ALASKA WORKERS' COMPENSATION BOARD

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

CHRISTINE MANSFIELD, Employee, Claimant, v. UNITED PARCEL SERVICE, Employer, and LM INSURANCE CORPORATION, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201614532 AWCB Decision No. 19-0055 Filed with AWCB Anchorage, Alaska on May 3, 2019

Christine Mansfield's (Employee) December 7, 2018 petition was heard on April 24, 2019, in Anchorage, Alaska, a date selected on March 12, 2019. A March 12, 2019 request gave rise to this hearing. Attorney Joe Kalamarides appeared and represented Employee who appeared and testified. Attorney Aaron Sandone appeared and represented United Parcel Service and its insurer (Employer). Rich Heath appeared and testified for Employer. The record remained open until April 30, 2019, for Employee to supplement her attorney fee affidavit and closed on May 3, 2019, the last date for Employer to file any response.

ISSUES

Employee contends she timely appealed the Rehabilitation Benefits Administrator's designee's (RBA-designee) September 6, 2018 decision finding her not eligible for reemployment benefits. She contends legal errors should therefore be addressed and the RBA-designee's decision reversed.

Employer contends while Employee attempted to appeal the RBA-designee's decision, she failed to prove service on her petition and the division rejected and returned her pleading. Therefore, Employer contends the RBA-designee's decision is final and Employee has no right to appeal it.

1) Did Employee appeal the RBA-designee's September 6, 2018 eligibility decision?

Employee contends a November 9, 2018 employer's medical evaluation (EME) report from John Ballard, M.D., said Employee could not return to her job at the time of her injury and he recommended vocational retraining. She contends this report justifies modifying the RBA-designee's decision finding her not eligible for reemployment benefits.

Employer contends the RBA-designee properly relied on Employee's attending physician Rob van Zweeden, DC, to find her ineligible for vocational retraining benefits and nothing has changed. It seeks an order denying Employee's modification request.

2) Should the RBA-designee's decision be modified?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On July 25, 2016, Employee fell down, injuring her right shoulder. (First Report of Injury, October 3, 2016; Deposition of Christine Mansfield, April 2, 2019, at 35).

2) From July 26, 2016 through September 19, 2016, Employee worked at her regular duties. (Deposition of Christine Mansfield, April 2, 2019, at 35-39).

3) From September 20, 2016 through October 30, 2016, Employee worked for Employer at a lighter duty position. Employee contends during this period she returned to her same job, performed the same duties and, "Light duty is not light duty at UPS." (Vargas Eligibility Report -- Final, July 16, 2018; Deposition of Christine Mansfield, April 2, 2019, at 50-51).

4) Employee's work for Employer required her to move packages weighing from one pound up to 150 pounds. Lifting up to 70 pounds, carrying and pushing boxes comprised at least 60 percent of Employee's work for Employer. (Deposition of Christine Mansfield, April 2, 2019, at 13, 20, 74).

5) On June 6, 2017, Employee had right shoulder surgery. (Medical Summary, March 27, 2019).

6) On November 17, 2017, Dr. Ballard said Employee was limited to sedentary work and was "not able to return to her regular duty." (Dr. Ballard, November 17, 2017).

7) On January 10, 2018, the division advised Employee about the vocational reemployment eligibility process:

> The specialist then prepares a report that is sent to this office with copies to you, your insurer/adjuster and any attorney representing either party. As soon as you receive this report, please review it carefully. During the evaluation process, you should bring any errors or inaccuracies you identify on documents to the attention of the specialist, this office and the insurer so they can be corrected. **Both you and the employer/insurer have 10 days after the evaluation report making a recommendation regarding eligibility is filed to file any additional evidence or comments with our office.** We will consider all of this information before making our decision on your eligibility for reemployment benefits. Our decision letter will be mailed to you by first-class mail and will include instructions on how to proceed. (Letter, January 10, 2018; emphasis in original).

8) On February 26, 2018, Employee had her second, right shoulder surgery. (Medical Summary, March 27, 2019).

9) Employee met with assigned vocational rehabilitation specialist Pete Vargas and described her job but "he wasn't fully getting it." Thereafter, Vargas would send Employee information in the mail, she would read it, call him and tell him, "This is not my job." Vargas told Employee, "I can only go by what's in my books." She disagreed with the Receiving and Shipping Clerk job description Vargas was using in his evaluation. Eventually, at Employee's urging, Vargas added a second job description, Material Handler, to best describe her "combined job" requirements. Employee still disagreed. (Deposition of Christine Mansfield, April 2, 2019, at 60-61; Employee).

10) On May 24, 2018, the RBA-designee suspended her eligibility evaluation based on insufficient information to determine eligibility. The RBA-designee reminded the adjuster of her obligation to provide medical reports to the RBA-designee and noted, "No records have been filed with this office or directly with the division of Workers' Compensation." (Letter, May 24, 2018).

11) On July 8, 2018, Dr. van Zweeden predicted Employee will have permanent physical capacities to perform physical demands as a Shipping and Receiving Clerk, but not as a Material Handler, based on the two SCODRDOT descriptions provided. (Dr. van Zweeden, July 8, 2018).

12) On July 16, 2018, Vargas wrote:

> Dr. van Zweeden predicts that Ms. Mansfield will incur a permanent partial impairment rating greater than zero as a result of her injury according to AMA's Guides to the Evaluation of Permanent Impairments, 6th Edition. AS 23.30.041(f)(4).
> . . . .
>
> Dr. van Zweeden predicts Ms. Mansfield will have the permanent physical capacities to perform the physical demands of the job Shipping and Receiving Clerk and he predicts she will not have the permanent physical capacities to perform the physical demands of the job Material Handler, which is part of her total job duties at the time of injury. AS 23.30.041(e)(1).
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> The Employer, UPS/HR, responded to question of offer of alternative employment for Ms. Mansfield that they have the process available for the injured worker to apply for ADA Accommodations on the job, and only if they have current restrictions that will prevent them from doing the job at time of injury, but will get better through therapy or treatment and can return to full-duty. I reiterated the question to HR, does the employer have offer of alternative employment for the injured worker and she said no, only the process to apply for ADA Accommodations, if the employee wishes to do so. AS 23.30.041(f)(1).
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> Ms. Mansfield informed me that she has not received dislocation benefits and confirmed by the Division of Workers' Comp. She has not returned to the same or similar occupation in terms of physical demands at any point since any previous workers' comp claim. AS 23.30.041(2).
>
> Ms. Mansfield has never been rehabilitated in a previous worker's comp. claim nor has she waived reemployment benefits through a waiver or compromise and release. AS 23.30.041(f)(3).
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> Based on the above information and the procedures for the completion of Reemployment Benefits Eligibility Evaluations, I am unable to recommend whether **Ms. Mansfield *is* eligible** for Reemployment Benefits at this time. . . . (Emphasis in original) (Eligibility Evaluation Report, July 16, 2018).

13) On July 19, 2018, Dr. Ballard opined Employee was not yet medically stable, had not returned to pre-injury status and was unable to return to "regular duty." He said it was difficult to determine when she could return to regular duty, which depended on how she progressed with therapy and whether her strength continued to improve. (Dr. Ballard, July 19, 2018).

14) On August 22, 2018, the RBA-designee advised Vargas his July 16, 2018 evaluation was not in accordance with 8 AAC 45.525(b)(4). Consequently, the RBA-designee said she could not make a determination on Employee's eligibility. She noted Employee returned to work post-injury as a Warehouse Light Duty Night Clerk with Employer and was restricted to lifting no more than

10 pounds. Vargas had concluded the SCODRDOT job description for Shipping and Receiving Clerk was most appropriate to describe Employee's duties post-injury with Employer, though it required a "Medium" level strength demand. He had also concluded Employee met the specific vocational preparation (SVP) code for Shipping and Receiving Clerk, level "5." Since Dr. van Zweeden predicted Employee will have permanent physical capacities to be a Shipping and Receiving Clerk, the RBA-designee said the evaluation was not in compliance because Vargas had to perform labor market research to determine if this job exists in the labor market. The RBA-designee directed Vargas to perform the labor market research and said:

> **Finally, to the claims adjuster:** In my last suspension letter, I requested records from the claims adjuster as directed per regulation 8 AAC 45.522(d); the adjuster was also reminded of this obligation in the referral letter. As of the date of this letter, no records have been filed with this office per the regulation; I do not know if the employee received any of the records, which should also have been forwarded to her at the same time. I renew my request to the claims adjuster to provide the records to this office as directed by regulation. I again remind the adjuster that failure to do so may result in delaying a final determination from me. The employee may also file any records relevant to the evaluation, which she would like me to consider when making a final determination. (RBA-designee letter, August 22, 2018; emphasis in original).

15) Employee recalls receiving the RBA-designee's August 22, 2018 letter to Vargas. However, she does not remember reading the instruction stating she could file any relevant records for the RBA-designee's consideration, and conceded she filed none. Employee thought the adjuster was going to file her medical records. (Deposition of Christine Mansfield, April 2, 2019, at 69-70).

16) On August 24, 2018, Vargas submitted additional information, which included:

> **Dr. van Zweeden predicts Ms. Mansfield will have the permanent physical capacities to perform the physical demands of the job Shipping and Receiving Clerk, she is performing Post-date of injury. Per AAC 45.525(b)(4), I conducted a labor market survey (LMS) to determine if this job exists in the labor market. The labor market survey results find that the job, Shipping and Receiving Clerk exists in the labor market as defined in AS 23.30.041(r)(3). LMS Report attached.**

Based on this additional information, Vargas concluded, "I am unable to recommend whether **Ms. Mansfield is not eligible** for reemployment benefits at this time." (Eligibility Evaluation Report -- Addendum to Final, August 24, 2018, emphasis in original).

17) On August 24, 2018, Vargas also submitted a Labor Market Survey showing Shipping and Receiving Clerk positions similar to what Employee was doing post-injury exist in the labor market, as it is defined by statute. (Labor Market Survey, August 24, 2018).

18) On September 6, 2018, the only medical records in the division's file were: (1) Dr. van Zweeden's January 25, 2018 prediction Employee would have a permanent partial impairment rating greater than zero and his opinion it was "unknown" if she would have permanent physical capacities to perform Shipping and Receiving Clerk duties (both attached to Vargas's April 26, 2018 report); and (2) Dr. van Zweeden's July 8, 2018 PPI prediction, his prediction she would have permanent physical capacities to perform Shipping and Receiving Clerk duties and his prediction she would not have permanent physical capacities to be a Material Handler (all attached to Vargas's February 26, 2018 letter to Dr. van Zweeden). (Agency file).

19) On Thursday, September 6, 2018, the RBA-designee determined Employee was not eligible for reemployment benefits. She based this determination on Vargas's evaluation report, notwithstanding his confusing conclusion. Factors the RBA-designee relied on from the report include: On July 8, 2018, Dr. van Zweeden predicted Employee would have permanent physical capacities to perform the physical demands of a Shipping and Receiving Clerk, the job she held post-injury with Employer; and Vargas' labor market survey documented Shipping and Receiving Clerk jobs exist in the labor market. Consequently, the RBA-designee determined Employee was not eligible for reemployment benefits under AS 23.30.041(e)(2). The RBA-designee advised Employee she could "complete and return" an attached petition, "paying particular attention" to "section 14," if she did not agree with the RBA-designee's decision. "Section 14" on the petition states: "REVIEW OF REEMPLOYMENT BENEFIT ADMINISTRATOR'S DECISION UNDER AS 23.30.041." The RBA-designee also attached an Affidavit of Readiness for Hearing form and advised Employee she must file it with the board if she wanted a hearing on her petition. The RBA-designee further provided division telephone numbers Employee could call if she had any questions about the process or the forms. Ten days from Thursday, September 6, 2018, was September 16, 2018, a Sunday. (RBA-designee letter, September 6, 2018; observations).

20) On Thursday, September 13, 2018, well within 10 days of the RBA-Designee's September 6, 2018 ineligibility decision letter, Employee requested an "EXTENSION OF TIME TO REQUEST A HEARING UNDER AS 23.30.110(c)." The request did not include proof of service on Employer. (Petition, September 12, 2018).

21) On Monday, September 17, 2018, the division by letter to Employee only, rejected and returned her September 12, 2018 petition requesting an extension of time because it lacked proof of service. (ICERS, Judicial, Party Actions, Petition Tab, letter September 13, 2018).

22) Employee does not remember correcting the service error and refiling the September 12, 2018 petition. Employee did not correct and refile it. (Deposition of Christine Mansfield, April 2, 2019, at 67-68; agency file and inferences drawn from the above).

23) On November 9, 2018, Dr. Ballard stated Employee had not improved and did not have the ability to do any repetitive activities with her arms extended or above shoulder level. He further stated, "The work is still the substantial cause of her right shoulder condition and need for treatment." Dr. Ballard said she was medically stable on November 9, 2018, and should avoid any activities requiring repetitive reaching, pushing or pulling with her arms out or above shoulder level. Employee could lift weights without restriction with her elbows by her side but extended in front or above shoulder level she could lift no more than "5-10 pounds." Employee could not return to lifting up to 70 pounds and had not returned to pre-injury status. Dr. Ballard provided a five percent, whole-person permanent partial impairment rating and opined, "No further treatment is needed." He further stated:

> At this time I do not believe that she is going to be able to return to her job at the time of the injury. Recommendation would be vocational rehab to get into a job that does not require repetitive reaching, pushing, pulling and lifting. She may benefit from a physical capacity evaluation to determine the true physical capacity that she's able to do for prolonged periods of time.

24) When Employee received Dr. Ballard's November 9, 2018 report, she ceased obtaining medical care because she was afraid she would have to pay for it. (Employee).

25) On November 26, 2018, Employee called the RBA's office:

> EE states that the current IME MD has said that she needs to be retrained, explained to her the 3 options she had (since found not eligible) 1) can file a petition w/Board for modification/reconsideration based on new info, 2) insurer can file the petition w/Board or 3) parties can stipulate to eligibility. Transferred her to the tech on Board side for instructions. (ICERS, Reemployment, Communications, Phone Call tab, November 26, 2018).

26) On December 7, 2018, acting on advice she received from the RBA's office, Employee requested "RECONSIDERATION OR MODIFICATION," stating, "Reconsider Retraining --

IME Doctor Recommends Retraining." Employee attached Dr. Ballard's November 9, 2018 report to her petition but did not follow 8 AAC 45.150's requirements. (Petition, December 3, 2018).

27) On February 21, 2019, Dr. Ballard reviewed the SCODRDOT description for Shipping and Receiving Clerk and predicted Employee will have permanent physical capacities to perform it. (Dr. Ballard, February 21, 2019).

28) The SCODRDOT physical requirements for Shipping and Receiving Clerk include: Exertional strength level "Medium." Medium exertional level work involves "exerting 20 to 50 pounds of force occasionally, or 10 to 25 pounds of force frequently, or an amount greater than negligible and up to 10 pounds constantly to move objects." This job requires "reaching," and "handling," "frequently." Shipping and Receiving Clerk has a level "5" SVP Code. This SVP level requires, "Over 6 months up to and including 1 year" experience. (Shipping and Receiving Clerk Job Description, February 21, 2019).

29) At hearing on April 24, 2019, Employee contended both her appeal and modification request were ripe for decision. Employer contended only Employee's petition for modification was before the board, as she had not perfected an appeal. (Parties' hearing arguments).

30) Employee worked for Employer as a Night Clerk since approximately 2000. She lifted up to 70 pounds and "slid around" heavier objects or moved them on a cart. Employee regularly pushed loaded carts weighing 300 to 400 pounds. Moving parcels comprised approximately 60 percent of her duties. Employee saw Dr. Ballard five times post-injury. She described difficult, distracting circumstances with her husband roughly concurrent with her receiving the RBA-designee's September 6, 2018 letter. Among other things, Employee's husband had maxed out several credit cards, bought an expensive vehicle, gotten into a wreck and had been hospitalized. She and her husband were in debt. When Dr. Ballard said she needed no more medical care, Employee stopped receiving physical therapy to avoid responsible for the bills. Employee has no experience with the workers' compensation system. She contends the "combined" job descriptions still do not describe her position, though Vargas maintained it was "the closest thing" he could come up with to match her job. She disputes Vargas' Labor Market Survey as inadequate, noting the first listed job was her old position as Night Clerk with Employer, which all doctors agree she cannot perform and Heath said did not exist. Employee also initially said, based on information from her attorney, that the second listed job, Stock Clerk, was a Heavy and not a Medium duty position. She later conceded she had no idea if Stock Clerk was a Heavy job. Employee agreed

she had no current medical opinion stating she could not perform Shipping and Receiving Clerk duties. Her other hearing testimony was similar to her deposition testimony. (Employee).

31) Rich Heath is Employer's Center Manager and Employee's former supervisor. Employer did not offer her alternative employment. He clarified that the temporary, light duty job she held from September 20, 2016 through October 30, 2016, was for her "recovery period" only. There is no job with Employer equivalent to a Shipping and Receiving Clerk. (Heath).

32) The parties could not point to a statute, regulation or case law describing what an acceptable, valid Labor Market Survey must contain. Employee contends she did her best as a non-attorney to appeal the RBA-designee's ruling. She asks the board to relax the regulations to afford her the right to appeal and argue the RBA-designee made legal errors in her September 6, 2016 eligibility determination, and pursue modification as well. (Parties' hearing arguments).

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 interested . . . 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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> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> > . . . .
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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.

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). "The Workmen's Compensation Act was enacted for the benefit of the employee." *Richard v. Fireman's fund Ins. Co.*, 384 P.2d 445, 449 n. 15 (Alaska 1963). "The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants." *Bohlmann v. Alaska Constr. &*

Engineering, Inc., 205 P.3d 316, 320 (Alaska 2009). Incorrect medical predictions are not "substantial evidence." *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249 (Alaska 2007).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
> . . . .
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> (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.
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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:
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> (1) the employee's job at the time of injury; or
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> (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". . . .
> . . . .
> (r) In this section,
> . . . .
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> (3) "labor market" means a geographical area that offers employment opportunities in the following priority:
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> (A) area of residence;
> (B) area of last employment;
> (C) the state;
> (D) other states;

Several "abuse of discretion" definitions appear in Alaska law but none appear in the Act. The Alaska Supreme Court stated "abuse of discretion" includes "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 controlling law may also be an abuse of discretion. *Manthey v. Collier* 367 P.2d 884 (Alaska 1962).

"Only a rehabilitation specialist may 'select[] appropriate job titles in accordance with 8 AAC 45.525(a)(2).'" *Vandenberg v. Department of Health & Social Services*, 371 P.3d 602, 607 (Alaska 2016). Physicians' opinions under AS 23.30.041(e) must be made in reference to the applicable SCODRDOT job description. *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1108 (Alaska 1999). On appeal from the RBA-designee's eligibility decision, the board will affirm the decision if it is supported by substantial evidence. *Yahara v. Construction & Rigging, Inc*., 851 P.2d 69 (Alaska 1993). The board will not reweigh the evidence upon which the RBA-designee relied in reaching her determination. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). The board's failure to apply a mandatory statutory provision was harmless error where substantial evidence existed to support the board's position. *Adamson v. University of Alaska*, 819 P.2d 86 (Alaska 1991).

In *Dittman v. Ray's Childcare*, AWCB Decision No. 03-0039 (February 20, 2003), the injured worker obtained new records showing her medical condition resulting from her work injury had deteriorated. She was not able to provide the RBA-designee with this information before the designee found her not eligible. Without much analysis, *Dittman* held under circumstances where surgery caused the employee's physical condition to deteriorate, the ineligibility decision should be remanded to the RBA-designee to consider the new medical evidence.

Peifer v. Sunshine School, AWCB Decision No. 10-0114 (June 23, 2010), vacated and remanded the RBA-designee's ineligibility decision as lacking substantial evidence when an EME physician offered a prediction stating the injured worker was no longer capable of performing the job duties on which the ineligibility decision was based.

Murphy v. Fred Meyer Stores, Inc., AWCB Decision No. 11-0028 (March 23, 2011), primarily held the RBA-designee erred by selecting an inappropriate job description for the injured employee's work in the previous 10 years. Since the attending physician reviewed the wrong job description, *Murphy* held the RBA-designee's decision relying upon the doctor's incorrect job description was not

supported by substantial evidence. *Murphy* also directed the RBA-designee on remand to examine medical records from the injured worker's third lumbar surgery, which were not available prior to the RBA-designee's initial ineligibility determination.

Polak v. Fred Meyer Stores, Inc., AWCB Decision No. 11-0168 (November 25, 2011), held a board decision reviewing the RBA-designee's eligibility determination must be based on "a complete record." In *Polak*, the attending physician made a "contingent" prediction the injured worker would be able to return to a particular job if surgery was performed and if it was successful. The RBA-designee decided Polak was ineligible for retraining benefits before the surgery had occurred. *Polak* stated this, and a failure to obtain opinions from other physicians for different body parts, constituted error, and given an incomplete record, was a lack of substantial evidence supporting the ineligibility decision. *Polak* vacated and remanded to the RBA-designee to complete the record and have the attending physicians reconsider the applicable job descriptions.

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter, it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter; . . . .

This presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption is attached, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). As the employer's evidence is not weighed against the employee's evidence, credibility is not examined here. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985). If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016)). This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step,

evidence is weighed, inferences are drawn and credibility is considered. *Wolfer*. If there are no factual disputes, the presumption analysis need not be applied. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **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.

Credibility findings are binding. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (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 . . . or because of mistake in its determination of a fact, the board may, . . . before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect to all 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. . . .

> **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. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.
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> (b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

> **8 AAC 45.050. Pleadings**. . . .
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> (8) . . . The petitioner must provide proof of service of the petition upon all parties. The board or its designee will return to the petitioner a petition which is not in accordance with this paragraph, and the board will not act on the petition. . . .

> **8 AAC 45.120. Evidence**. . . .
> . . . .

(e) . . . Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

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.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;

(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

(3) the effect that a finding of the alleged mistake 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 45.522. Ordering an eligibility evaluation without a request. . . .
. . . .

(d) . . . The employer or employer's adjuster shall also forward . . . all medical reports . . . to the rehabilitation specialist, the employee and the administrator.

8 AAC 45.525. Reemployment benefit eligibility evaluations. (a) If an employee is found eligible for an eligibility evaluation for reemployment benefits . . . the rehabilitation specialist whose name appears on the referral letter shall

(1) interview the employee and the employer and review all written job descriptions existing at the time of injury that describe the employee's job at the time of injury;

(2) review the appropriate volume listed in (A) or (B) of this paragraph and, based on the description obtained under (1) of this subsection, select the most appropriate job title or titles that describe the employee's job; if the employee's injury occurred

. . . .

(B) on or before after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (*SCODRDOT*). . . .

(3) submit all job titles selected under (2) of this subsection to the employee's physician, the employee, the employer, and the administrator.

(b) When interviewing the employee the rehabilitation specialist whose name appears on the referral letter shall obtain descriptions of the tasks and duties for other jobs the employee held or for which the employee received training within 10 years before the injury, and any jobs held after the injury. The rehabilitation specialist shall

. . . .

(2) review the appropriate volume listed in (A) or (B) of this paragraph and select the most appropriate job title or titles that describe the jobs held and training received; if the employee's injury occurred

. . . .

(B) on or after August 30, 1998, the rehabilitation specialist shall use the 1993 edition of the United States Department of Labor's *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (*SCODRDOT*). . . .

8 AAC 45.530. Determination on eligibility for reemployment benefits. . . .

. . . .

> (b) If the administrator determines the eligibility evaluation is not in accordance with 8 AAC 45.525, or the information in the board's case file is insufficient or does not support the eligibility recommendation, the administrator
>
> (1) may not decide the employee's eligibility for reemployment benefits. . . .

ANALYSIS

Most relevant facts in this case are not disputed. *Rockney*. The narrow issue presented is whether Employee qualifies for reemployment benefits under AS 23.30.041(e)(2). No other relevant §041 subsections are in dispute and Employee would otherwise qualify for reemployment benefits.

1) Did Employee appeal the RBA-designee's September 6, 2008 eligibility decision?

a) Employee did not perfect an appeal.

On Thursday, September 6, 2018, the RBA-designee sent Employee a letter telling her she was not eligible for reemployment benefits based on vocational rehabilitation specialist Vargas' recommendations and evidence. The letter included Petition and Affidavit of Readiness for Hearing forms for Employee's convenience. The RBA-designee told Employee if she disagreed with the decision she "must complete and return" the petition within 10 days of the September 6, 2018 letter. AS 23.30.041(d). Since 10 days from September 6, 2018, was September 16, 2018, a Sunday, Employee had until Monday, September 17, 2018, to file her petition. 8 AAC 45.063(a). Employee was told to "pay particular attention to section 14" on the petition. Section 14 is used to "request review" of an RBA decision. The September 6, 2018 letter advised Employee she must also file an Affidavit of Readiness for Hearing if she wanted a hearing on her petition. The RBA-designee provided several telephone numbers for division offices Employee could call if she had any questions about the process or about how to complete the forms. There is no evidence Employee called the division for further instructions or assistance. *Rogers & Babler*.

On Thursday, September 13, 2018, well within 10 days of the September 6, 2018 letter, Employee filed a petition dated September 12, 2018. On it, Employee checked section 17, which is a request for an "extension of time" to request a hearing under "AS 23.30.110(c)." In her deposition and at hearing, Employee explained she needed additional time because she had to obtain medical records to support her position and implied she could not obtain them within 10 days. She did not check

section 14. Employee also did not check appropriate blocks proving she served this petition on Employer or on its representative. On the following Monday, September 17, 2018, the division sent Employee a letter returning her petition to her for her failure to provide proof of service upon all parties. The division's September 17, 2018 letter also advised Employee to call the division if she had any questions. It did not suggest she remedy her omission by checking the appropriate service box, serving the document on Employer and refiling it. Division staff properly handled the petition pursuant to the appropriate regulation, 8 AAC 45.050(b)(8), which states:

> The petitioner must provide proof of service of the petition upon all parties. The board or its designee will return to the petitioner a petition which is not in accordance with this paragraph, and the board will not act on the petition. . . .

In her deposition and at hearing, Employee said she could not remember checking the appropriate service boxes and serving or even refiling the returned September 12, 2018 petition. There is no refiled or served copy in her agency file. Furthermore, Employer stated it never received this pleading. Employee never refiled or served it. *Rogers & Babler*.

There is no evidence Employee called the division after September 17, 2018, to ask how she could remedy her failure to provide proof she served this petition on Employer. Could the division have done more to assist Employee in preserving her claim for reemployment benefits? For example, could division staff have simply called Employee, pointed out she failed to prove service on Employer and suggested she come to the office to complete the form, serve it and refile it on Friday or on the following Monday before her 10 days to appeal expired? *Richard*; *Bohlmann*. In hindsight, the division could have done more. However, nothing on the September 12, 2018 petition would necessarily alert non-attorney division clerical staff that Employee had only a day or two to rectify her omission. Employee filed her September 12, 2018 petition on Thursday, September 13, 2018, and a staff member promptly rejected it in accordance with the applicable regulation, within one working day, on the following Monday, September 17, 2018. Employee had notice of the deadline to seek review of the designee's ineligibility determination. She had adequate instructions to help her complete this task. *Richard*; *Bohlmann*. While Employee had serious personal issues involving her husband during this same timeframe, she failed to read and follow instructions and the division rejected her petition. Reading the petition carefully, proving service and serving the petition would have taken mere minutes. Employee took no action later to

rectify her error. Therefore, Employee did not appeal the RBA-designee's September 6, 2018 determination and it is a final decision unless and until it is otherwise modified. AS 23.30.041(d).

b) Alternately, Employee nonetheless failed to prove abuse of discretion.

In the alternative, assuming Employee's timely September 12, 2018 petition was her attempt to obtain more time to appeal the RBA-designee's determination, assuming regulations were relaxed because she was not represented by an attorney, assuming Employer was not prejudiced by failing to receive the petition, and assuming her request for more time was granted she would still have to prove the RBA-designee abused her discretion. AS 23.30.041(d). The RBA-designee found her not eligible for reemployment benefits based on the rehabilitation specialist's report, itself based on Dr. van Zweeden's prediction Employee would have permanent physical capacities to be a Shipping and Receiving Clerk, a job she held long enough to meet the SVP code level "5." AS 23.30.041(e)(2). The RBA-designee relied on Employee's own attending physician's opinion.

Employee does not contend the RBA-designee's decision was arbitrary, capricious, manifestly unreasonable or stemmed from an improper motive. *Sheehan*. When asked at hearing how the RBA-designee abused her discretion, Employee contended the RBA-designee failed to properly apply the law because Vargas' selected job descriptions and labor market survey were incorrect or inadequate. *Manthey*. Vargas had the right to select appropriate job descriptions. *Vandenberg*. Employee pointed to no statute or regulation setting forth what information is required in a labor market survey. There no evidence the labor market survey was inadequate because Employee presented no evidence showing what constitutes adequacy. The RBA-designee accepted Vargas' labor market survey as appropriate. Nothing about the RBA-designee's reliance on the selected job descriptions or on the labor market survey to this point amounts to an abuse of discretion.

By statute, the "labor market" means a geographical area offering employment opportunities, in priority, in the injured worker's area of residence, her area of last employment, "the state," and other states. AS 23.30.041(r)(3). Vargas' August 24, 2018 labor market survey demonstrates Shipping and Receiving Clerk positions exist in the "labor market." Employee contends the labor market survey is flawed because the first job listed on the survey is her former, regular-duty Night Clerk position with Employer. She contends the survey is unreliable because all physicians

offering opinions in this case agreed she cannot physically return to her former position, which Vargas concluded is a "combined" position, including Shipping and Receiving Clerk and Material Handler duties. Heath testified Employer has no such position as Shipping and Receiving Clerk. Employee is correct and the RBA-designee could not and should not have relied on the first listed position with Employer as evidence of a labor market for Shipping and Receiving Clerk.

She also contends the RBA-designee should not have relied on the second position listed on the survey with Northern Air Cargo, Stock Clerk, because the exertional requirements for Stock Clerk are "Heavy," whereas those for Shipping and Receiving Clerk are only "Medium." But Employee got the exertional level for Stock Clerk from a document her attorney showed her. Employee never filed that document as evidence and Employee's testimony is hearsay. There is no direct evidence to support this hearsay. This decision cannot rely solely on hearsay to support a determination. 8 AAC 45.120(e). Employee demonstrates no abuse of discretion on this second point.

Alternately, assuming Employee had filed her Stock Clerk job description, and assuming it was admissible as evidence, she still did not explain why the RBA-designee could not rely on the remaining four positions located in Washington and Oregon reported on the labor market survey to demonstrate a viable labor market for Shipping and Receiving Clerk. While the meaning and importance of the "priority" in AS 23.30.041(r)(3) is unclear, even if job opportunities (1) and (2) were eliminated, the labor market survey still provides evidence Shipping and Receiving Clerk jobs exist in the statutorily defined labor market including Washington and Oregon. Employee has failed to demonstrate any legal infirmity with the labor market survey.

Employer correctly contends Dr. van Zweeden never changed his permanent physical capacities prediction upon which specialist Vargas and the RBA-designee based their ineligibility recommendation and determination, respectively. Furthermore, Employer contends Dr. Ballard in February 2019 subsequently agreed with Dr. van Zweeden's opinion and predicted Employee has the permanent physical capacities to perform the physical demands as a Shipping and Receiving Clerk. Employer contends this is substantial evidence supporting the RBA-designee's decision, which therefore must be affirmed. But the inquiry would not end here.

At hearing, Employer conceded it had no evidence the adjuster ever provided Employee's medical records to the RBA-designee, as directed in at least three letters from the division and as required by 8 AAC 45.522(d). Employee's agency file shows the adjuster never complied with the RBA-designee's direction or with the regulation. She did not provide the RBA-designee with Employee's medical records. Vargas had them because he summarized many in his status reports and the RBA-designee read his reports, thus receiving at least a summary of Employee's medical records. Deciding eligibility without all the medical records could be considered the RBA-designee's "failure to properly apply controlling law" and an abuse of discretion. *Murphy*; *Polak*; *Manthey*. Employee could reasonably contend the RBA-designee should have reviewed all of her medical records, including many mostly favorable records from Dr. Ballard stating Employee could not return to her regular job, before the RBA-designee rendered her eligibility decision. *Polak.* The RBA-designee should have found the "eligibility evaluation . . . not in accordance with 8 AAC 45.525," and she should not have decided Employee's eligibility absent all her medical records. 8 AAC 45.530(b)(1). She failed to properly apply controlling law. *Manthey*.

On the other hand, even had the adjuster sent the RBA-designee Employee's medical records, the records could not have changed the outcome. The eligibility regulations require the specialist to send SCODRDOT job titles describing Employee's job to "the employee's physician" to solicit predictions. 8 AAC 45.525(b)(4). He did so, and Dr. van Zweeden responded by predicting Employee would have permanent physical capabilities sufficient to work as a Receiving and Shipping Clerk. Vargas had no obligation to send the SCODRDOT job titles to Dr. Ballard, who was Employer's doctor, not Employee's. All physician predictions under AS 23.30.041(e) must be based on SCODRDOT job titles. *Irvine*. Only the assigned specialist gets to select appropriate SCODRDOT job titles. *Vandenberg*. Consequently, to the extent Dr. Ballard in his pre-determination reports, which the RBA-designee did not have before rendering her decision, said Employee did not have capacity to "return to regular duty," the RBA-designee could not have relied on his reports to find Employee eligible for reemployment because: (1) Dr. Ballard was referring to Employee's job on the injury date, which was a "combined job," and his opinions were not limited solely to Shipping and Receiving Clerk; and (2) he did not base his predictions on a SCODRDOT job title. 8 AAC 45.525(b)(4). Thus, the RBA-designee could not have relied on Dr. Ballard's pre-September 6, 2018 reports to come to a different conclusion on eligibility even

had she actually read them. Similarly, no other medical records to which the RBA-designee was also not privy address the relevant issue. In other words, to the extent the RBA-designee abused her discretion by failing "to properly apply controlling law" when she decided eligibility without reviewing Employee's complete medical record, any such abuse was harmless error, and could not have affected the evaluation's outcome. *Adamson*. This analysis is not intended to excuse the adjuster's failure to provide the RBA-designee with Employee's complete medical record as required and directed. Similarly, it does not condone the RBA-designee's decision to decide eligibility without considering Employee's medical records after directing the adjuster on three occasions to provide them. In this instance, these errors were simply harmless.

This decision may not reweigh or draw its own inferences from the evidence upon which the RBA-designee relied in her September 6, 2018 denial letter. *Miller*. If, after reviewing and considering admissible evidence on appeal, the fact-finders determine the RBA-designee's decision is supported by substantial evidence, it must be affirmed. *Yahara*. In this alternative "appeal" analysis, the panel majority carefully considered the evidence upon which the RBA-designee based her decision, and considered Employee's hearing brief, testimony and arguments. 8 AAC 45.150(f). Dr. van Zweeden is Employee's physician who made a prediction about Employee's physical capacities. As a reasonable mind might rely on Dr. van Zweeden's prediction to support an ineligibility finding, the RBA-designee's September 6, 2018 determination was supported by substantial evidence. AS 23.30.041(d). There was simply no relevant contrary opinion.

Employee does not contend she failed to meet SVP "5" for Shipping and Receiving Clerk. This SVP requires "over six months up to and including one year" experience. Vargas' report and the RBA-designee's determination letter suggest she met the SVP level for her *post-injury* employment and appear to include the period September 20, 2016 through October 30, 2016, when she supposedly did a lighter duty job while in recovery. There are not six months from September 20, 2016 through October 30, 2016. Vargas' evaluation is confusing on this point. *Rogers & Babler*. In reality, there are two *post-injury* employment periods, one beginning July 26, 2016 and ending on September 19, 2016, and the other from September 20, 2016 through October 30, 2016. Combined, this period still does not equal six months. One could argue Employee therefore did not meet SVP "5" in her *post-injury* work. However, since Shipping and Receiving Clerk was an

integral part of Employee's job with Employer since at least 2000, she clearly met the SVP code requiring over six months up to one year's experience to qualify in this position in the 10 years before her work injury. *Rogers & Babler*; AS 23.30.041(e)(2).

Employee does, however, contend the combined job descriptions do not reflect her work pre- or post-injury for Employer, which creates a factual dispute. Assuming her opinion is adequate to raise the statutory presumption of compensability, without considering credibility, Employer rebuts the raised presumption with Vargas' selected job descriptions. AS 23.30.120(a)(1); *Meek*; *Tolbert*; *Huit*; *Wolfer*. Employee provided no evidence to support her contention and did not explain why the RBA-designee could not reasonably rely upon the two SCODRDOT job descriptions Vargas selected. *Vandenberg*. Based on this alternative analysis, even if Employee's September 12, 2018 petition were considered a timely "appeal," she has not demonstrated the RBA-designee abused her discretion. AS 23.30.041(d); *Runstrom*; *Saxton*.

In summary, the RBA-designee did not abuse her discretion on these facts because a reasonable mind could rely on Dr. van Zweeden's SCODRDOT based prediction. AS 23.30.041(d). Employee's predicted physical capacity to be a Shipping and Receiving Clerk would have been the only issue appealed, had she properly perfected an appeal. The RBA-designee's decision is supported by substantial evidence. The RBA-designee's legal error was harmless. Employee's subsequent evidence does not have "a physician predict" based on a SCODRDOT job title that her expected physical capacities are different from Dr. van Zweeden's prediction. The RBA-designee's decision would thus be affirmed. AS 23.30.041(d); *Sheehan*; *Manthey*.

2) Should the RBA-designee's decision be modified?

Employee timely sought to modify the RBA-designee's decision under AS 23.30.130(a), based on a change in condition or based on factual errors, when she filed her December 3, 2018 petition well within one year from the RBA-designee's September 6, 2018 decision. Employer contends she failed to meet the regulatory requirements to perfect her petition for modification and her petition should be denied. Employer is correct; there is no question Employee failed to properly plead her requested remedy. 8 AAC 45.150; *Rogers & Babler*. However, she was self-represented when she filed her December 3, 2018 modification petition and had no prior experience in these

cases. Employer knew she contended Dr. Ballard's November 9, 2018 opinion supported her position for modification. Employer was not prejudiced by Employee's failure to follow strictly the regulations regarding modification, and it presented an appropriate defense. Therefore, it is fair to consider her petition notwithstanding its procedural infirmities. AS 23.30.001(1), (2), (4).

Assuming Dr. Ballard's November 9, 2018 opinion Employee cannot return to her regular job and needs vocational reemployment is adequate to raise the statutory presumption of compensability, without considering credibility, Employer rebuts the raised presumption with Dr. von Zweeden's July 8, 2018 and Dr. Ballard's February 21, 2019 contrary opinions. AS 23.30.120(a)(1); *Meek*; *Tolbert*; *Huit*; *Wolfer*. Employee presented no medical evidence showing her physical condition changed, rendering attending physician Dr. van Zweeden's medical opinion incorrect. *Thoeni*; *Pittman*; *Runstrom*; *Saxton*. Before the RBA-designee's September 6, 2018 determination, Dr. Ballard agreed Employee could not return to her "regular work." But Dr. van Zweeden is the only physician required to review SCODRDOT job titles for Employee's "combined" job. He was initially the only physician to predict her permanent physical capacities to perform the two separate job titles comprising Employee's "combined" job on her injury date.

Employee relies heavily on Dr. Ballard's November 9, 2018 report, where he opined she should avoid any activities requiring repetitive reaching, pushing or pulling with her arms out in front of her or above shoulder level and could lift weights without restriction with her elbows by her side but was limited to no more than five to 10 pounds in any other posture. She relies on his statement she needs "vocational rehab" to get a job that does not require these repetitive motions and weight requirements. His limitations describe the Shipping and Receiving Clerk position. While Employee's reliance on Dr. Ballard's report is understandable, as of November 9, 2018, he had not reviewed a SCODRDOT job description for Shipping and Receiving Clerk or given a prediction based thereon. *Irvine*. On February 21, 2019, when given the opportunity, Dr. Ballard reviewed the SCODRDOT job description, changed his mind and predicted Employee had permanent physical capacities to perform the physical demands of a Shipping and Receiving Clerk.

There are obvious and troubling contradictions in Dr. Ballard's opinions. On November 9, 2018, he stated Employee had significant physical limitations well below the postural and 50-pound

exertional requirements for a Shipping and Receiving Clerk. He said she needed vocational rehabilitation to avoid the exact requirements of that job. Inexplicably, only three months later, during a time Employee had no medical care to improve her function, Dr. Ballard completely contradicted his November 2018 recommendations and predicted Employee would have permanent physical capacities to perform a Medium level job as a Shipping and Receiving Clerk. This dramatic change without explanation casts doubt on Dr. Ballard's credibility and entitles all his opinions to little, if any, weight. AS 23.30.122; *Smith*. Absent Dr. Ballard's contradictory opinions, only Dr. van Zweeden's prediction remains. Employee has yet to produce a physician's opinion stating Dr. van Zweeden's prediction vis-à-vis Employee's ability to work as a Shipping and Receiving Clerk has changed or was incorrect.

Furthermore, Employee has produced no medical evidence showing anything has changed in her physical abilities since the RBA-designee's determination. *Polak.* The law plainly states eligibility is based on "having a physician predict" Employee will have permanent physical capacities less than the demands of, in this case, a Shipping and Receiving Clerk. To succeed on her modification petition, Employee had to show her condition changed, or prove a factual error. She could do one or both by having "a physician predict" she will not have permanent physical capacities to be a Shipping and Receiving Clerk as described in SCODRDOT. AS 23.30.041(e)(2). Without this medical evidence, Employee's petition for modification will be denied. Because Employee's petition will be denied, she is entitled to no attorney fee or cost award.

CONCLUSIONS OF LAW

1) Employee did not appeal the RBA-designee's September 6, 2008 eligibility decision.
2) The RBA-designee's decision will not be modified.

ORDER

1) Employee's unserved September 12, 2018 petition is denied.
2) Employee's December 7, 2018 petition is denied.
3) Employee's request for an attorney fee and cost award is denied.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

NANCY SHAW, MEMBER, CONCURRING IN PART AND DISSENTING

This separate opinion concurs in the panel's dismissal of the appeal and dissents with respect to its decision to deny reconsideration.

1) Did Employee perfect her appeal?

In her January 10, 2018 letter to Employee, the RBA-designee denied reemployment benefits and advised that, if she disagreed with the decision that she is not eligible for reemployment benefits, she must complete an attached petition form within ten days and an Affidavit of Readiness for Hearing if she desired a hearing. The RBA-designee gave no directions to Employee about serving Employer or its workers' compensation carrier with a copy of the petition. The form itself, however, has just 24 numbered items, one of which is a certification that the petitioner has "provided a true and correct copy of this petition" to the employee, the employer and the insurer, with convenient check boxes that the petitioner is to use to indicate service by mail, email or facsimile on each party. The language in the proof of service section of the form includes the caution that "your petition will be returned if you do not show service to all parties and employers/insurers sought to be joined."

The form's warning to a petitioner regarding the consequences of a failure to serve an opposing party is consistent with 8 AAC 45.050(b)(8):

> The petitioner must provide proof of service of the petition upon all parties. The Board or its designee will return to the petitioner a petition which is not in accordance with this paragraph, and the board will not act on the petition.

Petitioner timely filed her petition within ten days. Failing to provide a proof of service, the petition was returned to her, as the regulation directs. The petition was never served on the employer or the carrier. Dismissal of the appeal is a harsh sanction, but one required by the

regulation. Employee had fair warning, in the text of the petition form, that the petition would not be accepted without proof of service on other parties.

Dismissal could have been avoided if division staff had called Employee to advise her on how to cure the defect in her petition, *i.e*. the failure to serve opposing parties. Division staff could have served the opposing parties. Either assisting Employee to complete and prove service of the petition or serving Employer and carrier directly could have been accomplished with minimal effort by division staff within the remaining portion of the 10 days allowed. But I cannot read 8 AAC 45.050(b)(8) to *require* the division's staff to come to a party's rescue when it fails to meet a procedural requirement.

2) Did Petitioner offer grounds for reconsideration?

After reemployment benefits were denied, EME Dr. Ballard issued a lengthy examination report in which he indicated that Employee should "avoid any activities requiring repetitive reaching, pushing, or pulling with her arms out, in front of her, or above shoulder level." He said she could lift weights without restriction with elbows by her side but extended in front or above shoulder level she could lift no more than five to ten pounds. Dr. Ballard's report casts doubt on Employee's ability to perform the duties of positions that would require her to lift and move even moderately heavy items in a normal work setting, such as acting as a shipping and receiving clerk that must be able to move twenty to fifty pounds repeatedly. Dr. Ballard's report was new information not previously considered by the RBA-designee. I would have granted the petition for reconsideration.

Employer and its carrier cannot be heard to complain that the petition for reconsideration did not include attachments to the petition that specifically laid out the grounds for, and support for, the petition. Employee's "new evidence" was the report of Employer's EME physician, information which was necessarily known to Employer.

3) Scope of reconsideration.

On reconsideration, I would have suggested that the RBA-designee revisit the conclusions that she reached in her September 6, 2018 denial of reemployment benefits. Among other things, the RBA-designee should have been directed to:

1) Clearly identify the job that Employee is able to perform and that is available in the relevant labor market. In the letter of September 6, 2018, the RBA-designee states that Employee's treating physician has found her capable of meeting the physical demands of "*the job you held after your work-related injury as it is described in the SCODRDOT job description for Shipping and Receiving Clerk.*"

After Employee was injured, Employer gave her a "Temporary Alternate Work Offer" described as "clerk duties on computer w/no lifting or moving packages." This was a temporary assignment designed by Employer to accommodate Employee's physical condition post-injury. According to Employer's local operations manager Heath, the company does not have a Shipping and Receiving Clerk position and has no regular positions that do not require lifting. The temporary work assignment was not a position of the type described in the SCODRDOT job description for Shipping and Receiving Clerk because, among other things, lifting was expressly excluded from the position.

The RBA-designee based her determination letter on Employee's ability to perform her post-injury temporary light-duty position, while likening that position to a Shipping and Receiving Clerk position under the SCODRDOT regime. This coupling of the "no lifting" job with a SCODRDOT position that requires considerable exertion is illogical and undermines any determination that Employee was or was not eligible for reemployment benefits.

2) Determine what duties Employee is able to perform based on medical evidence, investigating possible misunderstandings and resolving conflicts in the evidence.

The RBA-designee relied upon Dr. van Zweeden's opinion that Employee could perform the duties of the temporary work assignment position she held with Employer post-injury, as if it were the equivalent of a Shipping and Receiving Clerk position in the SCODRDOT job classification regime. But the temporary position Employee held and the requirements for the SCODRDOT Shipping and Receiving Clerk are not similar, the Shipping and Receiving Clerk position requiring considerably more strength and tolerance for repeated exertion. It is not at all clear whether Dr. van Zweeden was clearing Employee to perform a "no lifting" job or something more demanding.

The opinion Dr. Ballard issued in November suggests that Employee could not perform the duties of the Shipping and Receiving Clerk position. He said she "should avoid any activities that require repetitive reaching, pushing or pulling with her arms out, in front of her, or above shoulder level." Additional factual findings would show, roughly contemporaneously, on November 1, 2018, Dr. Prevost, her surgeon, saw Employee, who reported to him that she had severe pain and was able to lift five pounds above her head. He gave her a steroid injection, prescribed physical therapy, recommended activity restrictions, and wrote that she would continue to be impaired for six weeks, when he would see her again. So, for a substantial period after the RBA-designee's determination, Employee was not cleared for work of any description.

On February 2, 2019, Dr. Ballard checked a "yes" box indicating that Employee could meet the requirements, including the exertion requirements, of the SCODRDOT Shipping and Receiving Clerk classification. Since this opinion is dramatically different from what can be learned from his lengthy narrative report of November 2018, it would make sense to conduct some further inquiry to determine what his opinion is.

I would not fault the RBA-designee for failing to take into account the results of medical examinations done and medical opinions given after the RBA-designee issued her decision. But, given the medical information that became available after her decision, which paints a different picture of Employee's condition and capabilities than the one assumed by the RBA-designee, the inquiry should be made again.

> 3) Decide what SCODRDOT position most fairly reflects the work that Employee is able to do, and ensure that the Labor Market Survey accurately reflects positions in the relevant market.

The RBA-designee identified the temporary, light-duty position with Employer that Employee performed after her injury as the job reflective of her then-current capabilities. Relying on the rehabilitation specialist, she determined that the SCODRDOT Shipping and Receiving Clerk position fairly represents the skills and effort necessary for that temporary job. In the text of the RBA-designee's determination letter to Employee, she attributes to the rehabilitation specialist the decision that the SCODRDOT for the Shipping and Receiving Clerk position was "the most

appropriate to describe the duties and tasks [Employee] performed *for this post-injury job."* But the SCODRDOT description of a Shipping and Receiving Clerk is a "medium" exertion job that involves exerting 20 to 50 pounds of force occasionally and up to 10 pounds constantly. Plainly, the SCODRDOT for a Shipping and Receiving Clerk describes a position different -- in terms of exertion and lifting requirements -- from the work that Employee did for Employer post-injury, which restricted her to "no lifting" activities. The conclusion that the SCODRDOT for the Shipping and Receiving Clerk position fairly matched the capabilities necessary for a "no lifting" position does not hold up.

The RBA-designee then concluded that, based on labor market research done by the rehabilitation specialist, there exist Shipping and Receiving Clerk positions in the relevant labor market. But the labor market survey is fraught with the same kinds of inconsistencies found elsewhere in the RBA-designee's determination. For example, the first listed Shipping and Receiving Clerk position is a "Night Clerk" position with Employer. This was the position held by Employee prior to her injury. The parties agree that this position is not currently suitable for her, because the lifting and exertion requirements of the Night Clerk position include exertion at the "Heavy" level, which she cannot now perform. And they further agree that the requirements for the Night Clerk position exceed the qualifications for a Shipping and Receiving Clerk under the SCODRDOT. The inclusion of this position, one of just two listed positions in Alaska in the Labor Market Survey, casts doubt on the validity of the survey.

The second Alaska position listed in the labor market survey is a "Stock Clerk" position at Northern Air Cargo. Additional factual findings which show that in the two-line description of this job provided by the rehabilitation specialist, he indicates that the position requires that the worker "moves materials in-house." Such a position is plainly not in line with the "no lifting" restriction on the position that Employee held with Employer post-injury, and is beyond what her doctors felt she could undertake two months *after* the RBA-designee issued her report. Some level of investigation with Northern Air Cargo might also reveal whether its Stock Clerk is required to move materials within the range require of a SCODRDOT Shipping and Receiving Clerk, or whether that job's lifting and moving requirements are in the "Heavy" range. If, in the end, the

Stock Clerk position at Northern Air Cargo is not within Employee's capabilities, it should not have been included in the Labor Market Survey.

I regret that the majority members of the hearing panel were willing to overlook the multiple incongruities in the RBA-designee's determination and to disregard post-determination medical information that casts doubt on the designee's denial of this essential benefit.

Dated in Anchorage, Alaska on May 3, 2019.

/s/
Nancy Shaw, 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 Christine Mansfield, employee / claimant v. United Parcel Service, employer; LM Insurance Corp., insurer / defendants; Case No. 201614532; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 3, 2019.

/s/
Nenita Farmer, Office Assistant