ALASKA WORKERS' COMPENSATION BOARD

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

JESUS RODRIGUEZ, Employee, Claimant, v. WHITTIER SEAFOOD, LLC, Employer, and COMMERCE AND INDUSTRY INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER ON RECONSIDERATION OR MODIFICATION AWCB Case No. 201909523 AWCB Decision No. 21-0057 Filed with AWCB Anchorage, Alaska on July 6, 2021.

Employee Jesus Ricardo Rodriguez' August 7, 2020 petition for a review of the Reemployment Benefits Administrator designee's February 27, 2020 determination he was not eligible for reemployment benefits was heard on June 2, 2021 in Anchorage, Alaska, a date selected on April 20, 2021. A November 18, 2020 affidavit of readiness for hearing gave rise to this hearing. Employee appeared, represented himself and also testified. Attorney Aaron Sandone appeared and represented Whittier Seafood, LLC and its insurer (Employer). The record closed at the hearing's conclusion on June 2, 2021.

ISSUES

Employee contends his petition for review of the Reemployment Benefits Administrator (RBA) designee's determination he was not eligible for reemployment benefits was timely as he did not receive the RBA's February 27, 2020 letter denying benefits until July or August, 2020.

Employer contends although Employee claims he did not receive the RBA's February 27, 2020 ineligibility determination letter until July or August 2020, Employee does not offer any proof. In addition, even if he did receive the letter in July or August, 2020, his petition was still very late, having been filed five months after the ineligibility letter.

1) **Should Employee's appeal of the RBA designee's ineligibility determination be dismissed as time barred?**

Employee contends the RBA designee abused her discretion because she relied on the opinion of Dr. Sparks, who he contends was not his treating physician. Employee also contends his treating physician, Dr. Zamudio's opinion should be considered.

Employer contends the RBA designee did not abuse her discretion as she relied on the only treating physician's opinion available to her, that of Dr. Sparks, who opined Employee could return to his job at the time of injury as well as others in the ten years prior to his injury.

2) **Did the RBA designee abuse her discretion in finding Employee ineligible for reemployment benefits?**

Employee contends the RBA designee's decision finding him ineligible for reemployment benefits should be modified to reflect the opinion of Dr. Zamudio. Employee contends Dr. Zamudio stated he could not perform the jobs he had had in the past 10 years.

Employer contends if Employee's petition for reconsideration is interpreted as a petition for modification, it should not be modified as it fails to comply with 8 AAC 45.150.

3) **Should the RBA designee's determination of ineligibility be modified?**

FINDINGS OF FACT

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

1) On July 17, 2019, Employee was working for Employer as a freezer room handler when he was working in the freezer and injured his right knee. (FROI, July 22, 2019).

2) On July 17, 2019, Employee was seen in Providence Emergency Department (ED) by Meganne M. Hendricks, MD. X-rays of the right knee revealed no fractures, but did show a large effusion in the region above the patella. He was advised not to use his right leg, to use crutches, to elevate his leg and ice frequently. (ED note, Dr. Hendricks, July 17, 2019).

3) On July 23, 2019 Employee was treated by Bradley L. Sparks, MD, at Anchorage Fracture and Orthopedic Clinic in Anchorage, Alaska. He reported he had sustained his injury on July 17, 2019 when working for Employer. He was attempting to get a cooler out of the freezer when he slipped and fell on a frozen spot on the ground. His right foot went out to the side, he slipped and fell forward, and his right knee buckled in. Employee stated he immediately felt a significant pop. There was severe pain and swelling, and he could not bear weight on it. He went to the clinic in Whittier, Alaska the same day, but was referred to Providence Hospital ED for evaluation, where x-rays were performed, which showed no fractures or dislocations. Employee was given crutches, placed in an anterior cruciate ligament (ACL) brace, and advised to follow up with an orthopedic provider. Dr. Sparks ordered an MRI. (Clinic note, July 23, 2019).

4) On July 23, 2019, an MRI of the right knee was performed which showed a partial separation of the medial retinaculum from the patella and a bone bruise of the lateral wall of the lateral femoral condyle. (MRI report, July 23, 2019.)

5) On July 31, 2021, Employee saw Dr. Sparks for follow up of his right knee patellar dislocation. Dr. Sparks recommended physical therapy. (Clinic note, July 31, 2021).

6) Three week after the July 17, 2019 work injury, Employer sent Employee back to Culiacan, Sinaloa, Mexico for treatment there. Employee began to treat with Marco Zamudio, M.D. On August 12, 2019 an MRI ordered by Dr. Zamudio showed a meniscus tear in the right knee. He noted Employee was walking with crutches and was very limited in complete extension and bending of the right knee. He prescribed 20 sessions of physical therapy to improve the post-traumatic edema, improve mobility and assess gait re-education. (Clinic note, August 12, 2019).

7) On October 1, 2019, a right knee MRI showed bone contusion and posttraumatic synovitis. (MRI, October 1, 2019).

8) On October 16, 2019, physical therapist (PT) Javier Sosa Catalan noted Employee had made remarkable improvement during physical therapy with a reduction in edema and pain. However, he still had joint instability of the knee and muscular atrophy of the lower right limb. PT Catalan

recommended continued physical therapy and reassessment by a specialist. (PT note, October 16, 2019).

9) On October 21, 2019, Employee was referred for a reemployment benefit eligibility evaluation with rehabilitation specialist (RS) Alejandro Calderon. (Letter, October 21, 2019).

10) On November 23, 2019, RS Calderon sent letters to both Dr. Sparks and Dr. Zamudio asking them to review the Dictionary of Occupational Titles (DOT) of the occupation Employee had held at the time of injury as well as those he had held in the ten years prior to injury. He also asked them to predict if Employee would have a permanent partial impairment (PPI) rating greater than zero percent according to the *AMA's Guides to the Evaluation of Permanent Impairment, Sixth Edition.* In the letters was including the information RS Calderon had only 60 days to complete the reemployment evaluation. (Letters, November 3, 2019).

11) On December 3, 2019, Dr. Sparks opined Employee would have the permanent physical capacities to perform the physical demands of his job at the time of injury as well as all the other jobs he had held in the ten years prior to his injury. He also predicted Employee would have a permanent partial impairment (PPI) rating greater than zero as a result of the work injury. (Dr. Sparks' response to RS Calderon's questions, December 3, 2019).

12) On December 5, 2019, Dr. Zamudio noted Employee had made satisfactory improvement with physical therapy, but he still had muscle atrophy, anterior knee pain and reduction in bone edema. He planned to continue PT and there was no improvement, surgical management. (Letter, December 5, 2019).

13) On January 22, 2020, Dr. Zamudio noted Employee continued to improve with PT and recommended 30 more sessions of PT for proprioception exercises and strengthening for the right knee. (Clinic note, January 22, 2020).

14) On February 3, 2020 RS Calderon submitted his eligibility evaluation status report. He noted he had not received a response from Dr. Zamudio despite repeated calls and emails. He also noted, based on Dr. Sparks' December 3, 2019 response, it appeared Employee might not be eligible for reemployment benefits, but the final determination would be made by the State of Alaska's Department of Labor and Workforce Development. (Report, February 3, 2020).

15) On February 27, 2020, the RBA Designee determined Employee was not eligible for reemployment benefits based on the February 3, 2020 eligibility evaluation report of RS

Calderon. The letter informed Employee of his right to appeal the determination of ineligibility within 10 days of the date of her letter. (Letter, February 27, 2020).

16) On April 22, 2020, PT Marco Cevas noted Employee was no longer using crutches and had continued to improve. He recommended continued PT treatment to improve walking and strength and reevaluation by a medical specialist. (PT note, April 22, 2020).

17) On May 7, 2020, Employee saw Dr. Zamudio for follow up. He reported a great decrease in pain, having anterior knee pain only occasionally when climbing stairs, and the ability to take prolonged walks. Dr. Zamudio noted the May 6, 2020 MRI showed suprapatellar bursitis and a 50 percent decrease in thickness of the patellar cartilage. There was improvement in comparison with the December 2019 MRI. In addition, Employee reported significant symptomatic improvement. He required continued PT to strengthen the quadriceps and continued proprioception exercises, but the physical therapy clinic had been closed due to the pandemic. (Clinic note, May 7, 2020).

18) On May 12, 2020, Dr. Zamudio opined Employee would be medically stable as of July 2020, at which time he would probably be discharged from care. (Dr. Zamudio's email, May 12, 2020).

19) On August 6, 2020, Dr. Marco Zamudio responded to RS Calderson's November 23, 2019 request and opined Employee would have the permanent physical capacities to perform the physical demands of two of the jobs he had held in the ten years prior to his job at the time of injury, namely, that of fish-bin tender, and food sales clerk. He also predicted Employee would have a one percent PPI as a result of the work injury. (Dr. Zamudio's response to Employer's questions, August 6, 2020).

20) On August 7, 2020, Employee filed a petition requesting review of the reemployment benefit administrator's decision based on his understanding treating physician Dr. Zamudio had opined he would not be able to perform the jobs he had held in the past ten years. (Employee's petition, August 7, 2021).

21) On November 18, 2020, Employee filed his affidavit of readiness for hearing (ARH). (Hearing request, November 28, 2020).

22) On December 28, 2020 Employee testified in his deposition he had come to the United States to work on a temporary visa from May 21st, to September 30th, 2019. He had completed his industrial engineering degree at university in June 2020. He thought he would have the

physical capacity to perform the jobs he is qualified for with his industrial engineering job, such as in quality control, as long as he can rest at times. Employee could not remember exactly when he had received the February 27, 2020 ineligibility determination letter from the RBA designee, but he thought it was in July or August of 2020. Employee stated any regular mail sent to him in Mexico was often very late and he would receive letters mailed on different dates all at once. (Deposition, December 28, 2019).

23) Employee could not remember exactly when he had received the February 27, 2020 ineligibility determination letter from the RBA designee, but he thought it was in July or August of 2020. Employee stated any regular mail sent to him in Mexico was often very late and he would receive letters mailed on different dates all at once. He only received email in a timely manner and when he did finally receive the ineligibility determination letter, it was emailed to him by RS Calderon, although he cannot remember the exact date. It was RS Calderon who assisted him with filing the petition for the review of the RBA designee's determination. (Deposition, December 28, 2020).

24) On April 20, 2021, the prehearing conference (PHC) summary set the issue for the June 2, 2021 hearing as the Employee's August 7, 2020 petition for reconsideration of the February 27, 2020 RBA determination that Employee was ineligible for reemployment benefits. (PHC summary, April 20, 2021).

25) On May 26, 2021, Employer controverted all benefits based on Dr. Zamudio's having discharged Employee from care and having found him medically stable as of July 30, 2020, with a PPI rating of 1 (one) percent. (Controversion, May 26, 2021).

26) As of July 2, 2021, Employer has neither controverted nor paid Employee's PPI benefits. (Record).

PRINCIPLES OF LAW

The board may base its decision on not only 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 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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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.
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> **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 ... for
> (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....
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> (f) An employee is not eligible for reemployment benefits if
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> ....
> (4) at the time of medical stability, no permanent impairment is identified or expected.
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> ....

The legislature granted the RBA authority to decide in the first instance issues related to reemployment preparation benefits, including approving a request for an eligibility evaluation and ultimately deciding whether an injured worker is eligible for rehabilitation and reemployment benefits. *Meza v. Alyeska Seafoods, Inc.*, AWCB Decision No. 89-0207 (August

14, 1989). The RBA's decision must be upheld absent an abuse of discretion on the administrator's part. The Alaska Supreme Court describes abuse of discretion as "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); *Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to properly apply controlling law, or follow its own regulations, may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

Abuse of discretion is also established where the findings are not supported by substantial evidence in light of the record as a whole. AS 44.62.570. When applying a substantial evidence standard, a "[reviewer may not reweigh the evidence or draw its own inferences from the evidence." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978). "If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order...must be upheld." *Id.* Whether the quantum of evidence is substantial enough to support a conclusion, in the contemplation of a reasonable mind, is a question of law. *Lynden Transport v. Mauget*, AWCAC Dec. No. 154 at 8 (June 17, 2011); *McGahuey v. Whitestone Logging, Inc.*, AWCAC Dec. No. 054 at 6 (August 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)). If the RBA's decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action. *Mauget* at 12 (failure to apply controlling law); *McGuey* at 11 (incomplete decision or record).

Both the RBA designee's eligibility determination, and the board's decision on review, must be made on a complete record. Where the board renders a decision on an incomplete record, it commits plain error. *Smith* at 1012-13; *Fred Meyer, Inc. v. Updike*, AWCAC Dec. No. 120, at 10-11, (Oct. 29, 2009). Plain errors are "obvious mistakes that create "a high likelihood that an injustice has resulted," and the matter must be remanded for further evaluation. *Updike* at 11 (citation omitted).

Rydwell v. Anchorage School Dist., 864 P.2d 526 (Alaska 1993), involved an injured worker, whose physician opined she did not have the physical capacities to return to her former job and,

even though the injured worker had objectively measurable permanent impairments, those impairments did not translate into a permanent impairment as defined in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Her physician accordingly assigned her a zero percent PPI rating and the RBA found her ineligible for reemployment benefits based on her lack of a PPI. The injured worker sought a review of the determination and, notwithstanding the statute's language under AS 23.30.041(f), a workers' compensation board panel concluded the injured worker was entitled to reemployment benefits because it was "unimaginable" the legislature would have intended to deny reemployment benefits to an injured worker who could not return to employment because of a work injury. *Id.* at 527-28. The Alaska Supreme Court disagreed and concluded a PPI rating was a "rather stringent, bright-line measure[]" that served as a prerequisite for obtaining reemployment benefits. *See, id.* at 530 (citing the employer's arguments with approval). It concluded, under AS 23.30.041, an employee must satisfy two tests in order to be eligible for reemployment benefits: 1) prior to medical stability, a physician must predict the employee's physical capacities will not be sufficient for the physical demands of her original job, and 2) once the employee has reached medical stability, she must have a ratable permanent impairment. *Id.* at 531.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment….
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> **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). 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 *Griffiths*, the board had dismissed a self-represented litigant's petition for modification because he failed to include the affidavit required by 8 AAC 45.150. In its original decision, the board had stated, in denying his claim for permanent partial impairment benefits, if the claimant obtained an appropriate impairment rating from his physician he could file for modification within one year under AS 23.30.130. Claimant obtained a rating, filed it with the board and requested modification, but did not provide the required affidavit setting forth the requirements mandated by the regulation. On appeal, *Griffiths* vacated and remanded the board's decision noting it was an abuse of discretion to hold the pro se litigant to the affidavit requirement when a lay person would reasonably understand that all he had to do was obtain a PPI rating from his doctor, petition for modification and file his newly obtained medical report with the board. (*Id*. at 624).

However, in the case of a hearing reviewing an RBA designee's determination, 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" "controls" over the modification provisions of AS 23.30.130. Therefore, unless the board finds that the RBA-designee abused her discretion in finding an employee eligible or ineligible, the board cannot modify the RBA-designee's decision, but must remand the issue to the RBA-designee. *Interior Towing and Salvage, Inc. v. Gracik*, AWCAC Decision No. 239 (September 5, 2017) at 9.

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without and award, except where liability to pay compensation is controverted by the employer.
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> (d) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. The additional amount shall be paid at the same time as, but in addition to, the compensaton….

AS 44.62.570. Scope of review.

....

(b).... Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence....

(c).... If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by
(1) the weight of the evidence; or

(2) substantial evidence in the light of the whole record.

....

8 AAC 45.070. Hearings

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(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

. . . .

8 AAC 45.082. Medical Treatments.
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(b)
. . . .
(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury….

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 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.
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> (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
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> (1) the facts upon which the original award was based;
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> (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
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> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
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> (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.
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> (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 45.195. Waiver of procedures**. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employer merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

In *Richard v. Fireman's Fund Insurance Co*., 384 P.2d 445 (Alaska 1963), the Alaska Supreme Court held the board must assist claimants by advising them of important facts bearing on their case and instructing them how to pursue their right to compensation. In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316, 320 (Alaska 2009) considered the board's duty to advise unrepresented claimants in workers' compensation cases how to preserve their claims:

> The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented claimants.

ANALYSIS

1. Should Employee's appeal of the RBA designee's ineligibility determination be dismissed as time barred?

Employee contends his appeal was timely as he did not receive the RBA designee's February 27, 2020 letter determining he was ineligible for reemployment benefits until sometime in July or August, although he does not remember the date more exactly. However, he has not provided any proof of when he did receive the letter, either from the RBA designee or emailed to him from RS Calderon. Employee's difficulties with receiving mail in Mexico might excuse a waiver of the procedural requirements of AS 23.30.41(d) for some period of time, but not for a period of several months. 8 AAC 45.195. Employee's appeal of the RBA designee's February 27, 2020 letter was due on March 10, 2020, but Employee did not file his appeal until August 7, 2020. Therefore, Employee's petition for reconsideration of the RBA designee's ineligibility determination should be dismissed as untimely. In the alternative, even if Employee's petition for reconsideration was not dismissed as untimely, it should be denied as the RBA designee did not abuse her discretion, as discussed below.

Nevertheless, Employee's petition will be construed as a petition for modification. AS 23.30.130.

2. Did the RBA designee abuse her discretion in finding Employee ineligible for reemployment benefits?

Employee contends the RBA designee abused her discretion by relying on the opinion of Dr. Sparks, who he contends was not his treating physician. However, Dr. Sparks meets the criteria as a treating physician, as he treated Employee in July 2019 shortly after his work injury. 8 AAC 45.082(b)(2). .Dr. Sparks opined Employee could return the job he held at the time of the work injury as well as all of the jobs he had held in the ten years prior to the work injury. Dr. Sparks

also predicted Employee would have a PPI rating greater than zero. Employer contends Dr. Zamudio, Employee's attending physician in Mexico, also predicted Employee would have a PPI rating of one percent, and could return to the job he held at the time of injury or one of the jobs he had held in the prior ten years. Although the RBA designee did not consider Dr. Zamudio's opinion, she was unable to as it was not provided to her despite the numerous attempts of RS Calderon to contact Dr. Zamudio. However, even if she had been able to consider Dr. Zamudio's opinion, it would not have altered her finding of ineligibility, as Dr. Zamudio also predicted Employee would have a PPI rating of one percent and would also have the permanent physical capacity to return to two of the jobs he had held in the prior ten years.

The RBA designee's determination is reviewed under an abuse of discretion standard. AS 23.30.041(d). The RBA designee's decision relied on Dr. Sparks' opinions and applied the controlling law. *Smith*. Dr. Sparks' opinions as a treating physician constitute substantial evidence. AS 44.62.570; *Miller*; *Lynden*; *McGahuey*; *Mauget*. Her decision was not arbitrary, capricious, unreasonable, nor did it stem from an improper purpose. *Sheehan*. There is no evidence in the record the RBA designee's decision demonstrated a failure to exercise sound, reasonable legal discretion. *Collier*. Employer correctly contends that in addition to a prediction Employee would have a PPI rating greater than zero, a physician must also predict Employee will not have the permanent physical capacities to return to his job at the time of injury or a job he has held or received training for within the ten years prior to his work injury. Both statutory requirements must be met. AS 23.30.041(e)(1), (2); *Rydwell*. Here both Dr. Sparks and Dr. Zamudio are in agreement Employee will have the permanent physical capacity to return to his either his job at the time of injury or jobs which he has held in within the ten years prior to his work injury. Therefore, the RBA designee did not abuse her discretion in finding Employee ineligible for reemployment benefits.

3. Should the RBA's determination of ineligibility be modified?

Where there is a factual mistake or a change in conditions, a party may petition the board to modify the award at any time within one year after the board rejected a claim. AS 23.30.130. AS 23.30.130 has been applied to claims for reemployment benefits.-*Lindekugel*; *Griffiths*. The RBA designee's ineligibility determination letter was issue on February 27, 2020 and

Employee's petition was filed on August 7, 2020, within one year after the board rejected a claim. Therefore, Employee's petition for modification is timely.

Employer contends the RBA's ineligibility determination should not be modified as Employee's petition did not meet the requirements of 8 AAC 45.150, which require a petition for modification based on a mistake of fact by the board must set out specifically and in detail the facts upon which the original decision was based as well as the facts alleged to be erroneous. However, Employee is self-represented and not required to meet the all the detailed requirements of 8 AAC 45.150. *Griffiths*.

Employee contends the RBA's determination of ineligibility should be modified based on a mistake of fact, that is, the RBA relied on the opinion of Dr. Sparks, who Employee believes is not his treating physician. However, as discussed above, Dr. Sparks was in fact one of Employee's treating physicians. 8 AAC 45.082(b)(2). Therefore, the RBA designee did not error in relying on Dr. Sparks' opinion. Employee also contends there is new evidence in the form of his treating physician Dr. Zamudio's opinions.

However, Dr. Zamudio's opinions do not support a modification of the RBA's determination of ineligibility, as Dr. Zamudio also opined Employee had the permanent physical capacity to return to his job as fish-bin tender and another of the jobs he had held in the ten years prior to the work injury, that is, a food sales clerk. As discussed above, both Dr. Sparks and Dr. Zamudio opined Employee would have a PPI rating greater than zero, which satisfies only one prong of the test for eligibility for reemployment benefits. However, both prongs of the requirements for reemployment benefit eligibility must be met before an employee may be found eligible. AS 23.30.041; *Rydell*. That is, an employee must also lack the permanent physical capacity to return to his job at the time of injury or any of the jobs he has held or been trained for in the prior ten years. Neither Dr. Sparks nor Dr. Zamudio opined Employee did not have the capacity to return to one of the jobs he had held in the past ten years. Finally, Employee testified he graduated from university in June 2020 with a degree in industrial engineering, so he has been trained for a job that he believes he will have the physical capacity to perform. Therefore, the RBA's determination should not be modified and will not be remanded to the RBA designee. *Gracik*.

The Alaska Supreme Court has ruled the Board has a duty to assist and advise unrepresented claimants in how to preserve their claims. *Richard v. Fireman's Fund Insurance Co.*; *Bohlmann*.

Dr. Zamudio has predicted Employee will have a one percent PPI when medically stable. However, no PPI rating has been performed. Employee may make a claim for PPI benefits once he has a PPI rating. Since medical benefits have been controverted, Employee may have to pay for a PPI rating, which must be performed according to the *American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition*. 8 AAC 45.122. Once he has the rating, he may make a claim for payment. Employee is encouraged to contact a workers' compensation officer at 907-269-4980 for assistance if needed.

CONCLUSIONS OF LAW

1) Employee's appeal of the RBA designee's ineligibility determination should be dismissed as time barred.

2) The RBA designee did not abuse her discretion in finding Employee ineligible for reemployment benefits.

2) The RBA's determination of ineligibility should not be modified.

ORDER

1) Employee's August 7, 2020 petition for review of the RBA designee's February 27, 2020 ineligibility determination is dismissed.
2) The RBA designee did not abuse her discretion when she found Employee ineligible for benefits.
3) The RBA's determination of ineligibility shall not be modified.

Dated in Anchorage, Alaska on July 6, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/ ____

Judith A DeMarsh, Designated Chair

/s/

Sara Faulkner, 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.

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 Final Decision and Order on Reconsideration or Modification in the matter of JESUS RODRIGUEZ, employee / claimant v. WHITTIER SEAFOOD, LLC, employer; COMMERCE AND INDUSTRY INSURANCE COMPANY, insurer / defendants; Case No. 201909523; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on July 6, 2021.

/s/

Kimberly Weaver, Office Assistant II