ALASKA WORKERS' COMPENSATION BOARD

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

IAN DEMELLO, Employee, Petitioner, v. SCHLUMBERGER, Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Insurer, Respondents.	)	FINAL DECISION AND ORDER ON RECONSIDERATION AWCB Case No. 201418349 AWCB Decision No. 16-0119 Filed with AWCB Anchorage, Alaska on November 30, 2016

On November 15, 2016, *deMello v. Schlumberger*, AWCB Decision No. 16-0111 (November 15, 2016) (*deMello I*), modified the December 15, 2015 Reemployment Benefits Administrator Designee's (RBA Designee) eligibility determination, denied Ian deMello's (Employee) petition for a second independent medical evaluation (SIME) and relieved Schlumberger (Employer) from is April 27, 2016 stipulation for an SIME. On November 21, 2016, Employee timely requested reconsideration of *deMello I*. On November 29, 2016, Employee's petition was heard on the written record. Employee represents himself. Employer is represented by attorney Robert Griffin. The record closed when the panel met to deliberate on November 29, 2016.

ISSUE

Employee's petition for reconsideration filed on November 21, 2016, requests reconsideration of *deMello I.* Employee does not provide a basis for his request. Employee does not state an alleged legal error, nor does he make an argument or provide new evidence to be considered. Employee seeks an order presumably reconsidering *deMello I*'s denial of his request for an SIME and modifying the determination he was eligible for reemployment benefits.

Employer has not yet responded to Employee's petition for reconsideration. Therefore, its position is not known at this time. It is assumed Employer opposes it.

Should *deMello I* be reconsidered?

FINDINGS OF FACT

All *deMello I* factual findings are adopted here in their entirety. 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 May 14, 2015, Lynne Adams Bell, M.D. 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.)

3) 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.)

4) On July 15, 2015, Michael McNamara, M.D. 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.)

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

6) On September 2, 2015, Dr. Craven said 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 approved the medium duty positions shipping and receiving clerk, food service manager, kitchen helper and industrial truck operator. (EME Report, Dr. Craven, September 2, 2015.)

7) 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 opinion

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.)

8) On September 28, 2015 and August 31, 2015, Alfred Lonser, M.D. reviewed numerous job descriptions and determined Employee did not have the physical capacities to perform any of the positions' physical demands. (Response to Job Descriptions, Dr. Lonser, August 31, 2015 in September 28, 2015.)

9) 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.)

10) 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.)

11) On November 17, 2015, Dr. Lonser wrote a letter on Employee's behalf and stated Employee's ongoing neck pain was related to his November 8, 2014 work injury. (To Whom It May Concern Letter, Dr. Lonser, November 17, 2015.)

12) 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.)

13) 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.)

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

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

16) On April 12, 2016, Dr. McNamara determined Employee had permanent physical capacities to perform the light duty positions informal waiter, food service manager, and receiving supervisor positions, and the sedentary position data entry clerk. Dr. McNamara predicted Employee would not have permanent physical capacities to perform the medium duty positions kitchen supervisor, shipping and receiving clerk, and kitchen helper. (Responses to Job Descriptions, Dr. McNamara, April 12, 2016.)

17) On April 12, 2016, Susan Klimow, M.D. rated Employee with five percent PPI. (PPI Rating, Dr. Klimow, April 12, 2016.)

18) 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.)

19) 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 the? 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.)

20) 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.)

21) 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 Forooz 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.)

22) 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 numerous positions and approved the light duty positions food service manager, shipping and receiving supervisor, file clerk I, and job analyst. (Responses to Job Descriptions, Dr. Taylor, June 8, 2016; Affidavit of Sean Taylor, M.D., June 9, 2016.)

23) Employee has been approved and meets the SVP for informal waiter. He has been approved for shipping and receiving supervisor and job analyst; however, it is uncertain if he meets the SVP for these positions. (Eligibility Evaluation, Ms. Sakata, November 29, 2015; Responses to Job Descriptions, Drs. Lonser, McNamara, Taylor, and Craven.)

24) On November 15, 2016, *deMello I* modified the RBA Designee's December 15, 2015 eligibility determination and Employee's entitlement to reemployment benefits were terminated. Employee's petition for an SIME was denied and Employer was relieved from its stipulation for an SIME. (*deMello I.*)

25) On November 21, 2016, Employee timely requested *deMello I* be reconsidered. The only reason stated for the petition is: "Reconsideration of final decision and order." Employee did not provide details regarding the basis for his petition. (Petition, November 17, 2016.)

PRINCIPLES OF LAW

> **AS 44.62.540. Reconsideration.** (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .
>
> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. . . .

"The appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a)." *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). A petition for reconsideration has a 15-day time limit for the request, and power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied." *Id.* at 743 n. 36. Due consideration must be given to any argument or evidence presented with a petition for reconsideration, but is not required to give conclusive weight to new evidence and has power to consider the new evidence against the backdrop of evidence presented at prior hearings. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 957 (July 30, 1982).

> **8 AAC 45.050. Pleadings.**
> . . .
> (c) Answers.
> . . .
> (2) An answer to a petition must be filed within 20 days after the date of service of the petition and must be served upon all parties.

In *Richard v. Fireman's Fund*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court said:

> If anyone deserves to be criticized for the manner in which this case was handled, it is the Board because of its failure to promptly advise the appellant on how to proceed when it was informed by Dr. Leer of the appellant's urgent need for additional surgery by an out-of-state doctor. We hold to the view that a workmen's compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

Richard cited with approval from *Cole v. Town of Miami*, 83 P.2d 997, 1000 (Ariz. 1938) and *Yurkovich v. Industrial Accident Bd.*, 314 P.2d 866, 869-71 (Mont. 1957), in which the court declared: "The Workmen's Compensation Act was enacted for the benefit of the employee. The Industrial Accident Board is a state board created by legislative act to administer this remedial legislation, and under the act the Board's first duty is to administer the act so as to give the employee the greatest possible protection within the purposes of the act."

In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 319-21 (Alaska 2009), the Alaska Supreme Court addressed this same issue and said:

> A central issue inherent to Bohlmann's appeal is the extent to which the board must inform a *pro se* claimant of the steps he must follow to preserve his claim.
> . . . .
>
> In *Richard* . . . we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation (footnote omitted). We have not considered the extent of the board's duty to advise claimants. . . .
> . . . Alternatively, the designee or the board should at least have told Bohlmann specifically how to determine whether, as AC&E asserted, the deadline had already run and how to determine the actual deadline. This minimal information would have made it clear to the claimant both the correct deadline and that he still had more than two weeks in which to submit the required affidavit.

. . . .

Given AC&E's incorrect statement about the timeliness of the rate adjustment claim and Bohlmann's request to include a compensation rate adjustment claim in the later claim, the prehearing officer should have told Bohlmann in more than general terms how he might still preserve the claim. . . . This requirement is similar to our holdings about the duty a court owes to a pro se litigant (footnote omitted).

We have held that a trial court has a duty to inform a pro se litigant of the 'necessity of opposing a summary judgment motion with affidavits or by amending the complaint' (footnote omitted). We likewise have held that a trial court must tell a pro se litigant that he needs an expert affidavit in a medical malpractice case (footnote omitted) and must inform him of deficiencies in his appellate paperwork, giving him an opportunity to correct them (footnote omitted). When a pro se litigant alerted a trial court that the opposing party had not complied with her discovery requests, we held that the court should have informed her of the basic steps she could take, including the option of filing a motion to compel discovery (footnote omitted). In evaluating the accuracy of notice of procedural rights by an opposing party, we have noted that pro se litigants are not always able to distinguish between 'what is indeed correct and what is merely wishful advocacy dressed in robes of certitude' (footnote omitted). The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants (footnote omitted).

Here, the board at a minimum should have informed Bohlmann how to preserve his claim. . . . Its failure to recognize that it had to do so in this case was an abuse of discretion (footnote omitted). . .

. . . Because there is no indication in the appellate record that the board or its designee informed Bohlmann of the correct deadline or at least how to determine what the correct deadline was, the board should deem his affidavit of readiness for hearing timely filed (footnote omitted). This is the appropriate remedy because the board's finding that Bohlmann 'had proved himself capable of filing claims and petitions even absent having counsel' (footnote omitted) is consistent with a presumption that Bohlmann would have filed a timely affidavit of readiness had the board or staff satisfied its duty to him.

ANALYSIS

In *deMello I,* two issues were addressed. First, whether to modify the RBA Designee's determination Employee was eligible for reemployment benefits; and second, whether a significant medical dispute or gap in the medical evidence exists and, if not, whether Employer should be relieved of its April 26, 2016 stipulation for an SIME. The results in *deMello I* did not deviate from the law. Dr. Lonser's changed opinion was the basis for modification of the RBA Designee's determination and eliminated the medical dispute, which was the foundation for the parties' stipulation for an SIME. Employee's petition for reconsideration presented no new arguments or new evidence necessitating reconsideration. *Whaley.*

Employee's reconsideration request did not state in detail the reason for his petition. Employer has 20 days to respond, has not done so yet, and cannot ascertain from Employee's petition the reason Employee believes reconsideration is warranted. 8 AAC 45.050.

Had Employee provided any arguments or evidence with his petition for reconsideration, it is required his arguments and evidence be considered. *Whaley*. Employee's opportunity to request reconsideration of *deMello I* expires on November 30, 2016. If there is a specific reason Employee believes *deMello I* should be reconsidered, such as legal error or mistake of fact, he should so state with particularity and detail in a petition for reconsideration of *deMello I* filed no later than November 30, 2016. *Richard; Bohlmann.*

CONCLUSION OF LAW

The *deMello I* decision should not be reconsidered.

ORDER

Employee's petition for reconsideration is denied.

Dated in Anchorage, Alaska on November 30, 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 on Reconsideration 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 30, 2016. A copy of this Final Decision and Order was also served upon Ian deMello via e-mail.

/s/ _____
Pamela Hardy, Office Assistant