Alaska Workers' Compensation Appeals Commission

Kenneth C. Widmer, Appellant, vs. Municipality of Anchorage/AFD and NovaPro Risk Solutions, Appellees.	Final Decision Decision No. 165 August 3, 2012 AWCAC Appeal No. 11-012 AWCB Decision No. 11-0105 AWCB Case No. 200106858

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order on Reconsideration No. 11-0105, issued at Anchorage on July 20, 2011, by southcentral panel members Deirdre D. Ford, Chair, Patricia Vollendorf, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Chancy Croft, The Crofts Law Office, for appellant, Kenneth C. Widmer; Shelby L. Nuenke-Davison, Law Offices of Davison & Davison, Inc., for appellees, Municipality of Anchorage/AFD and NovaPro Risk Solutions.

Commission proceedings: Appeal filed August 12, 2011; briefing completed January 17, 2012; oral argument held on June 27, 2012.

Commissioners: David W. Richards, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Kenneth C. Widmer (Widmer), fractured his right hip in connection with his employment as a firefighter with appellee, Municipality of Anchorage (MOA). The sole issue presented in his appeal to the Workers' Compensation Appeals Commission (commission) is whether the Alaska Workers' Compensation Board (board) erred when it ultimately ruled, on reconsideration, that MOA did not owe a penalty for

failure to timely pay reemployment benefits due Widmer for the November 16, 2010, through February 11, 2011, timeframe.[1] We affirm.

2. Factual background and proceedings.

In *Widmer I*, the board found that the hearing record as a whole established certain facts by a preponderance of the evidence.[2] Before the commission, those facts were not disputed in any significant respect by the parties. In the interest of brevity, they are set forth as bullet points below.

- 04/18/2001 Widmer fractured his right hip in connection with his employment with MOA as a firefighter;
- 05/02/2001 MOA began payment of temporary total disability (TTD) benefits;
- 07/16/2001 90 days post-injury, no medical provider had predicted that Widmer could not return to work as a firefighter;
- 10/07/2001 Widmer returned to work as a firefighter;
- 11/26/2001 John T. Duddy, M.D., Widmer's initial treating physician, released Widmer to light duty work and also signed a release provided by MOA that Widmer could return to work without restrictions; payment of TTD benefits ceased;
- 01/17/2002 Widmer treated with Bret L. Mason, D.O., complaining of hip pain;
- 06/28/2002 Dr. Mason gave Widmer a permanent partial impairment (PPI) rating of 8%;
- 07/16/2002 MOA paid Widmer PPI benefits in a lump sum of $14,160.00;
- 11/21/2002 Dr. Mason opined that Widmer was not medically stable and would need hip replacement surgery in the future;

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[1] *See Kenneth C. Widmer v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 11-0105, 8-9 (July 20, 2011) (*Widmer III*). The board also handed down two prior decisions on Widmer's claim. *See Kenneth C. Widmer v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 11-0014 (Feb. 9, 2011) (*Widmer I*) and *Kenneth C. Widmer v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 11-0023 (March 3, 2011) (*Widmer II*). *Widmer I* was a Final Decision and Order in which the board ruled 1) that Widmer was entitled to a reemployment benefits eligibility evaluation, and 2) that Widmer was not owed a penalty. *Widmer II* was an Interlocutory Decision and Order on Reconsideration which merely granted reconsideration of the board's denial of a penalty in *Widmer I*. *See Widmer II* at 3.

[2] *See Widmer I,* Bd. Dec. No. 11-0014 at 3.

- 01/11/2007 Dr. Mason referred Widmer to Tim Kavanaugh, M.D., for hip replacement surgery;
- 03/02/2007 Ilmar Soot, M.D., performed an employer's medical evaluation (EME), reporting that Widmer was a candidate for hip replacement surgery and recommending against his return to work as a firefighter;
- 03/06/2007 Dr. Kavanaugh recommended hip replacement surgery to Widmer;
- 12/05/2007 Dr. Kavanaugh performed the hip replacement surgery;
- 12/10/2007 MOA resumed payment of TTD;
- 03/02/2008 MOA discontinued payment of TTD;
- 03/05/2008 Widmer returned to light duty work;
- 04/06/2008 Dr. Kavanaugh released Widmer to work subject to restrictions;
- 06/05/2008 Dr. Kavanaugh released Widmer to light duty work;
- 08/29/2008 Widmer retired, not having voluntarily left the workforce, rather, his retirement was the result of the 2001 hip injury; Widmer opted to take regular retirement benefits rather than medical retirement benefits;
- 02/21/2009 MOA's adjuster inquired whether Widmer was still working light duty;
- 07/26/2009 Dr. Kavanaugh predicted Widmer would have some PPI but would not provide a rating;
- 07/31/2009 Widmer inquired of MOA's adjuster whether he was eligible for retraining, *i.e.* reemployment benefits; the adjuster indicated "maybe" and considered referring Widmer to the Reemployment Benefits Administrator (RBA);
- 08/03/2009 Dr. Kavanaugh responded to the adjuster's inquiry that Widmer would have PPI as a result of the hip replacement surgery;
- 08/28/2009 Timothy R. Borman, M.D., performed an EME, gave Widmer a PPI rating of 8%, and reported that Widmer should not return to work as a firefighter without restrictions;
- 01/19/2010 MOA's adjuster told Widmer he could request a reemployment benefits eligibility evaluation;
- 03/18/2010 Widmer wrote to the RBA to explain the circumstances of his late request for reemployment benefits;
- 05/13/2010 Dr. Kavanaugh expressed his opinion in a letter that Widmer could not return to work as a firefighter;
- 06/17/2010 The RBA Designee wrote Widmer asking him to provide the reasons for his late request for a reemployment benefits eligibility evaluation;

- 06/24/2010 Widmer wrote the RBA Designee explaining the reasons for his late request for reemployment benefits and addressing the RBA Designee's questions in that regard;
- 07/13/2010 The RBA Designee determined that unusual and extenuating circumstances existed to excuse Widmer's belated request for a reemployment benefits eligibility evaluation and decided he was eligible for such an evaluation;[3]
- 07/22/2010 MOA filed a petition requesting review of the RBA Designee's decision that Widmer was eligible for a reemployment benefits evaluation and an affidavit of readiness for hearing;[4]
- 08/30/2010 MOA filed a controversion of reemployment benefits on the basis of its request for review of the RBA Designee's decision that Widmer was eligible for a reemployment benefits evaluation;[5]
- 11/16/2010 Date of exhaustion of PPI benefits that were originally paid in a lump sum, had they been paid bi-weekly, as measured from the RBA Designee's 07/13/2010 decision that Widmer was eligible for a reemployment benefits evaluation;
- 02/09/2011 Date the board issued its decision in *Widmer I* upholding RBA Designee's eligibility decision;
- 02/11/2011 MOA commenced payment of reemployment benefits.[6]

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole.[7] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

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[3] The RBA Designee's letter stated in pertinent part:

> If the employer/insurer disagrees with my decision, they (*sic*) must ask the Alaska Workers' Compensation Board to review my decision by requesting a hearing within 13 days of receipt of this letter (10 days plus 3 days for mailing). *If the employer/insurer does not request a review within this thirteen-day period, my decision is final* and our office will refer you to a rehabilitation specialist for an eligibility evaluation. (Italics added.) Exc. 0006.

[4] *See* Exc. 0079.

[5] *See Widmer I*, Bd. Dec. No. 11-0014 at 6.

[6] *See Widmer III*, Bd. Dec. No. 11-0105 at 1.

[7] *See* AS 23.30.128(b).

conclusion."[8] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[9] The commission exercises its independent judgment in reviewing questions of law or procedure.[10] The question whether an agency action is a regulation is a question of law.[11]

4. Discussion.

The board concluded that MOA did not owe a penalty for two reasons. First, under AS 23.30.041(c) and 8 AAC 45.520, MOA had timely requested review of the RBA Designee's 1) determination that unusual or extenuating circumstances existed that excused the belatedness of Widmer's request for a reemployment benefits eligibility evaluation; and 2) decision that he was eligible for a reemployment benefits evaluation. As a consequence, according to the board, MOA's request for a review of the decision precluded a penalty from being imposed. Second, contrary to Widmer's argument, MOA was not required to seek a stay of the decision by the RBA Designee. Thus, no compensation in the form of reemployment benefits was owed until the board issued its decision in *Widmer I*.[12]

a. Applicable law.

The RBA Designee's determination, that unusual or extenuating circumstances existed to excuse the belatedness of Widmer's request for a reemployment benefits eligibility evaluation, is no longer at issue nor subject to a cross-appeal by MOA. Nevertheless, for context, we quote the statutory subsections and board regulation

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[8] *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

[9] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

[10] *See* AS 23.30.128(b).

[11] *See Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 867 (Alaska 2010).

[12] *See Widmer III*, Bd. Dec. No. 11-0105 at 8.

subsections that relate to the process leading up to the RBA Designee's decision that Widmer was eligible for a reemployment benefits evaluation. The pertinent portions of those subsections are italicized.

> **AS 23.30.041. Rehabilitation of injured workers.**[13]
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> (c) If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury *unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request*. . . .
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> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. *Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110.* The hearing shall be held within 30 days after it is requested. . . .
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> (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 employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, 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 plan, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan 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 disability*

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[13] AS 23.30.041 was amended in 2005. The subsections, as quoted, were in effect when Widmer was injured in 2001 and apply to his claim.

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 disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(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. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

8 AAC 45.070. Hearings.

. . . .

(b) . . . .

(1) A hearing is requested by using the following procedures:

(A) For review of an administrator's decision issued under AS 23.30.041(d), a party shall file a claim or petition asking for review of the administrator's decision and an affidavit of readiness for hearing. The affidavit of readiness for hearing may be filed at the same time as the claim or petition. . . .

8 AAC 45.520. Determination of unusual and extenuating circumstances.[14] (a) An employee requesting an eligibility evaluation for reemployment benefits more than 90 days after giving the employer notice of the injury must submit to the administrator

(1) a written request for the evaluation;

(2) a doctor's prediction that the injury may permanently preclude the employee from returning to the job at the time of injury; and

(3) a written statement explaining the unusual and extenuating circumstances that prevented the employee from timely requesting the eligibility evaluation.

(b) Within 30 days after receiving the information required under (a) of this section, the administrator will notify the parties, by certified mail, whether the employee had an unusual and extenuating circumstance that prevented the employee from making a timely request for an eligibility evaluation. . . .

(c) *Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110.*

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[14] This regulation was repealed on July 9, 2011.

> **8 AAC 45.530. Determination on eligibility for reemployment benefits.** (a) Within 14 days after receiving a rehabilitation specialist's eligibility evaluation report . . . , the administrator will determine whether the employee is eligible or ineligible 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*.

The statutory subsections that have a bearing on the issue presented in this appeal, whether MOA owed a penalty, read as follows:

> **AS 23.30.155. Payment of Compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim the employer must file a notice, on a form prescribed by the board, stating
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> (1) that the right of the employee to compensation is controverted;
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> (2) the name of the employee;
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> (3) the name of the employer;
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> (4) the date of the alleged injury or death; and
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> (5) the type of compensation and all grounds upon which the right to compensation is controverted.
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> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
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> (d) If the employer controverts the right to compensation the employer shall file with the board and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the board and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorneys' fees

incurred by the prevailing employer, shall be made within 14 days of the determination.

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of it. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment.

(f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of it, which shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award is had as provided in AS 23.30.125 and an interlocutory injunction staying payments is allowed by the court.

AS 23.30.110. Procedure on claims. (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability following an injury, or at any time after death, and the board may hear and determine all questions in respect to the claim.

(b) Within 10 days after a claim is filed the board, in accordance with its regulations, shall notify the employer and any other person, other than the claimant, whom the board considers an interested party that a claim has been filed. The notice may be served personally upon the employer or other person, or sent by registered mail.

(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*. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. 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. After completion of the hearing the board shall close the hearing record. If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing

> to state the terms of the settlement agreement. Within 30 days after the hearing record closes, the board shall file its decision. If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

b. The board's analysis and decision.

The board analyzed the penalty issue as follows. In July 2002, MOA paid Widmer PPI benefits in a lump sum of $14,160.00. AS 23.30.041(k) provides in relevant part:

> If permanent partial disability 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 disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate[.] . . .

Widmer was actively pursuing reemployment benefits by July 13, 2010, at the very latest. As of that date, the RBA's Designee wrote to inform him that it was her decision that Widmer was eligible for a reemployment benefits evaluation.[15] In *Widmer I*, the board calculated that, under AS 23.30.041(k), starting on July 13, 2010, had MOA made bi-weekly payments of compensation to Widmer, instead of the $14,160.00 lump sum, at his weekly TTD rate of $786.00, those payments would have been exhausted by November 16, 2010.[16] On reconsideration in *Widmer III*, it was conceded that November 16, 2010, was the triggering date for any penalty, if Widmer was owed compensation in the form of reemployment benefits beginning on that date.[17]

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[15] *See Widmer I*, Bd. Dec. No. 11-0014 at 17. The Alaska Supreme Court has held that "the reemployment process begins when the employee begins his active pursuit of reemployment benefits." *Carter v. B & B Constr., Inc.*, 199 P.3d 1150, 1160 (Alaska 2008). Carter, like Widmer, was injured before the 2005 amendment to AS 23.30.041(k), which replaced the phrase "reemployment plan" with "reemployment process." *See Carter*, 199 P.3d at 1158 n.36. This amendment had no bearing on the supreme court's analysis in *Carter* and does not affect the commission's analysis here, either.

[16] *See Widmer I*, Bd. Dec. No. 11-0014 at 17.

[17] *See Widmer III*, Bd. Dec. No. 11-0105 at 8.

The RBA Designee's correspondence dated July 13, 2010, acknowledged that her decision regarding Widmer's eligibility for a reemployment benefits evaluation was not necessarily final; review of the decision could be sought by MOA if it disagreed with it.[18] As the board noted,[19] MOA timely requested review of the RBA Designee's decision pursuant to AS 23.30.110. According to the board, the letter had the effect of a regulation.[20] It ruled:

> The RBA Designee's holding was not final because [MOA] appealed by following the requirements in AS 23.30.110 as instructed in the letter. [MOA]'s duty to pay .041(k) benefits did not arise until *Widmer I* affirmed the RBA Designee. The only requirement in either AS 23.30.041 or 8 AAC 45.520 was for [MOA] to seek a hearing pursuant to AS 23.30.110. This statute only requires a petition appealing the RBA Designee's decision followed by a request for a hearing. [MOA] followed this procedure.[21]

Furthermore, with respect to Widmer's argument that MOA had to seek a stay to avoid a penalty, the board ruled it was not necessary for MOA to do so.[22] It reasoned that, because it is unnecessary for an employer to obtain a stay of a reemployment benefits eligibility decision when seeking review, it is unnecessary for an employer to obtain a stay of an evaluation eligibility decision when seeking review. In either case, only a request for a hearing under AS 23.30.110 is required.[23]

c. The board did not err in concluding that MOA's timely request for review of the RBA Designee's decision that Widmer was eligible for a reemployment benefits evaluation precluded a penalty being imposed.

AS 23.30.041(d), 8 AAC 45.070(b)(1)(A), and 8 AAC 45.530 address reemployment benefits eligibility (hereinafter "benefits eligibility") and hearings in that

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[18] *See* n.3, *supra*.

[19] *See Widmer III*, Bd. Dec. No. 11-0105 at 8.

[20] *See Widmer III*, Bd. Dec. No. 11-0105 at 4-5 and 8 (citing *Burke*, 222 P.3d at 867-68 and *Municipality of Anchorage v. Mahe*, Alaska Workers' Comp. App. Comm'n Dec. No. 129, 14 (March 16, 2010) (hereinafter *Mahe*)).

[21] *Widmer III*, Bd. Dec. No. 11-0105 at 8.

[22] *See id*.

[23] *See id*.

respect. Subsection AS 23.30.041(d) states that "either party may seek review of the [RBA's] decision by requesting a hearing under AS 23.30.110." Subsection 8 AAC 45.530(a) indicates that the RBA will give the parties written notice "how to request review by the board of the determination." To obtain review of the decision, subsection 8 AAC 45.070(b)(1)(A) provides that a party must file a claim or petition.

Similarly, AS 23.30.041(c) and 8 AAC 45.520 cover reemployment benefits evaluation eligibility (hereinafter "evaluation eligibility") when there has been a delay in the employee requesting such benefits. Under subsection AS 23.30.041(c), the RBA "determines [whether] the employee has an unusual and extenuating circumstance that prevent[ed] the employee from making a timely request[.]" The regulation subsection, 8 AAC 45.520(c), provides that "after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110."

The commission does not view the minor discrepancies in terminology between the scheme for benefits eligibility and the scheme for evaluation eligibility as significant. In both instances, the RBA makes a "determination" which is communicated to the parties in a "decision." Review of either type of decision may be requested and is subject to the procedure set forth in AS 23.30.110. Review of a benefits eligibility decision is referenced in both a statute, subsection AS 23.30.041(d), and in board regulations, subsections 8 AAC 45.530(a) and 8 AAC 45.070(b)(1)(A). Review of an evaluation eligibility decision is referenced in a board regulation, 8 AAC 45.520(c). Despite these differences, to us it appears that the board, by virtue of 8 AAC 45.520(c), intended to put review of evaluation eligibility decisions on a similar procedural footing as review of benefits eligibility decisions.

The board did not rely on its interpretation and application of subsection 8 AAC 45.520(c) alone. It went one step further in its analysis. Citing the *Burke* and *Mahe*[24] decisions, the board found that the RBA Designee could implement AS 23.30.041(c) by

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[24] *See* n.20, *supra*.

declaring that her decision was not final and was subject to review in a hearing under AS 23.30.110.[25] According to the board, her doing so "had the effect of a regulation."[26]

In *Burke*, the supreme court reiterated "that an administrative agency can set and interpret policy using adjudication instead of rulemaking[.]"[27] Generally, if the agency's action "'implements, interprets or makes specific the law enforced or administered by the state agency" and "affects the public or is used by the agency in dealing with the public[,]'" it is permissible to do so without using the rulemaking process.[28] Should the agency's action effectively amend, supplement, or revise a regulation, it must follow rulemaking procedures.[29] Building on this distinction, in *Mahe* the commission held, in the context of a benefits eligibility dispute, that the RBA's *Guide for Preparing Reemployment Benefits Eligibility Evaluations* has the force or effect of a regulation. It "is used . . . in dealing with the public (including claimants, insurers, employers and specialists), and implements, interprets or makes specific the law enforced or administered[.]"[30]

In holding that the RBA Designee's letter informing the parties that her decision was not final had the effect of a regulation, the board was analogizing that letter to the RBA's *Guide* at issue in *Mahe*. The RBA Designee was merely implementing the provision in AS 23.30.041(c) for review of evaluation eligibility. Given the precedent provided by the *Mahe* decision, the board ruled that the RBA Designee's letter had the force of a regulation and deprived her evaluation eligibility decision of finality if review of it was requested.

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[25] *See Widmer III*, Bd. Dec. No. 11-0105 at 8.

[26] *Widmer III*, Bd. Dec. No. 11-0105 at 8.

[27] *Burke,* 222 P.3d at 867 (footnote omitted).

[28] *Burke,* 222 P.3d at 867 n.64, (citing *Jerrel v. State, Dep't of Natural Res.*, 999 P.2d 138, 143 (Alaska 2000) (citations omitted); AS 44.62.640(a)(3)).

[29] *See Burke,* 222 P.3d at 867.

[30] *Mahe*, App. Comm'n Dec. No. 129 at 14.

Turning to Widmer's arguments on appeal, in its initial decision, the board indicated that Widmer was arguing for a penalty under AS 23.30.155(e) and made no mention of any argument for a penalty under AS 23.30.155(f).[31] Before the commission, however, Widmer's argument for imposition of a penalty is founded on subsection .155(f), not subsection .155(e).[32] A fundamental distinction between the two subsections is that AS 23.30.155(e) relates to penalties on "compensation payable without an award[,]" whereas AS 23.30.155(f) covers penalties on "compensation payable under the terms of an award[.]"

Widmer's reasoning in arguing for a penalty can be summarized as follows. Citing AS 23.30.041(d),[33] Widmer asserts that the RBA Designee's July 13, 2010, decision was an award of reemployment benefits under AS 23.30.041(k). An award of benefits under subsection .041(k) is "compensation" as defined in AS 23.30.395(8).[34] Because MOA did not timely pay him the compensation he was owed in the form of reemployment benefits, Widmer maintains that he is entitled to a penalty under AS 23.30.155(f).[35]

We agree that, in any event, AS 23.30.041(k) reemployment benefits are "compensation" under AS 23.30.395(8). Nevertheless, it would be inaccurate to characterize the RBA Designee's conditional decision on Widmer's evaluation eligibility as compensation. First, the decision was conditional because it was subject to review pursuant to 8 AAC 45.520(c), as was requested here by MOA. On review, that decision might be reversed by the board, in which case, no compensation in the form of AS 23.30.041(k) reemployment benefits would be payable. Second, irrespective of any

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[31] *See Widmer I*, Bd. Dec. No. 11-0014 at 17.

[32] Appellant's Br. 4-7.

[33] Arguably, subsection .041(d) is not at issue here, as it pertains to reemployment *benefits* eligibility, as distinguished from *evaluation* eligibility where unusual and extenuating circumstances exist, which is addressed in subsection .041(c).

[34] "'[C]ompensation' means the money allowance payable to an employee[.]"

[35] Appellant's Br. 4-7.

review of evaluation eligibility, following an evaluation, Widmer might be found ineligible for reemployment benefits. In that event, no reemployment benefits would be owed him under AS 23.30.041(k), thus no money allowance, *i.e.*, compensation, would be owed Widmer. If no compensation is owed him, there is no amount against which a penalty could be calculated and imposed.

Widmer also argued that the delay in receiving reemployment benefits, while the board reviewed and ruled on the propriety of the RBA Designee's evaluation eligibility decision, is antithetical to the goal of expediting the reemployment process.[36] We agree that making the reemployment process prompt, efficient, and cost-effective, is a desirable goal. However, Widmer's argument is premised on the provision in AS 23.30.041(d) for expedited hearings on benefits eligibility decisions. Again, his reliance on AS 23.30.041(d) is misplaced because that subsection expressly applies to reemployment benefits eligibility, not evaluation eligibility, and any board review thereof.

Finally, Widmer argued that MOA could not controvert the RBA Designee's decision that he was entitled to an eligibility evaluation.[37] Citing board decisions,[38] Widmer points out that decisions by the RBA are not proper subjects of controversions. Our view is MOA, out of an excess of caution, "controverted" the RBA Designee's decision, in addition to requesting review. The controversion had no effect.

For the forgoing reasons, the commission concludes that, unless and until Widmer was found eligible for reemployment benefits, there was no compensation owed him that might serve as the basis for imposing a penalty. He was not eligible for reemployment benefits while the RBA Designee's evaluation eligibility decision was under review by the board, pursuant to AAC 45.520(c) and AS 23.30.110. That process was completed with

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[36] Appellant's Br. 7-12.

[37] *Id.* at 12-13.

[38] *See Seamon v. Matanuska Susitna Borough School District*, Alaska Workers' Comp. Bd. Dec. No. 02-0045 (March 8, 2002); *Van Horn v. City of Hydaburg School District*, Alaska Workers' Comp. Bd. Dec. No. 02-0085 (May 7, 2002).

issuance of the board's decision in *Widmer I* on February 9, 2011. MOA timely commenced payment of reemployment benefits on February 11, 2011.

d. Widmer has waived the argument he made to the board that MOA had to seek a stay.

Before the board, Widmer argued that MOA had to obtain a stay in order to postpone owing reemployment benefits as of November 16, 2010, the date the board calculated he would have exhausted his PPI benefits if they had not been paid in a lump sum. Here, Widmer did not identify MOA's failure to obtain a stay as an issue in his points on appeal.[39] Moreover, he did not adequately brief this issue on appeal to the commission. The only mention of a *stay* in Widmer's briefing is: "Similarly, requiring the MOA to pay the stipend or get a *stay* means it has every reason to seek a quick review of a ruling that an employee is entitled to rehabilitation benefits."[40] Issues that are not identified as points on appeal or are inadequately briefed are waived.[41]

5. Conclusion.

For the reasons stated, we AFFIRM the board's decision in *Widmer III* that MOA did not owe Widmer a penalty.

Date: *3 August 2012* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

[39] Statement of Point on Appeal asserting the board erred in denying a penalty.

[40] Appellant's Br. 10 (italics added).

[41] *See Hidden Heights Assisted Living, Inc. v. State, Dep't of Health and Social Services*, 222 P.3d 258, 270 n.60 (Alaska 2009) (citations omitted).

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[42] For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[43] and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

You may wish to consider consulting with legal counsel before filing an appeal. 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

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 for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration

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[42] A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[43] *Id.*

decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the Final Decision No. 165 issued in the matter of *Kenneth C. Widmer v. Municipality of Anchorage/AFD and NovaPro Risk Solutions*, AWCAC Appeal No. 11-012, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 3, 2012.

Date: *August 7, 2012*

Signed

B. Ward, Appeals Commission Clerk