ALASKA WORKERS' COMPENSATION BOARD

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

CHRISTOPHER P. ERICKSON, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201413044
FRED MEYER STORES, Employer,	)	AWCB Decision No. 15-0084
and	)	Filed with AWCB Fairbanks, Alaska on July 21, 2015
THE KROGER CO., Insurer, Defendants.	)	

Christopher P. Erickson's (Employee) March 24, 2015 workers' compensation claim appealing the Reemployment Benefits Administrator's designee's (RBA designee) March 13, 2015 letter decision finding him not eligible for reemployment benefits was heard on June 25, 2015 in Fairbanks, Alaska. The hearing date was selected on May 11, 2015. Attorney John Franich appeared and represented Employee, who appeared and testified. Attorney Vicki Paddock appeared and represented Fred Meyer Stores and The Kroger Co. (Employer). Rehabilitation Specialist Daniel LaBrosse appeared and testified for Employee. The record was left open to allow Employee's counsel to submit a supplemental affidavit of attorney's fees and costs. The record closed on June 26, 2015.

ISSUE

The parties agreed Employee worked for Employer as a greeter after his injury, but disagreed as to whether that employment should be considered in Employee's work history for purposes of

determining his eligibility for reemployment benefits. Employee contended the RBA designee should not have instructed the rehabilitation specialist to consider Employee's post-injury employment as a greeter in preparing his evaluation report. Employee contended the greeter work was not a "real job," but instead a temporary accommodation of his physical restrictions due to injury. Because Employee could not perform 100 percent of his regular stock clerk duties, which included greeting customers, Employer assigned him a "partial job" (i.e. not full-time) as a greeter, a position that normally does not exist in the store; Employee contended this amounted to "having him do his regular job in a much different way," not a distinct, post-injury job to be considered under AS 23.30.041(e)(2). Consequently, Employee contended, the designee inappropriately considered only the light-duty aspects of Employee's post-injury job as a stock clerk, rather than the physical requirements of that position as described in the United States Department of Labor's Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT). Employee also contended that considering "transitional light duty tasks" equivalent to a post-injury job would present employees with an unjust "Hobson's choice" between rejecting an employer's offer of modified employment, in which case they would be ineligible for disability benefits because they voluntarily removed themselves from the labor market, or accepting the offer of modified employment, which could later render them ineligible for reemployment benefits, even where the employer had not offered them alternate employment. In effect, Employee argued, no one would ever be found eligible for reemployment benefits if light-duty accommodation work is considered a job held after the injury. Employee further contended he should be found eligible because he was not disqualified under the specific language of AS 23.30.041(f), which should prevail over what Employee considers to be the more general language of AS 23.30.041(e)(2). Employee requested the RBA designee be found to have abused her discretion, and her ineligibility decision be reversed.

Employer contended the RBA designee did not abuse her discretion, either when she instructed the rehabilitation specialist to consider Employee's post-injury employment as a greeter, or when she found Employee ineligible for reemployment benefits under AS 23.30.041(e)(2). Employer implicitly rejected Employee's argument that AS 23.30.041(f) should take precedence over AS 23.30.041(e)(2) by contending the designee followed the letter of the law, substantial evidence supported her decision, and the ineligibility decision should be upheld.

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

FINDINGS OF FACT

1) On June 22, 1995, Employer hired Employee. (Report of Occupational Injury or Illness, April 18, 2014.)

2) On March 16, 2014, Employee injured his right shoulder lifting a box of celery at work. (*Id.*)

3) On August 6, 2014, Wendy Boucher, M.D., completed a "Transitional Light Duty Tasks" form sent to her by the Kroger Return to Work Unit. Dr. Boucher recommended Employee be given sedentary work, a category that included "Administrative, Product Sampler and Greeter." The word "job" does not appear on the form. (Transitional Light Duty Tasks form, August 6, 2014; observation.)

4) On October 20, 2014, Dr. Boucher reviewed two job descriptions provided to her by Rehabilitation Specialist Daniel A. LaBrosse: Stock Clerk and Maintenance-Repairer Helper, Industrial, as described in the 1993 edition of the SCODRDOT. Mr. LaBrosse indicated these jobs were ones held by Employee in the past ten years. Dr. Boucher predicted Employee would not have the permanent physical capacities to perform the physical demands of either job. She also predicted Employee would have a permanent partial impairment (PPI) rating of greater than 0 percent as a result of his work injury. (Boucher SCODRDOT job analyses and PPI prediction letter, October 20, 2014.)

5) On November 15, 2014, Mr. LaBrosse recommended Employee be found eligible for reemployment benefits. Mr. LaBrosse noted Employee was working for Employer as a greeter by the front doors, but the specialist did "not consider this temporary position as a valid full time long term position" in the store. Mr. LaBrosse further noted that Employee was not disqualified for reemployment benefits under AS 23.30.041(f). (LaBrosse eligibility evaluation report, November 15, 2014.)

6) On December 9, 2014, the RBA designee suspended making an eligibility decision because she did not have sufficient information to make a determination. Specifically, the designee found Mr. LaBrosse's evaluation had not considered Employee's post-injury employment as a greeter. The designee instructed Mr. LaBrosse to complete this aspect of the evaluation, in accordance with 8 AAC 45.525(b). The designee noted that "based on the brief description

provided in your report, the DOT/SCODRDOT job description for Information Clerk should be considered for this position." (RBA designee suspension letter, December 9, 2014.)

7) On January 15, 2015, Dr. Boucher predicted Employee would have the permanent physical capacities to perform the physical demands of a Doorkeeper/Greeter and a Pharmacy Technician. (Boucher SCODRDOT job analyses, January 15, 2015.)

8) On January 28, 2015, Mr. LaBrosse again recommended Employee be found eligible for reemployment benefits. Mr. LaBrosse indicated he had researched the DOT/SCODRDOT job description for Greeter/Information Clerk, but he had rejected the designee's suggestion, concluding:

> It clearly is not a complete match as this is a sit behind a desk type of job. However, the actual job the claimant as doing required standing most of the time and he had a tall stool to lean on, or sit on briefly if he needed to. He did do the part about greeting persons entering the establishment, and he may have provided information patrons on where to find items in the store but RS LaBrosse did not observe him doing this in all the times he observed him there. He mainly just greeted people entering the store with a friendly smile and that was all.

Mr. LaBrosse had instead provided Dr. Boucher with the SCODRDOT job description for a Doorkeeper/Greeter job, while simultaneously noting "[t]his also is not a good match for what RS LaBrosse has observed the claimant doing." Mr. LaBrosse stated Employer did not have a formal greeter position at its store, and opined that Employee's "temporary partial greeter job" did not encompass the majority of the duties listed under the Doorkeeper/Greeter SCODRDOT job description: "This is clearly only temporary work that by company policy [Employer] gives to injured workers while they recuperate." Mr. LaBrosse indicated Employee wanted to become certified as a Pharmacy Technician "so that he can remain employed by [Employer] but in a job that is more mentally challenging than Greeter," but that Employer had not offered Employee alternative employment. (LaBrosse eligibility evaluation report, January 28, 2015.)

9) On February 11, 2015, the RBA designee wrote the rehabilitation specialist:

> I received your eligibility evaluation report dated January 28, 2014. You recommended the employee be found eligible for reemployment benefits; however, because you did not complete the evaluation in accordance with regulation 8 AAC 45.530(b), I cannot make a determination regarding the employee's eligibility for reemployment benefits.
>
> Specifically, you did not complete the work necessary regarding the employee's post-injury employment as a "Greeter." While you wrote you met with the claimant to discuss the [RBA designee's] suggested SCODRDOT job

> description(s), and "the claimant and RS LABROSSE developed two new [job analyses]," you did not include this employment in the work history and you did not provide a description of the actual duties the employee performs for this job. Further, you did not complete labor market research, as described under 8 AAC 45.525(b)(4).
>
> Dr. Wendy Boucher predicted the employee would have the permanent physical capacities to perform the physical demands for Doorkeeper, the DOT title you selected to represent the employee's job as a Greeter. This is a job the employee held after the date of his work injury. Therefore, per 8 AAC 45.525(b)(4), you are required to perform research to determine if this job exists in the labor market. Please undertake this task immediately; file your final report within the next fourteen days. . . . (RBA designee suspension letter, February 11, 2015.)

10) On February 25, 2015, Mr. LaBrosse submitted a third eligibility evaluation report, in which he recommended ineligibility based on: (1) Dr. Boucher's prediction Employee will have the physical capacities to perform the physical demands of a Doorkeeper/Greeter, which Employee said was the SCODRDOT job description that most closely matches what he was currently assigned to do; and (2) a labor market survey indicating there were jobs elsewhere within the Fairbanks area for greeters. (LaBrosse eligibility evaluation report, February 25, 2015.)

11) On March 13, 2015, the RBA designee found Employee ineligible for reemployment benefits based upon the rehabilitation specialist's January 28, 2015 and February 25, 2015 eligibility evaluation reports. (RBA designee eligibility determination, March 13, 2015.)

12) On March 24, 2015, Employee filed a workers' compensation claim appealing the letter decision finding him not eligible for reemployment benefits. Employee noted, "Doorkeeper is not a job position (at [Employer's store])." (Claim, March 24, 2015.)

13) At hearing on June 25, 2015, Employee testified he had worked in Employer's produce department, lifting and stacking, for approximately 14 years. After he was injured, and on the advice of Employee's treating physician, Employer accommodated Employee's injury by giving him transitional light duty work with no reduction in salary. Employee testified he has not been able to return to his job at the time of injury. When his counsel asked, "really they're paying you to do your original job, they're just describing it differently, is that correct?," Employee answered, "Correct." Employee testified he was currently not just a greeter, he was also Employer's representative as far as answering questions and helping customers find particular items; greeting customers only accounted for about ¼ of the duties he performed. Part of his job before the injury was also greeting and helping customers. Employee testified Employer

eliminated some, but not all, of his pre-injury job duties as a temporary accommodation. Employee confirmed that Employer has not offered him any job other than the transitional light duty tasks. (Record.)

14) Rehabilitation Specialist LaBrosse testified that, in the course of his personal life, he had observed Employee working as a greeter. Mr. LaBrosse testified he has an obligation to get a full and complete job history as part of the evaluation process, so when he saw Employee greeting customers, Mr. LaBrosse investigated. Employee told him it was a transitional position, not an actual job, and therefore Mr. LaBrosse did not consider the greeter work to be formal employment. Mr. LaBrosse testified he was supposed to look only at formal, official jobs Employee has held, and Employer did not have a formal position or even a job description for a greeter. The rehabilitation specialist testified he "took issue with" the RBA designee's direction to consider Employee's post-injury employment as a greeter; he considered her instruction to be "pretty micromanaging" of him as an independent evaluator. Mr. LaBrosse disagreed with the designee's suggestion he consider the SCODRDOT job description for Greeter/Information Clerk, and determined the description for Doorkeeper/Greeter more closely matched Employee's post-injury work tasks; he therefore submitted the latter to Dr. Boucher for a physical capacities prediction, and subsequently did a labor market analysis. Mr. LaBrosse expressed his concern that no one would be found eligible for benefits if modified, post-injury accommodation work is considered part of the employee's job history. Opining that greeting was a subsection of Employee's pre-injury, stock clerk job, the specialist testified that pulling an unskilled job like a greeter "out of thin air" and then finding Employee ineligible because of it "seems like a real aberration." (Record.)

15) Employee was unable to cite any Alaska case law supporting his contention that "an accommodation of an employee's physical restriction" should not be used to disqualify the employee from reemployment benefits. (Attorney fee affidavit, June 22, 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 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 . . .

> **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 expressed its agreement with Professor Larson's statement, "the compensation process is not a game of 'say the magic word' in which the rights of injured workers depends on the use of specific terms, rather than substance." *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . .
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings .... Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job 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.'
>
> (f) An employee is not eligible for reemployment benefits if
>
> (1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;
>
> (2) the employee previously declined the development of a reemployment benefits plan under (g) of this section, received a job dislocation benefit under (g)(2) of this section, and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury;
>
> (3) the employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury; or
>
> (4) at the time of medical stability, no permanent impairment is identified or expected. . . .

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. *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 281 and n. 9 (Alaska 1996); *citing Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993).

Employees are eligible for reemployment benefits if their physical capacities are less than the physical demands for their job title as described in the SCODRDOT. *Konecky* at 281; *Yahara* at 73; *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 529 (Alaska 1993). It is irrelevant if the actual work demands in a particular employment situation are more or less than those defined in the SCODRDOT, or if a SCODRDOT description does not reflect the actual physical demands

of a specific job. *Konecky* at 282. Enforcement of the clear language of AS 23.30.041(e) promotes the legislative intent to ensure a prompt, efficient, more cost-effective, successful, and less litigated rehabilitation system. *Id.* at 281-283.

The Alaska Supreme Court has taken a "bright line" approach to reemployment benefits, holding that AS 23.30.041(e) is unambiguous on its face and must be applied as written, even if harsh outcomes result. 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 order denying the employee reemployment benefits. In a footnote, the superior court acknowledged that strict application of the statute could, under certain circumstances, force an employee to return to a low-paying job and a decreased standard of living; moreover, such a "harsh result seems inconsistent with the broad goals of Alaska's Workers' Compensation statute which favors returning injured employees to the work force as soon as possible and to positions that are at least comparable to the jobs they had when injured." *Id.* at 765 and n. 2. Nonetheless, *Moesh* concluded 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 Alaska Workers' Compensation Act (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 23.30.145. Attorney fees.**
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises

> that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .
>
> **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 administrator's part. Several definitions of "abuse of discretion" appear in Alaska law although none appears in the Act. An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive. An abuse of discretion will also be found where a decision fails to apply controlling law or regulations, or demonstrates a failure to exercise sound, reasonable and legal discretion. *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, (Alaska 1999); *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The RBA fails to exercise sound, reasonable and legal discretion where s/he relies on a rehabilitation specialist's report that fails to consider statutorily mandated factors. *Irvine* at 1107. Where the board upholds an RBA decision based on such a flawed report, the board commits legal error. *Id*.

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. When applying this standard, "[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*, 577 P.2d 1044, 1049 (Alaska 1978). 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 45.445. Activities to be performed only by the certified rehabilitation specialist.**
> For purposes of AS 23.30.041 (m), only the certified rehabilitation specialist assigned to a case may perform the following activities:
> . . .
> (3) selecting appropriate job titles in accordance with 8 AAC 45.525(a)(2);
> (4) determining whether specific vocational preparation has been met and which job titles are submitted to a physician;
> . . .
> (9) making a recommendation regarding the employee's eligibility;
> . . .
>
> **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

(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).

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.

(b) If the administrator determines the eligibility evaluation is not in accordance with 8 AAC 45.525, or the information in the board's case file is insufficient or does not support the eligibility recommendation, the administrator

(1) may not decide the employee's eligibility for reemployment benefits; and

(2) shall notify the employee, the employer, or the rehabilitation specialist

(A) what additional information is needed, who must submit the information, and the date by which the information must be submitted so eligibility can be determined; or

(B) that the administrator shall reassign the employee to a new rehabilitation specialist in accordance with 8 AAC 45.430.
. . .

> **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

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

Employee's contention the RBA designee abused her discretion is rooted in two fundamental issues: primarily, whether Employee's post-injury employment as a greeter should be included in Employee's job history for purposes of determining eligibility benefits; and secondarily, whether the statutory language of AS 23.30.041(e)(2) should override that of AS 23.30.041(f).

Employee's argument that his greeter work does not constitute a new job, but rather is a modified, lighter duty version of his pre-injury job as a stock clerk, is unpersuasive. Employee testified he had spent approximately 14 years lifting and stacking in the produce department. The rehabilitation specialist initially chose the SCODRDOT descriptions for Stock Clerk and Maintenance-Repairer Helper, Industrial to represent Employee's job history in the 10 years before the work injury, and Dr. Boucher predicted Employee *would not* have the permanent physical capacities to perform the physical capacities of either job. When later instructed to consider post-injury employment, Mr. LaBrosse chose the SCODRDOT job description for Doorkeeper/Greeter as the most accurate match for what Employee had been assigned to do, and Dr. Boucher predicted Employee *would* have the permanent physical capacities to perform the physical capacities of that job. Greeting and assisting customers was undoubtedly a component of his stocking job, but a certain amount of overlap in work chores does not equate to doing "the same job in a much different way." The fact that Employer labelled Employee's post-injury employment "transitional light duty tasks," rather than a job, is legally irrelevant: "the compensation process is not a game of 'say the magic word' in which the rights of injured workers depends on the use of specific terms, rather than substance." Larson; *Smith.* Employee's greeter position was a job under the ordinary-meaning rule: a job is a "regular activity performed in exchange for payment, especially a trade, occupation, or profession." *Arnesen.*

Under 8 AAC 45.525(b), a rehabilitation specialist must review the jobs an employee has held in the ten years before, as well as since, an injury and select the most appropriate job title or titles from the SCODRDOT. The selection of the appropriate job title may be done only by the rehabilitation specialist. 8 AAC 45.445(3). It is the rehabilitation specialist's responsibility to select the appropriate job title or titles, not the RBA designee's. If the RBA designee believes the specialist erred in selection of a job title, 8 AAC 45.530(b) states the designee may not decide the employee's eligibility, but must take one of two actions: (1) either request additional information or (2) assign a new rehabilitation specialist.

Though here the rehabilitation specialist "took issue with" the RBA designee's "pretty micromanaging" direction to consider Employee's post-injury employment as a greeter, the designee did not abuse her discretion. Rather, she behaved in full accordance with the regulations. Because Mr. LaBrosse noted Employee was working for Employer as a greeter, but did not include that employment in the work history, the designee properly concluded the information in the board's case file was insufficient. She therefore suspended the eligibility determination process pending receipt of a comprehensive work history, and notified the parties as to what additional information was needed. 8 AAC 45.530(b). In a hypothetical scenario in which she had not done this, and instead had decided Employee's eligibility without taking into consideration his post-injury employment, she clearly would have abused her discretion; by relying on a rehabilitation specialist's report that did not consider statutorily mandated factors, the designee would have failed to exercise sound, reasonable and legal discretion, and her decision would be reversed. *Irvine.*

The fact the designee requested the specialist to consider the SCODRDOT for Information Clerk was also not an abuse of discretion. In accordance with 8 AAC 45.445(3), the designee accepted Mr. LaBrosse's alternate selection of Doorkeeper/Greeter as the most appropriate job title to represent the post-injury employment.

Employee is correct in that it is irrelevant if the actual work demands in a particular employment situation are less than those defined in the SCODRDOT, or if a SCODRDOT description does not reflect the actual physical demands of a specific job. *Konecky*. Here, however, the finding

that Employee's post-injury work constituted a greeter job, not a stock clerk job, renders this argument moot.

Employee's belief, shared by the rehabilitation specialist, that he should be retrained in a capacity in which he will be able to approximate his former income level is understandable, but legally irrelevant. Employee was found not eligible for reemployment benefits because Dr. Boucher predicted he would have the physical capacity to work as a Doorkeeper/Greeter, a job he held after his work-related injury, and that job exists in the labor market. 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.*

Likewise, the fact Employee wishes to return to work for Employer as a pharmacy technician is legally irrelevant. Employer has not offered Employee alternate employment. In the absence of an eligibility determination, the Act does not provide a mechanism to help Employee re-enter the job market at a salary comparable to that at the time of injury.

Also unpersuasive is Employee's argument that the principles of statutory interpretation dictate that AS 23.30.041(f) trumps AS 23.30.041(e). While it is true that specific statutory language ordinarily overrides general language, this principle only applies when the language in question is contradictory. Here, even if Employee's questionable characterization that AS 23.30.041(f) is specific and AS 23.30.041(e) is general is accepted, there is no indication that the two subsections conflict with each other. AS 23.30.041(e)(2) expressly states that any job an employee has held following the injury for a period long enough to obtain the skills to compete in the labor market must be presented to a physician for a prediction as to whether the employee will have the permanent physical capacities to perform it again. The following subsection, AS 23.30.041(f), lays out circumstances in which an employee is not eligible for reemployment benefits, but there is no language to suggest that not being disqualified under §041(f) equates to being eligible. The undisputed fact that Employer has not offered Employee alternate

employment merely indicates that Employee should not be found ineligible under §041(f)(1); it does not indicate negate or contradict an ineligibility finding under §041(e)(2).

In summary, Employee has neither demonstrated that the RBA's decision was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive; nor that she failed to apply controlling law or regulations or exercise sound, reasonable and legal discretion. *Irvine; Sheehan; Tobeluk; Manthey*. On the contrary, a review of the entire record indicates substantial evidence supports her finding Employee is ineligible for reemployment benefits. The RBA designee did not abuse her discretion, and her determination will not be reversed. AS 23.30.041; AS 44.62.570; *Miller*.

Employee's argument that he was presented with a "Hobson's choice" is not discounted. However the Alaska Supreme Court has directed that the clear, unambiguous language of AS 23.30.041(e) must be applied as written, even if harsh outcomes result. *Konecky; Moesh.* Enforcement of the plain language of AS 23.30.041(e), without taking into consideration factors not expressly listed therein, promotes the legislative intent to ensure a prompt, efficient, more cost-effective, successful, and less litigated rehabilitation system. *Id.* Finally, because Employee did not prevail on his March 24, 2015 petition, Employee will not be awarded attorneys' fees at this time. AS 23.30.145.

CONCLUSION OF LAW

1) The RBA designee did not abuse her discretion in finding Employee ineligible for reemployment benefits.

ORDER

1) Employee's March 24, 2015 petition for review of the Reemployment Benefit Administrator designee's determination of Employee's ineligibility for reemployment benefits is denied.
2) The Reemployment Benefit Administrator designee's November 5, 2014 determination of ineligibility for reemployment benefits is upheld.
3) Employee will not be awarded attorneys' fees at this time.

Dated in Anchorage, Alaska on July 21, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Margaret Scott, Designated Chair

_____
Sarah Lefebvre, Member

_____
Jacob Howdeshell, 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 CHRISTOPHER P. ERICKSON, employee / claimant; v. FRED MEYER STORES, employer; THE KROGER CO., insurer / defendants; Case No. 201413044; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 21, 2015.

_____

Pamela Murray, Office Assistant