

Alaska Workers' Compensation Appeals Commission

Interior Towing & Salvage, Inc. and
American Interstate Insurance Company,
Appellants,

vs.

Glenn A. Gracik,
Appellee.

ORDER ON MOTION FOR STAY

Memorandum Decision No. 233

AWCAC Appeal No. 16-020
AWCB Decision No. 16-0120
AWCB Case No. 201506873

Motion for Stay of Alaska Workers' Compensation Board Final Decision and Order No. 16-0120, issued at Fairbanks, Alaska, on December 5, 2016, by northern panel members Kelly McNabb, Chair, and Jacob Howdeshell, Member for Labor.

Appearances: Michael A. Budzinski, Russell Wagg Meshke & Budzinski, PC, for appellants, Interior Towing & Salvage, Inc. and American Interstate Insurance Company; Robert B. Groseclose, CSG, Inc., for appellee, Glenn A. Gracik.

Commission proceedings: Appeal filed December 16, 2016, with Motion for Stay; Opposition to Motion for Stay filed January 3, 2017; hearing on Motion for Stay held January 10, 2017.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Glenn Gracik, while working as a tow truck driver for Interior Towing & Salvage, Inc. (Interior Towing), injured his left shoulder and right knee. Interior Towing accepted compensability and began paying benefits. Subsequently, a dispute arose as to whether Mr. Gracik was eligible for reemployment benefits. Initially, the Reemployment Benefits Administrator (RBA) found Mr. Gracik not eligible. Mr. Gracik appealed to the Alaska Workers' Compensation Board (Board) which remanded the

matter to the RBA on July 30, 2016.¹ The RBA again found Mr. Gracik not eligible for reemployment benefits on September 16, 2016. Mr. Gracik again appealed the matter to the Board, which on December 5, 2016, reversed the decision of the RBA and found Mr. Gracik eligible for reemployments benefits.² Interior Towing filed its Notice of Appeal with the Alaska Workers' Compensation Appeals Commission (Commission) on December 16, 2016, and sought a stay of the benefits awarded in *Gracik II*. The Commission heard oral argument on the Motion for Stay on December 10, 2016.

Given the confusing, contradictory, and unclear findings of fact and conclusions of law in *Gracik II*, the Commission grants a stay of the benefits awarded in Alaska Workers' Comp. Bd. Dec. No. 16-0120, pending the outcome of this appeal.

*2. Factual background and proceedings.*³

Mr. Gracik while working for Interior Towing slipped and fell from his tow truck on January 30, 2015.⁴ He sustained injuries to his left shoulder and right knee.⁵ Interior Towing accepted compensability of the injury and began paying time loss and medical benefits.⁶ On January 14, 2016, Mark Wade, M.D., Mr. Gracik's treating physician, stated Mr. Gracik was not "in the position to do any heavy labor or any repetitive demands on the shoulder for the remainder of his life."⁷

Thereafter, the RBA referred Mr. Gracik to Tommie Hutto, rehabilitation specialist, for an eligibility evaluation.⁸ Mr. Hutto prepared occupation descriptions for

¹ *Gracik v. Interior Towing & Salvage, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 16-0065 (July 30, 2016) (*Gracik I*).

² *Gracik v. Interior Towing & Salvage, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 16-0120 (Dec. 5, 2016) (*Gracik II*).

³ We do not, in this decision, make any factual findings. We state the facts as set forth in the Board's decisions, except as otherwise noted.

⁴ *Gracik II* at 2, No. 1.

⁵ *Id.*

⁶ *Id.*, No. 2.

⁷ *Id.*, No. 4.

⁸ *Id.* at 3, No. 5.

four jobs Mr. Gracik had performed in the ten years prior to his work injury.⁹ The jobs were tow-truck operator, instructor in vocational training, stock clerk, and teacher.¹⁰ Dr. Wade, on February 9, 2016, opined Mr. Gracik would have the physical capacities to perform each of the four jobs.¹¹ Dr. Wade then referred Mr. Gracik to Richard H. Cobden, M.D., for a permanent partial impairment (PPI) rating.¹²

The RBA Designee found Mr. Gracik ineligible for reemployment benefits based on Dr. Wade's February 9, 2016, opinion that Mr. Gracik has the physical capacities to perform the four jobs in his work history based on the descriptions submitted to him by Mr. Hutto.¹³ Mr. Gracik filed a Workers' Compensation Claim (WCC) on March 22, 2016, seeking review of the RBA Designee's finding of ineligibility for reemployment benefits.¹⁴ Dr. Cobden rated Mr. Gracik on April 28, 2016, and gave him a 6% PPI rating.¹⁵ Dr. Cobden also remarked that Mr. Gracik could not return to work as a tow truck operator, stating he had reviewed Dr. Wade's notes and physical findings, and reviewed Mr. Gracik's prior training and work history. Based on this review, he did not think Mr. Gracik could perform the work of tow truck operator.¹⁶ He suggested the issue of vocational rehabilitation should be reconsidered.¹⁷

⁹ *Gracik II* at 3, No. 5. (It is not clear if these descriptions were from the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles," otherwise known as SCODRDOT, as required by AS 23.30.041(e)(2)).

¹⁰ *Id.*

¹¹ *Id.*, No. 6.

¹² *Id.*

¹³ *Id.*, No. 8.

¹⁴ *Id.*, No. 9.

¹⁵ *Id.*, No. 10.

¹⁶ *Id.*

¹⁷ *Id.* (At this time there is no indication that Dr. Cobden had reviewed any SCODRDOT descriptions).

On July 30, 2016, the Board issued *Gracik I* remanding the matter to the RBA Designee for consideration of Dr. Cobden's April 28, 2016, report.¹⁸ The RBA Designee instructed Mr. Hutto to provide Dr. Wade with his January 14, 2016, report and to ask Dr. Wade if he wished to amend his predictions about Mr. Gracik's abilities to return to work.¹⁹ In August 2016, Dr. Wade's office wrote "no change" on the fax cover sheet and returned it to Mr. Hutto.²⁰ The Board found it was unclear if Dr. Wade was referring to his January 14, 2016, report or to his February 9, 2016, report approving the four jobs Mr. Gracik held in the previous ten years.²¹

On September 16, 2016, the RBA issued a determination that Mr. Gracik was not eligible for reemployment benefits based on Dr. Wade's prediction Mr. Gracik has the physical capacities to perform the work of tow truck driver.²² The RBA noted that there was no indication Dr. Cobden had reviewed the actual SCODRDOT description when he stated Mr. Gracik could not return to work as a tow truck operator.²³ On the same day, Dr. Cobden wrote an addendum to his report stating he had reviewed the SCODRDOT job description for tow truck operator and that Mr. Gracik could not fulfill the physical requirements of the job description.²⁴

On September 21, 2016, Mr. Gracik filed a Petition for Review of the RBA Designee's determination that he was not eligible for reemployment benefits.²⁵ The Board found Mr. Gracik was credible when he stated he could not perform the work of

¹⁸ *Gracik II* at 4, No. 12.

¹⁹ *Id.*, No. 13.

²⁰ *Id.*, No. 14.

²¹ *Id.*, No. 15.

²² *Id.*, No. 16.

²³ *Id.*

²⁴ *Id.* at No. 17 (It does not appear Dr. Cobden reviewed the SCODRDOT descriptions for jobs other than tow truck operator nor does it appear his report was provided to the RBA Designee).

²⁵ *Id.*, No. 18.

tow truck operator or any of the other jobs he held within the previous ten years.²⁶ On December 5, 2016, the Board issued *Gracik II*, finding the RBA Designee did not abuse her discretion when she found Mr. Gracik not eligible for reemployment benefits. The Board, then, reversed the RBA Designee's determination and held Mr. Gracik is entitled to vocational retraining benefits.²⁷ Interior Towing appealed this decision on December 16, 2016, and filed a motion to stay the decision. Oral argument on the motion to stay was heard on January 10, 2017.

3. *Standard of review.*

AS 23.30.125. Administrative review of compensation order.

(a) A compensation order becomes effective when filed with the office of the board as provided in AS 23.30.110, and, unless proceedings to reconsider, suspend, or set aside the order are instituted as provided in this chapter, the order becomes final on the 31st day after it is filed.

(b) Notwithstanding other provisions of law, a decision or order of the board is subject to review by the commission as provided in this chapter.

(c) If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment, in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

²⁶ *Gracik II* at 4, No. 19 (however, the test is whether an employee has the physical capacities to perform the job as described in the SCODRDOT).

²⁷ *Id.* at 12.

(d) Proceedings for reconsidering, suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, may not be instituted, except as provided in this chapter.

AS 23.30.041. Rehabilitation and reemployment of injured workers.

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. The administrator may grant up to an additional 30 days for performance of the eligibility evaluation upon notification of unusual and extenuating circumstances and the rehabilitation specialist's request. 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. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.

Pursuant to AS 23.30.125, a stay of continuing benefits should be granted only when "the party filing the application would otherwise suffer irreparable damage and [there is] the existence of the probability of the merits of the appeal being decided adversely to the recipient" of the benefits. As part of the process in making this determination, the hardship to the parties should be balanced.

Under AS 23.30.041, a decision of the RBA may be reversed only if the evidence provided demonstrates the RBA abused his discretion. "The board shall uphold the decision of the administrator except for abuse of discretion. . . ." ²⁸ Where there is no evidence of an abuse of discretion, the finding of the RBA must be affirmed. ²⁹

4. Discussion.

To stay an award of continuing benefits, an appellant must show both irreparable harm and "the existence of the probability of the merits . . . being decided adversely to the recipient. . . ." Interior Towing is able to demonstrate it will suffer irreparable harm by showing if the stay is not granted and Mr. Gracik is ultimately found not eligible for reemployment benefits, it cannot recover any overpayment of benefits.

²⁸ AS 23.30.041(d).

²⁹ *Morgan v. Lucky Strike Bingo*, 938 P.2d 1050, 1053 (Alaska 1997).

Under *Croft v. Pan Alaska Trucking*,³⁰ the only method for an employer to recover an overpayment of benefits is pursuant to AS 23.30.155(j) which allows withholding of 20% of each future benefit payment until the overpayment is recovered. Interior Towing is able to demonstrate it will suffer irreparable damage if a stay is not granted, because if it prevails no future benefits will be owed to Mr. Gracik and thus it would have no ability to recover any overpayment.

The Commission must also look at the probability of a decision adverse the employee. In doing so, the Commission notes that the Board's decision is inconsistent in both its findings and its statement of the law. The Board specifically found the RBA Designee did not abuse her discretion when she found Mr. Gracik not eligible for reemployment benefits. According to AS 23.30.041(d), a determination by the RBA must be upheld absent a finding of abuse of discretion.

Moreover, the Board admitted the evidence submitted to the RBA Designee was incomplete and confusing. First, the RBA Designee did not have access to Dr. Cobden's report stating he had reviewed the SCODRDOT for tow truck driver when he stated Mr. Gracik could not perform the work of tow truck operator. Next, it is unclear whether Dr. Cobden reviewed any of the other job descriptions and, if so, how or why Mr. Gracik does not have the physical capacities for any of the other three jobs. The Board further found it could not ascertain whether Dr. Wade reaffirmed his January 14, 2016, opinion or his February 9, 2016, opinion in his August 26, 2016, faxed note to Mr. Hutto.

In *Irvine v Glacier General Const.*,³¹ the Court reiterated its position that "medical opinions concerning eligibility for reemployment benefits be specifically referenced to the SCODDOT³² standards." It is not evident from the Board's decision if the SCODRDOT descriptions for all four jobs held in the preceding ten years were submitted to Dr. Cobden, thus, making his opinion somewhat unclear.

³⁰ 820 P.2d 1064, 1066 (Alaska 1991).

³¹ 984 P. 2d 1103, 1108 (Alaska 1999).

³² Now the SCODRDOT.

These latter inadequacies are particularly unsettling in light of *Konecky v. Camco Wireline, Inc.*,³³ wherein the Court stated that the RBA must rely only on the SCODRDOT job descriptions and not on any actual physical requirements when determining eligibility. The Court affirmed the use of the SCODRDOT description in face of evidence that the actual jobs might require very different physical capacities. Here, there is much confusion as to who saw what job descriptions, if the job descriptions were SCODRDOT descriptions, and whether the physical capacities of Mr. Gracik matched any of the SCODRDOT descriptions.

In deciding whether to grant a stay, the hardship to each party is weighed. Although the Board did not specifically award payment of AS 23.30.041(k) stipend benefits, the implication of the finding that Mr. Gracik is eligible for reemployment benefits means Interior Towing is responsible for paying stipend benefits. This includes payment of .041(k) stipend benefits while Mr. Gracik continues to be evaluated for retraining, during the development of a retraining plan, and during the execution of a retraining plan. In addition, Interior Towing is responsible for the continued payment of services to the rehabilitation specialist and the costs of the retraining plan. The exposure to Interior Towing is considerable because these costs are significant and would not be recoverable if Mr. Gracik is found not eligible for retraining.

On the other hand, Mr. Gracik has been without benefits since he received payment for the 6% PPI rating given to him by Dr. Cobden. He will continue to be without benefits if a stay is granted which is certainly a hardship for him. If Mr. Gracik is ultimately found not eligible for reemployment benefits, no additional benefits are due to him and Interior Towing would be unable to recoup payment of the benefits paid in the interim. As stated above, the hardship on Interior Towing is great as well. Both parties are equally under a hardship although the hardship (i.e. financial loss) seems greater to Interior Towing so the balancing test tips slightly to Interior Towing.

According to AS 23.30.041(d), a determination by the RBA must be upheld absent a finding of abuse of discretion. The Court, in *Morgan v. Lucky Strike Bingo*,

³³ 920 P.2d 277, 283 (Alaska 1996).

stated the "Board is required to uphold the RBA's determination unless the RBA abused her discretion. . . . An abuse of discretion exists when the decision is arbitrary, capricious, manifestly unreasonable or stems from an improper motive."³⁴ Here the Board specifically found the RBA Designee had not abused her discretion. Nonetheless, the Board reversed her determination. This decision is inconsistent and does not provide sufficient evidence that the RBA Designee acted inappropriately.

5. *Conclusion.*

Therefore, it is probable the Board's decision is not supported either by adherence to the applicable law or by substantial evidence in the record as a whole.

6. *Order.*

It is ORDERED that Board Decision No. 16-0120 is STAYED, *nunc pro tunc*, effective December 5, 2016, pending the outcome of this appeal. It is further ORDERED that no bond or financial guarantee is required.

Date: 3 February 2017 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

PETITION FOR REVIEW

A party may file a petition for review of this order 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 order's distribution as shown in the box below.

³⁴ 938 P.2d at 1053 (citation omitted).

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

This is a not a final decision issued under AS 23.30.128(e). It is not an appealable decision, so reconsideration is not available.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the Order on Motion for Stay, Memorandum Decision No. 233, issued in the matter of *Interior Towing & Salvage, Inc. and American Interstate Insurance Company vs. Glenn A. Gracik*, AWCAC Appeal No. 16-020, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on February 3, 2017.

Date: February 10, 2017



Signed

K. Morrison, Appeals Commission Clerk