ALASKA WORKERS' COMPENSATION BOARD

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

TAMARA L. TUCKER, Employee, Claimant, v. 45076 SAFEWAY, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201805118 AWCB Decision No. 20-0099 Filed with AWCB Juneau, Alaska on October 27, 2020

Tamara L. Tucker's (Employee) April 14, 2020 petition seeking modification of the reemployment benefit administrator designee's (RBA-designee) ineligibility determination was heard on September 29, 2020, in Juneau, Alaska, a date selected on June 24, 2020. A May 20, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney J. John Franich appeared and represented Employee, who appeared and testified. Attorney Jeffrey Holloway appeared and represented 45076 Safeway and its insurer (Employer). The record closed at the hearing's conclusion on September 29, 2020.

ISSUE

Employee contends her treating physician changed his prediction that she would have the permanent physical capacity to perform the physical demands of her job at the time of the injury. She contends a subsequent functional capacity evaluation (FCE) and her physician's permanent

partial impairment (PPI) rating and current physical capacities are evidence of a change of conditions. Employee requests an order modifying the reemployment ineligibility determination.

Employer contends no facts entitle Employee to reemployment benefits. It contends the FCE report and Employee's treating physician's opinion do not constitute a change in conditions because the records did not predict whether she will have permanent physical capacities less than her job at the time of injury or other jobs she held within the last 10 years. Employer requests an order denying Employee's petition.

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

FINDINGS OF FACT

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

1) On February 25, 2018, Employee complained of right foot pain, numbness and tingling. She stated she was at work that day moving a u-boat loaded with hundreds of pounds of freight tilted onto her foot while wearing steel-toed boots. Employee was diagnosed with right foot contusion and was provided a walking boot. She was restricted from working. (Robert Warren Haight, M.D., chart note, February 25, 2018).

2) On March 6, 2018, Employee reported her right foot pain was manageable but when she walked for long periods, she experienced pain in the plantar aspect of her cuneiform navicular articulation. It burned and ached. William Martin, M.D., provided a corticosteroid injection. (Martin chart note, March 6, 2018).

3) On March 16, 2018, John Bursell, M.D., performed an electrodiagnostic study and diagnosed right foot medial plantar neuropathy. He expected Employee's neurological function to improve over the next few months. (Bursell chart note, March 16, 2018).

4) On April 5, 2018, Employer reported Employee's right foot was injured at work on January 25, 2018. (First Report of Occupational Injury, April 5, 2018).

5) On February 20, 2019, Employee reported her right foot pain symptoms remained unchanged and it still hurt to put weight on her forefoot. She underwent physical therapy. Dr. Bursell diagnosed persistent right foot pain with neuropathic component after a crush injury. He

recommended continuing physical therapy and vocational rehabilitation. (Bursell chart note, February 20, 2019).

6) On February 25, 2019, Dr. Bursell released Employee to light duty work, restricted her from walking and climbing, and released her to sitting all day and bending and squatting occasionally. (Bursell Return to Work Recommendations, February 25, 2019).

7) On March 12, 2019, Dr. Bursell reviewed three "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) job descriptions for jobs Employee held in the 10 years prior to her work injury, including Floral Designer, Department Manager, Car Rental Clerk and Stock Clerk. He predicted she will have the permanent physical capacities to perform the demands of Floral Designer and Car Rental Clerk, both light duty jobs, and Department Manager, a medium duty job, as described but not the Stock Clerk job. Dr. Bursell also predicted Employee will have a PPI rating as a result of her work injury. (Bursell predictions, March 12, 2019).

8) On April 12, 2019, the rehabilitation specialist submitted an eligibility report. The specialist selected Floral Designer, Department Manager, Stock Clerk and Car Rental Clerk to represent Employee's job with Employer and jobs she held in the past 10 years. The specialist recommended Employee be found ineligible based upon Dr. Bursell's March 12, 2019 predictions. (Eligibility report, April 12, 2019).

9) On April 29, 2019, the RBA-designee determined Employee was ineligible for reemployment benefits based upon Dr. Bursell's March 12, 2019 predictions. (RBA-designee letter, April 29, 2019).

10) On October 3, 2019, Employee reported she cannot walk on un-even surfaces and cannot carry weight greater than 15 pounds due to increased right foot pain. She has been unable to return to work, hike, fish or run. Employee's foot swelled with use and the skin changes color, developing a black and blue appearance. Dr. Bursell opined she was medically stable and assessed a five percent PPI rating. He stated she can return to a sedentary work position due to limitations in walking distances and ability to lift and her inability to lift and carry greater than 15 pounds. (Bursell chart note, October 3, 2019).

11) On April 4, 2020, Employee requested modification of the RBA-designee's ineligibility determination because her physician's predictions were proven inaccurate when she reached medical stability. (Petition, April 4, 2020).

12) On May 7, 2020, Employer contended it was not clear whether Dr. Bursell predicted Employee will have the physical capacities to perform the SCODRDOT jobs because he did not re-review the SCODRDOT job descriptions on October 3, 2019. (Answer, May 7, 2019).

13) On July 20, 2020, Dr. Bursell reviewed three SCODRDOT job descriptions for jobs Employee held in the 10 years prior to her work injury, including Floral Designer, Department Manager and Car Rental Clerk. He predicted she will have permanent physical capacities to perform demands of the jobs as described. (Bursell predictions, July 20, 2020).

14) At deposition on July 28, 2020, Employee testified she could stand for 10 minutes before needing to sit down. She walked 12 or 13 minutes at Fred Meyers before she had to stop. (Employee, July 28, 2020).

15) On August 26, 2020, Dr. Bursell said in an eight hour work day, Employee can sit for two hours, stand for 30 minutes and walk for 30 minutes at one time. She can sit for four hours, stand for three hours and walk for two hours total during the entire work day. He limited Employee's carrying to less than 21 pounds and lifting to less than 26 pounds. Dr. Bursell stated Employee could seldom (1-10 percent) lift 21 to 25 pounds, occasionally (11-33 percent) lift and carry up to 11-20 pounds, and continuously (67-100 percent) lift 6-10 pounds. Employee was restricted from climbing, kneeling and squatting. (Bursell FCE, August 26, 2020).

16) At hearing on September 29, 2020, Employee testified she injured her right foot working as manager of the meat department when the wheel of a cart holding 500 pounds of meat got stuck on top of her foot for a long time and crushed it. She has had physical and massage therapy and cortisone shots in her foot. Employee uses a custom orthotic prosthetic which helps take the pressure off her foot by lifting her front foot. Her foot swells and bruises when she is on it for any length of time. Employee must take breaks when she is on her feet for any length of time, like when she does the dishes; she gets off of her feet and ices it. When Employee sits, she does not let her foot hang for long because it throbs and burns after 15 minutes. She elevates it and puts a heating pad on it. Employee can put weight on her foot but she cannot put weight on the front part because she does not have strength there anymore. She can walk, stand or sit with her leg down between 30 to 40 minutes but prefers to elevate it after 15 to 20 minutes. Employee even gets out of bed at night to sit and elevate her foot to relieve foot pain. The floral designer position she had in the past was not a light duty job because she had to carry large, heavy buckets of water and plants. Employee had to squat and stand up all the time to be a floral designer in

order to help customers and arrange flowers. She cannot stand or walk for long enough periods to be able to be a floral designer as described in the job description. Dr. Bursell filled out the July 20, 2020 job description predictions without consulting with her. Employee said her job as a car rental clerk required her to stand for long periods. Employee has epilepsy and does not have a driver's license. Her friend gave her the car rental clerk job and did not require her to drive cars. Employee unloaded trucks and pallets, stocked shelves, which required squatting and kneeling, and went up and down a ladder to organize the warehouse and put supplies away for her job at the time of the injury. Dr. Bursell completed the FCE after he examined her and consulted with her on her current physical abilities. Employee tried to squat during the exam and found she could not squat on her right foot. She cannot be on her foot for five hours per day; she thinks she could stand and walk a total of two hours per day with breaks. Employee elevates her foot at least 20 minutes after standing or walking and putting heat on it feels the best. Her physical capacities have not changed since August 2020. (Employee).

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. . . .

(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 Revised Dictionary of Occupational Titles" for

(1) the employee's job at the time of injury; or

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of

> Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

Pursuant to AS 23.30.041(e)'s express language, medical evidence of eligibility must satisfy three requirements. First, the evidence must take the form of a prediction. Second, the person making the prediction must be a physician. Third, the prediction must compare the physical demands of the employee's job, as the U.S. Department of Labor describes them, with the employee's physical capacities. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993).

> **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. *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007). 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. *Id.* at 624.

The substantial evidence standard is applied to requests for modification. *Interior Paint Co. v. Rodgers*, 522 P.2d 164 (Alaska 1974). "Substantial evidence" is such "relevant evidence" as a "reasonable mind might accept as adequate to support a conclusion." *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999).

The Alaska Supreme Court discussed AS 23.30.130(a) in *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 162 (Alaska 1996), and said "under this statute, the Board 'is granted broad discretion

to modify its prior decisions and findings' and may modify its prior factual findings if it finds they were mistaken" (citations omitted). "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a backdoor route to retrying a case because one party thinks he can make a better showing on the second attempt." *Rodgers* at 169 (citing 3 Larson, The Law of Workmen's Compensation § 81.52, at 354.8 (1971)).

When a party seeks modification based on a mistake of fact and desires to present new evidence, the key element in the regulation is the requirement the new evidence could not have been discoverable prior to the hearing through due diligence. *Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948 (Alaska 2005). Due diligence requires the new evidence "could not" have been developed prior to hearing, and it is not an abuse of discretion to reject a petition for modification when the evidence simply "was not" developed. *Id*. at 957.

When a party seeks modification based on a change in conditions, the term "change in conditions" might be limited to a change in the employee's physical or economic conditions. *Lindhag* at 957-58. An alleged change in conditions cannot be used to retry original issues. *Id*. at 958 (citing 8 Larson, Larson's Workers' Compensation Law § 131.03[1][e] (2005)). "Upon reopening a claim due to a change in conditions, 'the issue before the Board is sharply restricted to the question of the extent of the improvement or worsening of the injury on which the original award was based.'" *Id*. (citing Larson at § 131.03[2][a]). "In other words, 'neither party can raise original issues such as work-connection, employee or employer status, occurrence of a compensable accident, and degree of disability at the time of the first award.'" *Id*.

ANALYSIS

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

A reemployment eligibility decision may be modified if there is substantial evidence establishing a factual mistake or change in conditions which was not discoverable previously. AS 23.30.130; *Lindekugel*; *Griffiths*; *Sulkosky*; *Lindhag*. Employee contends Dr. Bursell's October 3, 2019 opinion and his August 26, 2020 FCE are substantial evidence supporting her petition for

modification. She contends she reached medical stability and her current physical limitations prove Dr. Bursell's March 12, 2019 predictions were mistaken.

An employee is eligible for reemployment benefits if, among other requirements, a physician predicts the employee will not have the physical capacities to perform her job at the time of the injury or in her ten-year work history. AS 23.30.041(e). Therefore, a physician must predict Employee's physical capacity and compare the prediction to the physical demands of the SCODRDOT job titles for Floral Designer, Department Manager and Car Rental Clerk. *Yahara*. AS 23.30.041(e) focuses on predicted permanent physical capacities and is silent regarding medical stability. It also does not specify as to when the physician expects the injured worker to have the predicted permanent physical capacities to perform the job title's physical demands. While Employee has reached medical stability, her physical capacity may continue to improve over time, or it may not, and a physician's prediction is required to address that issue. Neither the August 26, 2020 FCE nor Dr. Bursell's October 3, 2019 opinion predicted Employee's physical capacity as required under AS 23.30.041(e); both provided an opinion on Employee's existing physical capacity at the time of the exam. Furthermore, the FCE and Bursell's October 3, 2019 opinion both failed to compare the physical demands of the SCODRDOT job titles for Floral Designer, Department Manager and Car Rental Clerk to her predicted physical capacity as required under AS 23.30.041(e).

The only records comparing Employee's predicted physical capacity to the physical demands of the Floral Designer, Department Manager and Car Rental Clerk job titles are Dr. Bursell's March 12, 2019 and July 20, 2020 predictions. He made the same predictions on both dates: he predicted she will have the permanent physical capacities to perform the demands of Floral Designer, Car Rental Clerk and Department Manager job titles. Therefore, Employee failed to provide substantial evidence of a factual mistake or change in conditions. AS 23.30.041(e); AS 23.30.130; *Yahara*; *Tolbert*; *Rodgers*; *Rogers & Babler*. The RBA-designee's ineligibility determination will not be modified.

CONCLUSION OF LAW

The RBA-designee's ineligibility determination will not be modified.

ORDER

1) Employee's April 14, 2020 petition is denied.

Dated in Juneau, Alaska on October 27, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley Austin, 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 TAMARA L. TUCKER, employee / claimant v. 45076 SAFEWAY, employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case No.

201805118; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on October 27, 2020.

/s/
Krystal Gray, Workers' Compensation Tech