appeal should be denied as untimely because he did not seek review of the RBA designee's decision within 10 days.

Employee contended his appeal should not be denied due to late filing. He maintained he is a layman who did the best he could to comply with the Alaska Workers' Compensation Act's (Act) procedural requirements, but he had been out of town when the RBA designee's letter arrived. Employee contended upon receipt, he promptly did his due diligence and filed a claim requesting review of the decision.

2) Should Employee's claim for review of the RBA designee's eligibility decision be denied as untimely?

Employee contended the RBA designee incorrectly found him ineligible for reemployment benefits because owning and renting houses has never been his "job"; while he owns two rental properties that provide incidental income, his main source of income has always been from his plumbing business. Moreover, Employee contended he has never been and does not know how to be a leasing agent.

Employer contended the RBA designee correctly found Employee ineligible for reemployment benefits for several reasons: (1) he had worked as a residential leasing agent in the decade before

and also since his work injury; (2) his treating physicians predicted he would have the permanent physical capacities to perform that job again; and (3) the rehabilitation specialist determined the job exists in the labor market.

3) Did the RBA designee abuse her discretion in finding Employee ineligible for reemployment benefits?

FINDINGS OF FACT

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

1) On December 15, 2012, Employee reportedly injured his left shoulder when he slipped on ice while carrying boxes of flue pipe. (Report of Injury, December 19, 2012.)

2) On March 19, 2014, rehabilitation specialist Kaya Kade wrote a partial eligibility evaluation of Employee. Under Employee's 10-year work history, Ms. Kade listed:

> **12/15/2012 - Present, Rental Property Management after injury**
>
> [Employee] has been buying property and improving it and making it into rental property. Prior to his injury has also done the upkeep on the property. Since his injury he states that he has hired people to maintain the property. The following title best describes the work that he has been doing post injury. This specialist is not clear whether since the date of injury if [Employee] has actually acquired any new property. He did discuss that he was getting ready to buy another one in the near future.
>
> | | |
> |---|---|
> | Title: | Leasing Agent, Residence |
> | DOT Code: | 250.357-014 |
> | SVP: | Level 5: (Over 6 months to 1 year) |
> | PHYSICAL REQUIREMENTS: | Medium |

(Kade incomplete eligibility evaluation, March 19, 2014, p. 2.)

3) In the Dictionary of Occupational Titles, the job description for Leasing Agent, Residence (real estate), code 250.357-014, is:

> Shows and leases apartments, condominiums, homes, or mobile home lots to prospective tenants:

> Tasks
>
> 1. Interviews prospective tenants and records information to ascertain needs and qualifications.
> 2. Accompanies prospects to model homes and apartments and discusses size and layout of rooms, available facilities, such as swimming pool and saunas, location of shopping centers, services available, and terms of lease.
> 3. Completes lease form or agreement and collects rental deposit.
>
> May Also Include:
>
> 1. May inspect condition of premises periodically and arrange for necessary maintenance.
> 2. May compile listings of available rental property.
> 3. May compose newspaper advertisements.
> 4. May be required to have real estate agent's license.
> 5. May contact credit bureau to obtain credit report on prospective tenant.
>
> Alternate Titles: Rental Agent

(*Id.*, p. 19.)

4) On June 28, 2014, Kade recommended Employee be found not eligible for reemployment benefits. (Kade eligibility evaluation, June 28, 2014.)

5) On September 23, 2014, the RBA designee wrote Employee:

> I have determined that you are *not eligible* for reemployment benefits based upon eligibility evaluation reports of rehabilitation specialist Kaya T. Kade. Ms. Kade documented that your treating physicians, Dr. Doug Prevost and Dr. Robert Gieringer, both predicted that you would have the permanent physical capacities to perform the physical demands for Residence Leasing Agent, as it is described in the DOT/SCODRDOT job description. This was a job you performed during the ten-year time period prior to your job of injury and that you have held since your injury. Additionally, Ms. Kade conducted labor market research and documented that ". . . the job or jobs exist in the labor market. . ." per 8 AAC 45.525(b)(4).
>
> If you disagree with my decision that you are not eligible for reemployment benefits, then you must complete and return the attached Workers' Compensation Claim (Form #7-6106) within 10 days of receipt of this letter. Please pay particular attention to section 24(g). If you do not request review of my decision within the 10-day period, the decision is final.

(RBA designee letter, served September 23, 2014.)

6) The Division's ICERS database states on October 7, 2014, Employee returned a phone call and said he had concerns regarding the residential leasing agent job it was determined he could perform. Employee stated he was self-employed and had only a couple of properties he leases out, and that his rental properties were not a full-time job. (*Id.*)

7) On October 7, 2014, Employee completed a claim requesting review of the reemployment benefit decision finding him ineligible for retraining. The board received the claim the next day. Employee asserted, "I have never been a leasing agent, I own a couple rental properties, my main source of income is from my plumbing business." (Claim, October 7, 2014.)

8) At a prehearing conference on January 20, 2015, the designee scheduled a hearing for March 4, 2015. Parties were directed to serve and file witness lists in accordance with 8 AAC 45.112. (Prehearing Conference Summary, January 20, 2015.)

9) On February 9, 2015, Employee filed another claim requesting review of his reemployment benefit decision. In an attached letter, Employee described himself as a "small independent contractor" and wrote:

> I take exception to your allegation of ineligibility for workman compensation disability benefits. Residential Leasing was incidental income as my primary source of income was owning and operating Pit 61. This consisted of mining gravel, installing septic systems and related plumbing activities.
>
> Due to economic conditions in Michigan there was a period of time when I was unable to secure work in these fields. Therefore, I relocated to Alaska where my primary source of income, plumbing and heating was available. . . .

(Employee letter, February 9, 2015.)

10) On February 24, 2015, Employee filed a witness list including his girlfriend, Cindy Friese. The list did not indicate whether Friese would testify in person, by deposition, or telephonically, and did not include her address, phone number, or a brief description of the subject matter or substance of her expected testimony. (Witness list, February 24, 2015.)

11) At hearing on March 4, 2015, Employee testified he owned two rental houses, but had never held a job as a residential leasing agent:

> Just owning a couple of rental properties is totally incidental income. . . . I'm not a paper person. I . . . hire people to do that. I'm not a desk person. I'm an

> outside person. . . . I'm not a residential leasing agent, never have been, and I don't want to be.

Employee testified he is a "hands-on kinda guy" who works in the field, not an office person, and Friese does all his books and paperwork. Employee maintained it was unfair to insinuate he is something he is not. (Employee.)

12) Employee testified he is a layman who did the best he could to comply with the Act's procedural requirements, but he had been in Eagle, Alaska, with no mail or telephone access, for a three-week period during which the RBA designee's determination letter arrived in Valdez. He testified that upon receipt of the letter, he promptly did his due diligence and filed a claim requesting review of the decision. (*Id.*)

13) Employer objected to Friese testifying because Employee had not established her credentials or expertise, and Employer had no advance notice of the subject matter or substance of her expected testimony. (Employer's hearing arguments).

14) The panel overruled Employer's objection to Friese. At hearing Friese testified she is a leasing agent who owns "lots of properties" of her own, has held a real estate license in Michigan, and has "done leasing on houses and apartments." Friese testified she had known Employee since 1999, and he had rented properties for four to five years, but in Friese's opinion he "would not even know where to start when it came to being a leasing agent." Friese testified she does the bookkeeping for Employee, including the finances related to his rental properties, but has no responsibilities renting out the properties he owns; if tenants require maintenance, they call Dan Dennis, a friend in Michigan who is the local manager for the properties. She also testified Employee does not advertise for tenants. (Friese.)

15) Employer's counsel cross-examined Friese and, in closing arguments, used her testimony that Employee owned and rented properties to support Employer's contention Employee is not entitled to retraining. (Record; Hennemann.)

16) Employee and Friese testified credibly. (Judgment; Observation.)

17) The record was left open until March 26, 2015, to allow Employer to submit supplemental legal authority and Employee the opportunity to respond. (Record.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> > 1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board**.
> . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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

The Alaska Supreme Court stated the pleadings of self-represented (*pro se*) litigants should be held to less strict standards than those of lawyers. In *Gilbert v. Nina Plaza Condo Ass'n*, 64 P.3d 126, 129 (Alaska 2003), a case involving civil court discovery difficulties, the Court stated:

> It is well settled that in cases involving a *pro se* litigant the superior court must relax procedural requirements to a reasonable extent. We have indicated, for example, that courts should generally hold the pleadings of *pro se* litigants to less stringent standards than those of lawyers. This is particularly true when 'lack of familiarity with the rules rather than gross neglect or lack of good faith underlies litigants' errors.'. . .
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> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . .
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the

> administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
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> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:
>
> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'. . .

Pursuant to AS 23.30.041(e)'s express language, medical evidence of eligibility must satisfy three requirements. First, the evidence must take the form of a prediction. Second, the person making the prediction must be a physician. Third, the prediction must compare the physical demands of the employee's job, as the U.S. Department of Labor describes them, with the employee's physical capacities. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993).

In *Moesh v. Anchorage Sand & Gravel*, 877 P.2d 763 (Alaska 1994), an employee argued he should be eligible for reemployment benefits because, even though he could perform a job he held in the 10 years prior to his work injury, that job would pay less than 60% of the earnings he made at the time he was injured. The Alaska Supreme Court (*per curiam*) affirmed in entirety the superior court's holding that, because remunerative employability is not expressly listed in AS 23.30.041(e), it may not be considered in determining whether an injured worker is eligible for reemployment benefits.

There is no definition of "job" in the Act. However in *Arnesen v. Anchorage Refuse, Inc.*, 925 P.2d 661, 664 (Alaska 1996), the Alaska Supreme Court invoked the ordinary-meaning rule to define "job":

> We have previously held that, where a term used in a statute is not defined in that statute, 'the plain or common meaning . . . is controlling.' [*Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*], 746 P.2d at 905. The American Heritage Desk Dictionary defines a job as a 'regular activity performed in exchange for payment, especially a trade, occupation, or profession.'

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

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

> **AS 44.62.570. Scope of Review**. . . .
> . . .
> (b) . . . Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

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

> (1) the weight of the evidence; or

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

The RBA's decision must be upheld absent "an abuse of discretion on the part of the administrator." Several definitions of "abuse of discretion" appear in Alaska law although none appears in the Act. The Alaska Supreme Court stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan*

v. University of Alaska, 700 P.2d 1295, 1297 (Alaska 1985). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier* 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 25 (4th ed. 1968).

On appeal to the Alaska Worker's Compensation Appeals Commission and the courts, decisions reviewing RBA designee determinations are subject to reversal under the abuse of discretion standard in AS 44.62.570, incorporating the "substantial evidence test." Determining whether an abuse of discretion has taken place is aided by the practice of allowing additional evidence at the review hearing, based on the rationale expressed in several superior court opinions addressing board decisions. *See, e.g., Quirk v. Anchorage School District*, Superior Court Case No. 3AN-90-4509 CIV (August 21, 1991); *Kelley v. Sonic Cable Television*, Superior Court Case No. 3AN 89-6531 CIV (February 2, 1991). When applying a substantial evidence standard, a "[i]f, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 367 P.2d 884, 889 (Alaska 1962). If, in light of all the evidence, the RBA's decision is not supported by substantial evidence, the RBA must be found to have abused his discretion and the case remanded for reexamination and further action.

> **8 AAC 45.060. Service.**
> . . .
> (b) . . . Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.
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> **8 AAC 45.063. Computation of time.**
> (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. . . .
>
> **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.
. . .
(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, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . .

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

8 AAC 45.510. Request for reemployment benefits eligibility evaluation.
. . .
(g) If a party disputes the administrator's decision rendered under this section, the party must petition the board, no later than 10 days after the filing of that decision for review of the administrator's decision.

8 AAC 45.525. Reemployment benefit eligibility evaluations.
. . .
(b) When interviewing the employee the rehabilitation specialist whose name appears on the referral letter shall obtain descriptions of the tasks and duties for other jobs the employee held or for which the employee received training within 10 years before the injury, and any jobs held after the injury. The rehabilitation specialist shall

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

(2) review the appropriate volume listed in (A) or (B) of this paragraph and select the most appropriate job title or titles that describe the jobs held and training received; If the employee's injury occurred
. . .

> (B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) unless, under AS 23.30.041(p), the board has designated a later revision or version of that volume;
>
> (3) identify all job titles identified under (2) of this subsection for which the employee meets the specific vocational preparation codes as described in the volume; and
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> (4) submit all job titles identified under (3) of this subsection to the employee's physician, the employee, the employer and the administrator; if the physician predicts the employee will have permanent physical capacities equal to or greater than the physical demands of a job or jobs submitted under this paragraph, the rehabilitation specialist shall conduct labor market research to determine whether the job or jobs exist in the labor market as defined in AS 23.30.041(r)(3).
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> **8 AAC 45.530. Determination on eligibility for reemployment benefits.** (a) Within 14 days after receiving a rehabilitation specialist's eligibility evaluation report for an employee Injured on or after July 1, 1988, the administrator will determine whether the employee is eligible or ineligible for reemployment benefits, or that insufficient information exists to make a determination on the employee's eligibility for reemployment benefits. The administrator will give the parties written notice by certified mail of the determination, the reason for the determination, and how to request review by the board of the determination. . . .
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> **Ordinary-meaning rule. 1.** The rule that when a word is not defined in a statute or other legal instrument, the court normally construes it in accordance with its ordinary or natural meaning. . . . *Black's Law Dictionary*, Eighth Edition, 2004.

ANALYSIS

1) Was the oral ruling allowing Employee's witness to testify proper?

Employee's witness list included his girlfriend, Cindy Friese. Although the list was timely filed, it did not meet other 8 AAC 45.112 requirements, and Employer objected to its failure to include a brief description of the subject matter or substance of Friese's expected testimony. Employer also objected to Employee's failure to establish Friese's credentials or expertise.

Procedural requirements are sometimes relaxed or modified for self-represented litigants especially where, as here, Employee credibly testified he was a layman who had done the best he

could to comply with the Act's requirements, and there is no evidence Employee acted out of gross negligence or lack of good faith. *Gilbert*; 8 AAC 45.195. Moreover, Employer was not prejudiced by Friese's testimony, and in fact cited her testimony that Employee owned and rented properties for four to five years to bolster Employer's contention Employee is not entitled to retraining. AS 23.30.135(a) confers upon the factfinders broad authority to conduct hearings in the manner by which the rights of the parties may best be ascertained, and 8 AAC 45.120(e) provides for the admissibility of any relevant evidence if it is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Friese, herself a leasing agent, provided significant, relevant insights regarding Employee's work skills. The oral ruling allowing Friese to testify was proper.

2) Should Employee's claim for review of the RBA designee's eligibility decision be denied as untimely?

Within 10 days after the RBA designee's decision, Employee was entitled to seek review of it. AS 23.30.041(d); 8 AAC 45.510(g). The decision was served by mail on September 23, 2014. Under 8 AAC 45.060(b) and 8 AAC 45.063(a), Employee's time to appeal the decision expired October 6, 2014. On October 7, 2014, Employee contacted a workers' compensation technician for assistance filling out a claim for review, which he filed October 8, 2014.

Employee missed his October 6, 2014 deadline by two days. However Employee's late filing is excusable because, as discussed above, self-represented litigants are not expected to have a lawyer's grasp of procedural requirements. *Id.* Employee credibly testified the RBA designee's letter arrived during a three-week period when he was out of town and unreachable by mail or telephone. AS 23.30.122. Employee further testified as soon as he received the letter, he promptly did due diligence and filed his claim. The record includes no evidence of gross negligence. On the contrary, Employee's testimony and actions demonstrate a layman's responsible, good-faith effort to comply with the Act. Under these circumstances, it would be manifestly unjust to deny Employee's claim due to a procedural technicality. 8 AAC 45.195. The procedural requirements of AS 23.30.041(d), 8 AAC 45.060(b), 8 AAC 45.063(a), and 8 AAC 45.510(g) will be reasonably relaxed, and Employee's review request will not be denied as untimely. *Id.*

3) Did the RBA designee abuse her discretion in finding Employee ineligible for reemployment benefits?

Employee's contention the RBA designee incorrectly found him ineligible for reemployment benefits is based on two arguments: (1) his rental properties provide only incidental income, whereas his main income source has always been his plumbing business; and (2) he has never been and does not know how to be a leasing agent.

Employee undisputedly owns and rents residential properties. The facts that owning and renting residential properties has never been a full-time job, and has never provided more than incidental income are legally irrelevant. The law requires an ineligibility finding if an employee has the permanent physical capacities to do a job he has held or was trained to perform in the decade before his work injury, or has held since (assuming the job still exists in the labor market), regardless of how much income that job generated or will generate. AS 23.30.041(e); 8 AAC 45.525(b); *Moesh.*

That Employee does not want to be a residential leasing agent is also legally irrelevant. The dispositive issue here is whether Employee ever held a job as, or was trained to work in a job as, a residential leasing agent. AS 23.30.041(e)(2); 8 AAC 45.525(b). The statute concerns itself with "jobs," not with other life experiences.

This case turns on the definition of "job" as used in AS 23.30.041(e). Employee has admittedly shown and leased his personal residential properties to prospective tenants, activities that fall within the DOT's broad description of a "Leasing Agent, Residence." Most assuredly, some people hold "jobs" as residential leasing agents. However, Employee's and Friese's credible and consistent testimonies provide substantial evidence Employee has never held a "job" as a residential leasing agent. AS 23.30.122. There is no contrary evidence on this point. Further, the facts show he does not possess the vocational skills to perform many of the specific tasks associated with that job. Employee is an "outside person," not a "paper person" or a "desk person"; he is a "hands-on kinda guy" who works in the field, not in an office. Employee hired Friese to do all his books and paperwork. Friese, who has held a real estate license and is a

leasing agent and property owner, credibly opined Employee "would not even know where to start when it came to being a leasing agent." Based on this cumulative evidence, it is reasonable to conclude Employee has not held or been trained to do the DOT-described "job" of residential leasing agent. By contrast, it is unreasonable to conclude he has. Moreover, he is even less qualified to do the "optional" DOT-described job duties, including compiling available rental property listings, composing newspaper advertisements, and contacting credit bureaus for credit reports. Additionally, he does not possess the real estate agent's license that is sometimes required. *Rogers & Babler*.

"Job" is not defined in the Act, but the Alaska Supreme Court has adopted the ordinary-meaning definition of a "regular activity performed in exchange for payment, especially a trade, occupation, or profession." *Arnesen.* Employee's endeavors leasing his two out-of-state homes do not fall into this definition. First, although there is no evidence in the record as to turnover in Employee's properties, experience and logic dictate that an absentee landlord would strive to keep reliable tenants as long as possible -- in other words, to keep his leasing activity as seldom, and *irregular*, as possible. *Rogers & Babler*. Moreover, to the extent Employee has been involved in rental chores, it is reasonable to infer he has done so to avoid the expense of paying someone else. *Id.* There is no evidence Employee has paid himself or received more rent because he performed necessary but ancillary leasing tasks related to his personal residential property. Employee's behavior cannot justly be termed a "regular activity performed in exchange for payment," and it certainly is not his "trade, occupation or profession." Employee is a plumber by trade and profession; that has been his "job" during all relevant periods. *Id.*

Not every regular activity a person performs, whether paid or not, constitutes a "job." For example, if Employee, who is a plumber, were to buy and sell stocks online and make a profit occasionally, without any other financial training or experience, it would not be reasonable to conclude he has obtained the "skills to compete in the labor market" as a "stockbroker." AS 23.30.041(e)(2). Likewise, a reasonable person would not conclude a surgeon who regularly holds garage sales at home or sells her unused personal property on Craigslist has a "sales" or "internet commerce" job. A bricklayer who mows a neighbor's lawn weekly in return for dinner would not be considered to have a "lawn maintenance" job, nor would a dentist who routinely

buys lottery tickets and once hits the jackpot hold a job as a "professional gambler." These hypotheticals do not constitute regular activities performed in exchange for payment, nor would they reasonably be considered trades, occupations or professions. *Arnesen.*

Employer's arguments and the RBA designee's decision harken back to the days prior to the current AS 23.30.041, when "transferable skills" were considered in rehabilitating injured workers for new employment. The current law requires the RBA designee to examine "jobs" an injured worker held at the time of injury, has held or received training for in the 10 years before the injury, or has held following the injury. AS 23.30.041(e)(1)-(2). Therefore under *Arnesen*, Employee's ownership and rental of personal investment properties will not be considered a "job" under AS 23.30.041(e).

In summary, as a matter of law, AS 23.30.041(e) cannot be construed as including owning and leasing personal residential property as Employee's "job" at any relevant time. Substantial evidence establishes Employee never held a "job" as a residential leasing agent, for himself or anyone else, nor has he been sufficiently trained to do so. By contrast, there is no substantial evidence supporting the RBA designee's determination. Therefore, the RBA designee's finding that Employee is ineligible for reemployment benefits on the basis of an employment history including a "job" as a leasing agent is arbitrary, manifestly unreasonable, and not supported by substantial evidence, either now or when the determination was made. AS 44.62.570(c)(2); *Sheehan.* The RBA designee abused her discretion in relying on the rehabilitation specialist's opinion that Employee's ownership of rental properties was a "job" to be considered in determining whether Employee was eligible for reemployment benefits. AS 23.30.041(d). The RBA designee's decision will be remanded for reconsideration as to Employee's reemployment eligibility, taking into account his job history exclusive of any personal, residential rental activity.

CONCLUSIONS OF LAW

1) The oral ruling allowing Employee's witness to testify was proper.
2) Employee's claim for review of the RBA designee's eligibility decision will not be denied as untimely.

3) The RBA designee abused her discretion in finding Employee ineligible for reemployment benefits.

ORDER

1) Employee's October 7, 2014 appeal from the RBA designee's ineligibility determination is granted.

2) The RBA designee's September 30, 2014 determination that Employee is ineligible for reemployment benefits is remanded for reconsideration, taking into account his job history exclusive of any residential rental activity.

Dated in Anchorage, Alaska on April 13, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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Margaret Scott, Designated Chair

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Rick Traini, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Keith Thomas, employee / claimant v. Keith's Plumbing And Heating, employer; Alaska National Insurance Co., insurer / defendants; Case No. 201218735; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 13, 2015.

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Sertram Harris, Office Assistant II