

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSE G. ESQUIVEL,	)	
Employee,	)	
Claimant,	)	FINAL DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201325862
	)	
HUBBARD ENTERPRISES, INC.,	)	AWCB Decision No. 15-0103
Employer,	)	
	)	Filed with AWCB Anchorage, Alaska
and	)	on August 21, 2015
	)	
WCIP AMERICAN INTERSTATE	)	
INSURANCE CO. ,	)	
	)	
Insurer,	)	
Defendants.	)	

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Jose G. Esquivel's February 3, 2015 claim for review of the reemployment benefits administrator designee's (RBA designee) decision finding him ineligible for reemployment benefits was heard on August 6, 2015 in Anchorage, Alaska. This hearing date was selected on June 17, 2015. Jose Esquivel (Employee) appeared telephonically, represented himself, and testified. Attorney Michael Budzinski appeared and represented Hubbard Enterprises, Inc. and WCIP American Interstate Insurance Co. (Employer). The record closed at the hearing's conclusion on August 6, 2015.

## ISSUE

Employee contends the RBA designee abused her discretion in finding him ineligible for reemployment benefits based on his work as a kitchen helper in the ten years before the work injury. Employer contends the RBA designee did not err.

***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 11, 2013 while working for Employer, Employee fell about 12 feet from a ladder landing on his right side, suffering a fracture of the right hip and a tear of the rotator cuff in his right shoulder. At the time of injury, Employee was working as a construction laborer. (First Report of Injury, December 16, 2013; Employer's Hearing Brief; Reemployment Benefits Evaluation Report.
2. On December 14, 2013, Employee underwent open reduction internal fixation surgery on his right hip. (Anchorage Regional Hospital, Operative Report, December 14, 2013).
3. As some point after his hip surgery, Employee moved to Las Vegas, Nevada. (Observation).
4. On May 15, 2014, Employee underwent right rotator cuff surgery. (Sunrise Hospital and Medical Center, Operative Report, May 15, 2014).
5. On August 7, 2014, because Employee had missed 90 consecutive days' work, a rehabilitation specialist was assigned to complete an eligibility evaluation for reemployment benefits. (RBA Referral Letter, August 7, 2014).
6. On October 7, 2014, Dr. Silverberg predicted Employee would have a permanent impairment rating greater than zero and would be unable to return to his job as a construction worker. (Dr. Silverberg, Response to Rehabilitation Specialist Questions, October 7, 2014).
7. The rehabilitation specialist conferred with Employee and determined he had three types of jobs over the last ten years. He had worked primarily as a construction laborer, which was his job at the time of the injury, and he had worked as a dishwasher in a restaurant for about five months in 2011. The specialist found that Employee had worked at both of these jobs long enough to obtain the skills necessary to compete in those labor markets. Employee had also worked briefly as a handyman in 2009, but not long enough to obtain the skills needed to compete in that labor market. The rehabilitation specialist selected the DOT job titles of Construction Worker I and Kitchen Helper as best describing Employee's jobs. The

specialist submitted the DOT job description to Employee's doctor, David Silverberg, M.D., for review. (Revised Eligibility Evaluation Report, December 19, 2014).

8. On November 24, 2014, a functional capacity evaluation was done at Dr. Silverburg's request. The physical therapist indicated Employee could generally operate in the medium physical demand category, but recommended he not return to the kitchen helper job because of amount of reaching, squatting, and crouching required. (Functional Capacities Evaluation. November 24, 2014).
9. On December 16, 2014, despite the functional capacities evaluation, Dr. Silverberg predicted Employee would have the permanent physical capacities to return to work as a kitchen helper. (Dr. Silverberg, Response to Rehabilitation Specialist Questions, December 16, 2014).
10. The specialist determined the job of dishwasher/kitchen helper existed in significant numbers both in Los Vegas and in Alaska. Because Employee's doctor predicted he could return one of the jobs in his ten-year work history, and because both of the job existed in the labor market, the specialist recommended Employee be found not eligible for reemployment benefits. (Revised Eligibility Evaluation Report, December 19, 2014).
11. On January 20, 2015, the RBA designee determined Employee was not eligible for reemployment benefits based on the specialist's report. (Eligibility Denial Letter, January 20, 2015).
12. Employee testified at hearing that he normally worked in construction and his work as a dishwasher/kitchen helper was not his "normal" job. Also, the job did not pay enough to support his family. While he has returned to construction work, he is significantly limited because he cannot go up and down ladders. (Employee).

#### 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).

**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.' . . .

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.

**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, "[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. IIT 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 45.510. 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

(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. . . .

**ANALYSIS**

The essence of Employee's arguments is that the RBA designee erred because Employee's work as a dishwasher/kitchen helper should not have been considered because it was a temporary, low-paying job. In determining which employees qualify for reemployment benefit provisions under

the Act, the legislature included a number of specific, but somewhat arbitrary, requirements. In some cases, employees who might benefit from the reemployment process do not qualify. This is one of those cases. Dr. Silverberg predicted Employee would not be able to return to his job as a construction worker. While Employee returned to construction work against his doctor's advice, he is limited and unable to perform the work he did before. However, because Employee worked for a short time as a dishwasher/kitchen helper, he is disqualified from receiving reemployment benefits.

Employee does not disagree with the dates the rehabilitation specialist said he worked as a dishwasher/kitchen helper, or that he held the job long enough to obtain the skills to compete in the labor market. In fact, he conceded he could return to that work. While the physical therapist that performed the functional capacities evaluation recommended Employee not return to the dishwasher/kitchen helper job, it is Dr. Silverberg's prediction that counts. *Yahara* was clear that only a physician may review the job descriptions and make a prediction as to whether an employee can return to a prior job. Employee's argument that he cannot support his family working as a dishwasher/kitchen helper is understandable, but in *Moesh*, the Supreme Court was clear that remunerative employability cannot be considered in determining whether an employee is eligible for reemployment benefits.

The RBA designee did not abuse her discretion. Employee's ten-year work history included work as a dishwasher/kitchen helper, and he held the job long enough to obtain the skills in the labor market. A physician predicted he would have the permanent physical capacities to return to the job. Because the RBA designee could not consider remuneration, she properly found Employee was not eligible for reemployment benefits. Employee's claim will be denied.

#### CONCLUSION OF LAW

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

#### ORDER

1. Employee's February 3, 2015 claim for reemployment benefits is denied.



JOSE G ESQUIVEL v. HUBBARD ENTERPRISES INC

Dated in Anchorage, Alaska on August 21, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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Pamela Cline, Member

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Ronald Nalikak, 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 JOSE G. ESQUIVEL, employee / claimant; v. HUBBARD ENTERPRISES, INC., employer; WCIP AMERICAN INTERSTATE INSURANCE CO., insurer / defendants; Case No. 201325862; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 21, 2015.

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Pamela Murray, Office Assistant