

Alaska Workers' Compensation Appeals Commission

Laurie E. Vandenberg,
Appellant,

vs.

State of Alaska,
Appellee.

Final Decision

Decision No. 211

May 1, 2015

AWCAC Appeal No. 14-019
AWCB Decision Nos. 14-0093 and 14-0100
AWCB Case No. 201112729

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0093, issued at Anchorage, Alaska, on July 2, 2014, by southcentral panel members Ronald P. Ringel, Chair, Mark Talbert, Member for Labor, and Linda Hutchings, Member for Industry, and Final Decision and Order on Reconsideration No. 14-0100, issued at Anchorage, Alaska, on July 23, 2014, by southcentral panel members Ronald P. Ringel, Chair, Mark Talbert, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant, Laurie E. Vandenberg; Craig W. Richards, Attorney General, and Daniel N. Cadra, Assistant Attorney General, for appellee, State of Alaska.

Commission proceedings: Appeal filed August 19, 2014; briefing completed January 21, 2015; oral argument was not requested.

Commissioners: James N. Rhodes, S. T. Hagedorn, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

Laurie E. Vandenberg was employed by the State of Alaska, Department of Health and Social Services (DHSS) when she incurred a work-related injury. The reemployment benefits administrator assigned a rehabilitation specialist to perform a reemployment benefits evaluation. The specialist concluded that a combination of two job titles most appropriately described Ms. Vandenberg's prior job, and, based on a physician's prediction that Ms. Vandenberg would not have the capacity to perform the

physical demands of one of those jobs, recommended that she be found eligible for reemployment benefits.

The administrator's designee rejected the rehabilitation specialist's recommendation and determined that Ms. Vandenberg was ineligible, based on the designee's determination that a single job title most appropriately described her prior job, and the physician's prediction that she would have the capacity to perform the physical demands of that job.

Ms. Vandenberg filed a claim with the board contesting the designee's decision. The board conducted a hearing and affirmed the designee's decision. Ms. Vandenberg appeals. She argues that the board erred in selecting a single job title as most appropriately describing her prior job. We conclude that substantial evidence supports the board's decision.

2. *Factual Background and Proceedings.*¹

While working in a position as a nurse employed by DHSS, Ms. Vandenberg tore a tendon.² She had surgery to repair the tear,³ and her employer notified the reemployment benefits administrator that Ms. Vandenberg had lost 90 consecutive days of work.⁴

The administrator assigned rehabilitation specialist Lulie Williams to perform a reemployment benefits eligibility evaluation.⁵ In a corrected eligibility report, the rehabilitation specialist identified the position that Ms. Vandenberg occupied at the time of the injury as a Nurse II with DHSS.⁶ She identified several other jobs that

¹ We make no factual findings. We summarize the facts as stated in the board's decision, referencing applicable portions of the record for context and detail.

² *Laurie E. Vandenberg v. State of Alaska, Alaska Workers' Comp. Bd.* Dec. No. 14-0093 (July 2, 2014), p. 2 (#1, #2).

³ *Id.* (#4).

⁴ *Id.* (#5).

⁵ *Id.* (#6).

⁶ *Id.*, pp. 3-4 (#8, #10). See Exc. 28-34.

Ms. Vandenberg had performed within the past ten years, including one in a position as a Health Facilities Surveyor with DHSS.⁷

The rehabilitation specialist selected job titles that described those positions, using the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCO) and the department's "Revised Dictionary of Occupational Titles" (DOT).⁸ For every job that Ms. Vandenberg had performed in the last ten years, the specialist selected the DOT job title of Nurse, General Duty, either alone or in combination with another DOT job title.⁹ In particular, for the position as Health Facilities Surveyor with DHSS, the specialist selected two DOT job titles, Nurse, General Duty, and Inspector, Health Care Facilities.¹⁰ The specialist explained she believed the DOT job title Nurse, General Duty was required in addition to the title Inspector, Health Care Facilities as part of the description for Ms. Vandenberg's position as a Health Facilities Surveyor position for two reasons: first, the Health Facilities Surveyor position required occasional lifting of 50 pounds, which exceeded the strength requirement stated in the SCO for the Inspector, Health Care Facilities job title, but not that of a Nurse, General Duty; second, the Health Facilities Surveyor position required certification as a registered nurse.¹¹

The rehabilitation specialist had previously sent Dr. Larry Levine, M.D., the job descriptions set forth in the DOT for the job titles Nurse, General Duty, and Inspector, Health Care Facilities, along with the SCO's description of the physical demands for those job titles.¹² Based on the information provided to him, Dr. Levine predicted that Ms. Vandenberg would have the physical capacities to perform the physical demands of the job of an Inspector, Health Care Facilities, but would not have the physical

⁷ *Vandenberg*, Bd. Dec. No. 14-0093 at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, p. 3-4 (#10).

¹² *Id.*, p. 3 (#8). *See* Exc. 106-111.

capacities to perform the physical demands of the job of a Nurse, General Duty.¹³ Because the specialist had determined that the Nurse, General Duty title was, alone or in combination with another title, necessary to describe all of Ms. Vandenberg's prior jobs, the specialist recommended that Ms. Vandenberg be found eligible for reemployment benefits.¹⁴

The designee determined Ms. Vandenberg was ineligible for reemployment benefits, based on the designee's determination that the DOT job title Inspector, Health Care Facilities by itself "was sufficient to describe the duties [Ms. Vandenberg] performed" in her position as a Health Facilities Surveyor.¹⁵

Ms. Vandenberg filed a workers' compensation claim seeking review of the designee's eligibility decision.¹⁶ The board conducted a hearing, heard testimony by the specialist and Ms. Vandenberg, and affirmed the designee's decision.¹⁷ The board ruled that in disregarding the rehabilitation specialist's selection of the appropriate job titles, the designee had failed to comply with 8 AAC 45.525(b)(2) and 8 AAC 45.530(b).¹⁸ However, the board concluded this was harmless error.¹⁹

Ms. Vandenberg filed a petition for reconsideration, asserting that the board lacked authority to determine the appropriate job titles and rather ought to have remanded the matter to the administrator, and that the evidence did not support the board's decision.²⁰ The board denied the petition, concluding that it had authority to determine the appropriate job title, and that a remand was unnecessary.²¹

¹³ *Vandenberg*, Bd. Dec. No. 14-0093 at 3.

¹⁴ *Id.*, p. 4 (#10).

¹⁵ *Id.* (#12).

¹⁶ *Id.* (#13).

¹⁷ *Vandenberg*, Bd. Dec. No. 14-0093.

¹⁸ *Id.*, p. 14.

¹⁹ *Id.*, pp. 15-18.

²⁰ Exc. 59-64.

²¹ *Laurie E. Vandenberg v. State*, Alaska Workers' Comp. Bd. Dec. No. 14-0100 (July 23, 2014).

Ms. Vandenberg appeals.

3. Standard of review.

We review a board decision in accordance with AS 23.30.128(b) and AS 23.30.122. In the context of an appeal from the board's decision reviewing a determination by the rehabilitation benefits administrator, we have stated:

If the board reviews the administrator's decision without taking new evidence, we examine whether the board's decision affirming or reversing the administrator was an abuse of the board's discretion. If the board engages in fact-finding, as it does when it takes additional testimony from witnesses or receives evidence not submitted to the administrator, we will examine whether the board's findings of fact are supported by substantial evidence in light of the whole record. On a question of law applied, or procedure used, by the administrator or the board, the commission is required to exercise its independent judgment.^[22]

In her opening brief, Ms. Vandenberg did not argue that the board lacked authority to determine the most appropriate job title, or that it erred in not remanding the matter to the administrator.²³ She argued only that the board erred in determining that a single DOT job title most appropriately describes her job. In making that determination, the board took additional testimony and engaged in fact finding with respect to a single factual issue: the most appropriate job title or titles for Ms. Vandenberg's job as Health Facilities Surveyor for DHSS.²⁴ We review the board's factual finding on that issue under the substantial evidence standard.

²² *Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 13, 2006), at 14-15 (footnotes and citations omitted).

²³ In her reply brief, Ms. Vandenberg argued that the board erred in characterizing the designee's failure to request additional information or to reassign the matter to another specialist as harmless error. Reply Brief at 3. She speculated that if another rehabilitation specialist were assigned, a different job title might be selected. *Id.*, pp. 4-5. However, both before the board and on appeal, Ms. Vandenberg has failed to identify any alternative DOT job titles as potentially applicable. See *Vandenberg*, Bd. Dec. No. 14-0100, p. 13. In any event, as she did not raise this issue in her opening brief, we decline to consider it. See, e.g., *Landry v. Trinion Quality Care Services, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 137 at 18, note 145 (August 26, 2010).

²⁴ See *Vandenberg*, Bd. Dec. 14-0093 at 6 (#21).

4. Discussion

The rehabilitation specialist is directed to "select the most appropriate [DOT] job title or titles that describe the [employee's] job."²⁵ The "most appropriate" DOT job title is the title or titles whose job description as set forth in the DOT best matches the employee's job.

Ms. Vandenberg's job as a Health Facilities Surveyor is generally described in a recruitment bulletin as follows:

Health Facilities Surveyors I perform professional on-site inspections and reviews of health care facilities. As a member of a survey team, incumbents apply professional knowledge and expertise in a specialty area, such as nursing, medical technology, dietetics, sanitation, social work, or health administration, to analyze and assess the activities in the facility.^[26]

The lead statement of the DOT job description for an Inspector, Health Care Facilities is this: "Inspects health care facilities, such as hospitals, nursing homes, sheltered care homes, maternity homes, and day care centers, to enforce public health laws and to investigate complaints[.]"²⁷ The more detailed description of tasks notes that inspections include "operating procedures[.]"²⁸ This DOT job description is clearly an appropriate description of Ms. Vandenberg's job as a Health Facilities Surveyor: the basic function of both jobs is to inspect facilities and practices at health care facilities for compliance with applicable laws and regulations.

The lead statement of the DOT job description for a Nurse, General Duty is this: "Provides general nursing care to patients in hospital, nursing home infirmary, or similar health care facility[.]"²⁹ This DOT job description does not appropriately describe

²⁵ 8 AAC 45.525(b)(2).

²⁶ Exc. 1. The bulletin provides additional information regarding the areas and types of facilities that are inspected and reviewed.

²⁷ DOT No. 168.167-042.

²⁸ *Id.*

²⁹ The lead statement is the introductory sentence of the DOT definition; it summarizes and provides an overview of the occupation. *See*, DOT, Introduction (Parts of the Occupational Definition).

Ms. Vandenberg's job as a Health Facilities Surveyor: that job involves evaluating nursing care provided by other persons, but (as Ms. Vandenberg acknowledged in her testimony before the board) it does not involve providing nursing care to patients,³⁰ which is the basic function of a nurse, as described in the DOT job description for a Nurse, General Duty.

Indeed, Ms. Vandenberg does not suggest that the DOT job description for a Nurse, General Duty is an accurate description of her duties as a Health Facilities Surveyor. Rather, she asserts that her job as Health Facilities Surveyor "requires a Nurse Certification"³¹ and that "a nursing background is required"³² and she argues that in light of these requirements, the DOT job title or titles selected to describe her job as a Health Facilities Surveyor must include a DOT job title that has the same requirements.³³

The premise of this argument is that a nurse certificate and experience was required for Ms. Vandenberg's job. Looking at the job description for a Health Facilities Surveyor, we can see this is not true: a nurse certificate and experience is just one of a variety of alternative minimum qualifications.³⁴ It is true that Ms. Vandenberg worked as part of a team, and that for her specific position a nurse certificate and experience was required.³⁵ But Ms. Vandenberg has that certificate and experience, so that requirement is not a barrier to her reemployment as a Health Facilities Surveyor in the same position she previously occupied.³⁶ In any event, a DOT job title is selected to

³⁰ Hr'g Tr. at 19:11-15; 23:13-20, June 12, 2014.

³¹ Appellant's Brief at 11.

³² Appellant's Brief at 13.

³³ Appellant's Brief at 11-14.

³⁴ Exc. 2.

³⁵ See Hr'g Tr. at 26:6 – 27:1. There is substantial evidence that for the most part, only nurses are hired into positions as Health Facilities Surveyors. *Id.* See also Exc. 128; Hr'g Tr. at 13:13.

³⁶ Ms. Vandenberg testified that she anticipates retaining her license, notwithstanding her injury. See Hr'g Tr. at 31:8-25.

enable a physician to assess an employee's physical capacity to perform the physical demands of the selected DOT job title, as those physical demands are described in the SCO. Absent any evidence that a licensing requirement has a physical demands component, a licensing requirement has no relevance to such an assessment. We conclude that substantial evidence supports the board's factual finding that the DOT job title Inspector, Health Care Facilities most appropriately describes Ms. Vandenberg's former job as a Health Facilities Surveyor.

5. Conclusion.

The board's decision is AFFIRMED.

Date: May 1, 2015 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Andrew M. Hemenway, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

If you wish to appeal 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

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for

reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below).

I certify that this is a full and correct copy of Final Decision No. 211, issued in the matter of *Laurie E. Vandenberg vs. State of Alaska*, AWCAC Appeal No. 14-019, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 1, 2015.

Date: May 4, 2015



Signed

K. Morrison, Appeals Commission Clerk