

Alaska Workers' Compensation Appeals Commission

Fred Meyer Stores, Inc. and Sedgwick
CMS,

Petitioners,

vs.

Nannette Giroux,
Respondent.

Decision on Petition for Review

Decision No. 177

March 15, 2013

AWCAC Appeal No. 12-003

AWCB Decision No. 12-0011

AWCB Case No. 200905952

Decision on petition for review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 12-0011, issued at Anchorage on January 12, 2012, by southcentral panel members Linda M. Cerro, Chair, John Garrett, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Michelle M. Meshke, Russell, Wagg, Gabbert & Budzinski, P.C, for petitioners, Fred Meyer Stores, Inc. and Sedgwick CMS; Nannette Giroux, self-represented respondent.

Commission proceedings: Petition for Review filed January 27, 2012; Opposition to Petition for Review filed February 23, 2012; Order and Amended Order on Petition for Review (granting) issued April 12, 2012; briefing completed October 5, 2012; oral argument held February 14, 2013.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Petitioners, Fred Meyer Stores, Inc. and Sedgwick CMS,¹ have petitioned the Workers' Compensation Appeals Commission (commission) to review an Interlocutory

¹ Where appropriate, "Fred Meyer" refers to both Fred Meyer Stores, Inc. and Sedgwick CMS.

Decision and Order² of the Alaska Workers' Compensation Board (board). In that decision, the board vacated a determination by the Reemployment Benefits Administrator's (RBA) designee that Nannette Giroux (Giroux) was ineligible for reemployment benefits and remanded to the RBA designee.³ We reverse, vacate the board's decision, and remand the matter to the board with instructions to affirm the RBA designee's determination that Giroux was ineligible.

2. Factual background and proceedings.

Giroux held various positions while working in the bakeries at a Carrs-Safeway store between September 1995 and July 2000, and at a Fred Meyer store between July 2000 and September 2009.⁴ On May 2, 2009, she injured her low back while stacking items in the bakery freezer at the Fred Meyer store where she was employed.⁵ Giroux was paid medical, indemnity and permanent partial impairment (PPI) benefits.⁶

Between May 5, 2009, and September 10, 2009, Giroux was treated by John C. Cates, D.O.⁷ In mid-May Dr. Cates referred her for a lumbar magnetic resonance imaging, which revealed "a mild broad-based disc bulge" at L5-S1.⁸ The radiologist's impression was: "No acute skeletal injury and no significant protrusion or extrusion of disc material at the lumbar spine."⁹ Electromyographic and nerve conduction studies performed on June 9, 2009, were benign.¹⁰ Dr. Cates also referred Giroux to the Alaska Spine Institute (ASI) for a pain consultation and work hardening program, and to Maury A. Oswald, D.O.

² *Nannette Giroux v. Fred Meyer Stores, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 12-0011 (Jan. 12, 2012).

³ *See Giroux*, Bd. Dec. No. 12-0011 at 57.

⁴ R. 134.

⁵ R. 003.

⁶ R. 001-02, 004-17.

⁷ R. 184-85, 328, 330-31, 358, 361-62, 379, 381, 384-88.

⁸ Exc. 005.

⁹ Exc. 005.

¹⁰ Exc. 009.

At ASI, in mid-July 2009, Giroux saw Michel L. Gevaert, M.D.¹¹ Dr. Gevaert prescribed medications for her pain, recommended another epidural steroid injection, and referred her to ASI's physical therapy (PT) program.¹² A work hardening evaluation and a physical capacities evaluation were conducted at ASI.¹³ As of November 25, 2009, Dr. Gevaert found Giroux to be medically stable.¹⁴ Dr. Gevaert treated Giroux for the last time on December 1, 2009. He recorded that she continued to complain of moderate low back pain at L4-5 with accompanying radiating symptoms. His impression was "1. HNP [herniated nucleus pulposus], L5-S1, [and] 2. Nonfocal neurologic examination." Dr. Gevaert rated Giroux with a 5% whole person permanent impairment under the 6th edition of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*. He concluded that she was capable of performing work in the light-medium physical demand category and imposed a permanent lifting restriction of 35 pounds occasionally and 25 pounds frequently.¹⁵

Having been referred to the Integrative Physical Therapy and Spine Treatment Center by Dr. Oswald for VAX-D PT (vertebral axial decompression physical therapy), Giroux received therapy from December 3, 2009, through March 17, 2010.¹⁶ On January 14, 2010, Dr. Oswald conducted an electrodiagnostic study, and concluded that Giroux suffered left L5 peroneal nerve pathology – moderate, and left L1 upper lumbar nerve irritation.¹⁷ He continued the decompression therapy.

¹¹ Exc. 006-09.

¹² Exc. 008-09.

¹³ Exc. 010-21.

¹⁴ Exc. 022.

¹⁵ Exc. 024-26. Shortly thereafter, on December 29, 2009, having been provided with the job description for a bakery clerk at Fred Meyer by its adjuster, Dr. Gevaert responded that Giroux could not perform that work because it exceeded the lifting restrictions he thought were appropriate for her. R. 283.

¹⁶ R. 267-82, 284-96.

¹⁷ R. 398.

On January 29, 2010, Fred Meyer wrote the RBA requesting that a reemployment benefits eligibility evaluation be conducted.¹⁸ On March 5, 2010, rehabilitation specialist Carol Jacobsen (Jacobsen) was assigned to perform the evaluation.¹⁹ After interviewing Giroux on March 19, 2010, Jacobsen filed a Reemployment Benefits Eligibility Evaluation with the RBA designee on March 26, 2010. The report described Giroux’s work history since 1995 as follows:

9/95-7/1/00	Employer:	Safeway-Anchorage, Alaska
	Job Title:	Bakery (5 years)
	SCODRDOTs: ²⁰	Packager, Hand (SCODRDOT Code 920.587-018)—50%/Cake Decorator (SCODRDOT Code 524.381-010)—50%—Combo
7/1/00-9/27/09	Employer:	Fred Meyer-Eagle River, Alaska
	Job Title:	Cake Decorator (3½ years) Bakery Manager (4 years) Food Manager Trainee (1½ years)
	SCODRDOTs:	Cake Decorator (SCODRDOT Code 524.381-010)/Packager, Hand (SCODRDOT Code 920.587-018)—Combo; Manager, Bakery, (SCODRDOT Code 189.117-046) Management Trainee (SCODRDOT Code 189.167-018). ²¹

Jacobsen reported that while Giroux worked in the Carrs-Safeway bakery department, her job title, “Bakery,” was comprised of 50% Cake Decorator duties, and 50% Packager, Hand duties.²² She also indicated that while Giroux was employed by Fred Meyer, her appropriate job titles were “Cake Decorator,” “Bakery Manager,” and “Food Manager Trainee.” The Cake Decorator job title was a “Combo” position, consisting of job duties

¹⁸ R. 140.

¹⁹ R. 138-39.

²⁰ United States Department of Labor’s *Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles* (1993).

²¹ R. 134.

²² R. 134.

derived from two SCODRDOTs: "Cake Decorator," and "Packager, Hand." Jacobsen determined that the position of Bakery Section Manager was consistent with Manager, Bakery, and the position of Management Trainee was consistent with Management Trainee. According to the report, Giroux worked under the Cake Decorator job title for 3½ years, under the title Bakery Manager for 4 years, and as a Food Manager Trainee for 1½ years.²³ The report concluded that Giroux met the Specific Vocational Preparation (SVP) required for "Cake Decorator," "Packager, Hand," "Bakery Manager," and "Management Trainee."²⁴ Jacobsen noted she was unable to complete her evaluation because Dr. Oswald, Giroux's treating physician, had not yet responded to her inquiry whether Giroux would be able to perform jobs in her 10-year work history.²⁵

On May 4, 2010, Dr. Oswald responded that he had referred Giroux to neurosurgeon Louis L. Kralick, M.D., for a surgical evaluation, and it was premature to predict her ability to perform jobs in her 10-year work history until she was seen by Dr. Kralick.²⁶ This information was conveyed in Jacobsen's May 5, 2010, Addendum to her initial Reemployment Benefits Eligibility Evaluation.²⁷ Dr. Kralick saw Giroux on June 1, 2010. He did not recommend surgery.²⁸

On July 28, 2010, the RBA designee wrote a letter to Jacobsen requesting her to contact Dr. Oswald and explain to him the 60-day deadline for completing the evaluation, that he need only make predictions, that Giroux need not be medically stable for him to review the job descriptions and predict PPI, and that she ask him when he would be able to make his predictions. The RBA designee went on to inform Jacobsen that, should

²³ R. 134.

²⁴ R. 135.

²⁵ R. 135.

²⁶ R. 123, 126, 129, 132.

²⁷ R. 117-20.

²⁸ Exc. 051-53.

Dr. Oswald not respond, she should contact Dr. Gevaert for purposes of completing the evaluation.²⁹

On August 6, 2010, Jacobsen responded to the RBA designee's letter. She reported that upon contacting Dr. Oswald's office, she was informed that he had not received Dr. Kralick's June 1, 2010, report, and that Dr. Oswald had not seen Giroux since April 15, 2010. Jacobsen also reported that she had sent correspondence containing job descriptions to Dr. Gevaert, since he performed a PPI rating on December 1, 2009, and that she would file an Addendum after receiving Dr. Gevaert's reply.³⁰

On August 11, 2010, Dr. Gevaert predicted Giroux would have the permanent physical capacities to work as a Bakery Manager, a sedentary position under the SCODRDOT definition, Management Trainee, a light strength job under the SCODRDOT definitions, and Cake Decorator, also a light strength job. He also predicted that she would not have the physical capacities to perform the work of a Packager, Hand, a medium strength job under the SCODRDOT job description.³¹

On September 1, 2010, Jacobsen filed a second Addendum. She concluded that Giroux was ineligible for reemployment benefits based on Dr. Gevaert's prediction that she would have the permanent physical capacities to perform as a Bakery Manager, Management Trainee, and Cake Decorator.³²

On September 22, 2010, the RBA designee responded, expressing concern whether the three SCODRDOT job descriptions, Bakery Manager, Management Trainee, and Cake Decorator, accurately captured all of Giroux's job duties with Fred Meyer. Jacobsen was instructed to contact Giroux, and Fred Meyer if necessary, to obtain a more detailed description of Giroux's job duties at the time she was injured.³³

²⁹ R. 115-16.

³⁰ Exc. 057.

³¹ Exc. 059-70.

³² R. 675-90.

³³ R. 673-74.

On November 17, 2010, Jacobsen wrote to Dr. Gevaert again. She explained that certain job descriptions were utilized in her reemployment benefits eligibility evaluation, however, on contacting Fred Meyer, Jacobsen concluded that two additional job descriptions needed to be considered for purposes of the evaluation, Baker (SCODRDOT Code 526.381-010) and Stock Clerk (SCODRDOT Code 299.367-014).³⁴ On November 18, 2010, Dr. Gevaert responded. He indicated that Giroux would not have the physical capabilities to perform as either a Stock Clerk or Baker, as both jobs entailed heavy strength demands, requiring lifting, carrying, pushing, or pulling 50-to-100 pounds occasionally, 20-to-50 pounds frequently, and 10-to-20 pounds constantly.³⁵

On November, 30, 2010, Jacobsen submitted a third Addendum.³⁶ It included a printout from Fred Meyer listing the effective dates and titles for every job title corresponding to Giroux's employment with Fred Meyer:

7/01/00 – 2/18/01	Head Cake Decorator
2/18/01 – 4/06/03	Baker
4/06/03 – 3/20/05	Bakery Section Manager
3/20/05 – 8/20/06	Food Head Clerk
8/20/06 – 8/03/08	Bakery Section Manager
8/03/08 – 5/2/09 [injury date]	Baker ³⁷

According to this information, at the time of injury, Giroux's job title was "Baker." Prior to holding the job title "Baker," she held the job title "Bakery Section Manager" for 47 months, "Food Head Clerk" for 17 months, and "Cake Decorator" for 7½ months. Jacobsen concluded that Giroux was ineligible for reemployment benefits based on Dr. Gevaert's previous predictions she would have the physical capabilities to perform as a Bakery Manager, Cake Decorator, and Management Trainee.³⁸

³⁴ R. 094-100.

³⁵ R. 236-38, 240-41.

³⁶ Exc. 080-102.

³⁷ Exc. 102.

³⁸ R. 071-93.

On December 20, 2010, the RBA designee telephoned Jacobsen to express her confusion regarding the evaluation. On January 3, 2011, responding to the designee's concerns, Jacobsen filed a fourth Addendum. It summarized Giroux's 10-year work history as follows:

- 5/2/99-7/00 **Employer:** Carrs-Safeway-Gambell Store
Job Title: Bakery Manager
DOT Title: Manager, Bakery, DOT Code # 189.117-046, SVP 8 (4 to 10 years), Strength Sedentary (Lift up to 10 pounds).
- 7/1/00-12/02 **Employer:** Fred Meyer-Muldoon Store
Job Title: Cake Decorator
DOT Title: Cake Decorator, DOT Code # 524.381-010 SVP 6, Strength Light
- 12/02-6/03 **Employer:** Fred Meyer-Muldoon Store
Job Title: Assistant Bakery Manager
DOT Title: Manager, Bakery, DOT Code # 189.117-046
- 6/03-4/05 **Employer:** Fred Meyer-Muldoon Store
Job Title: Bakery Manager
DOT Title: Manager, Bakery, DOT Code # 189.117-046
- 4/05-6/06 **Employer:** Fred Meyer-Abbott Store
Job Title: Assistant Grocery Manager
DOT Title: Manager, Retail Store, DOT Code # 185.167-046, SVP 7 (2 to 4 years), Strength Light (Lift up to 20 pounds)
- 6/06-7/08 **Employer:** Fred Meyer-Eagle River
Job Title: Bakery Manager
DOT Title: Manager, Bakery, DOT Code # 189.117-046,
- 7/08-11/08 **Employer:** Fred Meyer-Eagle River
Job Title: Cake Decorator
DOT Title: Cake Decorator, DOT Code # 524.381-010
- 11/08-5/2/09 **Employer:** Fred Meyer-Eagle River
Job Title: Bakery Clerk
DOT Title: Cake Decorator, DOT Code # 524.381-010—
50%
Stock Clerk, DOT Code #299.367-014—
50%
SVP 4

Jacobsen concluded that Giroux was not eligible for reemployment benefits based on:

- The foregoing list of job titles and her selection of applicable SCODRDOTs;
- Dr. Gevaert's prediction that Giroux would have the physical abilities to perform as a Cake Decorator and a Bakery Manager;
- Her conclusion that Giroux had worked as a Cake Decorator and Bakery Manager long enough to meet the SVP for those positions;
- A labor market survey she conducted revealed four jobs as a "Cake Decorator Associate" for K Mart Corporation in and around Detroit, Michigan, one job as a "Production Supervisor, Bakery" for Hostess Brands, and one job as an "Assistant Manager" for Bruegger's Bagels, both in Philadelphia, Pennsylvania, and one job as a "Production Supervisor" for Northeast Foods/Bake Rite Rolls in Bensalem, Pennsylvania.³⁹

An employer's medical evaluation (EME) was conducted on January 7, 2011, by Thomas S. Dietrich, M.D., neurosurgeon. Dr. Dietrich concluded that Giroux's on-the-job injury was a lumbar strain, she was medically stable and would not benefit from further medical treatment, and she was not a surgical candidate. He thought a 35-pound lifting restriction was appropriate.⁴⁰

On January 19, 2011, based on the fourth Addendum, the RBA designee determined that Giroux was not eligible for reemployment benefits.⁴¹

On January 23, 2011, Giroux requested that the RBA designee reconsider her finding of ineligibility for reemployment benefits. She notified the designee that 50% of her former job duties were comprised of "Stock Clerk" duties, which Dr. Gevaert predicted she would not have the physical abilities to perform in the future. She also noted that she remained under Dr. Kralick's care, and appended copies of a number of her medical records. Giroux also included Fred Meyer's written job descriptions.⁴²

³⁹ R. 065-70.

⁴⁰ Exc. 111-23.

⁴¹ R. 063-64.

⁴² R. 691-735.

On January 31, 2011, Giroux timely filed a workers' compensation claim seeking review of the RBA designee's determination she was ineligible for reemployment benefits.⁴³ On February 25, 2011, Fred Meyer filed its Answer.⁴⁴ On March 1, 2011, the RBA designee responded to Giroux's request to reconsider her decision denying reemployment benefits eligibility. The request was denied.⁴⁵ On April 20, 2011, the parties filed a proposed Compromise and Release Agreement (C&R). Under the terms of the C&R, Giroux agreed to waive any and all rights to all benefits under the Alaska Workers' Compensation Act (Act) in return for \$8,000.00.⁴⁶ On April 26, 2011, a board panel, citing 8 AAC 45.160(a), declined to approve the C&R, for several reasons.⁴⁷

On October 29, 2011, at Fred Meyer's request, Giroux was seen by Keith Holley, M.D., orthopedic surgeon, for another EME. Dr. Holley was provided medical records from Giroux's visits with Dr. Kralick on June 1, 2010, October 12, 2010, October 25, 2010, and November 30, 2010, and noted she continued to treat with him. Dr. Holley's opinion was the work injury ceased to be the substantial cause of her ongoing need for treatment after December 1, 2009.⁴⁸

At the hearing in this matter on November 16, 2011, Giroux testified that while she was employed in the bakery department at Fred Meyer, and regardless of her job title, her day-to-day duties required numerous tasks with substantial physical demands, including lifting significant loads, standing for eight (8) hours, climbing, squatting, and kneeling. She further testified that the Bakery Section Manager position at Fred Meyer is not a sedentary job, as the SCODRDOT describes it, but is comprised of 60% stock clerk duties, 20% cake decorator duties, and 20% management duties.⁴⁹

⁴³ R. 040-41.

⁴⁴ R. 042-43.

⁴⁵ Exc. 130-31.

⁴⁶ R. 048-55.

⁴⁷ R. 460-61.

⁴⁸ Exc. 138-49.

⁴⁹ Hr'g Tr. 46:18-49:6.

On December 5, 2011, Fred Meyer controverted all benefits based on Dr. Holley's EME report.⁵⁰

3. Standard of review.

The board's credibility findings are binding on the commission;⁵¹ its weight findings are conclusive.⁵² The commission reviews board decisions involving reemployment benefits eligibility determinations under the abuse of discretion standard, which incorporates the substantial evidence test.⁵³ The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.⁵⁴ Whether the quantum of evidence is substantial enough to support a particular finding is a legal question.⁵⁵ We exercise our independent judgment when reviewing questions of law and procedure.⁵⁶

4. Discussion.

The board's reason for rejecting the RBA designee's determination that Giroux was ineligible for reemployment benefits was that the RBA designee failed to apply controlling law or regulation.⁵⁷ According to the board, by relying on Jacobsen's "flawed report," the RBA designee did not apply controlling law in several respects, including: 1) failure to contact the employer to determine Giroux's job title, tasks, and

⁵⁰ R. 024-25.

⁵¹ See AS 23.30.128(b).

⁵² See AS 23.30.122.

⁵³ See AS 44.62.570.

⁵⁴ See AS 23.30.128(b). Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. See, e.g., *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁵⁵ See, e.g., *Tinker v. Veco, Inc.*, 913 P.2d 488, 492 (Alaska 1996).

⁵⁶ See AS 23.30.128(b).

⁵⁷ See *Giroux*, Bd. Dec. No. 12-0011 at 49 (citing *Manthey v. Collier*, 367 P.2d 884 (Alaska 1962)).

duties, and obtain a written job description if one exists;⁵⁸ 2) failure to select the appropriate SCODRDOTs to describe Giroux's job duties;⁵⁹ 3) failure to determine whether Giroux held her jobs long enough to meet the SVP;⁶⁰ 4) failure to submit to Giroux's physician for review the SCODRDOTs that meet the SVP;⁶¹ and 5) failure to conduct an adequate labor market survey.⁶² We will discuss these findings below.

a. Applicable law.

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."

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

⁵⁸ As legal authority for this finding, the board cites two subparagraphs of one of its regulations, 8 AAC 45.525(a)(1) and .525(b)(1), and the *RBA Guide*. See *Giroux*, Bd. Dec. No. 12-0011 at 49. The *RBA Guide* refers to the *Guide for Preparing Reemployment Benefits Eligibility Evaluations* issued by the RBA. See *id.* at 50.

⁵⁹ See *Giroux*, Bd. Dec. No. 12-0011 at 51-53.

⁶⁰ See *id.* at 53-54

⁶¹ See *id.* at 54.

⁶² See *id.* at 54-56.

(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

(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.

b. Substantial compliance with the RBA Guide in the preparation of a reemployment benefits eligibility evaluation is the appropriate standard.

In its decision, the board stated: "To interpret its regulations, the RBA has issued a *Guide for Preparing Reemployment Benefits Eligibility Evaluations*."⁶³ It then quotes a decision by the commission, *Municipality of Anchorage v. Mahe*,⁶⁴ which reads in relevant part:

[T]o the extent that the administrator's Guide instructs the public (here the rehabilitation specialists) 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

⁶³ *Giroux*, Bd. Dec. No. 12-0011 at 42.

⁶⁴ Alaska Workers' Comp. App. Comm'n Dec. No. 129 (Mar. 16, 2010)(hereafter *Mahe*).

administered by the administrator, it has the effect or force of regulation.⁶⁵

Based on this authority, the board concluded that when “the board fails to apply the instructions set out in the RBA’s *Guide* as it would apply properly adopted regulations, it commits an error of law.”⁶⁶ From the foregoing assertion, we infer that the board is placing the provisions of the *Guide* on an equal legal basis with the regulations covering reemployment benefits evaluations. Thus, according to the board, if the preparation of an evaluation by a rehabilitation specialist deviates from the *Guide* in any significant way, when passing judgment on the evaluation, the board must reject it. That is to say, in the preparation of an evaluation, strict compliance with the *Guide* is required, as far as the board is concerned.

We respectfully disagree with the board on this legal issue, to which we apply our independent judgment. According to the following analysis, substantial compliance with the regulations pertaining to the preparation of a reemployment benefits eligibility evaluation and the provisions of the *Guide* is the appropriate standard. The Act, AS 23.30.001–.400, is the *statutory* framework applicable to workers’ compensation claims, including Giroux’s. With respect to the Act, the Alaska Supreme Court (supreme court) has held that statutes that are directory require substantial compliance, whereas statutes that are mandatory call for strict compliance.⁶⁷ “A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create ‘guidelines for the orderly conduct of public business’; and (3) ‘serious, practical consequences would result if it were considered mandatory.’”⁶⁸

⁶⁵ See *Giroux*, Bd. Dec. No. 12-0011 at 42 (quoting *Mahe*, Dec. No. 129 at 14).

⁶⁶ *Giroux*, Bd. Dec. No. 12-0011 at 43.

⁶⁷ See *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 198 (Alaska 2008).

⁶⁸ *Kim*, 197 P.3d at 197 (footnote omitted).

The statute at issue in *Kim* was AS 23.30.110, specifically subsection .110(c),⁶⁹ which the court described as “a procedural statute that ‘sets up the legal machinery through which a right is processed’ and ‘directs the claimant to take certain action following controversion.’”⁷⁰ Despite certain language in the subsection that might suggest it is mandatory,⁷¹ the court held it was directory.⁷² Of further interest here is that in *Kim*, the supreme court cited another of its decisions, *South Anchorage Concerned Coalition, Inc. v. Municipality of Anchorage*,⁷³ as additional authority for its holding that if a statute is directory, substantial compliance with the statute suffices.⁷⁴ At issue in *Concerned Coalition* was a municipal ordinance worded similarly to the statutory subsection at issue in *Kim*. The court held that the directory/mandatory distinction that applies to statutes applies to ordinances.⁷⁵

On the basis of this supreme court authority, the commission concludes that, like statutes and municipal ordinances, 1) regulations can be categorized as directory or mandatory, and 2) substantial compliance with regulations that are directory is all that is required. Furthermore, we conclude that 8 AAC 45.525, the regulation that governs reemployment benefits eligibility evaluations, is directory, rather than mandatory, when the analysis articulated by the supreme court in *Kim* and *Concerned Coalition* is applied

⁶⁹ AS 23.30.110(c) reads in relevant part:

Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. . . . If 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.

⁷⁰ *Kim*, 197 P.3d at 196 (footnote omitted).

⁷¹ For example, the subsection provides that a party “*shall* file a request for a hearing[.]” AS 23.30.110(c)(italics added).

⁷² *See Kim*, 197 P.3d at 197.

⁷³ 172 P.3d 768 (Alaska 2007)(hereafter *Concerned Coalition*).

⁷⁴ *See Kim*, 197 P.3d at 197.

⁷⁵ *See Concerned Coalition*, 172 P.3d at 772.

to the regulation. Section .525 instructs the rehabilitation specialist to, among other things, 1) conduct an evaluation that includes interviewing the claimant, 2) correlate the claimant's job descriptions with the SCODRDOT job descriptions, 3) consult the claimant's physician as to the claimant's physical capacities, and 4) submit a report.⁷⁶ Like AS 23.30.110(c), 8 AAC 45.525 is directory in that it directs the rehabilitation specialist to conduct an evaluation within certain parameters. Its wording is affirmative rather than prohibitive, and it provides guidelines for the orderly conduct of public business, in this instance, the preparation of reemployment benefits eligibility evaluations.⁷⁷

Assuming that 8 AAC 45.525 is, as we have found, directory, then it follows that the RBA *Guide*, which "has the effect or force of [that] regulation[.]"⁷⁸ is also directory. As further reinforcement for that conclusion, we note that AS 23.30.041, the statute which addresses reemployment benefits, including eligibility evaluations, provides that the board is to adopt regulations to implement that statute.⁷⁹ The Administrative Procedure Act, AS 44.62.010 *et seq.*, spells out the procedures an administrative agency like the board must follow to adopt regulations. Among other things, agencies are required to hold public hearings and receive public comment on proposed regulations.⁸⁰ None of these procedural requirements applied to the RBA in drafting the *Guide*. Therefore, we are reluctant to accord the *Guide* a status that would be superior to the regulations it is required to follow. Consequently, the *Guide* should be viewed as directory; its provisions should be substantially complied with.

⁷⁶ See 8 AAC 45.525.

⁷⁷ See *Kim*, 197 P.3d at 197.

⁷⁸ *Mahe*, App. Comm'n Dec. No. 129 at 14.

⁷⁹ See AS 23.30.041(b)(1).

⁸⁰ See AS 44.62.210 and .215.

c. The rehabilitation specialist substantially complied with the RBA Guide in the preparation of Giroux's reemployment benefits eligibility evaluation.

A review of the record reveals that Jacobsen, in conducting her evaluation of Giroux, substantially complied with both the regulations governing evaluations and the *RBA Guide*. In addition to interviewing Giroux, Jacobsen contacted Fred Meyer to gain more insight into Giroux's jobs, tasks, and duties.⁸¹ Based on that input, Jacobsen selected the SCODRDOTs which most closely encompassed Giroux's duties in the Fred Meyer bakery.⁸² Having reviewed Giroux's work history, Jacobsen concluded that Giroux met the SVP for jobs Giroux was physically capable of performing, including Cake Decorator, Bakery Manager, and Management Trainee.⁸³ Throughout the process of evaluating Giroux for reemployment benefits eligibility, Jacobsen conferred with Dr. Gevaert, seeking his expert medical input in terms of Giroux's ability to perform the jobs described in the SCODRDOTs.⁸⁴ Finally, Jacobsen conducted a labor market survey that showed there were several jobs available that Giroux was capable of doing in the lower 48.⁸⁵ Unlike the board,⁸⁶ we consider the survey to have been adequate.⁸⁷

⁸¹ See 8 AAC 45.525(a)(1) and (b).

⁸² See 8 AAC 45.525(a)(2) and (b)(1).

⁸³ See 8 AAC 45.525(b)(2) and (3).

⁸⁴ See 8 AAC 45.525(a)(3) and (b)(3).

⁸⁵ See 8 AAC 45.525(b)(4) and (c)(3).

⁸⁶ See *Giroux*, Bd. Dec. No. 12-0011 at 54-56.

⁸⁷ The board also cited Jacobsen's failure to complete an eligibility checklist as a reason for rejecting her evaluation. See *Giroux*, Bd. Dec. No. 12-0011 at 56. The regulation, 8 AAC 45.525, has no such requirement.

5. *Conclusion and order.*

We REVERSE the board's decision vacating the reemployment benefits evaluation and ordering another evaluation. On remand, it is ORDERED that the RBA designee's determination that Giroux was ineligible for reemployment benefits be reinstated, and that it serve as the operative reemployment benefits eligibility evaluation for Giroux.

Date: 15 March 2013 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

This is a decision on the petition for review. The appeals commission reverses the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to petition the Alaska Supreme Court for review are instituted (started).⁸⁸ For the date of distribution, see the box below.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started).⁸⁹ For the date of distribution, see the box below.

⁸⁸ A party has 10 days after the distribution of a decision on a petition for review by the commission to petition for review to the Alaska Supreme Court. If this decision was distributed by mail only to a party, then three days are added to the 10 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.

⁸⁹ See n.88, *supra*.

PETITION FOR REVIEW

A party may file a petition for review of this decision with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). See AS 23.30.129(a) and Appellate Rules 401-403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this decision’s distribution.⁹⁰

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

Reconsideration of this decision on petition for review is unavailable.

I certify that, with the exception of the correction of a typographical error, this is a full and correct copy of the Decision on Petition for Review No. 177 issued in the matter of *Fred Meyer Stores, Inc. and Sedgwick CMS v. Nannette Giroux*, AWCAC Appeal No. 12-003, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 15, 2013.

Date: March 18, 2013



K. Morrison

K. Morrison, Deputy Commission Clerk

⁹⁰ See *id.*