Alaska Workers' Compensation Appeals Commission

Interior Towing & Salvage, Inc. and American Interstate Insurance Company, Appellant, vs. Glenn A. Gracik, Appellee.	Final Decision Decision No. 239 September 5, 2017 AWCAC Appeal No. 16-020 AWCB Decision No. 16-0120 AWCB Case No. 201506873

Final decision on appeal from 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; briefing completed April 24, 2017; oral argument held on June 13, 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. A dispute arose over whether Mr. Gracik should be eligible for reemployment benefits. The Reemployment Benefits Administrator (RBA) designee initially found Mr. Gracik not eligible for retraining. He appealed this determination to the Alaska Workers' Compensation Board (Board). The Board remanded the matter to the RBA on July 30, 2016.[1] The RBA again found Mr. Gracik not eligible on

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

September 16, 2016. Mr. Gracik again appealed the determination to the Board. In its Final Decision and Order (D&O) No. 16-0120, issued December 5, 2016, the Board found the RBA had not abused her discretion but nonetheless reversed the RBA and found Mr. Gracik eligible for retraining.

Interior Towing appealed this D&O to the Alaska Workers' Compensation Appeals Commission (Commission) on December 16, 2016, and concurrently filed a motion to stay payment of benefits pending the outcome of the appeal. The Commission stayed payment of benefits on February 3, 2017. Oral argument on the appeal was heard on June 13, 2017. The Commission now remands the matter to the Board with direction.

2. Factual background and proceedings.[2]

On January 30, 2015, Mr. Gracik injured his left shoulder and right knee in the course of his employment as a tow truck driver when he slipped and fell from his tow truck.[3] Interior Towing accepted compensability of the injury and began paying time loss and medical benefits.

On June 12, 2015, Dr. Wade performed left shoulder surgery on Mr. Gracik.[4] On January 14, 2016, Dr. Wade opined Mr. Gracik could not be released to work:

> Glenn Gracik is here today for evaluation of his left shoulder. He wants to have a full release for a truck driver. Unfortunately, I feel that given the fact he had a large massive rotator cuff repair and allograft, I do not think that he is in the position to do any heavy labor or any repetitive demands on the shoulder for the remainder of his life. Clearly, a low sedentary-style job that requires more of a clerical-type environment as opposed to picking up heavy chains and cables is not in his best interest. I explained to Mr. Gracik that given the significant amount of degeneration and what was required to repair his left shoulder that I believe that possibly vocational rehab would be in his best interest. He had a massive rotator cuff repair that required allograft material simply to achieve humeral head coverage,

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[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] *Gracik v. Interior Towing & Salvage, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 16-0120 (Dec. 5, 2016)(*Gracik II*) at 2, No. 1.

[4] *Gracik I* at 2, No. 3.

> and given these findings, I do not think heavy labor and exertional demands on his left shoulder are in his best interest.[5]

On January 26, 2016, Mr. Gracik was referred for an eligibility evaluation for reemployment benefits with rehabilitation specialist Tommie Hutto. Mr. Hutto prepared an occupation description for the jobs Mr. Gracik held in the ten years prior to his injury. These jobs included tow-truck operator, instructor (vocational training), stock clerk, and teacher (adventure education).[6]

On February 9, 2016, Dr. Wade opined that Mr. Gracik would have the permanent physical capacities to perform the following jobs: tow truck operator; instructor, vocational training; stock clerk; and teacher, adventure education. Dr. Wade checked the "yes" line next to each job description. Dr. Wade did not see Mr. Gracik between January 14, 2016, when he stated Mr. Gracik could not be released to work and February 9, 2016, when he stated Mr. Gracik could perform the above jobs based on the "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) descriptions. Dr. Wade referred Mr. Gracik to Dr. Cobden for a permanent partial impairment (PPI) rating.[7]

On February 9, 2016, Dr. Wade signed the SCODRDOT for Tow-Truck Operator, designated as having a strength of Medium, stating Mr. Gracik would have the permanent physical capacity to perform this job.[8] On the same day, Dr. Wade also agreed Mr. Gracik could perform the work of Instructor, Vocational Training with a strength of Light, the work of Stock Clerk with a strength of Heavy, and the work of Teacher, Adventure Education with a strength of Medium.[9] Each of these descriptions were based on the SCODRDOT description.[10] Dr. Wade, in signing these descriptions, indicated that

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5 *Gracik I* at 2-3, No. 4.

6 *Id.* at 3, No. 5.

7 *Gracik II* at 3, No. 6.

8 R. 252.

9 R. 253-255.

10 *Id.*

Mr. Gracik would have the permanent physical capacities to perform each job in his ten-year job history.[11]

Neither party contacted Dr. Wade regarding the differences in his January 14, 2016, opinion and February 9, 2016, opinion.[12]

On March 9, 2016, the RBA issued a decision finding Mr. Gracik ineligible for reemployment benefits based on Dr. Wade's February 9, 2016, opinion that he could perform the jobs in his ten-year work history.[13]

On March 22, 2016, Mr. Gracik filed a Workers' Compensation Claim (WCC) requesting review of the RBA's finding of ineligibility for rehabilitation and reemployment benefits.[14]

On April 28, 2016, Dr. Cobden assigned Mr. Gracik a 6% PPI rating. Dr. Cobden also opined that Mr. Gracik would not be able to return to work as a tow truck driver. Dr. Cobden's report stated:

> [Employee] apparently has been turned down for vocational rehabilitation based upon Dr. Wade's suggestion that he can return to driving a tow truck. After reviewing Dr. Wade's notes, his physical findings, and his prior training and work experience, I do not think that he could perform this job adequately. Therefore I would suggest that vocational rehabilitation be reconsidered.[15]

On June 17, 2016, Dr. Cobden, in response to a letter from Mr. Gracik's attorney, circled "yes" to the question of whether Mr. Gracik had the physical capacity to work as a tow-truck driver, and then also checked "yes" as to whether he had the physical capacities to perform the work of "other jobs" Mr. Gracik had held in the past ten years, hand writing the notation "cannot return to work as tow-truck driver."[16]

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[11] R. 253-255.

[12] *Gracik I* at 3, No.7.

[13] *Id.*, No. 8.

[14] *Id.*, No. 9.

[15] *Id.*, No. 10.

[16] R. 59-61. (The letter does not refer to the SCODRDOT descriptions, but does list the specific jobs held by Mr. Gracik.)

Mr. Gracik testified about his employment history, his injury, and his left shoulder surgery, and further stated Dr. Wade advised him there was no guarantee that he would fully recover from the surgery. Mr. Gracik stated that while the surgery improved his condition, it did not fully resolve it. He can now lift and raise his arm and has range of motion, but he has no strength. He testified that he does not think he is physically capable of doing any of the jobs in his ten-year history.[17] The Board found Mr. Gracik to be credible.[18]

On July 30, 2016, *Gracik I* issued, which vacated the RBA's March 9, 2016, determination and remanded the matter to the RBA for reevaluation and consideration of Dr. Cobden's April 28, 2016, opinion.[19]

On August 22, 2016, the RBA contacted Mr. Hutto and directed him to contact Dr. Wade, provide him with his January 14, 2016, report appearing to recommend vocational rehabilitation, and inquire if he wished to amend his previous return-to-work predictions.[20] On August 26, 2016, Dr. Wade's office simply wrote back "no change" on the fax cover sheet and faxed it back to Mr. Hutto.[21]

Despite Mr. Hutto's attempt to obtain clarification from Dr. Wade, it remains unclear whether Dr. Wade realizes that he recommended vocational rehabilitation on January 14, 2016, yet on February 9, 2016, agreed Mr. Gracik could return to work as a tow truck operator as well as other jobs held in the ten years prior to the work injury. Dr. Wade found Mr. Gracik would have the physical capabilities to perform previous jobs on February 9, 2016. Since this discrepancy was not specifically pointed out to Dr. Wade, the Board found it unclear whether Dr. Wade meant that that there was "no change" in his January 14, 2016, opinion or his February 9, 2016, opinion.[22]

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17 *Gracik I* at 4, No. 14.

18 *Id.; Gracik II* at 5, No. 19.

19 *Gracik I.*

20 *Gracik II* at 4, No. 13.

21 *Id.*, No. 14.

22 *Id.*, No. 15.

On September 16, 2016, the RBA issued a decision finding Mr. Gracik not eligible for reemployment benefits based on Dr. Wade's prediction that Mr. Gracik would have the physical capability to perform the physical demands of his job at the time of injury as a tow truck driver. The RBA considered Dr. Cobden's April 28, 2016, opinion, but noted that that was no evidence Dr. Cobden reviewed the SCODRDOT job description for Tow-Truck Operator prior to rendering his opinion that Mr. Gracik cannot return to work in his position.[23]

On September 16, 2016, Dr. Cobden wrote an addendum opinion clarifying that he had reviewed the SCODRDOT job description for tow-truck operator (DOT #919.663-026) when he concluded that Mr. Gracik was unable to fulfill the physical requirements for the job description.[24] This addendum does not address the SCODRDOT job descriptions for any other jobs held by Mr. Gracik in the ten years prior to his injury.[25] On September 21, 2016, Mr. Gracik filed a Petition for Review of the RBA's determination finding him ineligible for reemployment benefits, contending the RBA did not have Dr. Cobden's supplemental information at the time of her decision.[26]

3. Standard of review.

AS 23.30.008 (a) provides:

> The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. The commission does not have jurisdiction in any case that does not arise under this chapter or in any criminal case. On any matter taken to the commission, the decision of the commission is final and conclusive, unless appealed to the Alaska Supreme Court, and shall stand in lieu of the order of the board from which the appeal was taken. Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

AS 23.30.128 states in part:

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[23] *Gracik II* at 4, No. 16.

[24] *Id.* at 4-5, No. 17.

[25] R. 120.

[26] *Gracik II* at 5, No. 18.

(b) The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

. . .

(d) The commission may affirm, reverse, or modify a decision or order upon review and issue other orders as appropriate. The commission may remand matters it determines were improperly, incompletely, or otherwise insufficiently developed. The commission may remand for further proceedings and appropriate action with or without relinquishing the commission's jurisdiction of the appeal. The administrative adjudication procedures of AS 44.62 (Administrative Procedure Act) do not apply to the proceedings of the commission.

AS 23.30.041 states in pertinent part:

(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.

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

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

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific

> vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."

The Commission, per the above statutes, reviews an appeal from the Board by looking at the record as a whole and determining if the Board's decision is supported by substantial evidence. If the factual findings are supported by substantial evidence, the Commission must uphold the Board. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[27]

However, where questions of law arise, the Commission does not defer to the Board, but rather exercises its independent judgment.[28] Additionally, the Commission may remand matters that were improperly, incompletely, or insufficiently developed.[29]

4. Discussion.

a. What is the Standard for Review of an Appeal from the RBA?

This matter arose as an appeal to the Board from the RBA's decision finding Mr. Gracik not eligible for reemployment benefits. The standard of review of an RBA's decision is found at AS 23.30.041(d) and states "the board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part." (Emphasis added). The Board, in its Conclusions of Law, found "The RBA Designee did not abuse her discretion by finding Mr. Gracik ineligible for reemployment benefits under AS 23.30.041(e), based on the evidence before her."[30] Having found the RBA did not abuse her discretion, according to AS 23.30.041(d), the Board had no option but to affirm the decision or remand the matter for her to consider the new evidence.

Mr. Gracik contends AS 23.30.130 allows the Board to make its own decision regarding an appeal from the RBA's decision. This statute states:

> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of

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[27] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.,* 880 P.2d 1051, 1054 (Alaska 1994).

[28] AS 23.30.128(b).

[29] AS 23.30.128(d).

[30] *Gracik II* at 12 (Emphasis added).

> AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.280, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
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> (b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

While this language allows the Board to review compensation benefits and may issue a new compensation order, nonetheless, in reviewing an RBA's decision, the more precise language in AS 23.30.041(d) controls.[31] "The board **shall** uphold the decision of the administrator except for abuse of discretion on the administrator's part." (Emphasis added).[32] This language does not give the Board any authority to make its own decision once it determines the RBA has not abused her discretion. The Board expressly found the RBA had not abused her discretion. The Board's only recourse was to remand the decision back to the RBA to consider the new information, since the RBA was not provided with the information the Board used in reversing her decision prior to rendering her decision. The RBA was not afforded the opportunity to review all the evidence and, thus, to perform her job effectively.

The Alaska Supreme Court (Court) has stated that abuse of discretion occurs where a decision issued is "arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive."[33] If an agency fails to apply properly controlling law, an abuse

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[31] *Rydwell v. Anchorage School Dist.*, 864 P.2d 526, 528 (Alaska 1993) (citing *Forest v. Safeway Stores, Inc.,* 830 P.2d 778,781 (Alaska 1992).

[32] AS 23.30.041(d).

[33] *Sheehan v. University of Alaska*, 700 P.2d 1295, 1997 (Alaska 1985).

of discretion exists.[34] No evidence was presented demonstrating the RBA acted arbitrarily or was capricious or that her decision was manifestly unreasonable or from an improper motive. Nor was there any evidence presented that the RBA failed to apply controlling law. Therefore, the Board correctly found the RBA's decision was not an abuse of discretion. The Board implicitly found the RBA acted prudently based on the information she had.

Pursuant to *Irvine v. Glacier General Construction*,[35] Mr. Gracik has a right to have Dr. Cobden's opinion considered by the RBA. Because this information was not submitted to the RBA prior to her decision, she was not able to consider it. The proper course is for the Board to remand the matter to the RBA so she may properly consider the opinions of both Dr. Cobden and Dr. Wade. Ultimately, the decision as to which doctor's opinion is the better weighted and more considered is up to the RBA in her discretion.[36]

The Commission remands the Board's decision to the Board for remand to the RBA to allow her full consideration of the opinions of Dr. Cobden and Dr. Wade.

b. What is the Meaning of AS 23.30.041(e)?

A basic principle of statutory construction is that a statute must be read as a whole and all parts of it are to be given meaning in order to "create a harmonious whole."[37] AS 23.30.041(e) states in full:

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

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[34] *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

[35] *Irvine v. Glacier Gen. Const.,* 984 P.2d 1103, 1107-1108 (Alaska 1999).

[36] *Id.*

[37] *See, Rydwell v. Anchorage School Dist.*, 864 P.2d 526, 528 (Alaska 1993) (citing *Forest v. Safeway Stores, Inc.,* 830 P.2d 778,781 (Alaska 1992).

> 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."

Mr. Gracik contends, since Dr. Cobden said he cannot return to work as a tow truck operator, he is automatically eligible for reemployment benefits because subsection (1) and (2) are joined by an "or" and since he met the condition of subsection (1) he is eligible. However, this reading ignores the precise language in the body of AS 23.30.041(e), which states an employee is only eligible for reemployment benefits "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 . . . for" both subsections (1) and (2). Both subsections (1) and (2) must be met before an employee is eligible for retraining. This is the only reading that harmonizes the statute and makes all portions relevant. To omit subsection (2) and to stop at subsection (1) renders subsection (2) meaningless and superfluous. This is contrary to the principles of statutory construction, which hold the legislature gave meaning to all sections. "We recognize a presumption that the legislature intended every word, sentences, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous."[38]

The Legislature, in enacting AS 23.30.041(e), therefore, intended to provide reemployment benefits to those workers who have no marketable skills and education and cannot return to any work previously performed. To accept Mr. Gracik's reading of the statute would ignore an injured worker's skills and education and focus only on the job at the time of injury. Such a reading would greatly increase the expense to an employer for retraining a worker who in reality needs no retraining. If an injured worker has the skills and education for jobs previously held for the requisite time, and these jobs currently exist in the labor market, then this worker does not need retraining.

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[38] *Rydwell v. Anchorage School Dist.* at 530-531 (citing *Alaska Transp. Comm'n v. AIRPAC, Inc.,* 685 P.2d 1248, 1253 (Alaska 1984).

The statute requires the rehabilitation specialist to look closely at an injured worker's job history and skill levels. The rehabilitation specialist must undertake a labor market survey to see if these jobs actually are available in the current labor market. If an injured worker cannot return to the job at the time of injury and has no skills from previous employment in the last ten years, or those jobs are no longer available then, and only then, is the injured worker entitled to reemployment benefits.

The Board's regulations support this interpretation. The regulation at 8 AAC 45.525 provides specific direction to the rehabilitation specialist for evaluating eligibility for reemployment benefits.

> (a) If an employee is found eligible for an eligibility evaluation for reemployment benefits under AS 23.30.041(c), the rehabilitation specialist whose name appears on the referral letter shall
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> > (1) interview the employee and the employer and review all written job descriptions existing at the time of injury that describe the employee's job at the time of injury;
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> > (2) review the appropriate volume listed in (A) or (B) of this paragraph and, based on the description obtained under (1) of this subsection, select the most appropriate job title or titles that describe the employee's job . . . .
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> (b) When interviewing the employee the rehabilitation specialist whose name appears on the referral letter shall obtain descriptions of the tasks and duties for other jobs the employee 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
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> > (1) exercise due diligence to verify the employee's jobs in the 10 years before the injury and any jobs held after the injury;
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> > (2) review the appropriate volume listed in (A) or (B) of this paragraph and select the most appropriate job title or titles that describe the jobs held and training received . . . .
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> > (3) identify all job titles identified under (2) of this subsection for which the employee meets the specific vocational preparation codes as described in the volume; and
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> > (4) submit all job titles identified under (3) of this subsection to the employee's physician, the employee, the employer and the administrator; if the physician predicts the employee will have permanent physical capacities equal to or greater than the physical demands of a job or jobs submitted under this paragraph, the

> rehabilitation specialist shall conduct labor market research to determine whether the job or jobs exist in the labor market as defined in AS 23.30.041(r)(3).

This regulation requires the rehabilitation specialist to identify the SCODRDOT for the job at the time of injury and for all jobs held with the ten years prior to the injury. All of these descriptions are then submitted to the employee and the employee's treating physician. Then the rehabilitation specialist must conduct labor market research. This is precisely what the Court stated in *Irvine.* There, the Court, in reviewing the requirements of AS 23.30.041(e), stated that both the job at the time of injury and other jobs existing in the labor market for which "the employee has held or received training for within 10 years before the injury . . ." must be considered in determining the physical capacities of the injured worker.[39]

Therefore, since Mr. Gracik's treating physician, after reviewing the SCODRDOT descriptions for jobs previously held, affirmed Mr. Gracik objectively has the physical capacities to perform at least one of those jobs, the Board must remand this matter to the RBA. The RBA must direct the rehabilitation specialist to follow the requirements of his appointment and perform a labor market survey for the jobs previously held in the ten years prior to Mr. Gracik's injury before the rehabilitation specialist may make a recommendation concerning eligibility for retraining. The RBA, prior to reaching a decision on eligibility, must have all the required facts at hand, including the physician's review of the SCODRDOT descriptions and the required labor market survey. The Commission remands this matter to the Board for remand to the RBA to allow the rehabilitation specialist to conduct the required labor market survey.

c. Is There Substantial Evidence to Support the Board's Decision?

Even if the Board's decision were not contrary to law, substantial evidence in the record as a whole does not support the Board's decision. The Board says it relies on Dr. Cobden's evaluation of Mr. Gracik, but there is no evidence Dr. Cobden saw or reviewed actual SCODRDOT job descriptions. The June 16, 2016, letter from Mr. Gracik's

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[39] *Irvine v. Glacier Gen. Const.,* 984 P.2d at 1106.

counsel to Dr. Cobden references the SCODRDOT job descriptions, but the only description attached to the letter in the record is a non-SCODRDOT description for an ROTC Instructor.[40] Moreover, in response to question No. 2, where Dr. Cobden checked the "yes" box, Dr. Cobden actually wrote in "cannot return to work as tow-truck driver." This is not evidence Dr. Cobden saw and reviewed the SCODRDOT descriptions even for a tow-truck driver. SCODRDOT descriptions for all four jobs Mr. Gracik held in the ten years prior to his injury were submitted to Dr. Wade and were reviewed and signed by Dr. Wade. The actual signed descriptions are included in the record, as signed on February 9, 2016.[41]

Although the Board found Mr. Gracik credible when he testified he could not perform the work of tow truck operator, this is not evidence the Board may use when reviewing the decision of the RBA. The only evidence that may be considered is the actual SCODRDOT descriptions.[42] These are the descriptions the physician must use in evaluating an employee's physical capacities for the job at the time of injury and any jobs held in the prior ten years. Neither actual job requirements nor an employee's opinion about his ability to perform the job may be the basis for a finding of eligibility.[43] "Employees are eligible for reemployment benefits only if their physical capacities are less than the physical demands as described in SCODDOT."[44] The Court continued "[t]he language of AS 23.30.041(e) is clear – the Board must compare the physical demands of a specific job as found in SCODDOT with the employee's physical capacities."[45]

It is furthermore up to the RBA to decide which physician's opinion is the better opinion. Mr. Gracik initially chose Dr. Wade as his treating physician and was referred to

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40 R. at 59-62; 25-26.

41 R. at 252-255.

42 *Irvine v. Glacier Gen. Const.,* 984 P.2d at 1108.

43 *Konecky v Camco Wireline, Inc.,* 920 P.2d 277, 281 (Alaska 1996) (SCODDOT is now SCODRDOT).

44 *Id.*

45 *Id.*

Dr. Cobden only for a PPI rating. Dr. Wade appears to be Mr. Gracik's treating physician as there is no evidence in the record that he has changed treating doctors. The Court, in *Irvine*, noted the RBA has "considerable discretion in performing an eligibility evaluation" and does not need automatically to find eligibility based on a favorable medical opinion.[46] Nonetheless, an employee is entitled to have the treating physician consulted.[47]

Here, Dr. Wade's opinion was provided and utilized. Mr. Gracik is entitled to have Dr. Cobden's opinion reviewed. However, any doctor upon whose opinion the final eligibility determination is based must have based his medical opinion on the SCODRDOT descriptions. As stated above, it is not clear Dr. Cobden reviewed the applicable SCODRDOT descriptions and his opinion is ambiguous about his rejection of any jobs other than tow truck driver. It is not even explicit that his rejection of tow truck driver is actually based on the SCODRDOT description. Thus, his opinion is not sufficient to constitute substantial evidence.

The Board based its decision in large measure on Mr. Gracik's opinion of his physical capacities and on Dr. Cobden's somewhat oblique opinion. The Board's decision is not supported by substantial evidence. The Commission reverses the Board's finding Mr. Gracik is eligible for reemployment benefits as not supported by substantial evidence.

5. Conclusion.

The Board incorrectly reversed the RBA's decision after finding she had not abused her discretion. Furthermore, the Board's decision in reversing the RBA's decision is not supported by substantial evidence. Since the RBA did not have Dr. Cobden's report before her, the matter is REMANDED to the Board with direction to remand the matter to the RBA for consideration of both Dr. Wade's and Dr. Cobden's opinions. The award of

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[46] *Konecky v Camco Wireline, Inc.,* 920 P.2d 277, 281.

[47] *Irvine v. Glacier Gen. Constr.,* 984 P.2d at 1106.

attorney's fees is STAYED pending the final resolution of the RBA's eligibility determination.

Date: ___*5 September 2017*____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

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

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

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

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). 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 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 Final Decision No. 239 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 September 5, 2017.

Date: *September 7, 2017*

K. Morrison, Appeals Commission Clerk