ALASKA WORKERS' COMPENSATION BOARD

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

ERIC MCDONALD, Employee, Claimant, v. ROCK & DIRT ENVIRONMENTAL, INC., Employer, and INS. CO. OF THE STATE OF PENNSYLVANIA, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201410268 AWCB Decision No. 22-0032 Filed with AWCB Anchorage, Alaska on May 18, 2022

Rock & Dirt Environmental, Inc.'s (Employer) December 8, 2021 petition to restart the vocational reemployment process was heard on the written record on May 10, 2022, in Anchorage, Alaska, a date selected on March 11, 2022. An amended February 7, 2022 hearing request gave rise to this hearing. Eric McDonald (Employee) represents himself; attorney Colby Smith represents Employer and its workers' compensation insurer. As preliminary matters, Employee contended Smith had a conflict of interest and should not be allowed to represent Employer. He also contended panel members Soule and Faulkner should be disqualified. On May 10, 2022, the panel met to address Employee's objection to Smith, Soule and Faulkner and decided the panel had no authority to prevent Smith from representing Employer; Soule and Shaw declined to disqualify Faulkner; and Faulkner and Shaw declined to disqualify Soule. The record closed at the hearing's

conclusion on May 10, 2022. This decision examines the preliminary orders and decides Employer's petition on its merits.

ISSUES

Employee contended attorney Colby Smith should not be allowed to represent Employer because he has a conflict-of-interest, which prejudices Employee.

Employer contended Smith's firm occasionally represents the state when a state employee has filed a workers' compensation claim in proceedings before the Workers' Compensation Board. It contended the firm does not represent the Workers' Compensation Board. Smith, who is representing Employer, does not personally represent the state although his firm does; another lawyer from the firm is assigned to those cases.

1) Does this decision have authority to disqualify Smith from representing Employer?

Employee contended Designated Chair William Soule should be disqualified from participating in his case because Soule purposely made findings contradictory to a Superior Court order and the hearing record, made false statements and declined to reconsider a prior decision "without explanation." He contends Soule is a "liar" and is otherwise "dishonest."

Employer did not offer a position on Employee's request to disqualify designated chair Soule.

2) Was the order declining to disqualify Designated Chair Soule, correct?

Employee contended panel member Faulkner should be disqualified from participating in his case because Smith allegedly represents her, and she sided with Soule in a previous hearing in this case.

Employer did not offer a position on Employee's request to disqualify panel member Faulkner.

3) Was the order declining to disqualify panel member Faulkner, correct?

Employee's May 6, 2022 pleading, styled an opposition to Smith's participation at the hearing, implicitly requested a hearing continuance. He contended former Acting Chief Ron Ringel told

Hearing Officer Janel Wright to not schedule any hearings on the written record, and Employee contended Wright ignored this directive when she scheduled a written record hearing. Employee contended he needs witnesses to address his reemployment status and needs to question Employer.

Employer has not responded to Employee's May 6, 2022 pleading and it is unknown if Employer understood that pleading to request a hearing continuance, implicitly. This decision will presume Employer opposed a hearing continuance.

4)Should the May 10, 2022 written record hearing be continued?

Employer contends the parties agreed on February 5, 2016 to resume plan development following an informal rehabilitation conference. It contends two second independent medical evaluation (SIME) physicians determined Employee could participate in a vocational reemployment training plan. However, the Rehabilitation Benefits Administrator (RBA) said Employer's request to restart reemployment efforts could not move forward without an order so stating.

Employee opposes a hearing on Employer's petition for various reasons including alleged collusion and conflicts-of-interest, violation of a 2019 stipulation, his recent sinus surgery, malfeasance by various past and present Division staff, Smith's alleged criminal actions and SIME fraud, and alleged discovery abuses. He further contends he is overwhelmed with pain, anxiety and stress and that no reemployment efforts are appropriate until he has completed five surgeries he is allegedly waiting for and has been allowed to heal.

5) Should the reemployment process be restarted?

FINDINGS OF FACT

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

1) On June 6, 2014, Employee was working as an asbestos removal laborer at Service High School in Anchorage when a cement wall collapsed on him. The injury required a five-week hospital stay. (First Report of Occupational Injury or Illness, June 18, 2014; Workers' Compensation Claim, February 13, 2013).

2) On June 28, 2014, psychiatrist Deanna Johnson, MD, evaluated Employee who was angry and argued the wall that fell on him was improperly engineered. Dr. Johnson noted Employee's "catastrophic" thinking about his future. (Johnston report, June 28, 2014).

3) On September 9, 2014, Laurence Wickler, MD, stated, "I suspect he is never going to go back to heavy labor and therefore, an evaluation and retraining program probably should start now while his treatment continues." (Wickler report, September 9, 2014).

4) On January 15, 2015, rehabilitation specialist Forooz Sakata, at the RBA's rotating selection, evaluated Employee for reemployment benefits eligibility. Sakata reviewed Employee's pre-injury 10-year work history and inquired of his physicians. His physician Robert Thomas, MD, predicted Employee would have a permanent partial impairment greater than zero and did not approve his return to his job at the time of injury or any jobs he held in the appropriate 10-year period. Employer did not have a suitable replacement job offer. Finding Employee met all other requirements, Sakata recommended he be found eligible for reemployment benefits. (Re-Employment Benefits Eligibility Evaluation, January 15, 2015).

5) On February 4, 2015, the RBA's office informed Employee he was eligible for reemployment benefits based on Sakata's report. The letter directed Employee to select a reemployment specialist to develop a plan, if he did not choose to receive a job dislocation benefit, within 30 days pursuant to statute. (RBA-designee letter, February 4, 2015).

6) On March 4, 2015, Employee presented at the Division's office and selected Sakata to prepare a reemployment plan. (Election to Receive Reemployment Benefits or Waive Reemployment Benefits and Receive a Job Dislocation Benefit Instead, March 4, 2015).

7) On March 26, 2015, the RBA-designee advised Sakata Employee had selected her to prepare a reemployment benefits plan and, since Employer had not objected to her selection, "services may go forward." The designee's letter cited the applicable statute and stated, "within 90 days after the rehabilitation specialist selection . . . the reemployment plan must be formulated and approved." The letter continued, "we will expect to receive a reemployment plan within 90 days of the date of this letter." (RBA-designee letter, March 26, 2015).

8) On June 3, 2015, an attorney from Smith's office wrote former RBA Mark Kemberling inquiring why no plan had been received and more than 60 days had expired since Employee had been found eligible. (Schwarting letter, June 3, 2015).

9) On June 23, 2015, Sakata called the RBA's office to state Employee did not want her communicating with Dr. Wickler. Sakata had received a note from Employee's family practitioner saying to stop the reemployment benefits process because Employee needed surgery. (Reemployment, Communications Tabs, Agency File, June 23, 2015).

10) On November 20, 2015, Employer's adjuster called the RBA's office to state that no rehabilitation plan had been received. (Reemployment, Communications Tabs, Agency File, November 20, 2015).

11) On January 13, 2016, Employer's attorney called the RBA-designee and requested an informal reemployment conference (Informal Conference) to move plan development forward. (Reemployment, Communications Tabs, Agency File, January 13, 2016).

12) On February 5, 2016, Kemberling held an informal conference. His comments in the agency file that same date conform to his February 16, 2016 informal conference summary. (Reemployment, Informal Conference Held tabs, Agency File, February 5, 2016).

13) On February 16, 2016, Kemberling sent the parties the following summary:

> **Issues**:
> The conference was scheduled to discuss moving forward with reemployment benefit plan development.
>
> **Discussions**:
> The employer expressed their opinion that reemployment benefit plan development should proceed given the go-ahead provided by Drs. McNamara and Chandler. Dr. Thiele, the employee's physician, noted he did not know those physicians' rationales and expressed concern that it is premature to move forward vocationally given future surgery(ies) and the employee will not be medically stable for some time.
>
> The undersigned noted the benefits to the employee of moving forward with plan development. The first benefit, of a psychological nature, is to help the employee look forward to his vocational future, providing distraction from dealing only with medical issues, and maintaining a sense of purpose. It is known that the longer an injured worker is off work, the less likely they are to return to work. The second benefit to the employee is to his financial situation over the long term. It is ideal for the employee to explore his vocational options, develop a plan and complete as much retraining as possible while he recovers and is receiving temporary total disability (TTD) benefits. Once he is medically stable, his permanent partial impairment (PPI) monies, based on his rating, are paid out every two weeks at his TTD rate until they are exhausted. The employee is essentially supporting his reemployment process, in terms of income, out of his PPI monies during that

> period. If the employee finishes the reemployment process prior to exhausting his PPI, the balance is paid to him in a lump sum. After the PPI is exhausted the employee incurs a reduction in benefits because the stipend, paid during the remainder of the reemployment process under .041(k), is only 85.5% of his TTD rate. Further, when the employee is on any of the above benefits, he is not credited with paying into the Social Security system or other retirement plan.
>
> The employee did not disagree with the rehabilitation specialist's assessment that he is a bright, capable individual. It was discussed what she needs from him to be able to develop a plan with him. The undersigned suggested the employee take UAA's placement test on "a good day" to assess his standing in relation to college reading, writing and math. The employee noted his criminal record will impact his vocational options.
>
> Dr. Thiele noted he could see value in the employee having something to look forward to with hope, and beginning the dialogue about his vocational possibilities. Dr. Thiele authorized the employee to do so. The undersigned further noted that the process, especially plan implementation, can be interrupted with documentation of medical necessity and an estimate of when he can resume his participation in the process.
>
> The undersigned noted the employee's average gross hourly wages of $55.26 in the week before his injury - calculated from his straight time, overtime, and cash paid in lieu of fringe benefits - leads to a remunerative wage of $33.16 per hour. That figure could vary somewhat depending on the period included in the calculation, but it is clear the employee will have a high remunerative wage.
>
> The undersigned pointed out that the parties can agree on a plan of their choosing and can choose to be flexible if they wish, especially in regard to taking a lighter load at the outset of an academic plan.
>
> **Action**:
> The employee and the specialist agreed to arrange resuming plan development after the conference. The specialist requested that Dr. Thiele document his authorization for the employee to move forward with plan development. (Alaska Workers Compensation Board Informal Rehabilitation Conference Summary, February 16, 2016).

14) On February 24, 2016, Sakata called the RBA's office to state Employee had canceled his appointment to go to the college for testing. She asked if Dr. Thiele had put "his permission to move forward in writing." The designee advised he had not, but his permission was not needed because the process can stop if a physician documents a medical need and predicts when he can resume reemployment activities. The designee suggested Sakata call Barbara Williams,

Employee's former non-attorney representative, to advise her what Employee was telling Sakata. (Reemployment, Communications, Phone Call tabs, Agency File, February 24, 2016).

15) On February 25, 2016, Employer wrote Kemberling thanking him for the Informal Conference "at the conclusion of which we agreed that planning activities could move forward." The letter further stated Employee had nonetheless informed Sakata he did not want to do any reemployment plan activity until his "medical treatment issues were resolved." Employer considered this contrary to what was discussed at the Informal Conference and considered it noncooperation with the reemployment process. It requested another Informal Conference. (Schwarting letter, February 25, 2016).

16) On February 25, 2016, Employee wrote Kemberling and disagreed with most everything Kemberling said in his February 16, 2016 Informal Conference summary. He suggested no weight should be given to Drs. McNamara's or Chandler's opinions because they provided no rationale for their opinions that Employee could begin reemployment plan development. Employee contended Employer's letter to Dr. Chandler was misleading and "falsely" stated he had initiated the reemployment process and had recently been found eligible. He also took issue with the adjuster's letter to Dr. McNamara referencing an employer's medical evaluation (EME). Employee denied he ever participated in the reemployment process and stated the adjuster's contrary assertion was "false." He contended he was not done getting treatment and was not medically stable. Employee contended he was not able to "look forward" as Kemberling suggested because he was dealing with his immediate medical issues. He disputed Kemberling's finding that Dr. Thiele authorized him to start a dialogue about vocational possibilities and contended Dr. Thiele did not state he was ready to start a plan or that a plan can be interrupted for medical necessity. Employee objected to Kemberling's "wording," and contended he had never agreed to anything other than "possibly beginning" to discuss future jobs "after" recovery from upcoming surgeries. He admitted he had never started any plan development and contended Dr. Thiele never stated he was authorized to move forward with plan development. Employee contended Dr. Thiele said, "the exact opposite," that is, he was not medically ready to develop a plan until he recovered sufficiently from his injuries. He asked Kemberling to suspend any plan development until he could obtain an SIME. Employee contended it was a "full-time job" dealing with Employer's controversions and contended even EME physician Swanson stated it made no sense to develop a reemployment plan until Employee's surgeries were all done. He contended Dr. McNamara

initially said he could not determine reemployment limitations until Employee recovered from surgery, and Employee implied unspecified "collusion" between Dr. McNamara and the adjuster regarding Dr. McNamara's bill resulted in him changing his opinion. Employee questioned the adjuster's motives for wanting him to "hurry" through plan development before his medical conditions had been properly treated and he had recovered. He noted, "this process is supposed to be fast, fair and efficient for the parties involved," and contended Employer had not been fair with its dealings with him and his providers. (Employee letter, February 25, 2016).

17) On July 25, 2016, Employee filed a claim for permanent total disability (PTD), medical and related transportation costs, penalty, interest, and a finding of unfair or frivolous controversion. He claimed severe stress, anxiety, and posttraumatic stress disorder (PTSD) episodes related to the June 6, 2014 work injury. (Workers' Compensation Claim, July 25, 2016).

18) On June 18, 2019, the parties attended a prehearing conference chaired by Wright. Nothing in the prehearing conference summary refers to any mandate that Wright never schedule another written record hearing in this case. However, in the prehearing conference recording Wright stated Ringel told her he would rather not have future hearings set on the written record because Ringel had sent the parties letters in the past seeking information and they had not responded. Ringel thought it would be better if the Board had an opportunity to ask the parties questions. (Prehearing Conference Summary; Prehearing Conference record, June 18, 2019).

19) On July 10, 2019, SIME psychiatrist Ronald Early, PhD, MD, evaluated Employee and reviewed more than 3,300 medical records. Dr. Early opined Employee could work on a full-time basis regarding his mental health impairment, with certain restrictions: He should avoid highly stressful environments such as working around large numbers of people or in areas with high stimulation levels; no work around construction; no extensive driving to or from work; and no driving as part of employment. He was asked:

> (19) Is [Mr.] McDonald capable of participating in vocational retraining if necessary on a full-time basis?
>
> *Answer: Yes, Mr. McDonald could participate in vocational retraining necessary on a full-time basis with the restrictions identified*. . . . (Early report, July 10, 2019; italics in original).

20) On July 12, 2019, SIME orthopedic surgeon Sidney Levine, MD, evaluated Employee and reviewed over 3,300 medical records. He was asked:

> **Question #24:**
>
> Is Mr. McDonald capable of participating in vocational retraining, if necessary, on a full-time basis?
>
> **Answer #24:**
>
> Yes, from an orthopedic standpoint. (Levine report, July 12, 2019; boldface in original).

21) At some point post-injury, Employee filed a civil lawsuit against third parties to obtain pain-and-suffering damages for his various work-related injuries. (*McDonald v. Architects Alaska, Inc. & BBFM Engineers, Inc.*, Superior Court Case No. 3AN-16-07620 Civil).

22) On August 13, 2019, the Superior Court in *McDonald*, Superior Court Case No. 3AN-16-07620 Civil, ordered:

> On July 12, 2019 Defendant BBFM Engineers, Inc. (BBFM) moved to enforce the agreed-upon walk-away settlement with Plaintiff Eric McDonald (Plaintiff) and alternatively moved to extend the deadline for dispositive motion practice (footnote omitted). Defendant Architect Alaska, Inc. (AAI) later joined in BBFM's motion (footnote omitted).
>
> This court, having considered the evidence, communications, and affidavits submitted by Defendant Architects Alaska, Inc. and Defendant BBFM Engineers, Inc. and all materials, if any, submitted by Plaintiff Eric McDonald, finds the existence of a valid offer encompassing all essential terms, unequivocal acceptance by the offerees, consideration, and an intent to be bound. As such, this court is required to enforce the settlement agreement between all named parties and grants BBFM's motion to enforce a settlement agreement.
>
> IT IS HEREBY ORDERED that this action shall be dismissed with prejudice, each party to bear its own costs and attorney fees. (Order Granting Motion to Enforce Settlement Agreement, August 13, 2019).

23) On August 16, 2019, Employee requested the right to cross-examine Dr. Early on his SIME report. (Request for Cross-Examination, August 16, 2019).

24) On September 4, 2019, Smith wrote the RBA asking that Employee's retraining plan development be re-initiated. (Smith letter, September 4, 2019).

25) On October 15, 2019, the RBA's office sent Sakata a letter advising Employee's plan "has been in a suspended status for some time and the employer's attorney on September 10, 2019 asks

that Mr. McDonald now participate in his plan." Sakata was directed to submit an update on or before October 31, 2019. (RBA-designee letter, October 15, 2019).

26) On October 17, 2019, Sakata called the RBA's office to state she was not able to continue with plan development in Employee's case and wanted to be taken off. (Reemployment, Communications, Phone Call tabs, agency file, October 17, 2019).

27) On October 21, 2019, Employee responded to the RBA's office about recent correspondence regarding his reemployment process. He contended Sakata provided "misleading information" to the RBA. Employee contended the RBA's office was trying to "coerce" him into a reemployment plan before he was finished with his surgeries and called such an attempt "idiotic." He reiterated his contentions that Employer had been "criminal" and committed "fraud" in his case. Employee contended it was not a matter of "whether the board has committed criminal acts of deception and fraud but how much and when." He stated:

> So you go on, write your little letters. I am informing you that I intend to pursue permanent disability through the workers' compensation system. (Employee letter, October 21, 2019).

28) On October 2, 2020, Employee contended Employer "failed to assert" its "lien held over the proceedings or with third party liability insurance company, yet is asking the board for a windfall by dismissing EE's entire claim." (Hearing Brief, October 2, 2020).

29) On October 6, 2020, the parties had a hearing on Employee's September 8, 2020 petition to continue the October 21, 2020 hearing set on Employer's petition to dismiss his claims based on the August 13, 2019 Court order that enforced "the settlement agreement between all named parties" and granted one defendant's motion to enforce "a settlement agreement" and "dismissed" his third-party lawsuit. Employee primarily contended the Superior Court should be allowed to rule on his request to vacate the August 13, 2019 Court order before the Board acted on the petition to dismiss his claim. His secondary contention was that Employer had failed to itemize and assert its alleged lien. In respect to Employer's lien on any third-party recovery, Employee testified, he "did not compromise with the third-party defendants in any way." He cited case law from New York stating a "judicial determination" is not the same as a compromise. Employee testified the Superior Court did not dismiss his case because they found there was a settlement but dismissed it because he failed to oppose the motion to dismiss timely. He further testified there was no money exchanged as part of the alleged settlement agreement but acknowledged his extensive legal

research showed "there doesn't need to be any money exchanged if the employee dismisses the case without the employer's permission." Employee testified "they [Employer] do have a lien," which he estimated was between "$400,000 to $500,000" for "meaningful care." No evidence was presented supporting or disproving Employee's contentions about Employer's lien. (Hearing record, October 6, 2020).

30) On October 7, 2020, *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 20-0092 (October 7, 2020), authored by panel members Soule, Faulkner and Shaw, made the following relevant factual findings and conclusions: A different Superior Court judge had reviewed Employee's motion to vacate the first judge's August 13, 2019 order dismissing his third-party case. *McDonald*, AWCB Dec. No. 20-0092 further found:

> 8) On October 5, 2020, the court in Employee's civil action issued in brief summary the following:
>
> . . . Whether a settlement agreement existed between the parties requires further consideration.
> . . . .
>
> 9) The court did not rule on Employee's September 23, 2020 motion for an injunction and order staying the board's October 21, 2020 hearing and is workers' compensation case. (Observations).
> . . . .
>
> 11) Employee testified Employer has a statutory lien worth at least $400,000; he also testified he received no money from the third parties in the civil action as result of the alleged "settlement," which the superior court enforced as the basis to dismiss his civil action. (Employee) (*McDonald*, AWCB Dec. No. 20-0092 (October 7, 2020).

In its analysis, decision 20-0092 noted Employee's July 2020 interest in going to hearing on Employer's petition to dismiss his claim, so a designee scheduled a hearing for October 21, 2020. He subsequently requested a continuance, which is "not favored and will not be routinely granted." The decision found Employee failed to provide a current basis to continue the hearing under the applicable regulations. Employee also contended he needed more time to provide the Board with additional "evidence or arguments" under the continuance regulation upon which he relied. Addressing his "additional evidence or arguments" contention, Decision 20-0092 stated:

> Unless and until the superior court vacates its existing order dismissing Employee's third-party lawsuit, relevant "evidence or arguments" for the October 21, 2020 hearing include: (1) Does Employer have a workers' compensation lien under §015(g), (i), and if so how much is it? This fact was proven by Employee's testimony at hearing; (2) Did Employee or his agents compromise with third parties in a civil action for an amount less than the workers' compensation lien under §015(h)? These facts were determined in the superior court's existing order, which enforced the settlement agreement, and through Employee's testimony stating he got no money from the compromise; and (3) Did Employer provide written approval for the compromise under §015(h)? This fact will need to be found at the October 21, 2020 hearing. . . . (*McDonald*, AWCB Dec. No. 20-0092).

McDonald, AWCB Dec. No. 20-0092, with one member dissenting, declined to continue the October 21, 2020 hearing. (*McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 20-0092 (October 7, 2020)).

31) On October 20, 2020, the Superior Court issued an order in Employee's third-party case stating, "Therefore, it is still an open question as to whether a settlement agreement existed between the parties." The Court was concurrently reviewing the parties' briefs on that issue. Accordingly, the Court ordered, "The WC board is hereby enjoined from holding the WC hearing until such time as this Court issues its ruling on whether a settlement agreement exists in this case." (Order Granting Plaintiff's Request for Injunction to Stay Workers Compensation October 21, 2020 Hearing, October 20, 2020).

32) On January 25, 2021, the Superior Court granted Employee's motion to vacate the prior judge's August 13, 2019 decision enforcing the settlement agreement. (Order Granting Motion to Vacate 8-13- 2019 Decision Enforcing Settlement Agreement, January 25, 2021).

33) On September 2, 2021 Employee told PA-C Greg Wilkinson he had right shoulder surgery planned "next month." (Wilkinson report, September 2, 2021).

34) On September 29, 2021, Employee told PA-C Wilkinson his right shoulder surgery was scheduled for October 29, 2021. (Wilkinson report, September 29, 2021).

35) Employee did not have right shoulder surgery in October 2021. The medical records in his agency file do not clearly state why. (Agency file; observations).

36) On November 1, 2021, Employer again asked the RBA to resume Employee's retraining plan development. (Smith letter, November 1, 2021).

37) On November 2, 2021, Employee told his physician he had right shoulder surgery scheduled for December 27, 2021. (Thiele report, November 2, 2021).

38) On November 5, 2021, current RBA Stacy Niwa advised Employer that she could not move forward with its request to restart Employee's reemployment process without a Board order. (Niwa letter, November 5, 2021).

39) On December 8, 2021, Employer petitioned for a hearing to address re-initiating Employee's retraining process. (Petition, December 8, 2021).

40) On December 13, 2021, the designee provided various hearing dates on which the Board could hear and decide Employer's request to restart the reemployment process. The designee clarified, "This is the only issue that will be heard." (Wright letter, December 13, 2021).

41) On December 14, 2021, Employee told Steven Johnson, MD, things were going "mostly okay," but he had a dental implant removed and replaced but the new had fallen out. Dr. Johnson recorded Employee was "slated for surgery on 12/23 on his right shoulder" in California. (Johnson report, December 14, 2021).

42) On December 27, 2021, Employee told the St. Mary's Hospital emergency room he had been suffering for "30 days" with diarrhea. His right shoulder surgery had been canceled due to a choleric-type infection. (St. Mary's Hospital report, December 27, 2021).

43) On December 27, 2021, the designee corrected an error in her December 13, 2021 letter and asked Employee to advise her no later than December 30, 2021, the dates he would be available; she advised him that if he did not respond, the January 25, 2022 hearing date would be selected. (Wright letter, December 27, 2021).

44) On December 30, 2021, Dr. Thiele said Employee had clearance for surgery, but it had been canceled because he had infectious gastroenteritis. (Thiele report, December 30, 2021).

45) On January 10, 2022, the Division served notice on the parties that a hearing on January 25, 2022, would address only Employer's request for an order restarting Employee's reemployment benefits process. (Hearing Notice, January 10, 2022).

46) On January 10, 2022, Employee sent emails to Smith, the Director, and the Commissioner stating he was not available for the January 25, 2022 hearing because he was going to be having surgery and "at my doctors at the exact time of the hearing." He objected to the lack of a prehearing conference or formal hearing request from Employer and contended the designee set the hearing even though he had already informed her that he would not be available because he would be out of state having surgery. (Employee's emails, January 10, 2022).

47) At some point prior to sending these above-referenced emails, Employee changed his email address to colbyisascumbag@gmail.com. This email name caused the Division's firewall to send emails referencing that address from Employee to "junk mail," which delayed receipt of some of his emails. Upon learning this, Employee changed his email address and resent his emails beginning December 30, 2021. (Observations; Employee email, January 13, 2022).

48) On January 13, 2022, Employee notified the Board he was not available for "at least" December 2021 through April 2022, depending on his recovery, as he was "out of state for right shoulder surgery." He asked the Board to postpone all proceedings until he was able to recover from his shoulder surgery, return home and was cleared by his doctor. (Notice of Unavailability, December 30, 2021).

49) On January 13, 2022, Employee expanded on his reasons for opposing a hearing on Employer's request to restart reemployment processes. These included, providing hearing dates for a hearing that had never had a prehearing conference and no Affidavit of Readiness for Hearing for Employee to oppose. He was "out of state" and needed several more surgeries. Employee contended Smith committed "criminal acts" in respect to the SIME, and Employee's doctors had not changed their opinions regarding reemployment. He objected to the designee setting a hearing on Smith's petition when Employee had not been given a hearing on his various pleadings. Employee stated, "I'm in the middle of getting shoulder surgery." He accused Smith, and past and current Division employees including former Workers' Compensation Officer Sue Reishus-O'Brien, former Division Director Grey Mitchell, Faulkner, Soule and Wright, of "fraud," "collusion" and "criminal acts." He also objected to a hearing on Employer's reemployment petition before his claim for permanent disability was heard. Employee contended "I will be out of state." He continued, "I've had the surgery scheduled for a long time. Colby knows all about it. I'm not available and a reemployment hearing at this time is premature." (Employee email, January 13, 2022).

50) On January 18, 2022, Employer stipulated to continue the January 25, 2022 hearing, and it was continued. (Hearing Details, Comments Tabs, January 18, 2022).

51) On January 25, 2022, Kenneth Akizuki, MD, said Employee was medically cleared for right shoulder surgery. (Akizuki report, January 25, 2022).

52) On February 7, 2022, Employer asked for a hearing on its December 8, 2021 petition. (Amended Affidavit of Readiness for Hearing, February 7, 2022).

53) Employee's agency file does not include an opposition to Employer's February 7, 2022 Affidavit of Readiness for Hearing on its December 8, 2021 petition. (Agency file).

54) On March 11, 2022, the parties appeared telephonically at a prehearing conference to set a written record hearing on Employer's December 8, 2021 petition. Given RBA Niwa's November 5, 2021 letter, Employer wanted a hearing to address restarting Employee's vocational retraining process. The designee stated the law required a hearing be scheduled within 60 days. She reviewed Employee's opposition and noted he contended his injuries should be determined compensable and his PTD claim should be heard prior to hearing on a reemployment issue. Employee said he did not know the purpose for the conference. He further contended various individuals had committed "fraud" and those issues should be heard prior to Employer's reemployment petition. Employee opposed a hearing without a panel including Board members from Labor and Industry. He contended he was not in "a good position" to deal with a hearing because his first grandchild was born recently and had medical issues requiring a life-flight from Homer to Anchorage, making his significant other Heather Johnson unavailable. Employee added he had recently filed a brief before the Supreme Court and was uncertain if he would have to "return to Alaska" to attend oral arguments or if he could participate remotely. He was twice asked if his surgery had been scheduled and Employee stated it had not for various reasons, but all he had to do was schedule it and it could probably occur in March or early April 2022. Employee stated he was "stressed out" and "overwhelmed." Smith requested a written record hearing. The designee explained a written record hearing would make it easy to ensure two Board members were included since they would not need to be physically present to participate. Employee contended he had heard "a rumor" that Griffin & Smith represented the State of Alaska and the Workers' Compensation Board. Given that understanding, he opposed moving forward with Smith representing Employer presumably for fear Smith would improperly influence the decision. Although the recording is difficult to hear, when Smith asked Employee to carefully articulate his accusation against him and provide proof, Employee said, "Fuck you, Colby; . . . I'm not going to take your fucking shit; fuck you, Colby." Employee immediately terminated his telephonic participation in the conference. The designee scheduled a written record hearing for May 10, 2022, to give Employee sufficient time to deal with his grandson's issues and his expected surgery. In her prehearing conference summary, the designee ordered the parties to file evidence for the hearing on or before April 20, 2022, and any hearing briefs on or before May 3, 2022. Smith stated

he does not represent the Board, but his office does have a contract with the Attorney General's office to help with excess workers' compensation and tort claims made against the State of Alaska. Smith stated he does not handle these cases personally; attorney Schwarting handles them. He added he does not represent any Board member. (Record; Prehearing Conference Summary, March 11, 2022).

55) At the March 11, 2022 prehearing conference, Employee objected to a hearing on Employer's petition on the grounds stated above but did not object to the written record hearing format. (Record; Prehearing Conference Summary, March 11, 2022).

56) On March 14, 2022, the Division served the March 11, 2022 conference summary on Employee. It advised him he had 10 days to ask the designee to modify or amend the summary to correct a misstatement of fact or a prehearing determination under 8 AAC 45.065(d). (Prehearing Conference Summary, March 11, 2022).

57) Employee's agency file does not include any timely objection from him to the March 11, 2022 conference summary under 8 AAC 45.065(d). (Agency file).

58) On March 14, 2022, the Division also served a hearing notice on Employee stating it was a "WRITTEN RECORD HEARING NOTICE," and said the matter would be decided based on documents in the case file and the parties' written arguments. (Hearing Notice, March 14, 2022).

59) On March 31, 2022, Employee told Dr. Thiele he had right shoulder surgery scheduled for December 28, 2021 but held off due to COVID. (Thiele report, March 31, 2022).

60) On May 3, 2022, Employer timely filed its hearing brief and contended Employee's approximately 250 petitions and claims filed with the Board, including many he actively litigated at hearings, and his pleadings with the Superior and Alaska Supreme Court involving a third-party matter, show his demonstrated ability to participate in vocational retraining efforts. It contended it withdrew its April 15, 2020 controversion on January 25, 2021, paid past TTD benefits, a penalty and interest and continues to pay Employee TTD benefits. Employer cited Dr. Thiele's unexplained opinion reversal following the February 5, 2016 Informal Conference and Drs. Early and Levine's SIME opinions stating Employee could return to work and participate in vocational retraining full-time with some restrictions. It cited its continued efforts to restart the vocational reemployment process and the RBA's letter advising the Board had to first order her to do so. Employer further contended it preauthorized bilateral shoulder and knee surgery, but Employee's last shoulder surgery occurred in December 2019. It contrasted this with Dr. Thiele's 2016 opinion

that Employee should not participate in retraining until all surgeries are complete and contended "that is not consistent with Alaska law." Employer contended the Board should order the RBA to reinitiate Employee's retraining process. (Employer's Hearing Brief, May 3, 2022).

61) Employee did not timely file a hearing brief and may not have filed one at all unless his May 6, 2022 pleading was intended to be his hearing brief. (Agency file).

62) On May 6, 2022, at 3:33 AM, Employee filed a "5-5-22" pleading opposing the May 10, 2022 written record hearing and reiterated his March 11, 2022 contentions. He contended Smith should not be allowed to participate because he represents the Board and Faulkner, creating "an extreme and unfair conflict of interest," and "colluded" with the Board repeatedly and with two defendants in a third-party matter. Employee objected to Faulkner because she "clearly side[d] with William Soule," presumably in *McDonald v. Rock & Dirt Environmental, Inc*., AWCB Dec. No. 20-0092 (October 7, 2020). (Opposition to Employer and SOA Counsel Colby Smith Participation, May 5, 2022).

63) Employee also raised new concerns not discussed in the prehearing conference and contended Ringel directed Wright to not schedule any written record hearings, as she stated in a June 18, 2019 prehearing conference, and Wright ignored this direction. Employee contended he required witnesses concerning his reemployment status. He contended Employer repeatedly tried to stop him from getting care including getting him fired from clinics, having the police called on him, canceling medical appointments, denying care and "lying about the status of the claim over and over." Employee further contended panel members are not physicians and since the record has been "spoiled," his physician should be able to testify. He contended an April 19, 2022 "sinus lift" surgery prevented him from preparing for hearing as did his recurrent pain, feeling his heartbeat at his surgery site, general unwellness, a "failed implant," and his shoulder "seizing." Employee contended the Board "refused to allow" him to depose EME doctors, Reishus-O'Brien "colluded" with Smith to "falsify" SIME information, Smith "criminally influenced" SIME doctors and the Board refused to do anything about it. (Opposition to Employer and SOA Counsel Colby Smith Participation, May 5, 2022).

64) Employee acknowledged the law prevents him from being considered permanently and totally disabled so long as he is involved in the rehabilitation process. But he still contended his permanent total disability claim must be heard before Employer's reemployment petition. (Opposition to Employer and SOA Counsel Colby Smith Participation, May 5, 2022).

65) Employee contended Soule was "deceptive" in a prior Board ruling, made "false statements" and denied reconsideration "without explanation," and Wright "repeatedly and purposely falsified" the "Alaska Workers' Compensation Act" and denied him a right to numerous hearings, "purposely altered" records and offered various other allegations against her. Specifically in reference to Soule, he stated: "Soule purposely made findings which contradicted both the Superior Court record and the hearing record itself." Moreover, Employee stated in respect to Soule:

> He falsely stated the Court had found McDonald had agreed to settle, knowing they had recently changed this finding, which was the sole purpose of this hearing. He found that McDonald had "admitted" that he had settled the third party case, which is untrue and contradicted by the record. Soule's finding also had the effect of rendering the upcoming hearing meaningless as he himself determined in his decision that McDonald had agreed to settle his case, a finding neither proven or supported by facts or the record. When McDonald timely requested reconsideration, Soule refused without explanation. (Opposition to Employer and SOA Counsel Colby Smith Participation, May 5, 2022).

66) Employee cited incorrect information about fraud investigations he received from former Hearing Officer Henry Tashjian, who has not been employed by the Division for years. Employee criticized Ringel who has not worked for the Division for over a year and contended he "committed repeated acts of deception and bias" throughout his involvement in the case. He contended Ringel "falsified" due dates and Employee's "evidence," ignored applicable statutes and regulations and discriminated against him based on his disabilities. Employee contended Employer falsely stated he failed to follow through on surgery based on a note from the surgeon that stated Employee had not contacted the surgeon concerning rescheduling it. He faulted Employer's alleged failure to reimburse his travel expenses and disputed Employer's contention that he demonstrated an ability to not only participate in vocational reemployment activities, but to also work full-time. (Opposition to Employer and SOA Counsel Colby Smith Participation, May 5, 2022).

67) Employee asked that the written record hearing be rescheduled to allow for witnesses and contended the Board should order Employer to stop "harassing" him and "let him get his surgeries." He contended the case should be "tolled" until he is capable of litigating. Attached to his untimely brief was Dr. Thiele's May 5, 2022 "To Whom It May Concern" chart note stating:

> Eric McDonald has been a patient of mine since 2 walls collapsed on him on 06/13/2014. He continues to be treated for his injuries from that day. He was scheduled to have surgery in California with Dr. Akizuki for his right shoulder on

> 12/27/2021, but had to cancel for reasons out of his control, including severe gastrointestinal flu, severe psoriatic flare from stress, and covid infection, back to back, prior to the scheduled surgery (see my visit notes). He just had sinus lift surgery on 04/19/22 from which he is still recovering. He still needs surgeries on the right shoulder, right knee, and possibly the elbows. He is not able to work nor is he cleared for any surgeries at this time. Workers Compensation is trying to close his case and retrain him for another job. In my opinion, they have not yet fulfilled their obligation to him for full recovery of his injuries. It is logically and medically foolish to think he could be trained for work until he has reached medical stability with his injuries, which he clearly has not. I am not the only provider that feels this way (see consults from Dr. Akizuki and others). This man is lucky to be alive. He is thankful for that, but now has to deal with all the treated and untreated medical problems remaining for the rest of his life. He is just asking for integrity from the insurance company to finish his recovery, reach medical stability, and then job retraining so he may live as close to a productive life as he can. (Opposition To Employer and SOA Counsel Colby Smith Participation, May 6, 2022; attached Thiele report, May 5, 2022).

68) On May 6, 2022, Employer timely filed a request to cross-examine Dr. Thiele on his May 5, 2022 report. (Request for Cross-Examination, May 6, 2022).

69) On May 6, 2022, at 3:27 PM, Faulkner disclosed to Soule that Employer's adjuster, Northern Adjusters, previously adjusted claims for her company but had not done so for about two years. She noted a "screening" for a potential conflict "last fall" when Employee's significant other Heather Johnson complained about her sitting on a panel. Nonetheless, Faulkner said she could be fair and impartial in this case. Soule at 4:12 PM the same day sent the parties an email with Faulkner's disclosure and advised the hearing panel consisted of him, and Board members Faulkner and Shaw. Soule stated:

> If any party has an objection to any panel member, they must follow the applicable statutes and regulations. Since the Alaska Workers' Compensation Act does not expressly address panel members' potential conflicts-of-interest, the Administrative Procedures Act (APA) applies to this issue and requires. . . .

Soule cited the APA (AS 44.62.450), 8 AAC 45.105 and 8 AAC 45.106 in their entirety. He highlighted in yellow the requirement that a party must file an affidavit before the taking of evidence at a hearing stating with particularity the grounds upon which the party claimed a fair and impartial hearing could not be accorded. Soule highlighted a party's right to file a petition objecting to the panel member, including a brief outline of the reasons, demonstrated by "clear and convincing evidence," why the panel member has a substantial and material conflict of interest,

showed actual bias or prejudgment, and has a substantial and material personal or financial interest in the case. (Soule email, May 6, 2022).

70) Given his contentions in his May 5, 2022 pleading, filed with the Division at 3:22 AM on May 6, 2022, Employee either knew or suspected Soule and Faulkner would be on his hearing panel because he objected to them participating before Faulkner even disclosed her potential conflict to Soule at 3:27 PM and he sent the parties an email identifying the panel members at 4:12 PM on May 6, 2022. (Observations and inferences drawn from the above).

71) On May 6, 2022, at 5:24 PM Employee responded to Soule's May 6, 2022 email:

> The fact that this information was NOT disclosed to me before the due date for the brief left me no opportunity to oppose.
>
> I oppose the hearing on the record, which does not allow for a fair process.
>
> And Colby still represents Sarah, believe me.
>
> And he represents the board [for] that matter. I don't see Colby making disclosures.
>
> This is a complete conflict of interest.
>
> I also oppose YOU as the officer handling this after you LIED about me saying I accepted a settlement and the superior court findings, and then refusing to reconsider. You are dishonest. Do you even care that the court OVERTURNED the dismissal?
>
> I oppose you being involved.
>
> I will be filing an opposition which shows that I was NEVER informed [] before the due date. (Employee email, May 6, 2022)

72) At the May 10, 2022 written record hearing, Faulkner confirmed she had never worked with Smith, and again said she could be fair and impartial. The panel determined Employee provided no petition or affidavit supporting his allegations and no clear and convincing evidence that Faulkner or Soule had a substantial and material conflict of interest, showed actual bias or prejudgment or had a substantial and material personal or financial interest in the outcome of this case. Soule and Shaw declined to disqualify Faulkner; Faulkner and Shaw declined to disqualify Soule. The panel determined it had no authority to disqualify Smith. It then decided Employer's petition on its merits as discussed in the analysis below. (Written record hearing discussions).

73) On May 12, 2022, Employee filed an untimely, post-hearing affidavit but still no petition. (Agency file).

74) Employee has filed approximately 200 petitions and claims in this case. (Agency file).

75) Any party may call or email the Division at any time prior to a scheduled hearing and ask Division staff to tell them who will be sitting on their hearing panel. If panel members are empaneled, Division staff will inform the inquiring party. If the panel members have not yet been empaneled, Division staff will advise the inquirer to inquire later when the panel is empaneled. (Experience, observations).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted...to ensure...quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to...employers. . . .
> . . . .
>
> (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).

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

> (h) Within 90 days after the rehabilitation specialist's selection under (g) of this section, the reemployment plan must be formulated and approved. The reemployment plan must require continuous participation by the employee and must maximize the usage of the employee's transferable skills. The reemployment plan must include at least the following:
>
> (1) a determination of the occupational goal in the labor market;
> (2) an inventory of the employee's technical skills, transferable skills, physical and intellectual capabilities, academic achievement, emotional condition, and family support;
> (3) a plan to acquire the occupational skills to be employable;

> (4) the cost estimate of the reemployment plan, including provider fees; and the cost of tuition, books, tools, and supplies, transportation, temporary lodging, or job modification devices;
> (5) the estimated length of time that the plan will take;
> (6) the date that the plan will commence;
> (7) the estimated time of medical stability as predicted by a treating physician or by a physician who has examined the employee at the request of the employer or the board, or by referral of the treating physician;
> (8) a detailed description and plan schedule;
> (9) a finding by the rehabilitation specialist that the inventory under (2) of this subsection indicates that the employee can be reasonably expected to satisfactorily complete the plan and perform in a new occupation within the time and cost limitations of the plan; and
> (10) a provision requiring that, after a person has been assigned to perform medical management services for an injured employee, the person shall send written notice to the employee, the employer, and the employee's physician explaining in what capacity the person is employed, whom the person represents, and the scope of the services to be provided.
>
> . . . .
>
> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employees temporary total disability rate. If the employees permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent . . . partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until . . . permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23/30155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. . . .

In *Wilson v. Flying Tiger Line, Inc*., AWCB Dec. No. 90-0055 **(**March 23, 1990), a reemployment specialist testified "the lack of medical stability restricted his ability to prepare a reemployment

benefits plan" and doing so would violate his ethical canons. The specialist testified the injured worker's physical capacities could not be definitively determined "pending the recovery from additional surgery" and said no physician had found the claimant's condition medically stable. The insurer agreed with the employee's position that the specialist needed more time to complete a reemployment benefits plan. However, the Board in *Wilson* stated:

> We must disagree with the insurer's contention. It is true that AS 23.30.041 does not have an express prohibition against a "waiver" of the time requirements sought by the insurer. However, that absence is in no way surprising given the express requirement that reemployment benefits plans "must be formulated and approved" within 90 days of the rehabilitation specialist's selection. AS 23.30.041(h). Moreover, one element the plan "must include" is the "estimated time of medical stability as predicted." AS 23.30.041(h) and (h)(7) (emphasis in original).
>
> We find the 90-day period for reemployment benefits plan completion an express statutory requirement which we are not empowered to "waive" or otherwise circumvent. The asserted basis for the additional time, the need to attain medical stability, is directly contrary to the statute's requirement for estimates of predicted stability. We conclude that no legal basis exists for the relief the insurer seeks.

In *Witbeck v. Superstructures, Inc*., AWCAC Dec. No. 014 (July 13, 2006) n. 17, the Commission stated, "thus, an employee need not be medically stable to begin reemployment benefits," and said numerous §041 subsections "also assume reemployment planning begins before medical stability." In *Griffiths v. Andy's Body & Frame, Inc*., AWCAC Dec. No. 119 (October 27, 2009), at 19-21, the Commission held:

> The deadlines provided in the statute reflect the Legislature's intent that the period between a referral for eligibility evaluation and eligibility determination would not exceed 74 days; between a finding of eligibility and submission of an accepted plan should not consume more than 129 days; and, between submission of an unaccepted plan and administrator approval or denial would not exceed 14 days. These statutory periods total of 217 days (about 30 weeks) between referral and plan approval (citation omitted). While the Legislature did not impose a specific limit on pre-plan stipend, these time periods reflect the Legislature's judgment of the number of days that make up a reasonable time to reach plan approval Such a period is consistent with the recognized legislative goal of achieving reemployment in the shortest possible time.
>
> A completely open-ended entitlement to §.041(k) stipend would defeat the legitimate legislative goals of returning employees to the workforce as quickly as possible and reducing the costs of rehabilitation to employers by creating an

> incentive for employees to drag out the pre-plan reemployment process. A reasonable limit based on the statutory time periods set forth in AS 23.30.041(k) avoids the absurd result that an employee receives more in pre-plan stipend than he or she may be entitled to receive during an approved plan (citation omitted). An unlimited right to §.041(k) stipend would undermine an important purpose of the statute, reducing predictability, increasing costs, and lessening the probability of a quick return to work.
>
> The commission finds unpersuasive Griffiths's arguments that the statutory time periods in AS 23.30.041 should be disregarded.
>
> Thus, including the initial 30 days the administrator has to respond to a request for benefits (citation omitted), the commission holds that the outside limit of a reasonable stipend award for the gap period before a plan is accepted or approved is 247 days. The commission cautions that employees are not *entitled* to 247 days of pre-plan stipend. Rather, the commission concludes that, as a matter of law, a board award of pre-plan gap stipend not exceeding 247 days would be considered reasonable if the employee was not eligible for temporary compensation benefits; the employee had exhausted permanent partial impairment benefits prior to the request for benefits (or no impairment rating was yet provided (citation omitted) the employee was vigorously pursuing reemployment benefits as required by AS 23.30.041during the entire 247 days; and, the employer did not unreasonably impede the progress of the evaluation or plan (citation omitted). The commission applies this rule prospectively only.
>
> **AS 23.30.110. Procedure on claims**.(a) . . . the board may hear and determine all questions in respect to the claim.
> . . . .
>
> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. . . . After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

The Act authorizes the Board to hear and determine all questions in a claim including those outside the RBA's "narrow" authority. *Summerville v. Denali Center*, 811 P.2d 1047, 1050 (Alaska 1991).

Binder v. Fairbanks Historical Preservation Foundation, 880 P2.d 117, 120 (Alaska 1994) stated to receive vocational reemployment benefits under the Act, "an eligible injured worker must cooperate with the rehabilitation specialist to formulate a reemployment plan which contains a

variety of information, including the occupational goal of the plan, a detailed schedule for achieving the goal, and estimation of time and cost, and an assessment of the workers skills and capabilities." The Act has statutory time and cost limitations for retraining benefits set forth in §041. If a party agrees to a plan, he agrees to those limitations. *Id*. At 121.

Meek v. Unocal Corp. 914 P.2d 1276 (Alaska 1996) said, "If a lack of education can be overcome through vocational rehabilitation, then a disability that was once 'total' may no longer be so. This is precisely what section .041 aims to do; it's goal is to retrain and educate permanently impaired employees so that they can attain 'remunerative employability.'"

Raris v. The Greek Corner, 911 P.2d 510, 512-13 (Alaska 1996) said allowing an injured worker to avoid a legal requirement of AS 23.30.041 would be contrary to the legislature's stated desire to control costs and workers' compensation premiums:

> Reemployment benefits are not simply an income-replacement vehicle to tide injured workers over until they can resume employment; these benefits are paid contingent on the employee's participation in the development and execution of a reemployment plan. *See* AS 23.30.041(g)–(n). The statute makes it clear that the legislature intended these plans to include employee contact with the rehabilitation specialist, and an opportunity for the employer to monitor the employee's compliance with the plan. *See* AS 23.30.041(n).

Harnish Group, Inc. v. Moore, 160 P.3d 146 (Alaska 2007) stated employers are required to provide additional compensation to workers participating in the reemployment process if permanent partial impairment benefits are exhausted before the plan is completed.

> **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 Board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 44.62.450. Hearings**. . . .

> (c) A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. . . . An agency member may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.

In *Kling v. Norcon, Inc.*, Superior Court Case No. 3AN-92-1232 (September 2, 1993), an injured worker appeared for his hearing against two defendants before a three-member Board panel. The "labor" panel member immediately recused himself, leaving the hearing officer and the "industry" member, a quorum, remaining. The industry panel member disclosed that his company had retained the employer's attorney "for the last five years to do worker compensation cases." He also disclosed that he had "an active case with her at the moment" that was "actually closing up." The industry panel member said he had also retained the law firm representing the second defendant as well. Despite the injured worker's objections at hearing, the industry member refused to step down "claiming that he could be fair." (*Id.* at 2).

The Board had ruled against Kling, and he appealed to the superior court and contended the Board's proceedings had violated his state and federal constitutional right to due process because the industry panel member was allowed to sit on the case despite his acknowledged, ongoing and extensive professional relationship with the employer's attorney. The employer and Board contended disqualification is required only in instances of "actual bias." Since the industry member denied he harbored bias, and because his presence was required by AS 44.62.450(c), which precludes recusal of an agency member "if disqualification would prevent the existence of a quorum qualified to act in a particular case," *Kling* held the Board acted properly to proceed with the hearing with the industry member seated on the panel:

> The court . . . concerned . . . there was at least an appearance of impropriety here, undertook to research additional law. . . . No case directly on point was found. Despite broad language regarding the importance of preserving the "appearance of justice," the opinions in this area rest on the maxim that adjudicators enjoy a presumption that they are unbiased. Only a direct, usually personal and pecuniary interest can operate to rebut the presumption. *See, Schweiker v. McClure*, 45 U.S. 188 (1982); *Sifagaloa v. Bd. of Trustees*, 840 P.2d 367 (Hawaii 1992); *Airline Pilots*

> *Ass'n v. United States Department of Transportation*, 899 F.2d 1230 (D.C. Circ. 1990). No such interest was demonstrated in this case. (*Kling* at 12).

AT & T Alascom v. Orchitt, 161 P.2d 1232, 1246 (Alaska 2007) said:

> Administrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudgment. (Citation omitted). To show hearing officer bias, a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence. (Citation omitted). We conclude that the hearing officer's position as an AFL-CIO vice president is insufficient to show actual or probable bias on its own.
>
> Although the chair ruled against AT & T on some procedural questions, that alone is not sufficient to show a predisposition to find against AT & T. AT & T has made no showing that the hearing officer prejudged any facts in this case or was motivated by actual bias in ruling on procedural issues.

8 AAC 45.065. Prehearings. . . .

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request. . . .

8 AAC 45.070. Hearings. . . .

(b). . . .

> (3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

> (1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and
(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;
(C) a party, a representative of a party, or a material witness becomes ill or dies;
(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
(E) the hearing was set under 8 AAC 45.160(d);
(F) a second independent medical evaluation is required under AS 23.30.095(k);
(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
(I) the parties have agreed to and scheduled mediation;
(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be

offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing; . . . .

8 AAC 45.092. Second independent medical evaluation. . . .

(j) After a party receives an examiner's report, communication with the examiner is limited as follows and must be in accord with this subsection. If a party wants the opportunity to

(1) submit written questions or depose the examiner, the party must

(A) file with the board and serve upon the examiner and all parties, not later than 30 days after receiving the examiner's report, a notice of scheduling a deposition or copies of the written questions; if notice or the written questions are not served in accordance with this paragraph, the party waives the right to question the examiner unless the opposing party gives timely notice of scheduling a deposition or serves written questions; and
(B) initially pay the examiner's charges to respond to the written questions or for being deposed; after a hearing and in accordance with AS 23.30.145 or 23.30.155(d), the charges may be awarded as costs to the prevailing party;

(2) communicate with the examiner regarding the evaluation or report, the party must communicate in writing, serve the other parties with a copy of the written communication at the same time the communication is sent or personally delivered to the examiner, and file a copy of the written communication with the board; or

(3) question the examiner at a hearing, the party must initially pay the examiner's fee for testifying; after a hearing and in accordance with AS 23.30.145 or AS 23.30.155(d), the board will, in its discretion, award the examiner's fee as costs to the prevailing party. . . .

8 AAC 45.105. Code of conduct. (a) Nothing in this section relieves a board member's duty to comply with the provisions of AS 39.52.010-39.52.960 (Alaska Executive Branch Ethics Act) and 9 AAC 52.010-9 AAC 52.990. A board member holds office as a public trust, and an effort to benefit from a personal or financial interest through official action is a violation of that trust. A board member is drawn from society and cannot and should not be without personal and financial interests in the decisions and policies of government. An individual who serves as a board member retains rights to interests of a personal or financial nature. Standards of ethical conduct for a board member distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

. . . .

(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member (1) has a conflict of interest that is substantial and material; or (2) shows actual bias or prejudgment.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member (1) has a personal or financial interest that is substantial and material; or (2) shows actual bias or prejudgment.

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. (a) Before conducting a hearing on a case, each board panel member shall be given the names of the parties involved in the hearing and any other appropriate information necessary for the board panel member to determine if the individual member, or another member, has a conflict of interest as described in 8 AAC 45.105.

(b) If a board panel member determines that the member has a potential conflict of interest, the potential conflict of interest must be disclosed to the board panel chair before the hearing.

(c) Upon notification by a board panel member of potential conflict of interest under (b) of this section, the board panel chair shall request that the board panel member recuse oneself or refer the matter to the remainder of the board panel to determine if recusal is appropriate.

(d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the

> commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

In *Leigh v. Alaska Children's Service*, AWCB Dec. No. 21-0105 (November 22, 2021), a Board hearing panel consisting of Soule and Faulkner addressed the employee's non-attorney representative Heather Johnson's request to disqualify Faulkner from hearing Leigh's case, and to continue the hearing so Johnson could better prepare to represent her. In *Leigh*:

> Johnson testified that [Colby] Smith's law firm (through attorney Schwarting) represents claimant "Twing" who had pending workers' compensation "claims" against Member Faulkner's business, at least one arising from Twing allegedly getting hit by a "backhoe bucket." Johnson testified that Member Faulkner's husband failed to report this injury. Employee further contended and Johnson testified that Member Faulkner did not mention this backhoe bucket incident on her Alaska Public Offices Commission (APOC) report; she provided no evidence that the APOC requires such information. Because Smith's firm represents Member Faulkner's business against a party who had allegedly filed claims against Member Faulkner's business, Employee contended this created a direct conflict of interest requiring Member Faulkner's disqualification. In Johnson's opinion, Member Faulkner may rule against Employee in the instant case just to keep her insurance premiums low, since she allegedly testified at a recent, unspecified meeting that she was trying to "lower premiums." Johnson further said Member Faulkner and Smith's client in this case Susan Daniels are "personal friends," and Daniels bought or leased property from Member Faulkner; Johnson admitted she heard this through "friends." Thus, Employee contended Member Faulkner cannot be impartial. As further support for this contention, Johnson referenced the last hearing in which she participated when Member Faulkner was on the hearing panel; in Johnson's opinion, Member Faulkner was "not impartial" in that case but Johnson provided no specifics. Employee is concerned Member Faulkner will have regular conversations with Smith about cases in which his law firm represents her business and speculated the conversations might drift toward the instant matter. In her view, Member Faulkner could not find Smith "not credible" if she is represented by him. When asked if there were any other grounds supporting Employee's request to disqualify Member Faulkner, Johnson testified Member Faulkner used to be Johnson's Employer but did not specify when, in what capacity or how that prior relationship could affect Member Faulkner's objectivity in this case. She further added as a ground for disqualification -- in Johnson's opinion Member Faulkner was "a big piece of crap." (Johnson).
>
> Before hearing, the chair had reviewed the *Twing* files, took official notice and so advised the parties at hearing that claimant Twing had three cases in the Division's

> database against Member Faulkner's business. However, there were no "claims" filed or pending in any of those three cases. Smith's law firm (through attorney Schwarting) had entered an appearance in only one case. The panel further took official notice and advised the parties that in mid-2020, Member Faulkner's business changed insurance companies from Republic Indemnity to another insurer, so Member Faulkner's business was no longer paying premiums to Republic Indemnity. Employee provided no evidence showing any financial gain or loss to Member Faulkner based on her business' past relationship with Republic Indemnity or its adjuster. (Record).
>
> Member Faulkner stated: She has never spoken to Smith outside a hearing room and did not think she had ever even spoken to him during a hearing. She has no relationship with Susan Daniels and does not know her. Member Faulkner has no financial interest in Employee's case and can be fair and impartial. She has two relatives who share her name and thought perhaps Johnson's friends were confusing her with her two relatives by the same name. (*Leigh*).

Soule in *Leigh* denied the request to disqualify Faulkner, but Soule and Faulkner granted her request to continue the hearing and denied the employer's request to "freeze" the record.

> **8 AAC 45.120. Evidence**. . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. 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 45.550. Plans.** (a) If an employee is found eligible for development of a reemployment plan, the rehabilitation specialist whose name appears on the referral letter shall
>
> (1) interview the employee, and conduct testing if needed, to complete an inventory in accordance with AS 23.30.041(h)(2);
> (2) document the employee's permanent physical capacities, in accordance with AS 23.30.041(h)(2), and the estimated date of medical stability in accordance with AS 23.30.041(h)(7);
> (3) compute the employee's remunerative employability wage; the wage computed under this paragraph must meet the standards of compensation set out in the definition of "remunerative employability" under AS 23.20.041(r)(7) and

meet the requirements of "gross hourly wages at the time of injury" under 8 AAC 45.490;
(4) determine an occupational goal for the employee;
(5) submit a job analysis of the occupational goal to a physician to predict whether the employee will have the permanent physical capacities to perform the physical demands of the job;
(6) submit research documenting that the

(A) plan will provide the employee the occupational skills necessary to be employable within the plan's occupational goal;
(B) occupational goal exists in the labor market, as defined in AS 23.30.041(r)(3); and
(C) plan ensures remunerative employability under AS 23.30.041(r)(7);

(7) consider all of the options listed under AS 23.30.041(i) before selecting the option that will return the employee to remunerative employability in the shortest possible time; and
(8) write a detailed reemployment plan, including

(A) the findings based on the documentation required under (1) - (7) of this subsection;
(B) the time frame for the employee's reemployment plan, to include the date the plan begins and the date the plan ends, with a total time frame not to exceed two years from the date of plan approval or the date of plan acceptance, whichever date occurs first;
(C) the cost of the plan, which may not exceed the statutory amount under AS 23.30.041(l); and
(D) a finding explaining why the employee can be reasonably expected to satisfactorily complete the plan and perform in the new occupation within the time and cost limits of the plan.

(b) No later than 90 days after the date of the employee's referral to the rehabilitation specialist for development of a reemployment plan, the rehabilitation specialist whose name appears on the referral letter shall submit

(1) the plan

(A) to the employee and the employer for their review and signatures in accordance with AS 23.30.041(j) indicating that the employee and employer have reviewed the plan and whether the employee and the employer agree or disagree with the plan; and
(B) signed by the specialist, the employee, and the employer, to the administrator in accordance with 8 AAC 45.500; or

(2) a report, together with medical documentation attached, that shows the employee's medical condition has changed since the start of efforts to develop

> the employee's reemployment plan, and that the employee is currently unable to participate in plan activities; the medical documentation required by this paragraph must also include an estimated date when efforts to develop the employee's reemployment plan can resume.
>
> (c) If the employee and the employer fail to agree to the reemployment plan written under (a)(8) of this section, either party may request the administrator to review and approve the plan. No later than 14 days after the administrator receives the plan for review, the administrator shall
>
> > (1) approve the plan and notify the parties by first class mail;
> > (2) deny the plan and notify the parties by first class mail; or
> > (3) notify the parties that the plan is incomplete and request additional information from the parties before making a decision on the plan.
>
> (d) If the administrator requests additional information, the administrator shall make a decision no later than 14 days after the additional information is received, and notify the parties by first class mail.

ANALYSIS

1) Does this decision have authority to disqualify Smith from representing Employer?

At the March 11, 2022 prehearing conference, before yelling obscenities at Smith and voluntarily terminating his participation at the conference, Employee raised a concern about Smith's representation. Employee said he heard that Smith represents the "State of Alaska" and specifically the "Alaska Workers' Compensation Board." After Employee terminated his telephonic participation, Smith explained that his law firm has a contract with the Alaska Department of Law, Torts and Workers' Compensation Division, to represent the state on claims filed by state employees for work-related injuries, in the event the Attorney General's office had inadequate lawyers to handle the claims. Another attorney in Smith's office handles these cases as an independent contractor. Smith also stated no one in his law firm represents the Alaska Workers' Compensation Board.

In his May 5, 2022 pleading, Employee reiterated his concerns about Smith's representation and contended it "presents an extreme and unfair conflict of interest in the employer's favor." He contended that Smith also represents Faulkner's interests and her private business, which he contended "poses an obvious conflict." Employee added that Smith's alleged "fraudulent,"

"criminal" acts and "collusion" with previous hearing panels and past and current Division staff in general further requires his disqualification as Employer's attorney.

Absent from Employee's arguments is reference to any statute, regulation or decisional law authorizing this decision to disqualify a private attorney from representing a private party in a workers' compensation case. The factfinders are unaware of any such provision and, consequently, Employee's request for this decision to disqualify Smith from representing Employer will be denied.

2) Was the order declining to disqualify Designated Chair Soule, correct?

First, Employee contended he had no opportunity to object to Soule prior to the hearing briefs' due date. Neither the Act nor the administrative regulations impose a duty on the Division to proactively give parties the names of those who will sit on a hearing panel. 8 AAC 45.106. Any party may call or email the Division at any time prior to a scheduled hearing and ask Division staff to tell them who will be sitting on their hearing panel. If Board panel members have signed up for the hearing date, and a hearing officer has been assigned, Division staff will so inform the inquiring party. If the panel members have not yet been empaneled, Division staff will advise the inquirer to inquire later when the panel is empaneled. *Rogers & Babler*. Employee's agency file does not show he contacted the Division to ask who was on his panel.

Second, panel members are presumed to be honest and unbiased. *Kling*; *Schweiker; Sifagaloa; Airline Pilots*. Employee had the burden to show Soule is dishonest or biased; he failed to meet his burden. *Kling* held only "a direct, usually personal and pecuniary, interest can operate to rebut the presumption" that a panel member is honest and unbiased. Absent any reliable, direct and specific evidence to the contrary, Soule is presumed honest and unbiased. Employee presented no evidence that Soule is dishonest or cannot be fair and impartial or that he has a substantial and material conflict of interest. 8 AAC 45.105(c), (d).

On May 6, 2022, within 45 minutes of receiving notice from Faulkner disclosing a potential conflict-of-interest, Soule sent the parties an email identifying the panel members for the May 10, 2022 written record hearing. The purpose was to advise them about Faulkner's disclosure. The

email included the relevant statutes and regulations necessary for either party to lodge a proper objection to any panel member's participation. Soule highlighted the most important procedural requirements for Employee's easy reference. On the same date, Employee responded by email and opposed Soule participating, called him a liar and dishonest and said he would file an additional opposition. Employee added, "The fact that this information was NOT disclosed to me before the due date for the brief left me no opportunity to oppose."

Employee's contentions are without merit, but his "disclosure" contention is also not credible. He objected to Soule in his May 5, 2022 pleading, filed on May 6, 2022, nearly 12 hours *before* Faulkner disclosed her potential conflict and Soule sent the parties an email naming the panel members. Employee either knew or suspected Soule would be on his May 10, 2022 hearing panel and objected. Whatever the reason for his May 5, 2022 pleading, for Employee to say he had no opportunity to oppose Soule is false. AS 23.30.122; *Smith*. Further, hearing briefs were due May 3, 2022, as Employee was twice advised. He never filed one unless his May 5, 2022 pleading, titled an objection to Smith was intended to be his hearing brief. Employee's false contention that late notice "prior to the due date for the brief" unfairly deprived him of a right to object to Soule is not only wrong but immaterial because he did not file a timely brief anyway. Moreover, if Employee had knowledge of a potential conflict of interest or thought Soule may present a potential impropriety or appearance of impropriety, he could have filed a petition and objected to Soule's participation, at any time "before a scheduled hearing begins," the due date for his hearing brief notwithstanding. 8 AAC 45.106(d).

A hearing panel member may be disqualified for a conflict of interest or to avoid impropriety or the appearance of impropriety, all which must be proven by "clear and convincing evidence" by affidavit. To recuse or disqualify a panel member for a conflict of interest, clear and convincing evidence must show the panel member has a "substantial and material" conflict of interest or shows "actual bias or prejudgment" by affidavit. AS 44.62.450; 8 AAC 45.105(c), (d).

Employee's May 6, 2022 email allegation that Soule was a liar and dishonest are conclusory statements but not evidence, much less clear and convincing evidence. His later contentions about Soule's "deceptive" role in decision 20-0092, which he implies showed "prejudgment," is

incorrect for several reasons, including: (1) Though one member dissented on the outcome, all three panel members at the October 6, 2020 hearing agreed on the factual findings and factual conclusions in decision 20-0092; therefore, it was not "Soule's decision." (2) Decision 20-0092 accurately recorded Employee's relevant testimony and arguments: His hearing brief for the October 6, 2020 hearing contended Employer failed to itemize and assert its lien and he renewed that contention at hearing. Addressing the lien contention, Employee testified he received zero dollars from the alleged settlement and said his legal research showed an exchange of money was not necessary to form a compromise if an injured worker dismissed a third-party case without the employer's permission. Referring to Employer, Employee testified "they do have a lien," which he estimated was $400,000 to $500,000. (3) Given Employee's testimony, the analysis in decision 20-0092 accurately found Employer had a lien for an amount more than the zero dollars Employee testified he received through the Court-enforced "settlement," and the remaining issue for the October 21, 2020 hearing would be whether Employer provided written approval for the compromise. (4) Decision 20-0092 also accurately determined an existing Superior Court order had found and enforced a settlement agreement, regardless of whether Employee contended he never agreed to it. (5) Decision 20-0092 accurately found there was no stay or other legal basis to continue the October 21, 2020 hearing on Employer's petition to dismiss. (6) A panel need not reconsider its decision; therefore, if a panel chooses not to, no "explanation" is required. (7) Nothing in Decision 20-0092 contradicted any Superior Court ruling existing at the time it was decided; and even though another judge was reviewing the ruling the outcome was uncertain. (8) Employee's contention that Soule "falsely stated" he had agreed to settle his third-party case is not true. Decision 20-0092 never stated Employee had agreed to settle his case; rather, it correctly stated the Superior Court found he, through his attorneys, had settled his case and the Court enforced the settlement. (9) The second Superior Court judge did not reverse the first judge's August 13, 2019 order until January 25, 2021. Thus, Employee's contentions that Soule should be disqualified because he was deceptive, a liar and dishonest are without merit, the "facts" he offered supporting his contentions are false and he is not credible. AS 23.30.122; *Smith*.

To disqualify Soule based on impropriety or the appearance of impropriety Employee had to present clear and convincing evidence showing Soule had a "substantial and material" personal or financial interest in the case or showed actual bias or prejudgment. 8 AAC 105(d). Employee

contended Soule improperly ruled against him in decision 20-0092. He presented no legal basis for disqualifying Soule simply because he ruled against him in a prior decision; the case law says the opposite is true. *Orchitt*. He offered no evidence, much less clear and convincing evidence showing Soule has a substantial and material personal or financial interest in his case or showed actual bias or prejudgment, as already discussed above.

Moreover, Employee failed to file a petition and affidavit timely as required by law and as instructed by Soule's email, prior to the hearing beginning on May 10, 2022. AS 44.62.450. Although he filed an affidavit on May 12, 2022, essentially incorporating his May 6, 2022 pleading, his affidavit is both untimely because it was filed after the hearing was over and was lacking for the reasons discussed above; he also still failed to file a petition. Nevertheless, given the above analysis even had Employee timely followed the explicit, highlighted procedural requirements for seeking Soule's recusal, by filing a petition and an affidavit before the hearing occurred, his request to recuse Soule would have still been denied for the reasons stated above. The decision to not disqualify Soule was correct.

3) Was the order declining to disqualify panel member Faulkner, correct?

Absent any reliable, direct and specific evidence to the contrary, Faulkner is also presumed to be unbiased. *Kling*; *Schweiker; Sifagaloa; Airline Pilots*. Employee had the burden to show she is dishonest or biased; he again failed to meet that burden. His disqualification request for Faulkner regarding concurrent legal representation is like the one made in *Kling*; the main difference is that the defense lawyer in *Kling* was actively representing the panel member sought to be recused. Here, Faulkner said she has never worked with Smith. Even so, the Superior Court in *Kling* rejected the same contention made here, noting only "a direct, usually personal and pecuniary, interest can operate to rebut the presumption" that a panel member is unbiased. Employee presented no evidence that Faulkner cannot be fair and impartial or that she has a substantial and material conflict of interest. 8 AAC 45.105(c), (d).

Employee's main objection to Faulkner in his May 6, 2022 email was that "Colby still represents Sara[], believe me." Faulkner addressed this in her disclosure email when she referenced the same argument made by Employee's significant-other Heather Johnson in *Leigh*, which also declined to

disqualify Faulkner. The fact that an attorney in Smith's law firm may represent a panel member in unrelated cases is not adequate to prove partiality or bias. The law contemplates that panel members are drawn from society and cannot and should not be without personal and financial interests in the decisions and policies of government. Minor and inconsequential conflicts are "unavoidable in a free society" and distinguishable from those that are "substantial and material." 8 AAC 45.105(a). Faulkner said she has never spoken to Smith outside a hearing room and has never worked with him. Another lawyer in Smith's office represents Faulkner's business in a case where no claim had been filed. Employee's email failed to provide any evidence, much less clear and convincing evidence, that Faulkner has a substantial and material conflict with Smith.

Employee's primary objection to her in his May 6, 2022 filing, was Faulkner "sided with" Soule by ruling against Employee's position in decision 20-0092. Prior rulings against a party on procedural issues are not in and of themselves evidence of bias or prejudgment. *Orchitt*. To the extent Employee's contentions otherwise implicate Faulkner's role in decision 20-0092, the analysis regarding Soule's participation, above, applies equally well and is incorporated in full here by reference. Based on the above, the decision to not disqualify Faulkner was also correct.

4) Should the May 10, 2022 written record hearing be continued?

Employer asked for a hearing on its December 8, 2021 petition on February 7, 2022. Employee did not file an affidavit in opposition to Employer's hearing request. Therefore, the designee was required by law to set a hearing on Employer's petition within 60 days. AS 23.30.110(c). A party may request a hearing continuance. To do so, the party must file a petition requesting a continuance, or a stipulation, with evidence of "good cause" for either. Continuances are not favored and will not be routinely granted. The regulations set forth what constitutes "good cause" to continue a hearing. 8 AAC 45.074(a)(1)-(2), (b)(1). As previously noted, Employee has filed some 200 petitions and claims in this case. He is well-versed in how to seek relief by filing a petition. *Rogers & Babler*. Employee's agency file does not show a stipulation, or a petition from Employee stipulating to or requesting a hearing continuance for any reason.

On March 11, 2022, the parties appeared telephonically at a prehearing conference to schedule this hearing. From the onset, the designee stated the sole purpose for the prehearing conference was

to schedule a "written record hearing" on Employer's December 8, 2021 petition. If Employee wanted to object to a written record hearing format, he could have done so at the prehearing conference and stated his reasons. While Employee objected to *any* hearing on the petition for various reasons, he did not object to a written record hearing *format*. After Employee calmly articulated his position, Smith asked him a question and Employee shouted obscenities and voluntarily terminated his participation in the telephonic conference.

Employee may contend that hearing Smith's voice "triggered" his outburst and the panel should overlook his subsequent absence from the conference. However, if this panel were to ignore Employee voluntarily leaving a prehearing conference where issues are raised and determinations made, in the way Employee did, it would fundamentally alter the way the Division operates. One party could make its position known and, when the other party began to present its position, the first party could leave the conference abruptly and later claim whatever happened thereafter at the prehearing conference was somehow "unfair." Nothing other than his voluntary withdrawal from the conference stopped Employee from objecting to the hearing format while at the prehearing conference. Nothing stopped him from requesting a hearing continuance at some point after he regained his composure but before May 10, 2022. He had several opportunities to do so:

The March 11, 2022 conference summary advised Employee he could ask the designee in writing to modify or amend the summary or "change a prehearing determination" within 10 days. A decision to schedule a written record hearing format is a "prehearing determination." 8 AAC 45.065(d). Employee's agency file does not disclose he thereafter timely asked the designee to convene an in-person hearing with witnesses or continue it altogether.

The Division's March 14, 2022 hearing notice boldly stated it was a "WRITTEN RECORD HEARING NOTICE," and said the matter would be decided based on documents in the case file and the parties' written arguments. This notice provided Employee yet a third opportunity, nearly two months prior to hearing, to object to the May 10, 2022 hearing format or seek a continuance. The agency file shows Employee filed nothing with the Division addressing this until May 6, 2022. His 14-page May 5, 2022 pleading, filed on May 6, 2022, styled "Opposition to Employer and SOA Counsel Colby Smith Participation," dedicated approximately nine lines on page two and a

couple lines on page 12 stating he needed to call witnesses, thus implying perhaps he wanted a continuance, but he never actually asked for one. His agency file does not contain a petition requesting a May 10, 2022 hearing continuance for any reason much less "for good cause." Employer did not respond to Employee's May 6, 2022 filing and it is not known if Employer even recognized an implicit request for a hearing continuance. To continue the May 10, 2022 hearing without Employer knowing there was such a request, and without allowing for its arguments to be considered, would be unfair. AS 23.30.001(1), (4). Lastly, at the June 18, 2019 prehearing conference, Wright mentioned in passing that Ringel had suggested she not schedule any future written record hearings because the parties had been nonresponsive to Ringel's letters requesting additional information and it would be better if the panel could ask the parties questions. However, Ringel's suggestion was not an order and Employee never objected to the written record format until a few days before the hearing. Employee also contended Employer never filed a hearing request, so the designee should not have scheduled a hearing. But a designee has discretion to set a hearing even if a party has not filed a hearing request. 8 AAC 45.070(b)(3).

Given the ample notice Employee had that the May 10, 2022 hearing was on the "written record," his robust experience filing petitions in this case, and his failure to file a petition requesting either an in-person hearing or a hearing continuance in a way that this panel and Employer could understand clearly what he was seeking, Employee's implicit request for a May 10, 2022 hearing continuance will be denied.

5) Should the reemployment process be restarted?

In the first line of the Alaska Workers' Compensation Act, the legislature clearly stated the Act should be interpreted to ensure "quick, efficient, fair, and predictable delivery" of benefits to injured workers at "a reasonable cost" to employers. AS 23.30.001(1). On June 28, 2014, psychiatrist Dr. Johnson said Employee had "catastrophic" thinking about his future. On September 9, 2014, Dr. Wickler noted Employee may never go back to heavy labor and suggested "an evaluation and retraining program probably should start now while his treatment continues." On February 4, 2015, the RBA informed Employee he was eligible for reemployment benefits. On March 4, 2015, Employee selected Sakata to prepare a reemployment plan. The statute at issue here requires that a reemployment plan must be formulated and approved within 90 days after

Employee selected Sakata as his reemployment specialist; the RBA-designee later reminded Sakata of this deadline. AS 23.30.041(h).

Almost immediately after he elected to receive reemployment benefits, Employee began resisting related efforts when on June 23, 2015, he told Sakata he did not want her communicating with his surgeon Dr. Wickler. Instead, Employee obtained a letter from his family practitioner saying reemployment efforts should stop because Employee needed surgery. On February 5, 2016, Kemberling held an Informal Conference to resolve the impasse. He explained the various benefits from Employee moving forward with plan development, including psychological health, distraction from dealing only with medical issues and maintaining a sense of purpose. He noted the longer a person is off work the less likely they are to return to work. Kemberling also noted Employee would be better off financially if plan development occurred during a period when Employer was paying him TTD benefits. AS 23.30.041(k); *Moore*. He suggested Employee take UAA placement tests on a "good day" to assess his standing regarding college reading, writing and math. Dr. Thiele said he could see value in Employee having something to look forward to and "beginning the dialogue about his vocational possibilities." According to Kemberling's summary, "Dr. Thiele authorized the employee to do so." Kemberling concluded that Employee and Sakata agreed at the Informal Conference to resume plan development.

Employee contends Kemberling's Informal Conference summary wording is "false" or "misleading." But Kemberling's summary reflects his notes made in Employee's agency file on the date the Informal Conference occurred. Kemberling's notes and Informal Conference summary are given greater weight than Employee's contrary contentions. AS 23.30.122; *Smith*. Only eight days after the Informal Conference, Employee canceled his appointment to go to UAA for testing. A few days later, on July 25, 2016, Employee filed a claim for PTD benefits.

On July 10, 2019, SIME physician Dr. Early opined Employee could work full-time notwithstanding his mental health issues, with certain restrictions that included avoiding highly stressful environments such as working around large numbers of people or in areas with high stimulation levels. He should not work around construction and should have no extensive driving to or from work or driving as part of employment. Dr. Early stated Employee could participate in

vocational retraining as necessary on a full-time basis with the above-referenced restrictions. On July 12, 2019, SIME physician Dr. Levine stated Employee could participate in vocational retraining on a full-time basis from an orthopedic standpoint. Employee filed a request for cross-examination against Drs. Early and Levine's reports. However, the cross-examination request does not apply to an SIME physician; SIME physician reports are governed by regulation 8 AAC 45.092(j), which allows parties who have received an SIME report to only submit written questions or notice the examiner's deposition at the party's expense within 30 days after receiving the SIME examiner's report. Drs. Early and Levine's opinions on Employee's ability to participate in the vocational reemployment process are given considerable weight because they are consistent with each other and with Dr. Wickler. AS 23.30.122; *Smith*.

By contrast, Employee obtained and filed a May 5, 2022 report from Dr. Thiele supporting his opposition to participating in the reemployment benefits process. However, on May 6, 2022 Employer promptly and timely requested to cross-examine Dr. Thiele. Employee did not provide Employer with an opportunity to cross-examine Dr. Thiele before the May 10, 2022 hearing and, since it was a written record hearing could not and did not provide Dr. Thiele to be cross-examined at hearing. The record, which appears to have been created at Employee's request specifically for litigation purposes is consequently not the sort of evidence on which responsible persons are accustomed to relying in the conduct of serious affairs and would not be admissible over Employer's objection in a civil action as a business record. 8 AAC 45.120(e). Thus, Dr. Thiele's May 5, 2022 report may not be considered.

Employee's main objection to restarting the reemployment process is his contention that things have changed since 2019 and he is not ready mainly because he has numerous additional surgical procedures to accomplish. As Kemberling pointed out at the Informal Conference in 2016, Employee's situation is not unusual. Many injured workers participate in the reemployment process while they are not yet medically stable and need further treatment. *Rogers & Babler*. There is no legal requirement that an injured worker be medically stable before participating in the reemployment process. In fact, *Wilson* determined waiting for medical stability "is directly contrary to the statute [AS 23.30.041(h)] requirement for estimates of predicted stability." Similarly, the Commission in *Witbeck* stated "an employee need not be medically stable to begin

reemployment benefits," and noted numerous §041 subsections that assume "reemployment planning begins before medical stability."

At least one Commission decision identified how many pre-plan days an injured worker has during which to collect benefits under AS 23.30.041 and emphasized the limited time the legislature provided to promptly provide reemployment benefits to injured workers. The Commission found these statutory deadlines cannot be ignored. *Griffiths*. Employee elected to participate in the reemployment benefits process. To receive those benefits, he "must cooperate with the rehabilitation specialist to formulate a reemployment plan," within the statutory time and cost limits in §041. *Binder*. Reemployment benefits are intended to help Employee overcome total disability by providing retraining and education so he can attain remunerative employability. *Meek*. Allowing him to avoid the legal requirements in §041 is contrary to the legislature's stated desire to control costs and premiums. *Raris*.

Clearly, Employee has had other medical care since the SIME physician's and others provided their opinions about his ability to participate in the reemployment process. But Employer is not asking that Employee be forced to participate full-time in a reemployment plan. Rather, it is simply asking that he restart his participation in the reemployment *process*, beginning with requirements imposed by his specialist. For example, it is inconceivable that since March 4, 2015, Employee has not been able to go to UAA or a comparable facility and perform testing to determine his "grade level" or meet with the specialist and explore possible reemployment benefit plans or perform other plan requirements under 8 AAC 45.550.

Moreover, on September 2, 2021, Employee told PA-C Wilkinson he had right shoulder surgery planned "next month." On September 29, 2021, he told PA-C Wilkinson his right shoulder surgery was scheduled for October 29, 2021. Employee did not have right shoulder surgery in October 2021 and his medical records do not clearly state why. On November 1, 2021, Employer asked the RBA to resume Employee's retraining plan development. On November 5, 2021, RBA Niwa advised she could not move forward with Employer's request as it exceeded her authority. She was correct as the RBA has "narrow" authority; but this panel has authority from the Act to hear and determine all questions in respect to a claim. AS 23.30.110(a); *Summerville*.

On December 8, 2021, Employer petitioned for a hearing to address restarting Employee's retraining process. On December 13, 2021, the designee provided hearing dates to hear Employer's request. On December 14, 2021, Employee told Dr. Johnson things were going "mostly okay" except for a dental implant that had fallen out. Dr. Johnson charted Employee was slated for right shoulder surgery on December 23, 2021 in California. However, on December 27, 2021, contrary to what he told Dr. Johnson, Employee told St. Mary's Hospital emergency room he been suffering with diarrhea for "30 days" and his right shoulder surgery had been canceled. Around this time, Employee changed his email address to one containing a vulgar reference to Smith, which the Division's firewall filtered out and sent to junk mail. Thus, some of Employee's responses to the designee's request for hearing dates were not immediately seen. Consequently, the designee set a hearing on Employer's request for an order restarting Employee's reemployment benefits process for January 25, 2022. Employee promptly emailed and stated he was not available for the January 25, 2022 hearing because he was going to be having surgery at "the exact time of the hearing." On January 13, 2022, he notified the Division he was not available from "at least" December 2021 through April 2022 because he was "out of state for right shoulder surgery." Given Employee's representations that he was having right shoulder surgery, Employer stipulated to cancel the January 25, 2022 hearing on January 18, 2022.

On January 25, 2022, Dr. Akizuki said Employee was cleared for right shoulder surgery. On February 7, 2022, Employer again asked for a hearing on its December 8, 2021 petition. By the March 11, 2022 prehearing conference, Employee said he had not had right shoulder surgery, but it could probably occur in March or early April 2022, because he had been cleared by his physicians and all he needed to do was schedule it. On March 31, 2022, Employee told Dr. Thiele he had right shoulder surgery scheduled for December 28, 2021 but held off due to COVID. In short, Employee has still not had right shoulder surgery and it is unclear when it will ever occur. Meanwhile, Employer is still paying Employee TTD benefits. AS 23.30.001(1).

Given the above analysis, Employer's contentions are more persuasive than Employee's objections. An open-ended prohibition against Employee participating in *any* vocational reemployment activities is inconsistent with his ability to represent himself in this forum as well as before the Alaska Supreme Court. It is also inconsistent with the legislative mandate that the

Act is interpreted to ensure quick, efficient, fair and predictable delivery of benefits to Employee at a reasonable cost to Employer. AS 23.30.001(1). Employee's position is also inconsistent with his claim for PTD benefits because he may not be considered permanently totally disabled so long as he is involved in the rehabilitation process. AS 23.30.041(k). He has been involved in the rehabilitation process since at least March 4, 2015 when he selected Sakata to prepare a reemployment plan. Thus, his refusal to participate in plan development activities is prohibiting him from obtaining PTD benefits, if he is in fact entitled to them.

For these reasons, Employer's December 8, 2021 petition for an order restarting Employee's reemployment benefits process will be granted. If he needs additional medical treatment that would interfere with the reemployment process, the specialist can file a report together with medical documentation attached that shows Employee's medical condition has changed since restarting efforts to develop his reemployment plan. If evidence shows Employee is then-currently unable to participate in "plan activities," the medical documentation must include an estimated date when efforts to develop a plan may resume and the parties can litigate this issue if necessary. 8 AAC 45.550(b)(2).

CONCLUSIONS OF LAW

1) This decision does not have authority to disqualify Smith from representing Employer.
2) The order declining to disqualify Designated Chair Soule was correct.
3) The order declining to disqualify panel member Faulkner was correct.
4) The May 10, 2022 written record hearing will not be continued.
5) The reemployment process should be restarted.

ORDER

1) Employer's December 8, 2021 petition to restart Employee's reemployment benefits process is granted.
2) The RBA is authorized and ordered to take appropriate steps to restart Employee's plan development activities in accordance with the Act and the administrative regulations.

Dated in Anchorage, Alaska on May 18, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/
Nancy Shaw, Member

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 yoke 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 Eric Mcdonald, employee / claimant v. Rock & Dirt Environmental, Inc., employer; Ins. Co. of the State of Pennsylvania, insurer / defendants; Case No. 201410268; 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 May 18, 2022.

/s/
Kimberly Weaver, Office Assistant