Alaska Workers' Compensation Appeals Commission

David J. Berrey,
Movant,

vs.

Arctec Services and Lumbermens Mutual Casualty Co.
Respondents.

Memorandum Decision
Decision No. 009 April 28, 2006
WCAC Appeal No. 06-007
AWCB No. 200120509

Memorandum Decision on Motion for Extraordinary Review of Alaska Workers' Compensation Board Order No. 06-0031, Fairbanks Panel, by William Walters, Chairman, and Chris Johansen, Board Member for Management.

Appearances: David J. Berrey, Pro Se; Richard Wagg, Russell, Tesche, Wagg, Cooper & Gabbert, for Appellees, Arctec Services and Lumbermens Mutual Casualty Co.

Commissioners: John Giuchici, Philip Ulmer, Kristin Knudsen.

By Kristin Knudsen, Chair:

Mr. Berrey asks the commission to review an interlocutory order by the board. In its decision, the board voided the Reemployment Benefits Administrator (RBA) designee's determination that Berrey was eligible for reemployment benefits, directed Berrey to attend a second independent medical examination (SIME), and retained jurisdiction to determine whether Berrey had a compensable permanent impairment and whether his condition was medically stable.

Berrey argues that the board erroneously voided the RBA designee's decision and division officer's statement to him that "causation was not an issue" barred the board from considering whether the permanent impairment is compensable. He

contends the only question before the board was if he had a permanent impairment that would make him eligible for reemployment benefits.

Because the board made no decision on the issue of compensable permanent impairment, and the employee agreed to a hearing on the issue of medical stability and eligibility for reemployment benefits, we conclude that the board has not departed from its regulations or the requirements of due process. We also note that the process of extraordinary review, if applied in this case, would only delay ultimate resolution of this litigation and impose substantial costs on the parties. Therefore, we deny the motion for extraordinary review.

Factual background.

The facts summarized in this decision are drawn from the board's decisions, *David Berrey v. Arctec Svcs. I*, AWCB Decision No. 06-0031 (February 7, 2006) and *David Berrey v. Arctec Svcs. II,* AWCB Decision No. 06-0050 (March 2, 2006). We make no independent findings of fact. We note the parties did not challenge the board's recitation of the facts of the case.

David J. Berrey was employed by Arctec Services as a laborer at Clear, Alaska when, in the summer of 2000, he developed pain in his right heel. His physician, then Ralph Dixon, DPM, diagnosed planter fascitis, bursitis and calcaneal bone spur, related to Berrey's employment. Arctec paid temporary total disability (TTD) compensation and medical benefits. Berry transferred his care to a PA-C (physician assistant – clinician) in the office of Cary Keller, MD. The PA-C determined he was released, with restrictions, to work in February 2001, and that his condition was medically stable on March 28, 2002.

In September 2002, the PA-C noted the employee continued to have problems with his foot at work and recommended to the employer's medical manager that he be evaluated for vocational rehabilitation. In October 2002, the employer inquired about medical stability and the PA-C responded that the employee was medically stable. The employer then controverted further TTD compensation.

In July 2003 the PA-C noted that the employee should not walk, stand or climb on concrete floors. In August 2003, Berrey asked for an evaluation[1] to determine if he was eligible for reemployment benefits.[2] Although she believed that Berrey's condition would not result in a ratable permanent impairment, in January 2004 the PA-C recommended to the RBA that he be found eligible for retraining.

---

[1] At the time of these events, AS 23.30.041(c) provided:

> If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request. The administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

[2] At the time of these events, AS 23.30.041(e) provided that an injured employee "shall be eligible" for benefits if the employee makes a request for benefits in writing and a physician predicts the employee will have permanent physical capacities less that the physical demands of (1) the employee's job at the time of injury; or, (2) a job in the US labor market the employee has held or been trained for within 10 years of the injury; or (3) a job that the employee has been trained for or held *after* the injury long enough to obtain skills to compete in the labor market. However, AS 23.30.041(f) also provided that an employee is *not* eligible for reemployment benefits if:

> (1) the employer offers employment within the employee's predicted post-injury physical capacities . . . and the employment prepares the employee to be employable in other jobs that exist in the labor market;
>
> (2) the employee has been previously rehabilitated . . . and returned to work in the same or similar occupation at the time of the previous injury; or
>
> (3) at the time of medical stability no permanent impairment is identified or expected.

The issue in the movant's case concerns application of subparagraph (3).

On March 10, 2004, the RBA designee, Mickey Andrew, assigned a specialist to do an evaluation to determine if Berrey was eligible for reemployment benefits.[3] By then, Berrey had moved to Arizona and begun care by Carry Zang, DPM. The specialist sent a letter to Dr. Keller's office in Fairbanks on March 31, 2004. Dr. Keller's office responded that Berrey could return to work in three job descriptions (construction worker, firefighter, and utility laborer). In an eligibility evaluation report dated April 15, 2004, the specialist recommended that Berrey be found not eligible for reemployment benefits.

RBA designee Andrew rejected the report because the PA-C's responses were not cosigned by a physician; there was no documentation whether or not the employee would have a permanent impairment; and, the job descriptions were approved subject to modifications of standing and walking. She suggested the specialist contact Mr. Berrey's current physician, Dr. Zang.

The specialist contacted Dr. Zang and reported on May 18, 2004, that Dr. Zang wanted to perform surgery, but the employee was reluctant, and that Dr. Zang would "discuss giving an impairment rating if the employee would make an appointment to see him." On May 21, 2004, the specialist reported that Dr. Zang had disapproved the three positions of construction worker, firefighter, utility laborer.

RBA designee Andrew issued a determination that Berrey was eligible for reemployment benefits on October 25, 2004, stating

> Dr. Zang has indicated that your predicted permanent physical capacities are less than those required of your job at time of injury and of jobs you held in the 10 years prior to your injury. Your employer is unable to offer alternative employment per AS 23.30.041(f)(1). You have not received vocational rehabilitation for a previous workers' compensation claim. Finally, you have or are expected to

[3] No explanation is provided in the board decision as to why it took more than six months to assign a specialist, or what "unusual and extenuating circumstances" allowed the employee's failure to request benefits within 90 days of the injury to be excused. AS 23.30.041(c).

> have a permanent partial impairment at the time of medical stability.[4]

The employer petitioned for review of the RBA designee's determination.

After the designee's determination, the employee was referred by Dr. Zang to Dr. Leonetti for a permanent impairment rating. Dr. Leonetti produced a rating of 10% permanent partial impairment of the right foot on February 14, 2005. The employer controverted the rating. Dr. Leonetti reported a 3% permanent partial impairment of the whole person on March 21, 2005. The employer sent the employee to an employer medical evaluation, performed July 6, 2005. The employer's medical evaluator, Dr. Marble, indicated the employee was medically stable and had no ratable permanent impairment. He said that the bone spur and plantar fascitis pre-existed the employment and Berrey's work did not permanently worsen his condition.

On November 22, 2005, the parties agreed to a hearing on January 19, 2006, on the issues of the employee's eligibility for reemployment benefits and the date of medical stability. Dr. Marble was deposed on January 13, 2006 and the deposition filed on January 18, 2006. Berrey participated in the deposition. The hearing was rescheduled, at the employer's request, to January 26, 2006.

The Board's decision.

In its interlocutory decision and order,[5] the board determined that the RBA designee did not have an "affirmative prediction of ratable impairment" at the time of the RBA designee's determination.[6] That is, when RBA designee Andrew issued her determination on October 25, 2004, she did not have in her file a physician's prediction that Berrey would have a permanent impairment that would be rated as greater than

---

[4] Respondent's exhibit 2, p. 1: Letter to David J. Berrey from Mickey Andrew, October 25, 2004.

[5] *David Berrey v. Arctec Svcs. I,* Decision No. 06-0031 (February 7, 2006).

[6] *Id.* at p. 10.

zero following the applicable *AMA Guides*[7]. The board concluded that, because RBA designee Andrew did not have evidence of such a prediction in her file before her decision on October 25, 2004, her determination that "you have or are expected to have a permanent partial impairment at the time of medical stability" was an abuse of discretion.[8] The board went on to find that evidence developed after October 25, 2004 both supported and refuted the prediction or existence of a permanent impairment. As the board noted, Dr. Leonetti's PPI rating of 3% of the whole man "was not rendered until several months after the eligibility determination."[9] Dr. Marble's report was not rendered until July 6, 2005.[10] Faced with a conflict of medical evidence, the board made no decision on whether the employee did or did not have a ratable permanent impairment under AS 23.20.190[11] or the date of medical stability.[12] Instead, it exercised its discretion to require a SIME under AS 23.30.095(k) and AS 23.30.110(g).[13]

---

[7] *American Medical Association Guides to the Evaluation of Permanent Impairment*, 5th Ed. Its use is required by AS 23.30.1290(b).

[8] *David Berrey v. Arctec Svcs. I.* at p. 10. As the board noted, when she issued her determination, RBA designee Andrew had a report from the specialist containing a statement that Dr. Zang "had agreed to discuss giving an impairment rating." Without commenting on the hearsay nature of this statement, we agree with the board that a report by the specialist that Dr. Zang was willing to discuss a rating is not equivalent to an affirmative prediction of ratable impairment by Dr. Zang. As the board pointed out, a rating can result in an impairment of zero. It is also possible that a rating exam may result in the rater determining that the impairment is of a type that cannot be rated under the applicable *Guides*, or that the data generated during the exam is not valid. Although not a circumstance specifically discussed by the board, the RBA designee also had before her an opposing hearsay statement to the effect that there would be no impairment in the PA-C's August 11, 2003 report of the content of Dr. Keller's notes. See *Id.* at p. 3.

[9] *Id.* at p. 10.

[10] *Id.* at p. 6.

[11] *Id.* at p. 11.

[12] *Id.* at p.12.

[13] *Id.* at p. 13.

The movant's arguments to the commission

Berrey first argued that the RBA designee's decision was correct and not an abuse of discretion. Berrey did not present anything to the commission that suggests RBA designee Andrew had a physician report or other evidence before her on October 25, 2004 that constituted such an affirmative prediction, but that the board overlooked it in its review. Instead, Berrey argued two points. First, he argued that the board incorrectly interpreted Dr. Zang's statement, reported by specialist Richter, as ambiguous. Second, he argued that because some evidence presented to the board *after* October 25, 2004 confirmed the RBA designee prediction, the board was obliged to affirm the RBA designee's decision as correct. The board's refusal to do so, and its order that he attend an SIME, he argues imposes unnecessary delay and undue hardship upon him and is a departure from the requirements of due process.

Berrey also argued that the board, by finding a conflict in the medical evidence and sending the question of a permanent impairment rating to an SIME, improperly considered the question of causation, which he was told would not be an issue before the board in the January 26, 2006 hearing. We noted that Berrey referred to the issue as "causation/compensability" but the letter[14] Berrey relies upon refers only to "causation." At oral argument, Berrey argued that causation and compensability are the same thing. Berrey argues board's decision reflects that it did consider causation, and therefore denied him the right to respond to and be prepared for that issue. He also claims that an immediate decision on the issue (whether the board's action of requiring an SIME was an improper inquiry into causation) is needed for the guidance of the board.

In a similar vein, Berrey argues the board had no basis to require an SIME because, in fact, no medical dispute existed. He argues that Dr. Marble's measurements support a 3% impairment rating and are similar to Dr. Leonetti's measurements. Because no medical dispute about the extent of impairment existed

[14] Fax note from Sandra Stuller to David Berrey, Jan. 25, 2006, attached to Berrey's motion for extraordinary review.

and the board was barred from considering causation, the only action open to the board was to award him permanent partial impairment and conclude he was therefore eligible for reemployment benefits. Berrey complains that the board's refusal to make the decision he believes it was obliged to make subjects him to undue delay and hardship.

Finally, Berry argues that the board violated its regulations by considering Dr. Marble's deposition. The deposition was filed January 18, 2006, less than two working days before the first scheduled date of the hearing, January 19, 2006, but more than two working days before the actual hearing date, January 26, 2006.[15] Berrey argues he was told by division staff (he does not say when) that the transcript would not be considered because it was not filed on time. He complains he did not receive it until January 25, 2006. Again he claims that the board's action denied him the right to respond to and be prepared for Dr. Marble's testimony, and that this denial of due process is so grave as to call for the commission to intervene.

Berrey's circumstances are not sufficient to compel extraordinary review of the board's decision.

Our task in a motion for review is to determine if, before the board's final decision on a petition or claim, the board's actions are so erroneous or unjust, so prejudicial to the requirements of due process, so likely to otherwise evade review, or reveal our guidance is needed to resolve conflict and materially advance the termination of the litigation, that the strong policy favoring appeals from final decisions is outweighed by the compelling circumstances presented by the motion.[16] Our authority is limited and we do not exercise extraordinary review lightly. Berrey's arguments do not persuade us that this is a case calling for extraordinary review. Our explanation follows.

---

[15] 8 AAC 45.120(a) requires that a party who wants to present a witness's testimony by deposition must file a transcript of the deposition with the board at least two working days before the hearing.

[16] 8 AAC 57.076(a).

The board's determination that the RBA designee's decision was an abuse of discretion.

Berrey does not argue that the board failed to consider a particular piece of evidence that RBA designee Andrew had in her file in October 2004 - some evidence that was an affirmative prediction of impairment. All of the evidentiary material produced with his motion was developed after October 25, 2004. Instead, Berrey points to rehabilitation specialist Richter's May 18, 2004 report citing Dr. Zang's belief that Berrey did not want surgery and that he (Dr. Zang) was willing to discuss a rating. Berrey argues this statement *could be considered* an affirmative prediction of permanent impairment because "a reasonable person could conclude that if Dr. Zang believed that [Berrey had] a condition [that] could only be remedied by an intrusive surgery . . . . Why would he subject his patient to a risky operation . . . if he thought it was not a permanent impairment?"[17]

Berrey argued that the RBA designee correctly decided he was eligible for reemployment benefits because she could reasonably rely on specialist Richter's report of Dr. Zang's expression of his belief regarding Berrey's state of mind, given Dr. Zang's offer to perform surgery. The inference Berrey drew from this report of Dr. Zang's opinion is very thin. As the board is aware, surgery is performed for many reasons, including relief of painful conditions that do not impair function. Specialist Richter reported that, despite Berrey's rejection of proffered treatment, Dr. Zang was willing to accommodate his patient by discussing a rating. From this the board could possibly infer that Dr. Zang was willing to make an examination, or refer Berrey to another physician to make an examination, to determine if Berrey had a permanent impairment. As the board noted, a rating may result in a zero permanent impairment.

The board applied an abuse of discretion standard in its review, as required by AS 23.30.041(d). It examined the evidence before the RBA designee carefully. It did not engage is speculation or overlook relevant evidence. Given the nature of the

[17] Berrey's memorandum in support of motion for extraordinary review, p.4.

evidence[18] before the RBA designee, the board's characterization of the evidence as "ambiguous."[19] is not irrational.[20]

The heart of Berrey's complaint is that the board did not draw the same inference that he did from specialist Richter's letter. This is an argument about the interpretation of the evidence. The commission cannot do in what Berrey asks: require the board to adopt his position about what inferences that should be drawn from the evidence. Berrey was not prevented from putting in his supporting evidence after the RBA designee's decision was challenged or from arguing his interpretation of specialist Richter's letter to the board. The board's interpretation of the statutes and regulations in regards to the review of the RBA designee's decision are unchallenged. The issue of requiring affirmative prediction of impairment as a condition of reemployment benefits eligibility is not one that will otherwise evade review. For these reasons, we find that

---

[18] Berrey relies on a statement written by Richter about something Dr. Zang said to her. While Dr. Zang's reported willingness to discuss a rating was later confirmed (i.e., he did refer the employee to Dr. Leonetti for a rating so it may be inferred he discussed a rating with Berrey), when the RBA designee made a decision that event had not occurred. The RBA designee also had before her PA-C Wyatt's summary of Dr. Keller's notes indicating that there was no rateable permanent impairment. Both were second hand, unsworn reports of a physician's statement and neither affirmatively predicted that Berrey would have a permanent partial impairment under the *AMA Guides*.

[19] *David J. Berrey v. Arctec Svcs. I,* Decision No. 06-0031 (February 7, 2006) at p. 10.

[20] We do not examine the board's findings of fact to determine if they are supported by substantial evidence in this proceeding; we look only to see if there is so clear an error in the board review process as to compel our intervention before a final decision. If an appeal were accepted upon motion for extraordinary review, we would then examine the board's findings of fact (if made) as we would on appeal: "the board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record." AS 23.30.128(b). Moreover, the board's determination of credibility, including the weight to be accorded medical testimony, is conclusive, AS 23.30.122, and the board's findings regarding the credibility of a witness before the board are binding on the commission. AS 23.30.128(b).

the board's conclusion (that the RBA designee's decision of October 25, 2004 was an abuse of discretion) is not a board action that requires extraordinary review.

The board's identification of a conflict in the medical evidence.

Having found an abuse of discretion, the board faced a decision about its next step. Relying on a practice of allowing additional evidence at hearing on an RBA review under AS 23.30.041(d),[21] and aware that the parties had submitted two issues to it for resolution, the board examined the evidence produced after October 25, 2004. The board concluded that a conflict existed "between the opinions of Dr. Leonetti and Dr. Marble concerning whether the employee suffers a permanent impairment related to his work injury."[22] The board also found "the record contains conflicting opinions between several of the employee's physicians and the employer's physician, Dr. Marble, concerning the medical stability of the employee's plantar fascitis condition."[23] Berrey argues there is no medical dispute regarding his impairment.

Berrey rests this argument on statements made in Dr. Marble's deposition.[24] According to Berrey, Dr. Marble found that in the past Berrey measured 10 degrees dorsiflexion on the right foot. Dr. Leonetti measured 7 degrees. Berrey asserts Dr. Marble's opinion that 10 degrees is in the normal range is incorrect under the *AMA Guides*, and that 10 degrees, like 7 degrees, supports a finding of impairment. Berrey then contends that because the "prediction of impairment" by the RBA designee was confirmed, both sets of measurements support a finding of impairment, and the question of causation was not before the board, the only option left to the board was to

---

[21] The commission expresses no opinion on the practice because the board's decision to do so was not challenged by the parties. We also note that the parties agreed to allow the board to hear the issues of medical stability and eligibility for reemployment benefits.

[22] *David J. Berry v. Arctec Svcs. I, supra* at p.11.

[23] *Id.*, at p. 12.

[24] Berrey did not provide a copy of the portion of the deposition he quotes, but for the purposes of this decision we assume he correctly quoted Dr. Marble.

find him eligible for reemployment benefits. In short, Berrey contends that the board was "boxed in" to a point that it *must* find in his favor and its refusal to do so subjects him to undue delay.

Berrey's arguments rest on incorrect assumptions. Berrey assigns great importance to the letter saying causation is not an issue for hearing.[25] Berrey argued that if the board confined itself to finding he had an impairment he would be eligible for reemployment benefits. If Berrey's assumptions were correct, barring the issue of causation would avoid the application of the principle that only a compensable permanent impairment could qualify him for reemployment benefits and the eliminate the risk that the board would accept Dr. Marble's opinion. If the Board's only available option was to decide the issue in his favor, as Berrey argues, then any other action creates undue delay.

Berrey agreed to submit the issue of whether he was eligible for reemployment benefits to the board. After the board rejected the RBA designee's determination, the only way Berrey could have been found eligible for reemployment benefits is if the board decided he had a compensable[26] permanent partial impairment.

One of the important factors in determining compensability of permanent partial impairment is whether the impairment rating is greater than zero. AS 23.30.190(c) requires that the impairment rating "be reduced by a permanent impairment that existed before the compensable injury." Thus, when the board looked at the impairment ratings in order to see whether a medical dispute existed regarding a

---

[25] Berrey's argument may have had merit if a decision had been reached on the basis of the presence or absence of causation without allowing the parties opportunity to prepare for and to address the issue. In this case, however, the parties were put on notice by the pre-hearing summary, 8 AAC 45.070(g). This a case in which the employee was unaware that the employer contested compensability of a permanent impairment, because the employer controverted the entitlement to permanent partial impairment. *See, Simon v. Alaska Wood Products*, 633 P.2d 252, 254 (Alaska 1981).

[26] The board noted an impairment rating may be zero and not compensable. Berrey must have a compensable permanent impairment to be eligible for reemployment benefits. *Rydwell v. Anchorage School Dist.*, 864 P.2d 526 (Alaska 1993).

compensable permanent impairment, it was appropriate to look at whether a physician had reduced the rating "by a permanent impairment that existed before the compensable injury" as required under AS 23.30.190. If one physician's opinion is that all of the impairment pre-existed the injury, and the other physician's opinion is that it did not, their ratings will differ, even if they agree on measurement of the current joint range of motion.[27]

To describe a physician's opinion is not to "consider" it in the sense of weighing it against another's opinion. Looking to the bottom line of the ratings and finding there is a disagreement does not mean that the board "considered" the causation of Berrey's impairment, weighed the evidence, and made a decision about it. To the contrary, the board explicitly did NOT weigh the evidence or make a decision. It did not adopt Dr. Marble's rating or Dr. Leonetti's rating, it made no finding regarding the cause of an impairment or its compensability. It simply noted that the two opinions differed.

The Board's decision to require an SIME.

Once the Board had determined that the RBA designee abused her discretion, it had a number of options. Reversal, without instruction for further proceedings, would terminate Berrey's claim for reemployment benefits. If the board voided the decision and remanded the issue to the RBA designee, the identified conflict in the medical evidence would still have to be resolved. The SIME process, if requested, would have to proceed to conclusion. The board would still need to determine if a compensable

[27] Berrey asks the board to disregard the reduction for impairment that pre-existed the compensable injury because accepting a reduction requires an inquiry into causation of the impairment. Berrey's reasoning is faulty. Agreeing not to consider the issue of causation is not the same as agreeing that causation exists. First, the issue presented to the board on eligibility for reemployment benefits encompasses a determination whether Berrey has a *compensable* permanent impairment under AS 23.30.190; a compensable impairment is one that exceeds zero after any applicable reduction. To accept Berrey's argument would mean that the board was required to accept any impairment – related to the employment or not – as a qualification for reemployment benefits, a result clearly barred by *Rydwell*. Second, disregarding the reduction would amount to adoption of Dr. Leonetti's opinion over a conflicting medical opinion. The board would be deciding the issue Berrey argues the board cannot consider – but in his favor.

permanent impairment existed and when the employee became medically stable. All of this could have delayed the RBA designee's second decision.

Instead of pushing the process back to the RBA designee, the board undertook to act as a fact-finding body to make the decisions upon which eligibility for reemployment benefits hinges: the date of medical stability and existence of a compensable permanent partial impairment.[28] It folded the pending SIME process into its decision-making process.[29] As a result of the board's action, the time that Berrey must wait to resolve his request for reemployment benefits, permanent impairment, and additional temporary disability compensation is *shortened*, not made longer. Therefore, we reject Berrey's argument that the board decision to require an SIME compels extraordinary review.

Dr. Marble's deposition.

Berrey argues that the Board violated its regulations by considering Dr. Marble's deposition and this violation constitutes a basis for review. We disagree. The deposition took place with Berrey participating actively – as evidenced by his memorandum. Berrey was well aware of its contents and Dr. Marble's testimony. The deposition was filed more than two days prior to the rescheduled hearing date, and no

---

[28] Berrey filed a claim for temporary disability benefits from September 23, 2003 to May 3, 2004, *David J. Berry v. Arctec Svcs. I, supra* at p. 5. The impairment rating was controverted by the employer, *id.* at p. 6, but the board failed to identify whether the employee filed a claim for permanent impairment compensation or the if subsequent prehearing conference summaries specifically noted amendment of the 2004 claim to include permanent impairment compensation. However, the parties agreed to a board hearing on the issues of medical stability and eligibility for reemployment benefits in a prehearing conference summary dated November 22, 2005, *id.* at n. 53, p. 6. Eligibility for reemployment benefits depends in this case on the existence of a compensable permanent impairment.

[29] An SIME request form had been filed in September 2005. *Id.,* at p. 13. A party has the right to request a SIME in the event of a medical dispute, AS 23.30.095(k), and nothing in this case suggested that the employer had waived that right. *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114 (Alaska 1994). If an SIME would occur, it is reasonable to complete it before the board makes its decision.

evidence suggests that the reason was improper.[30] The requirement that the deposition be filed with the board two days in advance of the hearing is designed to allow the division staff time to assemble the file and ensure the completion of the record, not to make sure that the parties have access to a copy, since a copy may be ordered from the court reporter at the time of the deposition.

Berrey does not state when he telephoned the board to determine if the deposition was there, or when he was told, or by whom, that the deposition would not be part of the record. Even if he had been told that the deposition would not be part of the record shortly before the rescheduled hearing date, he was not adversely impacted because the board did not "consider" the deposition and rely on it to make a decision. The board simply referred to the fact that the deposition took place and Dr. Marble's testimony was consistent with his report. The report was sufficient to establish a conflict in the medical evidence.

Conclusion

At hearing before the commission, Berrey's comments reinforced his written statements regarding the workers compensation system and his interpretation of information provided by workers compensation division staff and the board's decision. Berrey had assistance from workers compensation division staff to gain an understanding of his rights under the Act, which he was able to exercise. However, he misinterpreted the board's decision. This case illustrates some of the challenges faced by self-represented litigants as they attempt to deal with a system that has developed terminology, definitions, legal processes and discourse in response to court decisions, statutory changes, and the participation of the legal profession.[31] Although we

---

[30] 8 AAC 45.074(a)(3) permits the board to reschedule a hearing on the illness of a party's representative. Berrey does not suggest that the illness was feigned.

[31] The commission recognizes the board's efforts to assist pro se litigants while balancing due process and fairness concerns. The employer, unless self-insured or uninsured, rarely participates directly in hearings. Most often the employer has a legal or adjuster representative before the board and the representative explains the adjudication process and the board's decision to the employer. Division staff face a difficult task providing guidance to self-represented employees through the adjudication

sympathize with Berrey's expressed frustration, we do not agree that his case calls for extraordinary review.

The board made no final decisions on the merits of the issues the parties agreed should be presented to it: Berrey's eligibility for reemployment benefits and the date of medical stability. Berrey has not been denied the opportunity to present evidence and argument and he has not been subjected to unreasonable delay. The process of board review of the RBA designee determination was not irrational, nor did it violate the board's regulations, and the merits of the board's decision will not evade review. There is no compelling reason to intervene in the board process at this time. We therefore deny the motion for extraordinary review.

Dated: April 28, 2006 Alaska Workers' Compensation Appeals Commission

Signed
Philip Ulmer, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

---

process, while remaining in the bounds of impartiality, exercising their discretion fairly, and balancing their workload. We do not find the board's decision in this case was unusually difficult to understand, but, because this case reveals the employee misunderstood the board's decision, the commission encourages the board to take a fresh look at the language it uses. We acknowledge that there is historical or habitual usage, even jargon, in the workers' compensation field. It is difficult to avoid some repetition and complexity in writing decisions. The commission is sensitive to this issue because we face the same challenges. The commission supports the board's efforts to improve common understanding of the workers compensation system, the adjudication process and the board's decisions.