ALASKA WORKERS' COMPENSATION BOARD

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

IAN DEMELLO, Employee, Claimant, v. SCHLUMBERGER, Employer, and TRAVELERS PROPERY CASUALTY COMPANY OF AMERICA, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201418349 AWCB Decision No. 16-0111 Filed with AWCB Anchorage, Alaska on November 15, 2016

Ian deMello's (Employee) May 23, 2016 petition for a second independent medical evaluation (SIME) pursuant to the parties' April 27, 2016 stipulation, and Schlumberger and Travelers Property Casualty Company of America's (Employer) December 23, 2015 petition for modification of the December 15, 2015 Reemployment Benefits Administrator Designee's (RBA Designee) eligibility determination and its May 20, 2016 petition for modification and to set aside the April 27, 2016 stipulation for an SIME was heard in Anchorage, Alaska on September 7, 2016, a date selected on July 26, 2016. Employee appeared, represented himself, and testified. Attorney Robert Griffin appeared on Employer's behalf. The record remained open at the hearing's conclusion to receive information regarding releases from Employer, written closing arguments from Employee, and Employer's responses to Employee's closing arguments. The panel closed the record and deliberated on October 28, 2016.

ISSUES

Employer contends the RBA Designee abused her discretion in finding Employee eligible for reemployment benefits. Employer contends Employee's physician's opinion change regarding Employee's ability to return to light duty work is newly discovered evidence not available to the RBA Designee when the eligibility determination was made and entitles Employer to an order modifying the eligibility determination. Employer contends Employee is not eligible for reemployment benefits and those benefits should be terminated.

Employee contends Employer has not met its burden to modify the RBA Designee's determination he is eligible for reemployment benefits and the determination should be upheld. Employee contends he does not meet the Specific Vocational Preparation (SVP) for the job descriptions Employer provided and his physicians approved and therefore Employer's request for modification should be denied.

1) Shall the RBA Designee's December 15, 2015 eligibility determination be modified and Employee's entitlement to reemployment benefits be terminated?

The parties stipulated to an SIME on April 27, 2016 on whether work was the substantial cause of disability and need for medical treatment for Employee's shoulder, thoracic spine, and cervical spine. Employer contends Employee's attending physician changed his opinion and there are no longer any medical disputes or need for an SIME. Employer contends good cause exists to relieve Employer from its stipulation for an SIME.

Employee contends medical disputes exist between his attending physician's opinion and Employer's medical examiners' opinions. Employee contends an SIME will assist the fact-finders and Employer should not be relieved from its stipulation for an SIME.

2) Is there a medical dispute warranting an SIME and, if not, shall Employer be relieved from its stipulation's terms?

FINDINGS OF FACT

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

1) On November 8, 2014, Employee was working for Employer on a derrick floor as a floorhand. A pipe got away and he injured his wrist when attempting to pull the pipe back towards him. (Report of Injury, November 15, 2014.)

2) On November 8, 2014, Employee began treating with Samuel Schurig, D.O., for left bicep and shoulder pain, and left hand numbness. Dr. Schurig diagnosed left arm pain, left shoulder strain, left bicep tendon sprain, cubital tunnel, ulnar nerve pain, and left hand carpel tunnel syndrome. Dr. Schurig provided Employee a sling and prescribed Toradol. (Chart Note, Dr. Schurig, November 8, 2014; Physician's Report, Dr. Schurig, November 8, 2014.)

3) On November 10, 2014, Employee reported he kept his arm in the sling and Toradol was not helping; the tingling and pain had moved toward the left side of his neck and shoulder and his right hand started going numb. He was in severe pain and requested pain medications. (Chart Note, Dr. Schurig, November 10, 2014.)

4) A November 15, 2014 cervical spine magnetic resonance imaging (MRI) scan revealed minimal upper cervical degenerative disc disease, causing mild bilateral C3-4 foraminal stenosis with no neural impingement. (Cervical Spine MRI Report, Muneer Desal, M.D., November 15, 2014.)

5) On November 24, 2014, physiatrist Sean Taylor, M.D., diagnosed neck pain, left upper extremity weakness and skin sensation disturbance, C3-4 cervical degenerative disc disease, and left shoulder, elbow, and wrist pain. (Chart Note, Sean Taylor, November 24, 2014.)

6) On November 25, 2014, a lateral cervical spine x-ray revealed normal curvature loss on the neutral view, suggesting muscle spasm. Employee had normal motion and no instability on flexion and extension. Soft tissue planes appeared normal and there was no neural foraminal encroachment. (C-Spine LAT Report, Harold Cable, M.D., November 25, 2014.)

7) A November 25, 2014 left shoulder post arthrogram MRI showed no rotator cuff tear, labral tear, or obvious degenerative or posttraumatic changes. (Post Arthrogram MRI Report, Dr. Cable, November 25, 2014.)

8) On December 4, 2014, Kristy Donovan, adjuster for Employee's claim, received a signed medical release from Employee releasing medical records from his November 8, 2014 injury forward. (Affidavit of Kristy Donovan, September 16, 2016.)

9) On December 16, 2014, a left wrist MRI showed triangular fibrocartilage complex (TFCC) focal disruption at its attachment to the ulnar styloid, and a dorsal intercalated segment instability pattern with extrinsic ligament disruption. No fractures or aseptic necrosis was visible. (Left Wrist MRI Report, December 16, 2014.)

10) On January 21, 2015, Michael McNamara, M.D., performed a left wrist diagnostic arthroscopy with minor TFCC debridement. Employee's postoperative diagnosis was left wrist TFCC complex ulnar avulsion and marked dorsal distal radio-ulna joint (DRUJ) displacement, subluxation and pronation. (Operative Report, Dr. McNamara, January 21, 2015.)

11) On February 20, 2015, a thoracic MRI was obtained because Employee had chronic pain. The MRI was normal. After reviewing the thoracic MRI, Dr. Taylor was unable to explain Employee's ongoing severe cervical and thoracic pain, and recommended an employer's medical evaluation (EME) to obtain a second opinion.

12) On March 13, 2015, Kristy Donovan received a second medical release from Employee releasing medical records from November 8, 2009 forward. (Affidavit of Kristy Donovan, September 16, 2016.)

13) On March 20, 2015, Jeanne Tatum, legal assistant for the Law Offices of Griffin & Smith, utilizing the release Employee provided Ms. Donovan, requested records from AA Pain Clinic for Alfred Lonser, M.D.'s records. AA Pain Clinic stated it had no record Employee was a patient. (Affidavit of Jeannie Tatum, September 16, 2016.)

14) On April 20, 2015, Ms. Tatum, utilizing the release Employee provided Ms. Donovan, requested records from Medical Park Family Care, which she received on April 24, 2015; and First Care, which she received on May 18, 2015. (*Id.)*

15) On April 22, 2015, EME physician Lynne Adams Bell, M.D., Ph.D., noted imaging studies did not show significant abnormality in Employee's cervical spine to explain his chronic neck and right parascapular pain. She determined Employee did not have cervical radiculopathy or brachial plexopathy, and neurological examination findings were negative for an ulnar nerve lesion at Employee's elbow or wrist. Based upon Employee's anxiety and distress concerning his situation, Dr. Bell opined these emotional factors were perpetuating an increased intensity in Employee's subjective pain complaints. Dr. Bell diagnosed left wrist TFCC; minor cervical spine arthritic changes; cervical strain, resolved; left shoulder strain, likely resolved; possible

somatoform disorder responsible for Employee's chronic neck and bilateral parascapular pain. Dr. Bell stated:

> Mr. DeMello may have sustained a cervical strain and left shoulder strain associated with the original job injury. Strain injuries, however, typically resolve within three months of injury if not sooner. I'm unable to explain his persistent cervical, thoracic and parascapular symptoms on the basis of an injury mechanism. Cervical examination is unremarkable, consistent with his benign cervical imaging results. He has no evidence of a thoracic spine condition that would explain his complaints. Although the work injury was for a time the substantial cause of need for treatment of his neck and left shoulder symptoms, my opinion is that those strain injuries have recovered and are no longer responsible for the present complaints.

Dr. Bell confirmed there was no evidence Employee had a significant pre-existing condition. She opined Employee's cervical strain was resolved, had reached medical stability, and no further palliative treatment was required. (EME Report, Dr. Bell, April 22, 2015.)

16) On April 24, 2015, EME physician Charles Craven, M.D., determined work substantially caused Employee's disability and need for treatment for six weeks for a dorso-cervical strain. Dr. Craven determined work was not the substantial cause of Employee's disability and need for treatment for his ongoing cervical dorsal complaints. The November 8, 2014 work injury was the substantial cause of Employee's disability and need for medical treatment to his left wrist, including his surgical procedure and recovery. Dr. Craven, like Dr. Bell, found no pre-existing conditions and further found Employee's cervicodorsal strain medically stable on December 22, 2014, no further treatment was reasonable or necessary, and Employee sustained no ratable impairment. Employee's left wrist, however, was not medically stable. A left forearm MRI was recommended, as was continued occupational therapy as directed by Dr. McNamara. (EME Report, Dr. Craven, April 24, 2016.)

17) On May 14, 2015, Dr. Bell reviewed Employee's pre-injury medical records and imaging studies, which documented Employee's musculoskeletal pain complaints dating back to 2010, and according to the records' history, for four to five years prior to 2010. Dr. Bell found this consistent with Employee's chronic musculoskeletal pain complaints. According to October 2014 records, there was an acute injury involving an engine block, prior to the reported November 2014 job injury. Dr. Bell's opinion remained no further treatment was reasonable and necessary for Employee's resolved cervical strain and Employee was neurologically intact with

no cervical radiculopathy or peripheral nerve lesion related to the November 8, 2014 injury. (EME Report, Dr. Bell, May 14, 2015.)

18) On May 21, 2015, Employer controverted all benefits related to Employee's cervicodorsal conditions, including neck and thoracic spine, left shoulder, left elbow, and non-wrist related upper extremity pain complaints and conditions. (Controversion Notice, May 21, 2015.)

19) On May 29, 2015, Ms. Tatum made a second request to AA Pain Clinic for Dr. Lonser's medical records and again received a response AA Pain Clinic had no record Employee was a patient. (Affidavit of Jeannie Tatum, September 16, 2016.)

20) On June 2, 2015, upon Dr. McNamara's order, nerve conduction studies were conducted and within normal limits. There was no evidence of left carpel tunnel or cubital tunnel syndrome. All examined muscles showed no electrical instability or either acute or chronic upper extremity radiculopathy. (Nerve Conduction Studies Report, Susan Klimow, M.D., June 2, 2015.)

21) On June 3, 2015, Dr. Lonser accepted Employee as a new patient. He stated, "We have made it clear to the patient that we will not talk about his left wrist, but only his neck and back pain; the patient states he understands." Right occipital tenderness was present, and Dr. Lonser diagnosed chronic pain, cervical degenerative disc disease, and cervical stenosis. (Chart Note, Dr. Lonser, June 3, 2015.)

22) On June 18, 2015, Dr. McNamara noted Employee's nerve conduction velocity studies were negative and Employee's left wrist was doing well considering the severity of the DRUJ dislocation and TFCC tear. Dr. McNamara stated Employee should not go back to the work he was doing, which was a heavy nature job; "a lighter median level job would be required; otherwise he will have a re-injury to his left wrist lifelong." Dr. McNamara determined Employee was medically stable effective June 18, 2015, and asked Dr. Lonser to provide Employee with a permanent partial impairment rating, and assist Employee with return to work planning, and a physical capacity evaluation. (Chart Note, Dr. McNamara, June 18, 2015.)

23) On July 15, 2015, Dr. McNamara reviewed medical records from Employee's December 2013 motor vehicle accident, and preinjury records documenting an October 2014 injury involving a heavy engine block that fell on Employee's left arm, causing significant symptoms, Dr. McNamara considered the relationship of Employee's pain radiating up and down his entire left arm, including numbness and tingling symptoms radiating up and down his left shoulder, elbow, hand and fingers, to the November 8, 2014 injury, and stated:

> Based on injuries and symptoms documented in the preinjury records, and the fact that at the time of the first several clinical visits in my offices this was not part of Mr. DeMello's clinical presentation or complaints, I do not believe there is adequate documentation to support that the November 8, 2014 injury is the substantial cause of the left arm symptoms/conditions.

Dr. McNamara indicated Employee no longer required treatment for his left hand conditions and no additional surgery or invasive procedures to treat his left upper extremity condition were needed. (Affidavit of Michael G. McNamara, M.D., July 15, 2015.)

24) On July, 23, 2015, Dr. Taylor concurred with Dr. Bell's April 22, 2015 and May 14, 2015 EME reports, Dr. Craven's April 24, 2015 EME report, and Dr. McNamara's July 15, 2015 affidavit. (Response to Inquiry, Dr. Taylor, July, 23, 2015.)

25) On September 2, 2015, EME physician Dr. Craven indicated Employee's cervicodorsal strain had resolved without impairment, and he had pre-existing cervicalgia complaints not related to the November 8, 2014 work injury. Dr. Craven agreed with Dr. McNamara that Employee's left wrist injury was medically stable on June 18, 2015. No further physical therapy for Employee's left wrist and hand beyond a home exercise program was reasonable or necessary. Because Employee's wrist was structurally sound with no TFCC re-tear, Dr. Craven determined narcotics are not appropriate; nor are additional invasive procedures, surgery, or additional testing. Dr. Craven provided a five percent whole person permanent partial impairment (PPI) rating under the AMA *Guides to the Evaluation of Permanent Impairment*, Sixth Edition. Dr. Craven reviewed multiple job descriptions and approved or disapproved them, as follows:

Job Title	Strength Level	Approved	Disapproved
Automobile Mechanic Helper	Heavy		X
Roustabout	Heavy		X
Water Well Driller	Heavy		X
Carpet Layer	Heavy		X
Welder: Shielded-Metal Arc	Heavy		X
Parts Clerk	Heavy		X
Shipping and Receiving Clerk	Medium	X	
Food Service Manager	Light	X	
Kitchen Helper	Medium	X	
Floor Worker Well Service	Heavy		X
Industrial Truck Operator	Medium	X	
Carpet Layer Helper	Heavy		X
Welder Helper	Heavy		X

(EME Report, Dr. Craven, September 2, 2015.)

26) On September 22, 2015, Employer controverted temporary partial disability (TPD) and temporary total disability (TTD) benefits after June 17, 2015, PPI over five percent; and additional physical therapy. Employer based its controversion on Dr. McNamara's determination Employee's left wrist was medically stable on June 18, 2015, and Dr. Craven's concurrence with Dr. McNamara's medical stability date. (Controversion Notice, September 22, 2015.)

27) On September 28, 2015 and August 31, 2015, Dr. Lonser reviewed the following job descriptions and determined Employee did not have the physical capacities to perform the positions' physical demands:

Job Title	Strength Level	Approved	Disapproved
Kitchen Helper	Medium		X
Floor Worker Well Service	Heavy		X
Industrial Truck Operator	Medium		X
Carpet Layer Helper	Heavy		X
Welder Helper	Heavy		X
Waiter Informal	Light		X
Kitchen Supervisor	Medium		X

(Response to Job Descriptions, Dr. Lonser, August 31, 2015 in September 28, 2015.)

28) On October 1, 2015, a functional capacities evaluation (FCE) indicated Employee could perform light duty work. John DeCarlo, MSOT/L, determined Employee had the physical capacities to work as a food service manager and shipping and receiving supervisor. Mr. DeCarlo recommended a six week work hardening program, progressing Employee from four to eight hours, with a goal to return Employee to a medium strength function level. (Functional Capacity Evaluation, Mr. DeCarlo, October 1, 2015.)

29) On October 1, 2015, Ms. Tatum made a third request to AA Pain Clinic requesting Dr. Lonser's medical records for Employee. Records were received on October 26, 2015. (Affidavit of Jeannie Tatum, September 16, 2016.)

30) Dr. Lonser's October 22, 2015 chart note, while comprehensive, does not contain any reference to the October 1, 2015 FCE. (Chart Note, Dr. Lonser, October 22, 2015.)

31) On November 10, 2015, Dr. McNamara agreed with Mr. DeCarlo's determination Employee had physical capacities to perform only light work. However, he noted "light duty indefinite"

and "no heavy work indefinite." Dr. McNamara predicted Employee would not have permanent physical capacities to work as a welder helper. (Response to Welder Helper job description, Dr. McNamara, November 10, 2015.)

32) On November 17, 2015, Dr. Lonser wrote a letter on Employee's behalf. He stated Employee's ongoing neck pain was related to his November 8, 2014 work injury.

> Evidence of this is noted with comparison to imaging report from December 14th, 2013, which initially read normal prior to his injury and compared this to his MRI of the C-spine obtained on November 15th, 2014. Comparison of both imaging reports from 2013 to 2014 indicates significant changes that include the following: cervical degenerative disc disease present at bilateral C-3 – C-4, disc bulge at C-3 – C-4 with addition to cervical foraminal stenosis bilaterally.

(To Whom It May Concern Letter, Dr. Lonser, November 17, 2015.)

33) On November 29, 2015, Rehabilitation Specialist Forooz Sakata recommended Employee be found eligible for reemployment benefits. She noted Dr. Lonser based all his predictions only on Employee's wrist's physical capacities. Ms. Sakata determined Employee's informal waiter positions with Kenai Landing, Inc. and Little Italy Restaurante combined met the informal waiter SVP one to three months. Dr. Lonser was provided the informal waiter and kitchen supervisor job descriptions; he approved neither. Employer gave Employee light duty work for three weeks after his injury and Ms. Sakata selected the job descriptions data entry clerk, inventory clerk, job analyst, and file clerk. She determined he did not meet the SVP for these jobs and therefore they were not presented to Dr. Lonser. (Eligibility Evaluation Addendum, Forooz Sakata, November 1, 2015; Eligibility Evaluation Final Report/Addendum, Forooz Sakata, November 29, 2015; Dr. Lonser Confirmation, December 18, 2015.)

34) On December 15, 2015, the RBA Designee determined Employee was eligible for reemployment benefits considering the following: (1) Dr. Lonser predicted Employee would not have permanent physical capacities to perform the physical demands of Employee's job at time of injury, or any other jobs he held during the 10 year period prior to his injury; (2) when Employee was medically stable, a permanent partial impairment rating was given; (3) Employer did not offer Employee physically appropriate alternative work; (4) Employee had never been rehabilitated in a prior workers' compensation claim; (5) Employee had never declined development of a reemployment benefits plan, or received job dislocation benefits, and then returned to work in an occupation with the same or similar physical demands as his job at the

time of injury; and (6) Employee never waived reemployment benefits under AS 23.30 .041(q), AS 23.30.012, or a substantially similar law in another jurisdiction and then returned to work in an occupation with the same or similar physical demands as his job of injury. The RBA Designee relied on Dr. Lonser's opinion Employee's "neck and thoracic spine conditions are part of the work injury that occurred on November 8, 2014," and his prediction Employee would not have the permanent physical capacities to perform physical demands for Informal Waiter, the only job description that represented light duty work. (Eligibility Determination, RBA Designee Helgeson, December 15, 2015.)

35) On December 23, 2015, Employer appealed the RBA Designee's December 15, 2015 determination finding Employee eligible for reemployment benefits. (Petition, December 23, 2015.)

36) On February 9, 2016, Employee filed a workers' compensation claim (claim) for TTD from November 8, 2014 through February 9, 2015, PPI, and medical costs, and for an unfair controversion finding. (Claim, February 9, 2016.)

37) On March 1, 2016, Employer controverted TTD and TPD benefits after June 17, 2015; TTD from November 8, 2015 through January 27, 2015; PPI in excess of five percent; all medical care, disability and vocational reemployment benefits related to Employee's cervicodorsal strain/sprain, left shoulder, left elbow and non-wrist related upper extremity pain complaints/conditions; and additional physical therapy. (Controversion Notice, March 1, 2016.)

38) On April 1, 2016, Employee filed a petition for an SIME. (Petition, March 21, 2016.)

39) On April 12, 2016, Dr. McNamara met with Christi Niemann, certified legal assistant with the Law Offices of Griffin & Smith. Tracy Lyons, legal assistant in the Law Offices of Griffin & Smith, scheduled and rescheduled this conference on numerous occasions beginning on June 16, 2015. (Affidavit of Tracy Lyons, September 16, 2016.)

40) On April 12, 2016, Dr. McNamara determined Employee had permanent physical capacities to perform informal waiter, food service manager, and receiving supervisor positions. Dr. McNamara predicted Employee would not have permanent physical capacities to perform kitchen supervisor, shipping and receiving clerk, and kitchen helper. Dr. McNamara based his determinations upon his June 2015 evaluation. He evaluated Employee's physical capacity to perform the following positions:

Job Title	Strength Level	Approved	Disapproved
Shipping and Receiving Clerk	Medium		X
Food Service Manager	Light	X	
Kitchen Helper	Medium		X
Industrial Truck Operator	Medium		X
Waiter Informal	Light	X	
Kitchen Supervisor	Medium		X
Shipping and Receiving Supervisor	Light	X	
Data Entry Clerk	Sedentary	X	
File Clerk I	Light	X	

(Responses to Job Descriptions, Dr. McNamara, April 12, 2016.)

41) On April 12, 2016, Dr. Klimow rated Employee with five percent PPI. (PPI Rating, Dr. Klimow, April 12, 2016.)

42) On April 27, 2016, the parties stipulated to an SIME and agreed, "The medical disputes are likely to be causation, treatment, functional capacity, and medical stability as a non-SIME issue (parties have not yet finalized the form), and will be listed on the SIME form filed with the board on 05/27/2016." (Prehearing Conference Summary, April 27, 2016.)

43) On April 27, 2016, Ms. Lyons contacted AA Pain Clinic and requested a conference with Dr. Lonser and Ms. Niemann. On May 5, 2016, she again contacted AA Pain Clinic and was able to schedule a May 12, 2016 conference. (Affidavit of Tracy Lyons, September 16, 2016.)

44) On May 12, 2016, Dr. Lonser was provided the October 1, 2015 FCE, and Employee's medical records from June 28, 2010 through October 29, 2014, which documented symptoms and medical treatment for Employee's cervical spine, thoracic spine, and shoulders prior to the November 8, 2014 work injury. After reviewing the FCE report, Dr. Lonser evaluated job descriptions with light physical demands and determined Employee has permanent physical capacities to perform the physical demands for job analyst, data entry clerk, file clerk I, informal waiter, shipping and receiving supervisor, and food service manager. Dr. Lonser stated, "It is my opinion, to a reasonable degree of medical certainty, that November 8, 2014 on-the-job injury is not the substantial cause of Mr. deMello's disability and need for medical treatment for his cervical spine, thoracic spine, and shoulders." (Responses to Job Descriptions, Dr. Lonser, May 12, 2016; Affidavit of Alfred Lonser, M.D., May 16, 2016.)

45) On May 20, 2016, Employer petitioned to modify and set aside the parties' April 27, 2016 stipulation for an SIME. Employer asserted, subsequent to the April 27, 2016 stipulation new evidence was received, which eliminated the SIME dispute. (Petition, May 20, 2016.)

46) On June 8, 2016, Dr. Taylor reviewed his treatment records for Employee and the October 1, 2015 FCE. He evaluated Employee's physical capacity to perform the following positions:

Job Title	Strength Level	Approved	Disapproved
Shipping and Receiving Clerk	Medium		X
Food Service Manager	Light	X	
Industrial Truck Operator	Medium		X
Kitchen Supervisor	Medium		X
Shipping and Receiving Supervisor	Light	X	
Data Entry Clerk	Sedentary		X
File Clerk I	Light	X	
Job Analyst	Light	X	
Inventory Clerk	Medium		X
Automobile Mechanic Helper	Heavy		X
Roustabout	Heavy		X
Water Well Driller	Heavy		X
Carpet Layer	Heavy		X
Shielded-Metal Arc Welder	Heavy		X
Parts Clerk	Heavy		X
Well Service Floor Worker	Heavy		X
Carpet Layer Helper	Heavy		X
Welder Helper	Heavy		X

(Responses to Job Descriptions, Dr. Taylor, June 8, 2016; Affidavit of Sean Taylor, M.D., June 9, 2016.)

47) On May 23, 2016, Employee petitioned to continue with the SIME as stipulated on April 27, 2016. Employee requested Dr. Lonser's May 16, 2016 affidavit not be relied on, and asserted the FCE had been faxed to Dr. Lonser, Dr. Lonser and he discussed the FCE at an October 22, 2015 office visit, and Dr. Lonser reviewed both Dr. Craven's and Dr. Bell's EME reports, which included all prior medical records from October 2010 to the present. Employee stated:

> Dr. Lonser's letter dated November 17th 2015 and all job descriptions he signed in the year of 2015 are very conflicting with his affidavit dated May 16th 2016. I believe this to be very unprofessional and highly unethical. Furthermore, this is not "new discovery," as Griffin and Smith put it, being that *Dr. Lonser is the physician who ordered the FCA [sic] and also reviewed it back in 2015*. Dr. Lonser also does not specify on whether or not his opinion regarding the job descriptions is based off of my current condition and not the time period in which I was under evaluation for re-employment benefits with Farooz Sakata. I feel these discrepancies and conflicting documents are need [sic] for an SIME.

(Petition, May 23, 2016; Attachment to Petition, May 23, 2016; italics in original.)

48) On July 19, 2016, Employee's deposition was taken. Employee worked for Little Italy Restaurante as a "working manager" and handled anything and everything involved in the business. He testified:

> I was what they would call a working manager, so not only would I handle the day-to-day operations, but I would tell the crew what to do. And then I would also have to fill in for anybody who didn't show up, so if that meant jumping in on the line to cook, I did that.
>
> If I need to take deliveries, I took deliveries. If I needed to be out on the floor waiting tables, bussing tables, doing dishes. I also did all of the ordering. And then I ran deliveries, picked up produce, meats, did Costco runs, Sam's Club runs.

(Ian deMello Deposition, July 19, 2016.)

49) Employee worked full-time for Little Italy Restaurante from July 2008 through December 2010, and filled in for any employee that did not show up. (Addendum Report, Forooz Sakata, September 1, 2015.)

50) On July 26, 2016, the issues set for hearing were Employee's petition for an SIME and Employer's petition for modification of the December 15, 2015 eligibility determination. (Prehearing Conference Summary, July 26, 2016.)

51) Employee has been approved for various positions; however, whether he met the SVP for all approved positions has not been determined, as follows:

Approved Job Titles	Approved By	Physical Demand	SVP Met
Food Service Manager	Lonser, McNamara, Taylor, Craven	Light	No
Informal Waiter	Lonser, McNamara, Taylor	Light	Yes
Shipping and Receiving Supervisor	Lonser, McNamara, Taylor	Light	Uncertain
Data Entry Clerk	Lonser, McNamara	Sedentary	No
File Clerk I	Lonser, McNamara, Taylor	Light	No
Job Analyst	Taylor	Light	Uncertain

(Eligibility Evaluation, Ms. Sakata, November 29, 2015; Responses to Job Descriptions, Drs. Lonser, McNamara, Taylor, and Craven.)

52) An undated letter from P.J. Gialopsos, owner, Little Italy Restaurante and Employee's mother-in-law, confirmed Employee was "Working Manager" for Little Italy Restaurante. She stated Employee was required to have "knowledge of more than one position in case of what we call an 'emergency' arises." She explained Employee has multiple hand and finger tattoos and when he once filled in for absent servers, Ms. Gialopsos was approached by a well-respected customer who complained, not about Employee's service, but about his tattoos. Ms. Gialopsos told Employee she preferred he "not step in" for service staff. Ms. Gialopsos stated, "I am confused by the letter from A.R.O.S. citing his experience as a server/waiter. One evening of work would never qualify as sufficient work experience anywhere – including our business." (Letter to Whom It May Concern from P.J. Gialopsos, Undated.)

53) Employer argues based on the newly discovered evidence, including Dr. Lonser's changed opinion finding Employee has the ability to return to light duty work, Employee should be found ineligible for reemployment benefits. Employer asserts discovering Employee's medical record took time to develop and provide to Dr. Lonser for review. Employer asserts it exercised reasonable diligence in obtaining Employee's past medical records and the newly discovered evidence should be considered. Employer asserted, "Based on the affidavit of Dr. Lonser, he stated that he was unaware of the results of the October 1, 2015 FCA until May 12, 2016. Prior to this, it was assumed by the employer that Dr. Lonser had previously reviewed this documentation." Employer asserts there is no opinion from any physician to support the RBA Designee's eligibility determination. Additionally, Employer argues the newly discovered evidence eliminates a medical dispute to warrant an SIME and provides good cause to relieve Employer from the stipulation's terms. (Employer's Hearing Brief, September 2, 2016.)

54) Employee argues he does not meet the one to three month SVP for informal waiter because he served as a waiter for only one night at Little Italy Restaurante and for only two weeks when he worked for Kenai Landing, Inc. He contends the physicians who approved the informal waiter position failed to consider the FCE, which determined Employee can reach frequently with his right arm, but only occasionally with his left arm, and "DeCarlo stated I could only reach occasionally with my left arm and do not meet the standard to reach 'frequently' with my left arm." He believes the informal waiter position's physical demands require greater physical strength than the FCE demonstrates he has; specifically, the position's need to be able to lift, carry, push, and pull 20 pounds occasionally, up to 10 pounds frequently, and negligible amounts

constantly. Employee asserts the RBA Designee's December 15, 2015 eligibility determination should be upheld. (Written Closing Arguments, Ian deMello, Undated; filed on September 16, 2016, and entered into ICERS database October 13, 2016.)

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 . . . employers. . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
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> **AS 23.30.041. Rehabilitation and reemployment of injured workers**.
> . . . .
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> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:
>
> > (1) the employee's job at the time of injury; or
> >
> > (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles'. . . .

The RBA designee's decision must be upheld absent "an abuse of discretion on the administrator's [designee's] part." Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act (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).

The Administrative Procedure Act (APA) provides another definition used by courts in considering appeals from administrative agency decisions. It contains terms similar to those above and expressly includes reference to a "substantial evidence" standard:

> 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. . . . 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.

AS 44.62.570.

While applying a substantial evidence standard a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 367 P.2d 884, 889 (Alaska 1962). Determining whether an abuse of discretion has taken place is aided by the practice of allowing additional evidence at the review hearing. *Kelley v. Sonic Cable Television*, Superior Court Case No. 3AN 89-6531 Civil (February 2, 1991). Additional evidence is precluded if the party offering it failed to exercise reasonable diligence in developing and presenting it to the RBA Designee. *Kin v. Norcon*, AWCB Decision No. 99-0041 (March 1, 1999).

After allowing parties to offer admissible evidence, all evidence is reviewed to assess whether the RBA Designee's decision was supported by substantial evidence and therefore reasonable. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69 (Alaska 1993). If, in light of all the evidence, the RBA designee's decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action.

> **AS 23.30.095. Medical treatments, services, and examinations**.
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, . . . functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of an examination and medical report shall be paid by the employer. The report of an independent medical examiner shall be furnished to the board and to the parties within 14 days after the examination is concluded. . . .

The Alaska Workers' Compensation Appeals Commission (AWCAC) in *Bah v. Trident Seafoods Corp.,* AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME. With regard to §095(k), the AWCAC referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.
>
> An SIME is to assist the board, and is not intended to give employees an additional medical opinion at the employer's expense when employees disagree with their own physician's opinion. (*Id*.)

> **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 . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board's credibility finding "is binding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **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.

In regard to rehabilitation and reemployment issues, the court in *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007) stated:

> Alaska Statute 23.30.130(a) allows the workers' compensation board to modify a previous decision based on changed conditions or a mistake of a fact. The board may modify the prior decision on its own initiative or upon application by an interested party so long as the board's review process begins within one year of the last payment of compensation or the rejection of the claim.

AS 23.30.130 is 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 Designee relied when making a reemployment benefits eligibility determination. *Id.*

In *Hodges v. Alaska Constructors*, 957 P2d 957 (Alaska 1998), the Alaska Supreme Court held a petition for modification under AS 23.30.130(a) is timely, and the board may consider modification, if the petitioner files the request within one year of the last payment of compensation, or of the filing of the challenged decision and order.

In *Imhof v. Eagle River Refuse*, AWCB Decision No. 94-0330 (December 29, 1994), the RBA found the employee eligible for rehabilitation and reemployment benefits. When physical therapy improved the employee's physical capacities, to the extent he could return to appropriate employment, the employer filed a petition for modification under AS 23.30.130 within one year of the last date it had paid benefits under AS 23.30.041(k). The employee argued §130 did not apply to RBA determinations, but the board held:

We find Employee's condition has changed since the RBA's initial determination under subsection 41(e) that he was entitled to reemployment benefits. We find this change in conditions gives us the authority under subsection 130(a) to review Employee's case. We find under AS 23.30.041(f) he is no longer entitled to reemployment benefits. Because this is not a situation requiring the RBA's particular expertise, we will grant Petitioners' request rather than remand this to the RBA for his review. We will enter an order terminating Employee's entitlement to benefits under AS 23.30.041 (footnotes omitted).

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. . . .

8 AAC 45.050. Pleadings. . . .

(f) **Stipulations**.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing;

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

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;

(5) meeting with the physician;

(6) evaluating physician responses; . . . .

. . . .

(9) making a recommendation regarding the employee's eligibility; . . . .

ANALYSIS

1) Shall the RBA Designee's December 15, 2015 eligibility determination be modified and Employee's entitlement to reemployment benefits terminated?

The law provides criteria an injured worker must satisfy to be eligible for reemployment benefits. Among other things, the law requires a physician's prediction Employee will have permanent physical capacities "less than the physical demands" of Employee's job at the time of injury, or other jobs in the labor market Employee held or received training for within 10 years before the injury, or he held following the injury for a period long enough to obtain the skills to compete in the labor market, all according to the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* used to identify these physical and work-experience requirements. AS 23.30.041(e)(1)-(2). These time periods are known as the "SVP" codes for each job. It is the reemployment specialist's job in the first instance to ferret out these jobs and determine through medical evidence whether Employee is physically capable of performing them. It is also the specialist's job to determine if Employee meets the SVP code for relevant jobs. 8 AAC 45.445(3)-(6).

If the RBA Designee's decision is supported by substantial evidence and is not otherwise unlawful, it must be upheld. AS 44.52.570; *Sheehan*; *Manthey*; *Miller*. The issue here is whether based upon newly discovered evidence, the RBA Designee's eligibility determination should be modified and Employee's reemployment benefits terminated. Employer seeks to modify Employee's eligibility based upon a factual mistake or a changed circumstance pursuant to AS 23.30.130. *Kelley*. Employee contends he does not meet the SVP for informal waiter and, even if he did, the position's physical demands are greater than his physical capacities.

If a factual mistake or condition change occurs, a party can ask for modification of a reemployment decision at any time until one year after the last compensation payment is made. *Griffiths*; *Hodges; Imhof*. Employer's petition for modification of the December 15, 2015 eligibility determination was timely; it was filed on December 23, 2015, while it continued to pay compensation benefits. AS 23.30.130; *Imhof*. A change in Employee's treating physician's opinion constitutes a sufficient change in condition to warrant modification of an RBA designee's eligibility determination. *Griffiths*.

Dr. Lonser ordered an FCE, which was conducted on October 1, 2015. However, before the FCE results were available to Dr. Lonser, on August 31, 2015 and September 28, 2015, he responded to seven job descriptions, including informal waiter, and determined Employee did not have the physical capacities to perform these positions. 8 AAC 45.445(6). The RBA designee relied upon Dr. Lonser's opinions and on December 15, 2015, determined Employee was eligible for reemployment benefits. Rehabilitation Specialist Sakata was responsible for meeting with Dr. Lonser and evaluating his responses. 8 AAC 45.445(5)-(6). Presumably, she would have conferred with Dr. Lonser regarding his opinions after the FCE report was available; however, this did not occur and Dr. Lonser did not review the FCE until Ms. Niemann provided it to him on May 12, 2016. Upon reviewing the FCE, Dr. Lonser's opinion changed. He determined Employee has permanent physical capacities to perform the physical demands of job analyst, data entry clerk, file clerk I, informal waiter, shipping and receiving supervisor, and food service manager. Ms. Sakata determined Employee met the SVP code for informal waiter. 8 AAC 45.445(4).

Employee worked for Little Italy Restaurante for over two years. Ms. Sakata noted, based upon Employee's report, he filled in for any employee who did not show up. Employee also testified he was a working manager and in addition to handling day-to-day operations and directing the crew, "I would also have to fill in for anybody who didn't show up. . . . If I needed to be on the floor waiting tables. . . ." he did. Employee's mother-in-law owns Little Italy Restaurante and wrote an undated letter stating Employee only waited tables one evening because a customer complained about Employee's tattoos. More weight is given to Ms. Sakata's finding Employee meets the SVP for informal waiter because it is supported by Employee's deposition testimony and it is given more weight than Employee's mother-in-law's undated letter, which was produced only after the hearing and contradicts Employee's testimony. AS 23.30.122; *Smith*.

All relevant evidence has been reviewed. *Yahara*; *Rodgers*; *O'Keefe*. Employer showed it tried to obtain Dr. Lonser's records on several occasions but could not. It assumed Dr. Lonser had reviewed the FCE when he made his predictions, but later learned he had not. The medical records do not support Employee's contention he discussed the FCE with Dr. Lonser before Dr. Lonser made his physical capacity opinions. AS 23.30.122; *Smith*. Employer met its burden to

show it exercised due diligence to obtain opinions from Employee's physicians based on all relevant evidence. *Kin*. Given Employee's physicians Drs. Lonser, McNamara and Taylor opined Employee has the physical capacity to perform the physical demands of informal waiter, a position Employee held in the 10 years prior to his injury, and for which it has been determined he meets the SVP code, the facts have changed since the RBA Designee found him entitled to rehabilitation and reemployment benefits and he is by law no longer entitled to these benefits. AS 23.30.041(k); AS 23.30.130; *Griffiths*. Because this issue does not require the RBA Designee's expertise, and to make this process as summary and simple as possible, it need not be remanded to the RBA Designee for further action. AS 23.30.005(h). Employer's petition will be granted and Employee's entitlement to rehabilitation and reemployment benefits will be terminated.

2) Is there a medical dispute warranting an SIME and, if not, shall Employer be relieved from its stipulation's terms?

When there is a significant medical dispute in the medical evidence and an SIME opinion will assist to resolve the issues in a case, an SIME can be ordered. AS 23.30.095(k); *Bah*; *Smith*. An SIME is not intended to give employees an addition medical opinion when they do not agree with their own physician's opinion. *Bah.* The parties stipulated to an SIME on April 27, 2016. Employer requests relief from its stipulation and Employee requests an SIME be ordered. Stipulations to procedure are binding on parties and have the effect of an order unless there is good cause to relieve parties from their stipulation's terms. 8 AAC 45.050(f)(2)-(3). When the parties stipulated to an SIME, they noted the issues would likely be causation treatment, functional capacity, and medical stability. Employer does not dispute Employee's left wrist was damaged by his work injury. Dr. Lonser has not treated Employee's left wrist. Drs. McNamara Taylor, and Craven concur Employee's left wrist was medically stable on June 18, 2015, and no further treatment is reasonable or necessary for his left wrist. Dr. Lonser treated Employee's neck and shoulder complaints. On November 17, 2015, before reviewing Employee's pre-injury medical records, Dr. Lonser opined Employee's ongoing neck pain was related to his November 8, 2014 work injury. However, after reviewing Employee's medical records from June 28, 2010 through October 29, 2014, which documented symptoms and medical treatment for Employee's cervical spine, thoracic spine, and shoulders, Dr. Lonser changed his opinion. He determined the

November 8, 2014 injury was not the substantial cause of Employee's disability and need for medical treatment for his cervical spine, thoracic spine, and shoulders. Dr. Lonser concurred with Drs. Bell and Craven. His changed opinion eliminates the medical dispute that existed on April 27, 2016, when the parties stipulated to an SIME. *Bah.*

Employee argued Dr. Lonser's May 16, 2016 affidavit should not be relied on because it conflicts with his November 17, 2015 letter. Dr. Lonser's opinion changed after he had an opportunity to review Employee's pre-injury medical records. Employee asserted the discrepancies in Dr. Lonser's opinions warrant an SIME. Employee is unhappy with Dr. Lonser's changed opinion. Were an SIME ordered due to a conflict in Employee's treating physician's opinions, it would be providing Employee an additional medical opinion at Employer's expense, which is specifically prohibited and unreasonable. *Bah;* AS 23.30.001(1).

A medical dispute between Employee's treating physicians and Employer's EME physicians no longer exists. *Smith*. Without a medical dispute, the basis for an SIME is nonexistent and good cause exists to relieve Employer from its SIME stipulation. 8 AAC 45.050(f)(3). An SIME will not be ordered.

CONCLUSIONS OF LAW

1) The RBA Designee's December 15, 2015 eligibility determination will be modified and Employee's entitlement to reemployment benefits will be terminated.
2) There is not a medical dispute warranting an SIME and Employer will be relieved from its stipulation's terms.

ORDER

1) The RBA Designee's December 15, 2015 eligibility determination is modified and Employee's entitlement to reemployment benefits is terminated.
2) Employee's petition for an SIME is denied.
3) Employer's petition to be relieved from its stipulation for an SIME is granted.

Dated in Anchorage, Alaska on November 15, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Amy Steele, 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 Ian deMello, employee / claimant; v. Schlumberger, employer; Travelers Property Casualty Company of America, insurer / defendants; Case No. 201418349; 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 November 15, 2016.

/s/ _____
Pamela Hardy, Office Assistant