

Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and NovaPro
Risk Solutions,
Appellants,

vs.

Paul Mahe,
Appellee.

Final Decision

Decision No. 129 March 16, 2010

AWCAC Appeal No. 09-015

AWCB Decision No. 09-0068

AWCB Case No. 200705818

Appeal from Alaska Workers' Compensation Board Decision No. 09-0068, issued on April 7, 2009, by southcentral panel members Linda M. Cerro, Chair, Don Gray, Member for Industry, Howard A. Hansen, Member for Labor.

Appearances: Erin K. Egan, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants Municipality of Anchorage and NovaPro Risk Solutions. Robert A. Rehbock, Rehbock & Rehbock, for appellee Paul Mahe.

Commission proceedings: Appeal filed April 20, 2009, with Motion for Stay. Opposition to Motion for Stay filed April 28, 2009. Hearing on Motion for Stay held May 8, 2009.¹ Order on Motion for Stay issued May 14, 2009. Order extending time to file appellee's brief issued August 12, 2009. Motion for Samoan translation filed August 28, 2009. Motion for a second extension of time filed September 8, 2009. Hearing on motions held September 24, 2009. Order on motions issued October 27, 2009. Oral argument on appeal presented December 17, 2009. Notice of appointment of chair *pro tempore* issued March 1, 2010.

Appeals Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By: Kristin Knudsen, Chair *pro tempore*.

¹ The commission provided an interpreter, Lucy Hansen, for this hearing and the hearing on Sept. 24, 2009. The commission appreciates Ms. Hansen's professionalism and objectivity.

Paul Mahe, a maintenance worker for the Municipality of Anchorage (Municipality), injured his right knee as he stepped down from the driver's area of a bus in 2007. He requested an evaluation for reemployment benefits in October 2008, and the reemployment benefits administrator's designee, Deborah Torgerson,² appointed rehabilitation specialist Virginia Samson to perform an eligibility evaluation. After receiving her report, the administrator notified Mahe that he was not eligible for reemployment benefits because he had been released by his physician to return to positions he held in the last 10 years. Mahe appealed the denial to the board. The board overturned the administrator's decision, finding that Samson's reliance on the physician's responses was error, that the physician failed to consider whether the employee's other medical conditions would inhibit Mahe's ability to perform the occupations, and that Samson's labor market survey was flawed. Therefore, the board concluded, the administrator abused her discretion when relying on Samson's report.

On appeal, the Municipality argues that the board erred as a matter of law in holding that the form responses by Mahe's physician are unreliable. The board, the Municipality also argues, impermissibly reweighed the evidence presented to the administrator and failed to accord deference to the administrator's exercise of discretion. The Municipality argues the board exceeded its authority in requiring the administrator to consider nonwork-related conditions. Finally, the Municipality argues that the labor market survey was adequate. Mahe responds that the administrator's designee did abuse her discretion because the form responses were not substantial evidence on which she could rely. Mahe also argues that the administrator was required to investigate the inconsistencies in the record and that failure to do so was an abuse of discretion.

The parties' contentions require the commission to decide if the board abused its discretion in its review of the administrator's decision. The commission concludes the board erred as a matter of law. The board reweighed the evidence presented to the

² Hereafter the commission uses the term "administrator" to refer to the reemployment benefits administrator and the administrator's designee, who acts for the administrator, unless it is necessary to identify a particular person.

administrator without considering new evidence. By ruling that the administrator's form was entitled to less weight as a matter of law, the board panel effectively invalidated the administrator's implementation of a regulation, which is beyond a board hearing panel's authority. However, because the commission concludes that the administrator abused her discretion when she failed to follow the administrator's regulations and this error requires reversal, the commission affirms the remand to the administrator.

1. Factual background.

Paul Mahe is a native of Samoa who attended school in Hawaii, but who did not graduate.³ In May of 2005, he started working for the Municipality of Anchorage as a Maintenance Worker.⁴ In April 2007, he injured his right knee as he stepped down from the bus driver's area,⁵ tearing the posterior horn of the medial meniscus.⁶ He was treated by arthroscopic surgery in May 2007 by Dr. William Mills.⁷ When he continued to have symptoms, Dr. Mills performed a second surgery in December 2007 to remove loose bodies and a large popliteal cyst.⁸ The employer paid compensation and medical benefits for this injury.⁹

In July 2008, he saw Dr. J. Michael James for an impairment rating.¹⁰ Dr. James rated his permanent partial impairment at 1 percent of the whole person.¹¹ He was also released to return to work with a lifting limit of 40 pounds occasionally and 20 pounds frequently, and ordered to do no bending, squatting, or climbing ladders.¹² On

³ *Municipality of Anchorage v. Mahe*, Alaska Workers' Comp. App. Comm'n Dec. No. 125, 2-3 (Oct. 27, 2009).

⁴ R. 0001.

⁵ *Id.*

⁶ R. 0164.

⁷ R. 0162-63.

⁸ R. 0154, 0142-43.

⁹ R. 0010.

¹⁰ R. 0128-29.

¹¹ R. 0129.

¹² R. 0127.

September 15, 2008, Dr. Mills recommended vocational retraining, because “it is very unlikely that [Mahe] can return to unlimited work requirements of his previous job.”¹³

The next month, Mahe requested an eligibility evaluation.¹⁴ The administrator assigned rehabilitation specialist Virginia Samson to perform the eligibility evaluation.¹⁵ Ms. Samson took a work history¹⁶ and sent 10 SCODDOT¹⁷ occupation descriptions for jobs Mahe had held in the past 10 years to Dr. Mills.¹⁸ The forms are three pages long, and contain a detailed list of the physical demands of the occupation. At the bottom of the third page, the physician is asked to predict if the employee will or will not have the permanent physical capacities to meet the physical demands of the job description. Dr. Mills marked six occupations (including one volunteer position) for which Mahe would have physical capacities, including cook helper, bus driver, cafeteria attendant, driver, and newspaper delivery driver.¹⁹

These were submitted to the administrator with Samson’s report on January 16, 2009.²⁰ A separate labor market survey was submitted on January 26, 2009.²¹ Based on Samson’s report and the labor market survey, the administrator determined that Mahe was not eligible for reemployment benefits because his physician predicted he would have the permanent physical capacity to perform the physical demands of jobs he had held in the 10 years before his injury.²²

¹³ R. 0125.

¹⁴ R. 0183.

¹⁵ R. 0189.

¹⁶ R. 0193.

¹⁷ A system of occupational classification by the U.S. Department of Labor, SCODOT is the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles. Its use is required by AS 23.30.041(e).

¹⁸ R. 0199, 0203-35.

¹⁹ R. 0208, 0211, 0223, 0226, 0229, 0235.

²⁰ R. 0195.

²¹ R. 0239.

²² R. 0247.

2. Board proceedings.

Mahe filed an appeal to the board February 17, 2009, stating that “The jobs that listed I can go back to now I’ve been injured I can’t do it.”²³ A board hearing was held on March 25, 2009, to hear Mahe’s appeal.²⁴ Mahe obtained a letter, dated March 18, 2009, from Dr. Mills, that Mahe filed at the board March 23, 2009.²⁵ The employer objected to the board’s consideration of the letter, because it had not been filed more than five days before hearing, the employer only received it March 23, 2009, and the employer filed a request to cross-examine Dr. Mills.²⁶ The board quoted the entire letter in its decision.²⁷ However, the board stated it did not need to rule on the employer’s objection, because, without considering Dr. Mills’s March 18, 2009, letter, it determined that the administrator did not have substantial evidence to support her conclusion.²⁸

The board held that Dr. Mills’s responses to Virginia Samson were “inconsistent with the substantive contents of the medical records, were limited to Employee’s right knee, and failed to consider” a number of unrelated conditions.²⁹ The board concluded that Dr. Mills’s responses were “not evidence a reasonable mind would accept as adequate to support the conclusion Employee has the overall physical capacity to perform the ‘Medium’ physical demand occupations of Bus Driver, Cook Helper, Newspaper Delivery Driver, and Driver.”³⁰ The board also found that the labor market survey was flawed because, if positions requiring “Medium” capacity were eliminated, the specialist had “failed to identify a viable labor market for Employee’s employment

²³ R. 0019.

²⁴ *Paul Mahe v. Municipality of Anchorage*, Alaska Workers’ Comp. Bd. Dec. No. 09-0068 (Apr. 7, 2009).

²⁵ R. 0175-76.

²⁶ *Paul Mahe*, Bd. Dec. No. 09-0068 at 13.

²⁷ *Id.* 12-13.

²⁸ *Id.* at 21.

²⁹ *Id.*

³⁰ *Id.*

skills.”³¹ The board reversed the administrator’s conclusion that Mahe was not eligible for reemployment benefits.³² The Municipality appealed.

3. Discussion.

a. Standard of review.

On review of the board’s findings of fact, the commission must uphold the board’s findings of fact if they are supported by substantial evidence in light of the whole record.³³ The commission examines “the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board’s conclusion.”³⁴ However, the commission “will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the board.”³⁵ The commission makes its decision based on the record before the board, the briefs, and oral argument, and no new evidence may be presented.³⁶

The question whether the quantum of evidence is substantial enough to support a conclusion of a reasonable mind is a question of law.³⁷ The scope of the board’s

³¹ *Id.* at 24.

³² *Id.*

³³ AS 23.30.128(b).

³⁴ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 054, 6 (August 28, 2007) (citation omitted).

³⁵ *Fred Meyer Stores, Inc. v. Updike*, Alaska Workers’ Comp. App. Comm’n Dec. No. 120, 5 (Oct. 29, 2009), citing *Lindhag v. State, Dep’t of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)); AS 23.30.122 (providing “[t]he 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.”); and, AS 23.30.128(b) (providing the “board’s findings regarding the credibility of testimony of a witness before the board are binding on the commission.”).

³⁶ AS 23.30.128(a).

³⁷ *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

authority is also a question of law.³⁸ On questions of law and procedure, the commission exercises its independent judgment.³⁹

b. The hearing panel may not invalidate a board-adopted regulation by holding that a physician prediction in the format required by regulation has less weight as a matter of law.

The appellants do not dispute that Mahe was entitled to a reemployment eligibility evaluation under AS 23.30.041. The rehabilitation specialist was selected and, under AS 23.30.041(d), the specialist had 30 days to “perform the eligibility evaluation and issue a report of findings.” The purpose of the specialist’s report is to aid the administrator in determining if an employee is eligible.

AS 23.30.041(e) provides:

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

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

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

The Alaska Supreme Court has held that the presumption of compensability in AS 23.30.120(a) applies to an employee's eligibility for reemployment benefits.⁴⁰ But,

³⁸ *Schouten v. Alaska Industrial Hardware*, Alaska Workers' Comp. App. Comm'n Dec. No. 094, 8 (Dec. 5, 2008) (citing *Simon v. Alaska Wood Prods.*, 633 P.2d 252, 254 (Alaska 1981)).

³⁹ AS 23.30.128(b).

the presumption is not irrebuttable. The presumption of eligibility may be rebutted by substantial evidence that, standing alone and not assessed for its credibility, would eliminate a required element of eligibility or affirmatively establish non-eligibility.⁴¹ The administrator had evidence that Mahe's physician predicted he would have the physical capacity to return to occupations that he held in the past ten years. Standing alone, without weighing the evidence, Dr. Mills's responses to the specialist's inquiry were evidence that eliminates the reasonable possibility that "the employee will have permanent physical capacities that are less than the physical demands of . . . jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury."⁴²

⁴⁰ *Rockney v. Boslough Constr. Co.*, 115 P.3d 1240, 1243-44 (Alaska 2005) ("[W]e have applied the presumption to any disputes over the employee's eligibility for benefits, including eligibility for reemployment benefits." (footnotes omitted)).

⁴¹ AS 23.30.041(f) provides:

An employee is not eligible for reemployment benefits if

(1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;

(2) the employee previously declined the development of a reemployment benefits plan under (g) of this section, received a job dislocation benefit under (g)(2) of this section, and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury;

(3) the employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury; or

(4) at the time of medical stability, no permanent impairment is identified or expected.

⁴² AS 23.30.041(e).

The board, however, failed to recognize that Dr. Mills's responses were sufficient to overcome the presumption that the employee was eligible for reemployment benefits. The board did not examine Dr. Mills's responses alone, but compared them with other medical records in the board's file that discussed other conditions that were not work-related. The board held that "based on the record as a whole, Dr. Mills' check box responses are not evidence a reasonable mind would accept as adequate to support the conclusion Employee has the overall physical capacity to perform the 'Medium' physical demand occupations"43 The board noted that it "consistently held a physician's 'checking the box' opinions are entitled to very little weight."44 In short, the board did not examine Dr. Mills's responses alone and the board held they were insufficient *as a matter of law* because of the format of the opinion.

8 AAC 45.525 sets out the specific actions the rehabilitation specialist is to perform in preparing a report.⁴⁵ 8 AAC 45.525(b) requires that the rehabilitation

⁴³ *Paul Mahe*, Bd. Dec. No. 09-0068 at 21.

⁴⁴ *Paul Mahe*, Bd. Dec. No. 09-0068 at 21 n.87.

⁴⁵ 8 AAC 45.525 provides

Reemployment benefit eligibility evaluations. (a) If an employee is found eligible for an eligibility evaluation for reemployment benefits under 8 AAC 45.510 or 8 AAC 45.520, the rehabilitation specialist shall

(1) interview the employee and, if necessary, the employer at time of injury to obtain a description of the tasks and duties of the employee's job at time of injury;

(2) review the following volume and, from the volume, choose the most appropriate job title or titles based on the description of the employee's job; the volume to be reviewed under this paragraph is

(A) on or after July 2, 1998 and until August 29, 1998, the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles" (1981) (SCODDOT); and

(B) on or after August 30, 1998, the effective date of the amendment of AS 23.30.041(e) by sec. 1,

ch. 59, SLA 1998, the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" unless, under AS 23.30.041(q), the board has designated a later revision or version of that volume; and

(3) submit the job title or titles chosen under (2) of this subsection to a physician.

(b) When interviewing the employee the rehabilitation specialist shall obtain descriptions of the tasks and duties for other jobs that the employee has held or for which the employee received training within 10 years before the injury, and any jobs held after the injury. The rehabilitation specialist shall

(1) review the following volume and, from the volume, choose the most appropriate job title or titles based on the employee's descriptions of the job's held and training received; the volume to be reviewed under this paragraph is

(A) on or after July 2, 1998, and until August 29, 1998, the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (1981) (SCODDOT); and

(B) on or after August 30, 1998, the effective date of the amendment of AS 23.30.041(e) by sec. 1, ch. 59, SLA 1998, the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" unless, under AS 23.30.041(q), the board has designated a later revision or version of that volume;

(2) determine whether the employee held the jobs long enough to meet the specific vocational preparation codes as described in the volume;

(3) submit the job title or titles chosen under (1) — (2) of this subsection, for which the employee meets the specific vocational preparation codes, to a physician.

(4) if the physician predicts the employee will have the permanent physical capacities equal to or greater than the physical demands of a job or jobs, conduct a labor

market survey to document that a reasonable number of job vacancies exist for those jobs.

(c) The rehabilitation specialist shall contact the employee's employer at time of injury about employment in accordance with AS 23.30.041(f)(1). If the employer offers employment, the rehabilitation specialist shall

(1) complete a job analysis, including a description of the job duties, tasks, and physical requirements, and give this description to a physician to predict whether the job's physical demands are within the employee's post-injury physical capacities;

(2) require the employer to complete an offer of employment on a form prescribed by the administrator, and document that the job offered will pay the employee at least the state minimum wage under AS 23.10.065 or an amount that is at least equal to 75 percent of the employee's gross hourly wages at the time of injury; and

(3) submit a labor market survey if the offer of employment meets the requirements of AS 23.30.041(f)(1); the survey must document that the offered employment prepares the employee to be employable in other jobs that exist in the labor market.

(d) The rehabilitation specialist shall ask if the employee has ever been rehabilitated in a prior workers' compensation claim. If the employee has been rehabilitated in a prior claim, the specialist shall try to obtain documentation of this rehabilitation for the purposes of AS 23.30.041(f)(2).

(e) The rehabilitation specialist shall document whether or not a permanent impairment is identified or expected at the time of medical stability. This documentation may be either a physician's rating according to the appropriate edition of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, use of which is directed by AS 23.30.190 or a physician's statement that an impairment rating is or is not expected.

(f) In accordance with 8 AAC 45.500 and within 30 days after the rehabilitation specialist received notification under 8 AAC 45.510(c)(2)(A) of being selected, the rehabilitation specialist shall submit

specialist shall, when interviewing the employee, choose the most appropriate job title or titles based on the description of the employee's job. Then, if the specialist decides the employee held the job long enough, or had training enough, to qualify for the job, the administrator shall submit the chosen job descriptions to a physician, and if the physician "predicts the employee will have the permanent physical capacities equal to or greater than the physical demands of a job or jobs," the specialist will conduct a labor market survey. The regulation specifically requires that the specialist obtain a prediction from a physician as to the ability of the employee to perform the tasks described in the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."⁴⁶ To implement this regulation, the administrator published a "Guide for Preparing Reemployment

(1) a report of findings, including a recommendation regarding eligibility for reemployment benefits, together with

- (A) copies of the physician's predictions;
- (B) the completed offer of employment form, if employment has been offered;
- (C) labor market surveys, if necessary;
- (D) documentation of previous rehabilitation, if received; and
- (E) the physician's rating or statement regarding permanent impairment; or

(2) a written request for a 30-day extension explaining the unusual and extenuating circumstances, in accordance with AS 23.30.041(d), that prevented the rehabilitation specialist from completing the evaluation within 30 days of notification of selection; if the administrator grants an extension requested under this paragraph, no later than at the end of the 30-day extension the rehabilitation specialist shall prepare and submit a report of findings in accordance with (1) of this subsection.

⁴⁶ 8 AAC 45.525(b)(3).

Benefits Eligibility Evaluations” for rehabilitation specialists to follow.⁴⁷ The administrator’s guide states that “The physician must review the correct SCODRDOT job descriptions and respond to one question: ‘Do you predict that [the employee] will have permanent physical capacities that are equal to or greater than the physical demands of the job described above.’ Yes No.”⁴⁸ Thus the predictions obtained by the specialist complied exactly with the administrator’s Guide.

In *Irvine v. Glacier General Construction*,⁴⁹ the Supreme Court emphasized that the Court “has consistently enforced subsection (e)’s requirement that medical opinions concerning eligibility for reemployment benefits be specifically referenced to the SCODDOT standards.”⁵⁰ The Court said,

While acknowledging that unfairness would result in certain circumstances, we maintained that the plain language of AS 23.30.041(e) leaves no room for the suggested departure: “[The statutory language] is plain and demands that reemployment benefit eligibility be determined by the [SCODDOT] job descriptions. The legislature neither expressed nor implied any exceptions.”⁵¹

In *Irvine*, the Court held that the administrator’s failure to consider the employee’s physician’s opinions was harmless error because “the doctor did not couch her opinion in terms of the SCODDOT standards”⁵² and it was clear that she would “not rely on them as a basis for evaluating Irvine’s physical capacity to perform work comparable to the job he held when injured.”⁵³ Therefore, if a physician’s opinion was to form a valid

⁴⁷ *Guide for Preparing Reemployment Benefits Eligibility Evaluations*, State of Alaska Div. of Workers’ Compensation, Reemployment Benefits Section, revised June 26, 2009. Available on-line at <http://www.labor.alaska.gov/wc/forms/wcdsubpagereemploymentguide.pdf>.

⁴⁸ *Id.* at 5 (footnote omitted).

⁴⁹ 984 P.2d 1103 (Alaska 1999).

⁵⁰ *Id.* at 1108 (footnote omitted).

⁵¹ *Id.* at 1108 (citing *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 282 (Alaska 1996)).

⁵² 984 P.2d at 1108.

⁵³ *Id.*

basis for evaluating Mahe's physical capacity to perform work in a particular occupation, it must be couched in terms of the SCODDOT standards. This necessarily requires the use of a form, as the physician must be able to predict if the employee will or will not have the permanent physical capacity to perform the specific occupational title.

While a form is not itself a regulation, to the extent that the administrator's Guide instructs the public (here the rehabilitation specialist's) or is used by the administrator in dealing with the public (including claimants, insurers, employers and specialists), and implements, interprets or makes specific the law enforced or administered by the administrator, it has the effect or force of regulation.⁵⁴ Regulations implementing AS 23.30.041 are adopted by the full board.⁵⁵ Because they are adopted by the full workers' compensation board, they may only be repealed by the full board, but they may not be made ineffective by a single hearing panel.

Here the panel accorded the physician's predictions "less weight" as a matter of law *because* they complied with the specific requirements of the administrator's regulations. In effect, the board upended the Supreme Court's holding that a physician's prediction that is not expressed "in terms of the SCODDOT standards" is entitled to no weight. This was reversible error. However, for reasons set out below, the commission vacates the board's decision and remands to the administrator for further action.⁵⁶

c. Administrator's failure to apply 8 AAC 45.530(b) and to resolve a dispute of fact was an abuse of discretion.

8 AAC 45.530 provides:

Determination on eligibility for reemployment benefits.

(a) Within 14 days after receiving a rehabilitation specialist's

⁵⁴ AS 44.62.640(a)(3); *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 825 (Alaska 1997).

⁵⁵ AS 23.30.041(b)(1).

⁵⁶ Because of the disposition of this appeal, the commission does not address the appellants' arguments that the board impermissibly reweighed the evidence or exceeded its authority in requiring the administrator to consider nonwork-related conditions.

eligibility evaluation report for an employee injured on or after July 1, 1988, the administrator will determine whether the employee is eligible or ineligible for reemployment benefits, or that insufficient information exists to make a determination on the employee's eligibility for reemployment benefits. The administrator will give the parties written notice by certified mail of the determination, the reason for the determination, and how to request review by the board of the determination.

(b) If the administrator determines the eligibility evaluation is not in accordance with 8 AAC 45.525, or the information on the board's case file is insufficient or does not support the eligibility recommendation, the administrator

(1) may not decide the employee's eligibility for reemployment benefits; and

(2) shall notify the employee, the employer, or the rehabilitation specialist to submit additional information within a specified date so eligibility can be determined.

(c) If the administrator determines the employer is eligible for reemployment benefits, the administrator's notice must

(1) state that the employee shall select a rehabilitation specialist within 10 days after the employee receives the notice;

(2) be accompanied by a copy of the administrator's list of rehabilitation specialists; under this paragraph, if the employee

(A) resides in the state, the administrator will send the lists of rehabilitation specialists in Alaska as defined in 8 AAC 45.400(b)(1); or

(B) does not reside in the state, the administrator will send a list of rehabilitation specialists nearest the employee based on the geographic area, as defined in 8 AAC 45.400(b)(2); and

(3) inform the employee on how the employee shall tell the employer and administrator of the rehabilitation specialist selected.

In this case, the administrator had in the board's case file information that "does not support the eligibility recommendation." The administrator must, in such cases, notify the employee, the employer, or the rehabilitation specialist to submit additional information within a specified date so eligibility can be determined. In effect, this is an

opportunity to notify the parties that disputes of material fact exist and allow the parties opportunity to submit evidence. There is no record that the administrator provided the employee, the employer, or the rehabilitation specialist the opportunity to submit additional evidence before making the determination that Mahe was not eligible for reemployment benefits, nor does the administrator's letter denying eligibility indicate that she weighed inconsistent evidence in the case file.

The commission has held that board failure to follow its own regulation is an abuse of discretion.⁵⁷ Similarly, the administrator's failure to follow his or her regulations is an abuse of discretion. But, where the Workers' Compensation Act clearly vests the administrator with the obligation to decide disputes of fact related to eligibility for reemployment benefits in the first instance, and the record is not clear that the administrator considered inconsistent evidence or provided the parties the opportunity required by 8 AAC 45.530(b)(2), the commission will remand so that the administrator may do so.

4. Conclusion.

The commission VACATES the board's order reversing the administrator's denial of eligibility and MODIFIES the board's order remanding the case to the administrator to read as follows: "This matter is remanded to the RBA for notice under 8 AAC 45.530(b)(2) and determination of eligibility following opportunity for parties to

⁵⁷ *Alcan Electrical & Engineering, Inc. v. Redi Electric, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 112, 11, 2009 WL 1941866, *6 (Jul. 1, 2009) (citing *Smith v. CSK Auto, Inc.*, 204 P.3d 1001 (Alaska 2009)).

submit additional information within a specified date." The commission does not retain jurisdiction.

Date: 16 Mar. 2010

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



signed

Philip Ulmer, Appeals Commissioner

signed

Jim Robison, Appeals Commissioner

signed

Kristin Knudsen, Chair *pro tempore*

APPEAL PROCEDURES

This is a **final decision** on this appeal taken by the Municipality of Anchorage from Alaska Workers' Compensation Board Decision No. 09-0068. The commission vacated the board's order reversing the reemployment benefits administrator's decision, and sent the case back to the board with a modification of the board's order remanding the case to the reemployment benefits administrator. This means that the administrator must take action to determine if Mr. Mahe is, or is not, eligible for reemployment benefits. The commission did not retain jurisdiction.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the box below.

Although this is a final decision by the commission, and the commission did not retain jurisdiction, it is not a final decision on Mr. Mahe's claim for reemployment benefits. It is possible, because this is not a final decision on an appeal of a decision on a workers' compensation claim, that the Supreme Court might not allow an appeal of this decision. Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 129 issued in the matter of *Municipality of Anchorage and NovaPro Risk Solutions v. Paul Mahe*, AWCAC Appeal No. 09-015, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 16, 2010.

Date: 3/23/2010



signed

B. Ward, Appeals Commission Clerk