ALASKA WORKERS' COMPENSATION BOARD

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

JOHN A. HODGES, Employee, Claimant, v. PATTERSON-UTI DRILLING CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201411500 AWCB Decision No. 15-0129 Filed with AWCB Anchorage, Alaska on October 5, 2015

John A. Hodges' (Employee) May 18, 2015 claim, as amended July 30, 2015, appealing the Reemployment Benefits Administrator's (RBA) designee's determination Employee is ineligible for reemployment benefits was heard on August 20, 2015, in Anchorage, Alaska. The hearing date was selected on June 23, 2015. Attorney Michael J. Patterson appeared and represented Employee. Attorney Constance E. Livsey appeared and represented Patterson-UTI Drilling Co. and Liberty Mutual Insurance Company (Employer). Employee appeared and testified. The record was left open to allow the filing of additional evidence and legal memoranda. The record closed on September 4, 2015.

ISSUES

Employer contended Employee's appeal should be denied because, even allowing for three days' mailing time under the "mailbox rule," he did not timely seek review of the RBA designee's decision.

Employee contended his appeal should not be denied due to late filing. He maintained he was a layman who did the best he could to comply with procedural requirements, and properly followed the instructions given to him by the Alaska Workers' Compensation Division (division).

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

Employee contended the RBA designee abused her discretion when she found him ineligible for reemployment benefits, because she failed to take into consideration existing medical records in which an EME physician opined Employee had a one percent whole person permanent partial impairment (PPI) rating. Employee requested the decision be overturned.

Employer contended the RBA correctly based her determination on the rehabilitation counselor's report indicating Employee's treating physician expected no PPI at the time of medical stability. Employer contended the ineligibility determination must be upheld under AS 23.30.041(d), as no abuse of discretion occurred.

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

Employee contended he was entitled to relief pursuant to AS 23.30.130, on the grounds of change in condition and mistake in determination of fact. Employee requested the ineligibility decision be modified and vacated, and Employee awarded AS 23.30.041(k) benefits.

Employer contended it too had "later-developed evidence" supporting its contention Employee is not entitled to retraining, but no hearing had been requested on the modification issue. Employer therefore contended it would be premature to rule on Employee's amended claim before a future hearing on modification, where the record could be fully developed.

3) Should the RBA designee's determination that Employee is ineligible for reemployment benefits be modified?

Employee contended if he was successful on his appeal, he should receive an award to reimburse his attorney for reasonable fees and costs incurred in the proceeding. Employer contended even if the board were to remand this matter to the RBA, a fee award would be improper because it is unknown what the ultimate outcome of the eligibility process would be, or whether Employee would receive any additional benefits.

4) Should Employee be awarded attorney's fees and costs and, if so, in what amount?

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 July 1, 2014, Employee struck his right knee on a valve while working for Employer. (Report of Occupational Injury, July 8, 2014.)

2) On July 7, 2014, Employee began knee treatment, initially for right prepatellar bursitis and cellulitis, with Jared Lee, MD, in Cody, Wyoming. (Medical records.)

3) On January 8, 2015, Dr. Lee's PA-C, Richard Bennett, responded to a letter from nurse case manager Calley Crowley, RN. PA-C Bennett opined Employee did not have any impairment related to the work injury. (Letter, January 8, 2015.)

4) On February 20, 2015, Liberty Mutual claims specialist Sherrie Arbuckle wrote Employee he was scheduled for an employer's medical evaluation (EME) with Lawrence G. Splitter, DO, on March 12, 2015. (Letter, February 20, 2015.)

5) On February 24, 2015, the RBA office notified Employee rehabilitation specialist (RS) Delane Hall had been assigned to complete an eligibility evaluation within the next 30 days. The letter included the following notice: "**By copy of this letter to the employee and the employer/insurer, you are being notified that all discovery, evidence and results of employer medical examinations should be in the Reemployment Benefits Section's file during this evaluation period."** (Letter, February 24, 2015; emphasis original.)

6) On March 4, 2015, Employer filed 400 pages of records with the board, including a February 11, 2015 letter from MES Solutions to Ms. Arbuckle, confirming that Employee was scheduled for an employer's medical evaluation (EME) with Lawrence G. Splitter, DO, Occupational Medicine, on March 12, 2015. (Letter, February 11, 2015.)

7) On March 12, 2015, Dr. Splitter evaluated Employee and opined he had a whole person PPI rating of one percent. (EME report, March 12, 2015, p. 7.)

8) On March 21, 2015, RS Hall requested an extension of the 30-day deadline, due to his inability to obtain information required to complete the evaluation. (30 Day Extension Request, March 21, 2015.)

9) On March 26, 2015, RS Hall's request for a 30-day extension was granted and his deadline to submit the evaluation report was extended to April 24, 2015. The letter, which was copied to Liberty Mutual, stated, "The employer/adjuster is reminded they are to send Mr. Hodges [sic] complete file to Mr. Hall so that he may proceed in getting the eligibility evaluation done." (Letter, March 26, 2015.)

10) On March 31, 2015, Dr. Splitter reiterated his opinion Employee had a one percent whole person PPI rating. (EME addendum, March 31, 2015.)

11) On April 6, 2015, Dr. Lee responded to a March 26, 2015 letter from RS Hall and predicted Employee would not have a PPI rating greater than zero as a result of the work injury. (Letter, April 6, 2015.)

12) On April 7, 2015, RS Hall prepared his eligibility evaluation, which included the following determination:

> Dr. Lea [sic] has indicated that [Employee] will not have an impairment rating greater than zero but did disapprove his returning to his time of injury positon [sic]. Therefore as per my understanding of the statues [sic], [Employee] would not be eligible for reemployment benefits based on no permanent impairment. This opinion is based on information received from Dr. Lea [sic] in response to a letter and the SCODRDOT job descriptions submitted to him for review. I am aware that the insurance company had referred Mr. Hodges for an evaluation by Dr. Lawrence Splitter, Pathway Occupational Medicine for 3/12/15. I do not have any information regarding that physician visit.

(Eligibility evaluation, April 7, 2015; filed April 13, 2015.)

13) On April 8, 2015, RS Hall called the RBA, who made the following entry into the division's computer database:

> Reason for call: MD says no to JOI [job at time of injury] SCODRDOTS but does not predict PPI
>
> Comments: RS called noting MD has released EE to work in oilfields, but predicted "no" to JOI SCODRDOTS but has predicted there will be no PPI. RS said record does not reflect any PPI and while an [EME] is supposed to happen,

> he does not have anything on that. I confirmed he should recommend not eligible, but to forward any info to the contrary immediately.

(ICERS computer database, April 8, 2015 entry.)

14) On April 17, 2015, mail to Employee was returned to the RBA office marked "moved left no address." (ICERS computer database.)

15) On April 20, 2015, the RBA's office assistant left a voice mail for Employee requesting he call back to provide an updated mailing address. Employee responded the same day, giving a new street address the assistant recorded as "*** Route *." The assistant updated the division's computer database to indicate this was Employee's address of record. (*Id.*)

16) On April 28, 2015, the RBA designee notified Employee by certified mail at his address of record:

> I have determined that you are ***not eligible*** for reemployment benefits based upon the eligibility evaluation report of Delane Hall. In this report, Delane Hall documented that on April 6, 2015, Dr. Jared Lea [sic] *predicted* that at the time of medical stability, no permanent impairment is expected (footnote omitted). AS 23.30.041(f)(4) reads, "An employee is not eligible for reemployment benefits if at the time of medical stability, no permanent impairment is identified or expected."
>
> 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 April 28, 2015.)

17) On May 11, 2015, Employee's eligibility decision was returned to the RBA office marked "no such street." (ICERS computer database.)

18) On May 12, 2015, Employee told the RBA assistant by telephone his address should be "*** Road *," not "*** Route *." The assistant corrected Employee's address in the division's computer database, and resent the eligibility decision to the correct address by both regular and certified mail. (*Id.*)

19) On May 14, 2015, Michael J. Patterson entered his appearance on behalf of Employee. (Entry of Appearance, May 14, 2015.)

20) On May 18, 2015, Employee filed a claim requesting a review of the RBA decision, which Employee stated he received on May 16, 2015. Employee also claimed attorney's fees and costs. (Claim, May 18, 2015.)

21) On June 1, 2015, in response to a May 28, 2015 letter from Employee's attorney, treating physician Dr. Lee opined Employee would have a PPI rating greater than zero: "[Employee] has not made the progress in his right knee. I am sending him to Dr. Emery for PPI." (Letter, June 1, 2015.)

22) On June 4, 2015, Employer filed a controversion of the May 18, 2015 claim, stating the RBA designee did not abuse her discretion. The controversion noted Employee's treating physician predicted Employee would have no PPI at the time of medical stability, and would be able to return to full duty. (Controversion, signed June 1, 2015.)

23) On June 4, 2015, Employer served on Employee and the board medical records including Dr. Splitter's March 12, 2015 EME report and March 31, 2015 EME addendum, as well as a April 9, 2015 Functional Capacities Evaluation conducted by physical therapist Troy M. Fulton, who opined Employee was capable of heavy level work. (Medical summary, filed June 4, 2015.)

24) At a prehearing on June 23, 2015, a hearing was set for August 20, 2015 on the issues of Employee's May 18, 2015 claim appealing the RBA designee's determination Employee is ineligible for reemployment benefits, and attorney's fees and costs. (Prehearing conference summary, June 23, 2015.)

25) On July 30, 2015, Employee amended his May 18, 2015 claim to request relief pursuant to AS 23.30.130, on the grounds of change in condition and mistake in determination of fact. Employee stated, "This claim amends and incorporates all prior claims." (Amended claim, July 30, 2015.)

26) On August 10, 2015, Dr. Lee was deposed. The following exchange between Employee's attorney and Dr. Lee took place:

> **Q: On or about April 6th you were asked by a rehabilitation specialist if Mr. Hodges would have a permanent partial impairment pursuant to the sixth edition of the American Medical Association's Guide to the Evaluation of Permanent Impairment. In your practice, do you often do permanent partial impairment ratings?**
>
> A: I never do them. I don't do them.

Q: In response to the letter from Mr. Hall, I believe you indicated that you didn't think that Mr. Hodges would have a permanent partial impairment. Have you changed your mind since that time?

A: Well, he seemed to be making progress, so it's a little bit of predicting the future. So after he - I'm trying to remember. After he went and saw one of the physical therapists he did have some residual weakness that persisted. I still felt that he would, with rehab and additional - at that time with additional rehab be able to strengthen the leg and return to full capacity, so that's why I said no. After further continued evaluation he seemed to be failing this and I believe that's why I changed from saying that, no, I didn't think he would have a problem to he - looked like he was going to have a partial disability from this.

Q: So is it your impression or opinion today that Mr. Hodges will have a permanent partial impairment pursuant to the Sixth Edition greater than zero?

A: Based on the most recent reports that I've received, yes.

Q: And you've been provided a copy of an impairment rating that was done by a Dr. Splitter?

A: Yes.

Q: Does that also confirm your belief that Mr. Hodges will have a rating greater than zero?

A: Yes.

(Deposition, August 10, 2015, pp. 7-9.)

27) On August 14, 2015, Employee filed an Affidavit of Attorney's Fees and Costs, claiming he had to date incurred $14,095.00 in fees and $1,075.28 in costs, for a total of $15,170.28, in the reasonable and necessary course of litigating Employee's claim. Employee indicated this amount would be supplemented after the hearing. (Affidavit, August 14, 2015.)

28) At hearing on August 20, 2015, Employee credibly testified he received the RBA designee's eligibility letter on May 16, 2015, and, based on information in the letter, thought he had 10 days in which to appeal her determination. (Judgment; observation.)

29) On September 1, 2015, Employee filed a Supplemental Affidavit of Attorney's Costs after Hearing, requesting an additional $276.50 in costs. (Supplemental Affidavit, September 1, 2015.)

30) On September 4, 2015, Employer opposed awarding Employee any interim attorney's fees or costs. (Opposition, September 4, 2015.)

31) The Reemployment Benefits Section staff includes the RBA, two Workers' Compensation Officers, a Workers' Compensation Technician, and an Office Assistant. Like Adjudications Section staff, these individuals have a duty to accurately instruct claimants on how to pursue their right to compensation under the Alaska Workers' Compensation Act. (Experience; judgment; observations.)

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (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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> . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.
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> **AS 23.30.005. Alaska Workers' Compensation Board**.
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> . . .
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> (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 held 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.'. . .

See also, e.g., Bohlmann v, Alaska Construction & Engineering, 205 P.2d 316 (Alaska 2009); *Thomas v. Keith's Plumbing and Heating,* AWCB Decision No. 15-0042 (April 13, 2015); *Mendoza v. Qdoba Mexican Grill,* AWCB Decision No. 12-0187 (October 31, 2012).

Richard v. Fireman's Fund Insurance Co., 384 P.2d 445 (1963) reviewed case law regarding promptly advising injured workers how to proceed with their claims, and criticized the board for failure to take swift action. The Alaska Supreme Court held the board owes to every claimant the duty of fully advising him regarding all the real facts which bear upon his condition and right to compensation, so far as those conditions are known. The board also owes a duty to instruct claimants how to pursue their rights under the Act. *Id.*

> **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.
> . . .
> (f) An employee is not eligible for reemployment benefits if
> . . .
> (4) at the time of medical stability, no permanent impairment is identified or expected. . . .

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . .
> (h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed

> reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.
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> **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.
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> **AS 23.30.130. Modification of awards.**
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases or decreases the compensation, or award compensation.

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 161, 168 (Alaska 1974), *quoting from O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971):

> The plain import of this amendment [adding 'mistake in a determination of fact' as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.

An examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). However, "[t]he concept of mistake requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back-door route to retrying a case because one party thinks he can make a better showing on the second attempt." 3 A. Larson, *The Law of Workmen's Compensation* Section 81.52 at 354.8 (1971); *Rodgers* at 169.

AS 23.30.130 has long been applied to changes in conditions affecting reemployment benefits and vocational status. This includes a change in the treating physician's opinion on which the RBA relied when making a reemployment benefits eligibility determination. *See, e.g., Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007); *Philley v. AIS, Inc.*, AWCB Decision No. 03-0228 (September 19, 2003); *Wickett v. Arctic Slope Consulting Group*, AWCB Decision No. 02-0057 (April 3, 2002); *Imhof v. Eagle River Refuse*, AWCB Decision No. 94-0330 (December 29, 1994). The board may decide, based on evidence in the record upon conclusion of a hearing on modification, whether an employee is entitled to reemployment benefits. *See, e.g., Griffiths* at 624.

> **AS 23.30.145. Attorney fees**.
> . . .
> (b) If an employer . . . 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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.
> . . .

In *Adamson v. University of Alaska*, 819 P.2d 886, 888 (Alaska 1991), the Court held the language of AS 23.30.145(b) "makes it clear" that to be awarded attorney's fees and costs, "the employee must be successful on the claim itself, not on a collateral issue. . . . The word 'proceedings' also indicates that the Board should look at who ultimately is successful on the claim, as opposed to who prevails at each proceeding." *Id.* at 895.

> **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.
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> (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
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> (1) the weight of the evidence; or
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> (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 45.050. Pleadings.**
> . . .
> (e) Amendments. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading.
> . . .

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.

. . .

(f) Immediately upon a change of address for service, a party or party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served on the party at the party's last known address.

. . .

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 45.150. Rehearings and modification of board orders.

(a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

. . .

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

8 AAC 45.150(e) requires specific facts, not just a general allegation, of a change of conditions to serve as a basis for modification. *See, e.g., Lindhag v. State, Dep't of Natural Resources*, 123 P.3d 948, 957 (Alaska 2005).

> **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.
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> **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.
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> **8 AAC 45.522. Ordering an eligibility evaluation without a request.**
> . . .
> (d) No later than 10 working days after receipt of the administrator's letter selecting a rehabilitation specialist, the employer at the time of injury or the employer's adjuster shall forward a copy of the employee's resume and job application, and a job description or summary of the employee's job duties, if available, to the rehabilitation specialist, the employee, and the administrator. The employer or employer's adjuster shall also forward a copy of the report of injury and all medical reports, and controversions to the rehabilitation specialist, the employee, and the administrator.
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> **8 AAC 45.525. Reemployment benefit eligibility evaluations.**
> . . .
> (g) In accordance with 8 AAC 45.500, and no later than 30 days after being selected, the rehabilitation specialist whose name appears on the referral letter shall submit to the administrator, with simultaneous copies to the employee and employer,
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> (1) a report of findings, including a recommendation regarding eligibility for reemployment benefits, together with
> . . .
> (E) all physicians' rating or statement regarding permanent impairment; or
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> (2) a written request for a 30-day extension explaining the unusual and extenuating circumstances, in accordance with AS 23.30.041(d), that prevented the rehabilitation specialist from completing the evaluation within 30 days after selection, documenting that the employee, employer, and the

> employee's physician were contacted within the first 30 days and that the rehabilitation specialist is awaiting a response from one or more of the contacts; if the administrator grants an extension requested under this paragraph, the rehabilitation specialist shall prepare and submit a report of findings in accordance with (1) of this subsection within a total of 60 days from the date the rehabilitation specialist was selected.

> **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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> (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
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> (1) may not decide the employee's eligibility for reemployment benefits; and
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> (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
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> (B) that the administrator shall reassign the employee to a new rehabilitation specialist in accordance with 8 AAC 45.430.

. . .

ANALYSIS

1) 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. AS 23.30.041(d); 8 AAC 45.510(g). The decision was first served by certified mail on April 28, 2015. Under 8 AAC 45.060(b) and 8 AAC 45.063(a), with a proper service date of April 28, 2015, Employee's time to appeal the decision would have expired May 11, 2015, the date the determination was returned to the RBA with the notation, "no such street."

However Employee was not properly served with the RBA designee's determination on April 28, 2015. Employee had provided the RBA office assistant with his change of address information by telephone on April 20, 2015. At the time he did so, there is no evidence he was notified he should put the change of address in writing. *Richard.* Employee's new address was entered incorrectly into the division's computer database, resulting in the April 28, 2015 determination being sent to an invalid address. When the determination was returned to the RBA, the office assistant clarified Employee's address by phone, corrected the address in the database, and properly served Employee with the RBA designee's determination on May 12, 2015. Employee's appeal was timely filed on May 18, 2015, which was six days after Employee was properly served written notice of the determination by certified mail.

In the alternative, Employee's claim for review will be analyzed as if it had been properly served on April 28, 2015. Employee filed his claim for review of the eligibility decision on May 18, 2015, which was seven days late, according to statute and regulations. However Employee's late filing is excusable. Employee was not represented by counsel until May 14, 2015. A *pro se* claimant cannot be expected to possess an attorney's comprehensive grasp of legal issues, and procedural requirements are often relaxed or modified for self-represented litigants, especially where, as here, there is no evidence Employee's actions stemmed from gross neglect or bad faith. *Gilbert; Thomas.* Employee was not properly advised of the requirement he provide his change of address is writing and he diligently followed the division's instructions regarding the time limits for his appeal of the ineligibility determination.

On April 20, 2015, Employee responded within hours to the RBA office's phone call asking him to provide an updated mailing address. The RBA assistant then mistakenly recorded the street address as being on a "Route," not a "Road." This error was not realized until May 11, 2015, when the RBA's April 28, 2015 decision was returned as undeliverable. On May 12, 2015, Employee identified the mistake via telephone, whereupon the assistant re-sent the RBA's decision to the correct address. It would be manifestly unjust to penalize Employee for his failure to give the board written notice of his address change, pursuant to 8 AAC 45.060(f), when the division did not make him aware of that requirement, and in fact Employee had promptly and

fully cooperated with the RBA office regarding updating and correcting his mailing address. 8 AAC 45.195; *Gilbert; Richard.*

Moreover, by instructing Employee he needed to request review of the eligibility decision within 10 days of *receipt* of her letter, rather than within 13 days of service, the RBA designee failed in her 8 AAC 45.530(a) duty to properly inform Employee how to pursue an appeal under AS 23.30.041(d) and 8 AAC 45.510(g). The decision was served to Employee's correct address on May 12, 2015, and Employee credibly testified he received it on May 16, 2015. Relying on the RBA designee's written instructions, Employee believed he had 10 days, or until May 26, 2015, to appeal the decision. It would be manifestly unjust to time bar Employee's May 18, 2015 appeal when he complied with the filing deadline set forth by the division. 8 AAC 45.195; *Gilbert; Richard.* Employee's claim for review of the RBA designee's eligibility decision will not be denied as untimely.

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

Employee was found ineligible because Dr. Lee predicted Employee would have no PPI at the time of medical stability. However, in both his April 7, 2015 eligibility evaluation and his April 8, 2015 phone call with the RBA, RS Hall indicated he knew Employee had been scheduled for an EME with Dr. Splitter of Pathway Occupational Medicine on March 12, 2015, but RS Hall did not have any information regarding that visit. RS Hall consulted with the RBA regarding his knowledge Employee underwent an evaluation with Dr. Splitter and the RBA told RS Hall "he should recommend not eligible," but forward any information to the contrary immediately. If RS Hall had reviewed the EME report from March 12, 2015 prior to completing his evaluation, he would have known Dr. Splitter opined Employee had a one percent PPI rating, and the RBA designee would not have found him ineligible under AS 23.30.041(f)(4).

It was not RS Hall's obligation to obtain a copy of Dr. Splitter's report; it should have been provided to him by Employer or Employer's adjuster. On February 24, 2015, the RBA office notified Employer it had an obligation to provide RS Hall and the RBA with Employee's complete file, including EME reports, during the evaluation period, originally set to expire March 26, 2015

but extended to April 24, 2015. The notice included the following, bold-face statement: "**By copy of this letter to the employee and the employer/insurer, you are being notified that all discovery, evidence and results of employer medical examinations should be in the Reemployment Benefits Section's file during this evaluation period."** Employer filed 400 pages of records on March 4, 2015, which was timely under 8 AAC 45.522(d), but this filing predated the March 12, 2015 EME report. The March 26, 2015 letter extending RS Hall's deadline to complete his evaluation to April 24, 2015 reiterated, "The employer/adjuster is reminded they are to send Mr. Hodges [sic] complete file to Mr. Hall so that he may proceed in getting the eligibility evaluation done."

The March 4, 2015 filing included a letter indicating Dr. Splitter's EME was to take place on March 12, 2015. However Employer did not file, nor is there any evidence it served on Employee or RS Hall, the March 2015 EME report and addendum, both including the one percent PPI rating, until June 2015. Employer and its adjuster failed to discharge their continuing obligation to update medical records with rehabilitation specialists, injured workers, and the RBA. 8 AAC 45.522(d). To find otherwise would be in direct conflict with the legislative intents that the Act be interpreted to ensure the quick, efficient, fair, and predictable delivery of benefits to injured workers at a reasonable cost to employers, and that evidence be fully considered. AS 23.30.001(a), (d).

Thus in April 2015 RS Hall, on advice from the RBA, made his ineligibility recommendation based on incomplete records. RS Hall, the RBA and the RBA designee should have realized that existing medical reports from an occupational medicine specialist needed to be considered in making an eligibility evaluation, particularly because they were highly likely to include a statement or rating regarding PPI, which here was the determining factor in finding Employee ineligible. RS Hall's evaluation violated AS 23.30.041(f)(4) and 8 AAC 45.525(g)(1)(E) by not including all physicians' PPI ratings, and therefore also violated 8 AAC 45.530(b) by being based on insufficient information.

The RBA designee's proper course of action would have been to not decide the employee's eligibility for reemployment benefits, but instead to notify Employer or Employer's adjuster to submit Dr. Splitter's report to RS Hall before eligibility could be determined.

8 AAC 45.530(b)(1)-(2)(A). The RBA designee therefore abused her discretion because her decision was arbitrary, was based on a flawed report, failed to apply controlling law and regulations, and demonstrated a failure to exercise sound, reasonable and legal discretion. *Irvine; Sheehan; Tobeluk; Manthey*.

3) Should the RBA designee's determination that Employee is ineligible for reemployment benefits be modified?

Though the hearing issue was originally set as an appeal under AS 23.30.041(d), on July 30, 2015 Employee amended his claim to request relief pursuant to AS 23.30.130, on the grounds of a change of condition and a mistake in determination of fact. Pleadings may be amended at any time before award upon such terms as the board or its designee directs. 8 AAC 45.050(e). Here the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, and therefore the amendment relates back to the May 18, 2015 original pleading. 8 AAC 45.050(e); *Rogers & Babler*. Employee did not strictly follow the procedural requirements of 8 AAC 45.150 in that the allegation in his amended claim was not specific or detailed, nor was it accompanied by supporting evidence. However, Employee provided that information in his hearing brief and arguments. To not address the modification issue at this hearing would contravene the legislative intents to ensure quick, efficient, and fair delivery of benefits to injured workers who are entitled to them, at a reasonable cost to employers, and for process and procedure to be as summary and simple as possible. AS 23.30.001(1); AS 23.30.005(h).

AS 23.30.130 has long been applied to changes in conditions affecting reemployment benefits and vocational status, including a change in the treating physician's opinion on which the RBA relied when making his determination. *Griffiths; Philley; Wickett; Imhof.* The Supreme Court has authorized broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *Rodgers; O'Keeffe*. Here both parties have evidence, dated after the RBA's April 28, 2015 decision, they believe should be taken into consideration when deciding Employee's eligibility for reemployment training: (1) Employee relies on Dr. Lee's June 1, 2015 revised opinion that Employee will have a PPI rating greater than zero, and Dr. Lee's August 10, 2015 deposition testimony, in which he states he never does PPI ratings and explains why he changed his opinion on

PPI; and (2) Employer relies on PT Fulton's April 9, 2015 Functional Capacities Evaluation. Employee also relies upon Dr. Splitter's March 12, 2015 report, which was evidence not provided to RS Hall when he made his recommendation, or to the RBA designee prior to her determination Employee is not eligible for reemployment benefits.

The board has authority to decide whether an employee is entitled to reemployment benefits, based on evidence in the record upon conclusion of a hearing on modification. *Griffiths.* However here, in light of Employer's concerns the record was not fully developed at the instant hearing, no such decision will be made. Rather, the RBA designee's April 28, 2015 determination that Employee is ineligible for reemployment benefits will be remanded for reconsideration, taking into account all currently available evidence related to Employee's eligibility for reemployment benefits. Likewise, Employee's request for AS 23.30.041(k) benefits will not be granted at this time.

In the context of ensuring RS Hall does not again make a recommendation based on incomplete records, it is noteworthy that Employee filed his first claim on May 18, 2015, but Employer's first medical summary, with chronologically arranged attachments, was dated June 4, 2015 and filed June 8, 2014. Employer thereby failed its statutory obligation to immediately, or in any event within five days after service of a pleading, file and serve all related physician reports in its possession or under its control. AS 23.30.095(h). The parties are reminded this duty continues throughout the pendency of the proceeding, and both will be ordered to file and serve any outstanding medical evidence related to Employee's injury by October 12, 2015, which is five working days after issuance of this decision.

4) Should Employee be awarded attorney's fees and costs and, if so, in what amount?

Employee prevailed on the collateral issue of securing a reconsideration of the ineligibility decision, but has not yet successfully prosecuted a claim or obtained a benefit. Awarding attorney's fees and costs would be improper in this interlocutory order, and Employee's claim for them will be denied without prejudice. *Adamson.*

CONCLUSIONS OF LAW

1) Employee's claim for review of the RBA designee's eligibility decision should not be denied as untimely.

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

3) The RBA designee's determination that Employee is ineligible for reemployment benefits should be modified.

4) No attorney's fees and costs should be awarded at this time.

ORDER

1) Employee's May 18, 2015 appeal and July 30, 2015 amended appeal from the RBA designee's April 28, 2015 ineligibility determination are granted.

2) Employee's request that the RBA designee's April 28, 2015 ineligibility determination be vacated is denied.

3) Parties are ordered to file and serve any outstanding medical evidence related to Employee's injury by October 12, 2015.

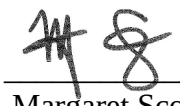
4) The RBA designee's April 28, 2015 ineligibility determination is remanded for reconsideration, taking into account all evidence in the record as of October 12, 2015.

5) Employee's request for AS 23.30.041(k) benefits is denied without prejudice.

6) Employee's request for attorney's fees and costs is denied without prejudice.

Dated in Anchorage, Alaska on October 5, 2015.

ALASKA WORKERS' COMPENSATION BOARD



Margaret Scott, Designated Chair

Robert Weel, Member

Donna Phillips, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JOHN A HODGES, employee / claimant; v. PATTERSON-UTI DRILLING CO., employer; LIBERTY MUTUAL INSURANCE CO., insurer / defendants; Case No. 201411500; 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 October 5, 2015.

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Elizabeth Pleitez, Office Assistant