ALASKA WORKERS' COMPENSATION BOARD

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

ANGELEE WOOD, Employee, Claimant, v. STATE OF ALASKA, Self-insured Employer, Defendant.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201509544 AWCB Decision No. 24-0006 Filed with AWCB Anchorage, Alaska on February 9, 2024.

Angelee Wood's (Employee) August 17, 2017 claim was heard on January 3, 2023, in Anchorage, Alaska, a date selected on October 10, 2023. An October 23, 2019 hearing request gave rise to this hearing. Attorney John Franich appeared and represented Employee. Attorney Justin Tapp appeared and represented the State of Alaska, a self-insured employer (Employer). Witnesses included Dr. Deborah Gideon, Ph.D., Loretta Cortis, CDMS, Angelee Wood, Jean Brooking, and Dr. Aryeh Levenson, M.D. The record closed on January 12, 2024, upon receipt of additional filings by the parties.

ISSUE

Employee contends that her reemployment specialist never developed a retraining plan, and based on the opinions of Employee's treating physicians a plan cannot be developed. Therefore, she contends the reemployment process should end.

Employer contends the reemployment specialist never issued a formal termination of the reemployment process, or determined whether a plan could be developed. It contends the reemployment process is not over.

Has Employee's reemployment process ended?

FINDINGS OF FACT

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

1) The parties stipulated in *Woods v. State of Alaska*, AWCB Dec. No. 18-0014, February 14, 2018 (*Woods I*) as follows: Employee was assaulted by an inmate at Highland Mountain Correctional Facility on June 16, 2015, during the course of her employment as a correctional officer; the inmate who assaulted Employee was wearing a cast and broke Employee's nose; this is an extremely complex medical case; Employer commenced workers' compensation benefits and those benefits have continuously been paid since the injury date; Employee is eligible for reemployment benefits and reemployment plan development has been suspended. Employee received treatment from a naturopath, chiropractor and psychiatrist. (*Woods I*).

2) On November 2, 2015, the Reemployment Benefits Administrator's Designee (RBAD) contacted the reemployment specialist Janice Shipman regarding her October 26, 2015 evaluation of Employee. Shipman could not make a recommendation for reemployment because Employee's treating physician Dr. Amy Murphy (Kolarova), Physiatrist, MD, declined to make a prediction and recommended a neuropsychological evaluation. (Eligibility Evaluation Determination Suspension letter, November 2, 2015).

3) On March 25, 2016, Shipman issued a report recommending that Employee be found eligible for reemployment benefits. (Eligibility Evaluation, March 29, 2016).

4) On April 29, 2016, the RBAD issued a determination finding Employee eligible for reemployment benefits. (Eligibility Determination Letter, April 29, 2016).

5) On May 2, 2016, Employee elected to pursue a reemployment plan with rehabilitation specialist Loretta Cortis. (Election to Receive Reemployment Benefits, May 2, 2016).

6) On June 6. 2016, Gerald York, MD, diagnostic radiologist, performed magnetic resonance imaging (MRI) on Employee's brain. Dr. York reviewed the MRI and diagnosed no acute cortical or deep white matter infarction and no intraparenchymal or extra-axial hemorrhage. He

found quantitative volumetric evaluation demonstrated lobe volumes in the primary motor cortex on the left greater than right and in the bilateral cerebellar gray matter. He noted these changes can be the result of prior traumatic brain injury. Dr. York added that no hemosiderin deposition or cortical signal abnormality was seen in these areas on the current exam to indicate acute or subacute injury. (York report, June 6, 2016).

7) On June 15, 2016, Cortis provided an update to the RBAD. She stated Employee would be attending the Progressive Rehabilitation Associates' Brain Injury Rehabilitation Center (PRA) out of state. Cortis noted that correspondence with Employee's physician Dr. Jill Gaskill, MD, indicated Employee was unable to participate in retraining until a undetermined future date. (Cortis Letter, June 15, 2016).

8) On October 11, 2016, Cortis emailed the RBAD to provide an update that Employee was completing her out of state rehabilitation in one month and she would be issuing a formal status report at that time. (Cortis email, October 11, 2016).

9) On November 2, 2016, Cortis requested a suspension on Employee's reemployment plan. She noted that the Director of Rehabilitation at PRA indicated Employee could participate in retraining in January 2017. Cortis stated she would place Employee's plan on hold until January 2017. (Cortis letter, November 2, 2016).

10) On November 29, 2016, the Workers' Compensation Division's (Division) reemployment designee formally suspended Employee's plan. (Letter, November 29, 2016).

11) On January 31, 2017, the RBAD advised Cortis to resume developing Employee's retraining plan. The RBAD noted that Dr. Ellis at PRA had discharged her on November 11, 2016, and it was appropriate to resume reemployment planning. (Letter, January 31, 2017).

12) On February 2, 2017, Cortis reported to the RBAD that Employee had returned from PRA but was struggling without structure in her life. Employee was referred to Rehab Without Walls for an assessment, which occurred on January 25, 2017. She was recommended to work with rehab specialists in her home three days per week, up to four hours per day. Employee's treating physician said Employee's reemployment plan should again be placed on hold for six more months at which time the Employee could be reassessed. (Cortis letter, February 2, 2017).

13) On May 17, 2017, Dr. York performed a pituitary MRI and an angiogram MRI on Employee. The purpose of the imaging was to assess Employee's complaints of unspecified headache. Dr. York found no anatomic focus to account for Employee's headache on the

pituitary MRI as all findings were normal in appearance. In relation to the angiogram MRI, Dr. York found nothing abnormal and assessed a normal MRI angiography of the brain. (York report, May 17, 2017).

14) On August 14, 2017, Cortis provided a plan update. Dr. Gaskill recommended Employee's plan be placed on hold for an additional six months. Cortis would retain her file and provide updates as necessary. (Letter, August 14, 2017).

15) On August 15, 2017, Andrea Leep Hunderfund, MD, MHPE, neurologist, evaluated Employee at the Brain Rehabilitation Program at the Mayo Clinic. Under social history, Dr. Hunderfund noted Employee reported pressure to do job training and get back to work, which Employee did not feel was possible. Employee reported she felt maximally disabled and should be able to go on long-term disability. She expressed concern her family could not manage without disability or workers' compensation payments. Dr. Hunderfund deferred an opinion on a traumatic brain injury (TBI) as her cohorts in the TBI clinic at the Mayo Clinic were better suited to assess Employee. (Hunderfund report, August 15, 2017).

16) On August 16, 2017, Employee underwent a neuropsychological assessment with Thomas Bergquist, Ph.D., LP. He made "behavioral observations" including Employee had a clear stutter throughout the evaluation and understood most directions but needed directions repeatedly clarified. Occasionally, she seemed unable to concentrate for extended periods. Employee displayed a good attitude and established and maintained good rapport throughout the evaluation. She warned Dr. Bergquist she has difficulty controlling her temper and is easily frustrated due to 'how high functioning' she used to be compared to now. Despite this warning, Employee was calm and pleasant throughout testing and handled the difficult tests well. Dr. Bergquist felt Employee put forth good effort but, at the same time, noted she performed quite poorly. He stated she performed "well below the chance level on a measure of performance validity testing" and in certain other instances seemed to give effort less than optimal. Dr. Bergquist emphasized Employee "refused to guess on items of the TOMM, a forced choice measure of performance validity testing, and gave a 'don't know' response despite significant prompting from the examiner on the majority of items on that particular measure. On those items which she did give response, she was correct in all but one instance." Dr. Bergquist determined Employee's evaluation results were of questionable validity, and as a result the data's integrity was questionable. He nonetheless interpreted the results with this factor in mind.

Employee performed poorly on the vast majority of the evaluation's measures, including her basic measured intelligence, on which her overall performance was in the first percentile, a "clearly impaired range." Dr. Bergquist's impressions were:

> The results of neurological testing are positive, but interpretation of the results is complicated by much less than expected, in fact less than chance, level of performance on performance validity testing measures. As a consequence, I am unable to confidently interpret the true significance of these results in terms of their representation of level of underlying cognitive dysfunction and even more so to the degree to which they represent underlying brain injury. They do represent that Mrs. Wood is having difficulties with functioning at this time. She essentially shows poor and impaired performances in the vast majority of measures given as part of this evaluation, with her performances varying from at, or even in some cases, above the average range to in other cases being clearly, even markedly, impaired. This includes her performance of measured intelligence which are markedly below expectation and are at the 1st percentile.
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> Also elevated are scores on measures of both anxiety and depression which are significantly elevated in both instances. In fact, her score in both measures are at or near the ceiling level including endorsement of suicidal ideation, though she denies any specific plan or intent. She also performs markedly poorly and well within the impaired range on measures of both motor speed and motor functioning bilaterally in both hands.
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> Thus in summary, these results, while not useful for determining the actual degree and nature and pattern of neurocognitive impairment, do represent a means to degree to which Mrs. Wood feels she is having difficulty and essentially can be considered almost a 'cry for help.' The fact that her performance is not only poor, but well below the chance level, on performance validity testing suggests some degree of an attempt to present to the examiner in such a way that she is trying to show how much difficulty she is having and the degree to which she is impaired.
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> She likely can benefit from the brain rehabilitation services including among other things cognitive rehabilitation, but these are really secondary to the need to address emotional, psychological factors and perhaps, most importantly, her own perception of her current situation. Also, related to this are the circumstances surrounding her injury and her job history in which she was involved in regular levels of stress on the job as a corrections officer.

(Mayo Clinic Neuropsychological Assessment, Dr. Bergquist, August 16, 2017.)

17) On August 17, 2017, Billie A. Schulz, MD, physiatrist from the Brain Rehabilitation Program at the Mayo Clinic, assessed Employee to have a concussive-type brain injury. She

opined that in treating Employee, providers must consider treatment for her varying symptoms over offering diagnoses. For Employee to improve she needs to receive physical and psychological treatment. (Schulz report, August 17, 2017).

18) On August 17, 2017, Employee filed a claim for permanent total disability (PTD) benefits and attorney fees and costs. (Claim, August 17, 2017).

19) On May 17, 2018, Cortis submitted a letter to Dr. Gaskill requesting information on whether a plan should move forward with Employee. Dr. Gaskill said the plan should continue to be put on hold. When asked when Employee could begin a plan Dr. Gaskill wrote "not at all in the foreseeable future." (Employee's Hearing Exhibit 1, Cortis letter, June 11, 2018).

20) On June 4, 2018, Cortis issued her last update on Employee's plan and stated Employee's "retraining will continue to be placed on hold while she undergoes psychiatric care. Contact will be maintained with all parties to determine when Ms. Wood will be able to participate in retraining." (Cortis letter, June 4, 2018).

21) No further communication occurred among Cortis, the RBAD or the parties. (Agency file).

22) On July 27, 2018, Michael D. Ward MD, psychiatrist, conducted a psychiatric employer's medical evaluation (EME) on Employee. Dr. Ward opined Employee could not engage in any form of gainful employment. In relation to retraining, Dr. Ward assessed that Employee could participate in a retraining program in the future. He cautioned that it was unlikely Employee would be motivated to participate given her apparent disability conviction. Dr. Ward recommended she be assessed by a vocational rehabilitation or reemployment counselor to assess her aptitude, skills and level of motivation. (Ward report, July 27, 2018).

23) On August 2, 2018, the parties submitted a signed Second Independent Medical Evaluation (SIME) form. The parties agreed to a panel SIME to include a psychiatrist, orthopedist and neurologist. (SIME form, August 2, 2018).

24) On August 31, 2018, Aryeh Levenson, MD, Employee's treating psychiatrist published a forensic evaluation for her. Dr. Levenson noted an important aspect of life is engagement in meaningful work. He assessed Employee to be permanently disabled from performing the duties of her previous occupation as a corrections officer. Dr. Levenson diagnosed Employee with multiple deficits rendering her unemployable on the open job market. He recommended

Employee no longer be evaluated because it added stress to her life which could overwhelm her. (Levenson Forensic Evaluation, August 31, 2018).

25) On February 26, 2019, Deborah Gideon, Ph.D., neuropsychologist, evaluated Employee on referral from Dr. Levenson. Dr. Gideon performed numerous neuropsychological tests and found Employee performed at a significantly impaired level. He posited that Employee's performance on the tests, which was similar to previous tests administered to her, showed an overall low cognitive function. Dr. Gideon did not believe Employee was malingering. She diagnosed Employee with posttraumatic stress disorder (PTSD), a cranial injury, major neurocognitive disorder and somatic symptom disorder. Dr. Gideon did not believe Employee could return to her previous work as a corrections officer based on her PTSD. She did not say Employee was unable to work. Dr. Gideon recommended Employee seek treatment for PTSD; she believed Employee should be seen by less providers to reduce anxiety, and treatment should focus on symptomatic relief. She also suggested a de-emphasis on a brain injury for Employee as it may be counterproductive to her improvement. (Gideon report, February 26, 2019).

26) On April 8, 2019, Nicholas Ahn, MD, orthopedist, evaluated Employee as part of an SIME. Dr. Ahn's evaluation focused primarily on Employee's physical limitations and capabilities after her work incident. He reviewed Employee's MRIs and established from a physical standpoint Employee was medically stable; he did not believe she suffered a TBI. Dr. Ahn was not able to identify any physical restrictions to Employee's ability to work. Based on her performance in a physical capacity evaluation (PCE) she could perform moderate work without limitations. He did not believe she required a reemployment training plan because her work-related conditions had resolved, and she was seeing specialists to manage her psychiatric conditions so she would be capable of performing light or moderate duty work. (Ahn SIME report, April 8, 2019).

27) On April 11, 2019, Walter Ling, MD, psychiatrist, conducted a psychiatric SIME on Employee. He recommended six to nine months of additional treatment for Employee to reach medical stability. Dr. Ling noted this would not preclude Employee from being trained to do some other work. He believed if treated properly Employee would be able to participate in a reemployment plan. When asked if Employee could engage in *any* form of gainful employment, Dr. Ling explained that initially, she needs to gain confidence in doing any job including volunteer work and through small successes she could begin to make substantial gains in

retraining. Dr. Ling recommended Employee be weaned from the belief that she has a TBI and PTSD that keep her from working. He noted Employee has severe anxiety and fear about returning to work, but those fears can be alleviated by placing her in a different field performing different work. (Ling SIME report, April 11, 2019).

28) On December 12, 2023, the parties set the following issues for hearing on January 3, 2024: Employee's claim for PTD benefits, attorney's fees and costs, medical costs, compensability of various treatments and interest. (Prehearing Conference Summary, December 12, 2023).

29) Employer's EMEs by M. Sean Green, MD, and Paul Craig, PhD, were not considered in this decision based on Employee's request for cross examination of both providers and Employer's failure to present either physician at hearing. (Observations, judgment).

30) On January 3, 2024, Dr. Gideon testified at hearing that she could not think of any jobs that Employee was suited to perform. She believed Employee could not process new information or learn new tasks at all. Dr. Gideon did not think there was any way for Employee to even perform menial tasks. When asked if Employee could perform work as a grocery stocker, Dr. Gideon explained how Employee would quickly become overwhelmed with the process. Dr. Gideon testified she has never treated Employee but rather performed a two-day evaluation on Employee five years ago from which she bases her opinion. When asked if Employee can improve with treatment, Dr. Gideon expressed that she did not foresee any improvement for Employee's condition even with treatment. (Record).

31) Loretta Cortis testified she did not believe she could create a reemployment plan for Employee. She stated her file on Employee was current up to June 2018. She had received medical reports up to that date but did not receive anything after except for letters of continuing disability from November 2023, provided by Employee's attorney. In Cortis' opinion there was no job available for Employee. She acknowledged that no one ever asked her to develop a plan and she placed plan development on hold based on lack of response from Employee's treating physician. Cortis stated she never received Dr. Gaskill's response indicating Employee could not participate "for the foreseeable future." She believed the labor market had changed since 2018 but neither party provided any labor market survey for her to evaluate in plan development. Cortis, when asked why nothing moved forward after 2018, said she believed the plan to be on hold and was awaiting further information from either the parties, the Board or the RBAD from which she received none. (Record).

32) Employee testified at hearing that she struggles in her daily life to keep track of simple things such as doctors' appointments and cooking. She relies on help from her family to review what she does to ensure tasks like cooking dinner are completed. Employee stated she did well in high school and performed well in her job as a corrections officer but after she was assaulted at work she described a change as different as night and day in how capable she was. She stated without Medicaid she would be "screwed financially," as her medical costs continue to accumulate post-injury. Employee expressed concern about her children growing up and leaving because without them she would lack a support system she has come to rely on. She expressed a high desire to be successful in what she does. Employee provided the example of her participation in Crossfit, an exercise program, which she attends a few days a week. She drives to the "box" (colloquial term in Crossfit for "gym"), where she engages in exercise routines to improve her balance and coordination. Employee described Crossfit as the one place she can feel "normal." She described herself as a fighter, and was frustrated that she was not doing better. In regard to treatment, she wanted to do the work because she could not just sit around and do nothing. (Record; experience, observations, judgment).

33) Jean Brooking, Employee's mother, testified at hearing. She articulated the struggles she had observed with Employee's daily life. Brooking said Employee has burned pre-made dinners, and misplaced items around the house, which creates stress within the household. She also described Employee as an incredible mother whose children adore her. Brooking said Employee has always been hardworking and spoke about her successes in Crossfit as indication of her hardworking nature. She explained further that Employee had values of honesty and servitude, readily provided help those in need and was always willing to assist in any way she could. When asked about Employee's ability to be employed, Brooking ruminated on the idea of Employee working with service animals for the elderly, but noted her belief that even a grocery store that employed persons with mental disabilities had higher standards than Employee could currently meet. (Record).

34) Dr. Levenson, Employee's treating psychiatrist, testified at hearing. He provided his credentialing and educational background in psychiatry. Dr. Levenson described the work he does can be both clinical and forensic. In Employee's case, he stated he took on a dual hat role. He worked as her treating psychiatrist from a clinical perspective, but also as a forensic psychiatrist where he evaluated Employee's medical records and researched alternative

explanations as to why her condition persisted. In his forensic role, Dr. Levenson stated he explored differing diagnoses for Employee and utilized a multi-faceted approach to reaching a conclusion. Part of his approach included looking at "unique sources" that had not been "adulterated." By this, he explained that other physicians can be influenced by medical reports that he believes to be incorrect. Dr. Levenson explained after reading a provider's report he found the physician's opinion to be entirely discrepant to the conclusion he had reached. He noted the ethical concerns with his approach but to him it was clear he would not run afoul of his medical ethics to proceed in this role for Employee. Dr. Levenson based his time working with Employee as sufficient to enter into the role as both her clinical and forensic psychiatrist. He diagnosed Employee with a cognitive disorder and a mild TBI. Dr. Levenson referred Employee to Dr. Gideon after he received reports from other neuropsychologists that he found to be lacking. He described Dr. Gideon as brilliant based on work he had done with her. Dr. Levenson did not believe Employee was malingering based on the amount of effort he believed would be required to lie to multiple providers over the course of seven years. He expressed concern about her diagnosis of conversion disorder, which he described as developing over time with pre-existing characteristics present. With Employee, Dr. Levenson noted she had always been hard working, and a good performer; for her to develop a conversion disorder was unlikely. Dr. Levenson believed Employee would never work again; he provided the example of stacking cans in a grocery store as beyond her capacity. He stated she has never shown improved function, but noted her use of a cell phone has improved. Dr. Levenson opined that further treatment would be necessary for Employee to maintain her current level of progress but noted that without consistent treatment it was likely that Employee's condition would continue to deteriorate. (Record).

PRINCIPLES OF LAW

The Board may base its decisions not only on direct testimony and other tangible evidence, but also on the Board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

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

> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job. . . .
> . . . .
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> (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 transferrable skills. . . .
> . . . .
> (j) The employee, rehabilitation specialist, and the employer shall sign the reemployment benefits plan. If the employer and employee fail to agree on a reemployment plan, either party may submit a reemployment plan for approval to the administrator; the administrator shall approve or deny a plan within 14 days after the plan is submitted; within 10 days of the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110; the board shall uphold the decision of the administrator unless evidence is submitted supporting an allegation of abuse of discretion on the part of the administrator; the board shall render a decision within 30 days after completion of the hearing.
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> (k)An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process. . . .

Irvine v. Glacier General Const., 984 P.2d 1103, 1107 (Alaska 1999), held AS 23.30.041(e) allows an employee to designate a physician who must be consulted, and whose views must be considered, in the reemployment eligibility evaluation process. *Irvine* explained, to permit a reemployment specialist to disregard the employee's choice of medical opinion would deprive him or her of a choice that AS 23.30.041(e) meant to provide and would amount to an abuse of discretion. Because AS 23.30.041(e) requires a specialist to consult with a doctor chosen by the employee in preparing an eligibility evaluation, he or she has no discretion to ignore the doctor completely.

In *Barbaza v. State of Alaska*, AWCB Dec. No. 20-0022 (April 13, 2020) (*Barbaza I*), the parties had a partial agreement in which the reemployment specialist was to consult with a specific physician for plan development. After the specialist failed to consult with the agreed specialist the Board ordered the specialist to comply with the agreement and develop a plan.

In *Barbaza v. State of Alaska*, AWCB Dec. No. 20-0058 (July 15, 2020) (*Barbaza II*), the specialist averred a plan could not be developed after consulting with the designated physician. The Board found the reemployment process had ended and Employee's claim for PTD benefits was ripe. The Board conducted a PTD analysis and found the Employee to be permanently and totally disabled.

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

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption applies to any claim for compensation under the workers' compensation statute. Id. The presumption involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence.

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

In *Kirby v. Alaska Treatment Center*, 821 P.2d 127 (Alaska 1991), the Court reasoned the presumption analysis would apply to claims for vocational rehabilitation under the plain text reading of AS 23.30.120(a)(1). In *Rockney v. Boslough Const. Co.*, 115 P.3d 1240 (Alaska 2005), the Court reiterated its use of the presumption analysis for any claim under the workers compensation statute, stating "using the presumption in these cases, "simplifies proceedings before the Board and thus reduces the hazards interinsurer dispute pose for the injured worker."

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

> **8 AAC 45.542. Change of rehabilitation specialist**. (a) If an employee has selected or been assigned a rehabilitation specialist to perform an evaluation or to develop a plan and, before the evaluation is completed or the plan is formulated, a change of residence by the employee or a change of business address by the rehabilitation specialist places the employee and rehabilitation specialist in different geographical locations, upon written notice that the worker or rehabilitation specialist has relocated, the administrator may assign another rehabilitation specialist to complete the evaluation or develop a plan.

> **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
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> (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;
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> . . . .
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> (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. Within 14 days after the administrator receives the plan for review, the administrator will
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> (1) approve the plan and notify the parties by certified mail;
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> (2) deny the plan and notify the parties by certified mail; or
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> (3) notify the parties that the plan is incomplete and request additional information from the parties before making a decision on the plan.

ANALYSIS

Has Employee's reemployment process ended?

Employee contends she is no longer engaged in the reemployment process, it has ended, and requests an order that she is permanently and totally disabled. She contends a plan has not been able to be developed. Employee relies on opinions from Drs. Levenson, Gaskill, and Gideon, finding she is not capable of participating in the reemployment process. Employer relies on Drs. Ward, Ling, and Ahn's opinions that Employee can be retrained. Reemployment specialist Cortis testified based on the information she had available in June of 2018, she did not believe a plan could be developed, but she never terminated the plan development process. Rather, Cortis placed the plan on "hold." *Rogers & Babler*.

Without regard to credibility, Employee raises the presumption that she is no longer in the reemployment process through the testimony of her treating physicians who state she can't be employed or retrained. She also relies on Loretta Cortis' hearing testimony she did not believe a plan could be created. *Tolbert*; *Wolfer*. Employer must rebut the raised presumption with substantial evidence to the contrary. *Tolbert*. Credibility is not weighed at this stage. *Saxton*.

Drs. Ling and Ahn, SIME physicians, opined Employee was retrainable and could participate in a plan. Cortis testified at hearing that she had placed the plan on hold but never issued a formal plan report since her last update of 2018. Both reports for Drs. Ling and Ahn were developed after Cortis' last update and not considered in her last message to the parties. *Tolbert.*

Employee has to prove her claim by a preponderance of the evidence. *Steffey*; *Saxton.* Employee relies on the testimony of Cortis that a plan cannot foreseeably be developed based on what she knew of Employee in 2018. Cortis' testimony is given less weight based on her statements that she had not received anything after June of 2018. Employer relies on the SIME physician opinions that issued after 2018 that Employee is retrainable, and a plan can be developed. Specifically, Dr. Ahn noted Employee did have the physical capacity to perform moderate duty work and Dr. Ling believed Employee to be retrainable. The SIME physicians' opinions are given more weight. Based on Cortis' testimony the information she had available at the date of her testimony is not the most current and excludes the SIME physician opinions directly in opposite of Employee's treating physicians. In short, based on this analysis, Employee failed to prove by a preponderance of the evidence the reemployment process has ended. *Steffey*; *Saxton.*

Employee was found eligible for reemployment benefits by the RBAD on April 29, 2016. She selected Cortis to develop a plan on May 2, 2016. The reemployment plan has never been developed. Cortis issued periodic updates to the parties and the RBAD from 2016 to 2018. Cortis placed the plan on hold while Employee was attending out of state rehabilitation and at the request of Employee's treating physicians. Ultimately, Cortis placed the plan on hold in June 2018, and never returned to it. Since June 2018, additional SIME opinions have been authored. Cortis did not review or consider the SIME opinions when she placed plan development on hold in June 2018. The opinions of Drs. Ward, Ling, and Ahn, all issued after June 2018, indicate Employee can be retrained and can participate in the reemployment process.

Employee contends she should be found permanently and totally disabled under *Barbaza*. *Barbaza I* erroneously relied upon *Irvine* when it concluded the fact-finders must rely on the employee's treating physician at the plan development stage to determine if an employee can be retrained. *Irvine* applies not to plan development, but rather to a reemployment benefits eligibility evaluation under AS 23.30.041(e).

Employee's psychiatrist Dr. Levenson noted meaningful work is critical to improving Employee's condition. Inexplicably, he also believes Employee cannot be retrained or ever work

in any meaningful capacity. Dr. Levenson's inconsistent opinions are given no weight. AS 23.30.122; *Smith*.

The opinions of Drs. Ward, Ling, Ahn are given great weight and relied upon to conclude that Employee's plan development must proceed to determine if employee can be retrained to perform a line of work that will permit her to become a productive individual and give meaning and purpose so her life, even if she is not motivated to do so. AS 23.30.122; *Smith*. Cortis will be directed to review the SIME reports and commence plan development, with the 90 days beginning on the date this decision and order is issued. AS 23.30.041(h). Therefore, Employee is still involved in the rehabilitation process under the Act and that process is not yet over. AS 23.30.041(k).

CONCLUSION OF LAW

Employee's reemployment process has not ended.

ORDER

1) Cortis is directed to develop a reemployment plan in accordance with AS 23.30.041(h) and 8 AAC 45.550, and submit the plan to Drs. Ling and Ahn for their predictions under 8 AAC 45.550(a)(5).
2) Cortis shall present the reemployment plan to the parties for approval under AS 23.30.041(j).
3) If the parties do not agree with the reemployment plan, they are directed to proceed in accordance with AS 23.30.041(j) and 8 AAC 45.550(c).
4) If Cortis becomes no longer available, she is directed to notify the RBAD within 14 days of this order by serving a "notice of change of business address" pursuant to 8 AAC 45.542.
5) Continuing jurisdiction is retained in this matter, and a merits determination may be held upon receipt of Cortis' reemployment plan report.

Dated in Anchorage, Alaska on February 9, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Kyle Reding, Designated Chair

/s/
Sara Faulkner, Member

/s/
Randy Beltz, 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 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 Angelee Wood, employee/claimant v. State of Alaska, self-insured employer; defendant; Case No. 201509544; 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 February 9, 2024.

/s/ Lorvin Uddipa
Workers' Compensation Technician