

**Case:** *Municipality of Anchorage and NovaPro Risk Solutions vs. Paul Mahe*, Alaska Workers' Comp. App. Comm'n Dec. No. 129 (March 16, 2010)

**Facts:** Paul Mahe (Mahe), a maintenance worker for the Municipality of Anchorage (the Municipality), injured his right knee stepping off a bus. After two surgeries, he sought an eligibility evaluation for reemployment benefits. The specialist appointed to his case sent a list of Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODDOT) job descriptions, which matched occupations that Mahe had worked in during the past 10 years, to Mahe's surgeon, Dr. William Mills. At the end of the job descriptions, the doctor is asked if the employee will or will not have the permanent physical capacities to meet the physical demands of that job. Dr. Mills predicted that Mahe could perform six of the jobs. A labor market survey was also done. Both were submitted to the reemployment benefits administrator (RBA) who denied eligibility for reemployment benefits based on Dr. Mills's responses.

Mahe appealed to the board. The board decided that the RBA lacked substantial evidence to support her decision because "Dr. Mills' responses . . . were 'inconsistent with the substantive contents of the medical records, were limited to Employee's right knee, and failed to consider' a number of unrelated conditions." Dec. No. 129 at 5. The board also found the labor market survey was flawed. The Municipality appealed.

**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."

The Alaska Supreme Court has held that the presumption of compensability in AS 23.30.120(a) applies to an employee's eligibility for reemployment benefits. *Rockney v. Boslough Constr. Co.*, 115 P.3d 1240, 1243-44 (Alaska 2005).

*Irvine v. Glacier General Construction*, 984 P.2d 1103, 1108 (Alaska 1999) held, "While acknowledging that unfairness would result in certain circumstances, . . . the plain language of AS 23.30.041(e) leaves no room for the suggested departure: '[The

statutory language] is plain and demands that reemployment benefit eligibility be determined by the [SCODDOT] job descriptions.”

8 AAC 45.530(b) provides:

If the administrator determines the eligibility evaluation is not in accordance with 8 AAC 45.525, or the information on the board's case file is insufficient or does not support the eligibility recommendation, the administrator

(1) may not decide the employee's eligibility for reemployment benefits; and

(2) shall notify the employee, the employer, or the rehabilitation specialist to submit additional information within a specified date so eligibility can be determined.

Board failure to follow its own regulation is an abuse of discretion. *Alcan Electrical & Engineering, Inc. v. Redi Electric, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 112, 11 (July 1, 2009).

**Issues:** Did the board err in concluding that Mills's responses were insufficient as a matter of law because of the format of his opinion? Did the RBA abuse her discretion by failing to comply with 8 AAC 45.530(b)?

**Holding/analysis:** The commission observed that AS 23.30.041(e), as interpreted by the Alaska Supreme Court, required predictions based on the SCODDOT job descriptions. Moreover, Dr. Mills's predictions complied precisely with a guide for eligibility evaluations that was written to implement 8 AAC 45.525. The guide stated that “The physician must review the correct SCODDOT job descriptions and respond to one question: ‘Do you predict that [the employee] will have permanent physical capacities that are equal to or greater than the physical demands of the job described above.’ Yes No.” The commission held:

Here the panel accorded the physician's predictions “less weight” as a matter of law *because* they complied with the specific requirements of the administrator's regulations. In effect, the board upended the Supreme Court's holding that a physician's prediction that is not expressed “in terms of the SCODDOT standards” is entitled to no weight. This was reversible error. Dec. No. 129 at 14.

The commission also observed that at the presumption rebuttal stage the board needed to consider Dr. Mills' responses alone, rather than weighing them against other medical records. Dec. No. 129 at 9.

The commission concluded that the RBA failed to comply with 8 AAC 45.525(b), and the RBA's failure to comply with a regulation was an abuse of discretion. The RBA had in the file information that “does not support the eligibility recommendation” but did not provide the parties the opportunity to submit evidence. The commission remanded to the RBA to allow the parties to submit evidence and to decide eligibility.

**Note:** *Municipality of Anchorage v. Mahe*, Dec. No. 125 (Oct. 27, 2009) granted Mahe's request for an extension of time and denied Mahe's request for a translation of the appellants' brief.