

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JAMES METZGER,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201617868
THE COCA-COLA BOTTLERS)
ASSOCIATION,) AWCB Decision No. 19-0085
)
Employer,) Filed with AWCB Fairbanks, Alaska
and) on August 22, 2019
)
TRAVELERS INDEMNITY OF)
AMERICA,)
)
Insurer,)
Defendants.)

James Metzger's (Employee) November 29, 2017 petition for review of a decision of the Reemployment Benefits Administrator designee (RBA-designee) was heard on July 11, 2019, a date selected on February 27, 2019. A February 19, 2019 affidavit of readiness for hearing gave rise to this hearing. Attorney J. John Franich appeared and represented Employee. Attorney Robert McLaughlin appeared and represented the Coca-Cola Bottlers Association (Employer). Employee appeared and testified on his own behalf. Daniel LaBrosse appeared and testified for Employer. The record closed at the hearing's conclusion on July 11, 2019.

ISSUE

Employee contends the RBA-designee abused her discretion in finding him ineligible for reemployment benefits. He contends he is not capable of doing any job in his ten year work history

because of vertigo. Employee contends the RBA-designee's reliance on his treating physician's conditional release to find him ineligible was an abuse of discretion. He requests an order granting his petition.

Employer contends Employee the RBA designee did not abuse her discretion and correctly found Employee ineligible. It contends substantial evidence supports the RBA-designee's decision. Employer requests an order denying Employee's petition.

Should the RBA-designee's eligibility determination be remanded or reversed?

FINDINGS OF FACT

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

- 1) On December 8, 2016, Employee injured his ribs, lower back and head when he opened a connex door which opened so fast it hit him and knocked him down. (First Report of Occupational Injury, December 13, 2016; Employee).
- 2) On July 27, 2017, Jennifer Malcolm, D.O., predicted Employee will have the physical capacities to perform the physical demands of the Kitchen Helper job as outlined in the job description but noted Employee "may have difficulty unloading truck if turning head involved." The job duties included sweeping and mopping floors, washing worktables, walls, refrigerators and meat blocks, segregating and removing trash and garbage and placing it in designated containers, steam-cleans or hoses-out garbage cans, washing pots, pans and trays by hand, scraping food from dirty dishes and washing them by hand or placing them in racks or on a conveyor to dishwashing machine, transferring supplies and equipment between storage and work areas by hand or by using a hand-truck, setting up banquet tables and loading or unloading trucks picking up or delivering supplies and foods. It required frequent stooping and frequent work in extreme heat and wet or humid conditions. (Malcolm prediction, July 27, 2017).
- 3) On August 16, 2017, reemployment specialist Daniel LaBrosse recommended Employee be found eligible for reemployment benefits based on Dr. Malcolm's July 27, 2017 prediction because she indicated "she would not release [Employee] to all the Job Descriptions that involving driving, due to vertigo, and would only conditionally release [Employee] to the job of Kitchen Helper, because of difficulty in turning his head." (LaBrosse report, August 16, 2017)

- 4) On September 26, 2017, the RBA-designee wrote a letter to reemployment specialist LaBrosse instructing him to perform several actions to complete the evaluation. She disagreed with reemployment specialist LaBrosse's conclusion Dr. Malcolm's conditional release to the Kitchen Helper job eliminated it from consideration, "The physician noted the employee may have difficulty with turning his head, nonetheless, she checked the 'yes' box indicating the employee will have the physical capacities to perform the physical demands for his job. The physician apparently carefully considered this aspect of the employee's injury when providing her response" The RBA-designee instructed reemployment specialist LaBrosse to contact Dr. Malcolm again to obtain updated predictions on all of the job descriptions, ensure her responses were based on Employee's predicted permanent physical capacities and clarify her intent with regard to her comment on the Kitchen Helper job description. (RBA-designee letter, September 26, 2017).
- 5) On November 2, 2017, reemployment specialist LaBrosse recommended Employee be found ineligible for reemployment benefits based on Dr. Malcolm's July 27, 2017 prediction. He noted he would have assumed the conditional release would have eliminated the Kitchen Helper job description but pursuant to the RBA-designee's September 26, 2017 letter, he recommended Employee be found ineligible for benefits. (LaBrosse report, November 2, 2017).
- 6) On November 30, 2017, Dr. Malcom authored a note stating Employee had concerns regarding kitchen work given the amount of time on feet in a busy kitchen environment. She stated a functional assessment by physical therapy "may be best to assess his functional capacity" for the Kitchen Helper job. (Malcolm note, November 30, 2017).
- 7) On November 21, 2017, the RBA-designee found Employee ineligible for reemployment benefits because Dr. Malcom predicted he would have the permanent physical capacities to perform the physical demands of the Kitchen Helper job description. (RBA-designee letter, November 21, 2017).
- 8) On November 29, 2017, Employee petitioned for review of the reemployment benefit decision contending he is not capable of performing the job description duties of Kitchen Helper. (Petition, November 29, 2017).
- 9) On December 5, 2017, Employer answered Employee's November 29, 2017 petition and contended the RBA-designee's decision was supported by substantial evidence. (Answer, December 5, 2017).

10) When Employee opened a brand new connex box, the doors opened with so much pressure the doors hit him and knocked him down. He broke his ribs and sustained a concussion. Employee feels vertigo all the time when he moves. When he worked as a Kitchen Helper in the past, he had to move quickly all the time, turning and stacking and lifting objects. Employee feels incapable of moving quickly on tile floors covered in water and oil, like in a kitchen, because he experiences vertigo. He cannot stoop or pick things up safely by bending at the hips because he experiences vertigo, now he bends at the knee and does not lower his head, which would affect his ability to sweep and mop floors, segregate and remove trash and transfer supplies and equipment. He could probably clean a wall but slowly. A lot of head movement affects his vertigo. Employee's vertigo would affect his ability to unload a truck because moving quickly or bending over affects his vertigo. When he feels vertigo, he pauses and waits until "he gets his sea legs." Heat makes him more nauseous. Employee believes working in a kitchen would be unsafe because he "does not feel secure on his feet" due to the vertigo. (Employee).

11) Reemployment Specialist Daniel LaBrosse had concerns when he saw Dr. Malcom's July 27, 2017 prediction. Typically when he receives a conditional release from a physician, he does not accept it as a full release and does not use it for eligibility determinations but it is a "judgment call." In this case, the RBA-designee instructed him to accept Dr. Malcolm's prediction as a release for the Kitchen Helper job description. He performed a labor market survey and found sufficient jobs in the labor market for Kitchen Helper. Mr. LaBrosse recommended Employee be found Employee ineligible for reemployment benefits. If he could go back in time, he would recommend consulting with Dr. Malcolm regarding concerns he had about the Kitchen Helper job description's specific physical demands. (LaBrosse).

PRINCIPLES OF LAW

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).

AS 23.30.041. Rehabilitation and reemployment of injured workers. . . .

. . . .

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles" for:

. . . .

(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". . . .

. . . .

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). The Alaska Supreme Court stated abuse of discretion exists when the court is "left with the definite and firm conviction on the whole record that the trial judge has made a mistake." *Brown v. State*, 563 P.2d 275, 279 (Alaska 1977).

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).

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 upon review. *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. . . .

In the case of a factual mistake or a change in conditions, a party “may ask the board to exercise its discretion to modify the award at any time until one year” after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). AS 23.30.130 has been applied to changes in conditions affecting reemployment benefits and vocational status. *See, e.g., Griffiths v. Andy’s Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007); *Imhof v. Eagle River Refuse*, AWCBC Decision No. 94-0330 (December 29, 1994). The board may decide, based on evidence in the record upon conclusion of a hearing on modification, whether an employee is entitled to reemployment benefits. *See, e.g., Griffiths*, 165 P.3d at 624.

In *Interior Towing and Salvage, Inc. v. Gracik*, AWCAC Decision No. 239 (September 5, 2017), the Commission held that the provision of AS 23.30.041(d), stating the board “shall uphold the decision of the administrator except for abuse of discretion on the administrator’s part” controlled

over the modification provisions of AS 23.30.130. Thus, unless the board finds that the RBA-designee abused her discretion in finding an employee eligible or ineligible, the board could not modify the RBA-designee’s decision, but must remand the issue to the RBA-designee. In *Gracik*, the Commission did not address the Supreme Court’s approval of the board’s modification of a reemployment eligibility determination based on newly discovered evidence.

8 AAC 45.070. Hearings.

....

(b)

(1)

(A) For review of an administrator’s decision issued under AS 23.30.041(d), a party shall file a claim or petition asking for review of the administrator’s decision and an affidavit of readiness for hearing. The affidavit of readiness for hearing may be filed at the same time as the claim or petition. In reviewing the administrator’s decision, the board may not consider evidence that was not available to the administrator at the time of the administrator’s decision unless the board determines the evidence is newly discovered and could not with due diligence have been produced for the administrator’s consideration.

ANALYSIS

Should the RBA-designee’s eligibility determination be remanded or reversed?

The RBA-designee’s decision must be upheld except for an abuse of discretion. AS 23.30.041(d). Employee contends Dr. Malcolm’s July 27, 2017 prediction is conditional and he is unable to perform job duties which require head movement. AS 23.30.041(e)(2).

Dr. Malcolm’s July 27, 2017 opinion predicted Employee would have the permanent physical capacities to meet the physical demands of a Kitchen Helper but Employee “may have difficulty unloading truck if turning head involved.” Dr. Malcolm’s July 27, 2017 prediction is open to interpretation as the Kitchen Helper job description duties involves frequent stooping and tasks involving head movement, including loading or unloading trucks picking up or delivering supplies and food. *Rogers & Babler*. The RBA-designee exercised her discretion to conclude Dr. Malcolm

intended Employee had the physical capacities to perform the physical demands of the Kitchen Helper. Her decision was not arbitrary, manifestly unreasonably and does not stem from an improper motive. *Sheehan*. She followed the law reaching her decision finding Employee ineligible and there is no evidence she made a mistake. *Brown*. Therefore, the RBA-designee did not abuse her discretion by finding Employee not eligible for reemployment benefits.

This decision may not reweigh or draw its own inference from the evidence upon which the RBA-designee relied in her denial letter. *Miller*. If, after reviewing and considering admissible evidence on appeal, the reviewers find the RBA-designee's decision is supported by substantial evidence, it must be affirmed. *Yahara*. Dr. Malcolm's July 27, 2017 prediction is the only relevant physician opinion in the record. A review of the administrator's decision under does not require a change in conditions; it only states new evidence can be considered. AS 23.30.130; 8 AAC 45.070(b)(1)(A). On November 30, 2017, Dr. Malcolm recommended a functional capacity evaluation based on Employee's concerns regarding the Kitchen Helper work environment, which was never completed. Employee credibly testified he experiences vertigo when he moves and there are compelling safety concerns regarding his ability to return to work as a Kitchen Helper. AS 23.30.122; *Smith*. His testimony, along with Dr. Malcolm's recommendation of a physical capacity evaluation, is sufficient to overcome Dr. Malcolm's equivocal July 27, 2017 prediction. *Id.* As the RBA-designee did not abuse her discretion, the issue should be remanded back to the RBA-designee to confirm Dr. Malcolm's intent with her comment on Employee's head turning to ensure she carefully considered his vertigo. *Gracik*.

CONCLUSION OF LAW

The RBA-designee's eligibility determination will be remanded.

ORDERS

- 1) Employee's November 29, 2017 petition is granted.
- 2) The RBA-designee's ineligibility determination will be remanded back for the RBA-designee to confirm Dr. Malcolm's intent and to ensure she carefully considered Employee's vertigo.

Dated in Fairbanks, Alaska on August 22, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Julie Duquette, Member

/s/
Jacob Howdeshell, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JAMES METZGER, employee / claimant v. THE COCA-COLA BOTTLERS ASSOCIA, employer; TRAVELERS INDEMNITY OF AMERICA, insurer / defendants; Case No. 201617868; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 22, 2019.

/s/
Mahogany Mitchell, Technician