Alaska Workers' Compensation Appeals Commission

Laurie E. Vandenberg, Petitioner, vs. State of Alaska, Respondent.	Memorandum Decision on Petition for Review Decision No. 240 September 14, 2017 AWCAC Appeal No. 16-018 AWCB Decision No. 16-0114 AWCB Case No. 201112729

Memorandum decision on petition for review from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 16-0114, issued at Anchorage, Alaska, on November 22, 2016, by southcentral panel members Ronald P. Ringel, Chair, and Rick Traini, Member for Labor.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for petitioner, Laurie E. Vandenberg; Jahna Lindemuth, Attorney General, and Daniel N. Cadra, Assistant Attorney General, for respondent, State of Alaska.

Commission proceedings: Petition for Review filed November 30, 2016; Order granting Petition for Review issued January 27, 2017; briefing completed May 19, 2017; oral argument held on June 27, 2017.

Commissioners: Michael J. Notar, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Laurie E. Vandenberg was injured on August 30, 2011, while working for the State of Alaska (State) as a Nurse II. Subsequently, Ms. Vandenberg entered the rehabilitation process in which she initially was found ineligible for retraining. The Alaska Workers' Compensation Board (Board) upheld the Rehabilitation Benefits Administrator's (RBA) determination in *Vandenberg v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 14-0093 (July 2, 2014)(*Vandenberg I*). The Board denied reconsideration of *Vandenberg I* in *Vandenberg v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 14-0100 (July 23,

2014)(*Vandenberg II*). The Alaska Workers' Compensation Appeals Commission (Commission) affirmed the Board in *Vandenberg v. State of Alaska*, Alaska Workers' Comp. App. Comm'n Dec. No. 211 (May 1, 2015)(*Vandenberg III*). The Alaska Supreme Court (Court) reversed in *Vandenberg v. State,* 371 P.3d 602 (Alaska 2016)(*Vandenberg IV*). On remand, the Board found that while Ms. Vandenberg might be entitled to AS 23.30.041(k) gap stipend benefits (stipend benefits) during the pendency of an appeal, she had already received more than 262 days in stipend benefits and, therefore, she was not entitled to any additional stipend benefits.[1]

Ms. Vandenberg filed a petition for review on November 30, 2016, asking whether the limitation on stipend benefits enunciated in *Griffiths v. Andy's Body & Frame, Inc.*[2] is in accordance with AS 23.30.041 and whether the language in *Griffiths* limiting stipend benefits to 242/247 days should be treated as dictum. Additionally, Ms. Vandenberg contends the Board decision relying on this limitation is contrary to the Court's decision in *Carter v. B & B Construction, Inc.*[3] Ms. Vandenberg also seeks review of whether her rights to due process under the Alaska Constitution have been violated. The State agreed her petition should be heard, but asked for clarification on whether she contends the violation of her due process rights was procedural or substantive. The State contends if her due process claim is procedural she has no claim because she was afforded a hearing. The State further asserts if her due process claim is substantive the Commission does not have jurisdiction to address a constitutional issue. The petition for review was granted on January 27, 2017, and oral argument was heard on June 27, 2017.

The Commission now finds the language in *Griffiths* limiting payment of stipend benefits to 242/247 days prior to plan acceptance or approval is dictum. The Commission also finds this limitation on stipend benefits is contrary to the Court's holding in *Carter*

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[1] *Vandenberg v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 16-0114 (Nov. 22, 2016)(*Vandenberg V*).

[2] *Griffiths v. Andy's Body & Frame, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009).

[3] *Carter v. B & B Constr.*, *Inc.*, 199 P.3d 1150, 1160 (Alaska 2008).

that a worker is entitled to stipend benefits after the expiration of permanent partial impairment (PPI) benefits as long as the employee is actively pursuing reemployment benefits. The Court did not address whether stipend benefits prior to plan approval could be paid for more than two years. The matter is remanded to the Board for further action in accordance with this decision.

2. Factual background and proceedings.[4]

Laurie E. Vandenberg was injured on August 30, 2011, while working for the State as a Nurse II.[5] On May 3, 2013, the State notified the RBA that Ms. Vandenberg had been unable to return to work for 90 consecutive days and, on May 29, 2013, the RBA appointed a rehabilitation specialist to complete an eligibility evaluation.[6] Ms. Vandenberg received temporary total disability (TTD) benefits and PPI benefits through July 27, 2013, and then stipend benefits under AS 23.30.041(k).[7]

On July 24, 2013, the rehabilitation specialist submitted an eligibility report. The rehabilitation specialist selected two "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) job titles to represent Ms. Vandenberg's job at the time of injury, as well as jobs she had held in the ten years before the injury. The rehabilitation specialist determined the SCODRDOT job titles of Nurse, General Duty, DOT #075.364-010, and Examiner, DOT #169.267-014, best represented her work at the time of injury. Three of the positions Ms. Vandenberg held in the ten years before the injury were Nurse II positions. In each case, the rehabilitation specialist found the Nurse, General Duty title, either alone or in combination with another title, represented the actual job. In the ten years before the work injury, Ms. Vandenberg had also worked for the State as a Health Facilities Surveyor for approximately three and one-half years. The rehabilitation specialist determined a combination of two SCODRDOT

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[4] We make no findings of fact. We state facts as set forth in the Board's decisions, except as otherwise noted.

[5] *Vandenberg V* at 2, No. 1.

[6] *Vandenberg V* at 2-3, No. 4.

[7] *Vandenberg V* at 3, No. 5.

job titles described that position: Inspector, Health Facility, DOT #168.167-042, and Nurse, General Duty, DOT #075.364-010. The rehabilitation specialist sent Larry Levine, M.D., descriptions for each of the SCODRDOT job titles and asked him to predict whether Ms. Vandenberg could perform those duties. Dr. Levine predicted that Ms. Vandenberg would have the physical capabilities to perform the duties of an Inspector, Health Care Facilities, DOT #168.167-042, but would not have the physical capacities to work as a Nurse, General Duty, DOT #075.364-010. Because the rehabilitation specialist determined that the Nurse, General Duty title was, alone or in combination with another title, necessary to describe all of Ms. Vandenberg's jobs, and because Ms. Vandenberg met all of the other eligibility requirements, the rehabilitation specialist recommended Ms. Vandenberg be eligible for reemployment benefits.[8] Neither party asserted a different SCODRDOT job title would better describe the duties of a Health Facilities Surveyor.[9]

On October 8, 2013, the RBA wrote to the rehabilitation specialist stating the rehabilitation specialist had not included a description of the duties for Ms. Vandenberg's various jobs, and she had difficulty understanding the need for multiple SCODRDOT titles for some positions, particularly the Health Facilities Surveyor position.[10] On October 21, 2013, the rehabilitation specialist filed a new eligibility report and a letter to the RBA explaining the rehabilitation specialist's rationale for combining SCODRDOT job titles for the Health Facilities Surveyor position. In her report, the rehabilitation specialist again recommended that Ms. Vandenberg be found eligible for reemployment benefits.[11] The RBA and the rehabilitation specialist exchanged further correspondence regarding other aspects of the eligibility report until March 3, 2014.[12]

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8 *Vandenberg I* at 3, No. 8.

9 *Id.* at 4, No. 14.

10 *Id.* at 3, No. 9.

11 *Id.* at 3-4, No. 10.

12 *Id.* at 4, No. 11.

On March 3, 2014, the RBA determined Ms. Vandenberg was ineligible for reemployment benefits. The RBA stated, "Dr. Larry Levine predicted that you would have the permanent physical capacities to perform the physical demands for Health Care Facilities Inspector, a DOT/SCODRDOT job description selected by the specialist to best represent the duties you performed as a Health Facilities Surveyor." The RBA noted that "the specialist had selected a combination of DOT/SCODRDOT job titles to represent your job as a Health Facilities Surveyor; however, I made a determination that the title for Health Care Facilities Inspector was sufficient to describe the duties you performed in this position."[13]

Ms. Vandenberg appealed this decision by filing a workers' compensation claim on March 14, 2014.[14] The State terminated Ms. Vandenberg's gap stipend benefits on April 4, 2014.[15] The Board affirmed the RBA determination in *Vandenberg I* on July 2, 2014.[16] On July 23, 2014, the Board issued *Vandenberg II*, denying reconsideration of *Vandenberg I.* Ms. Vandenberg appealed to the Commission, which affirmed the Board in *Vandenberg III* on May 1, 2015.[17]

Ms. Vandenberg then appealed to the Court which, on April 8, 2016, reversed the decisions of both the Commission and the Board, finding that both SCODRDOT job titles: Health Care Facilities Inspector and General Duty Nurse, were necessary to describe her work as a Health Facilities Surveyor.[18] The Court held that since the RBA had only considered one SCODRDOT job title in his decision, his finding of ineligibility for retraining benefits was not supported by the appropriate SCODRDOT and, therefore, in error.[19]

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13 *Vandenberg I* at 4, No. 12.

14 *Vandenberg V* at 3, No. 7.

15 *Id.*, No. 8.

16 *Id.*, No. 9.

17 *Id.*, No. 10.

18 *Id.*, Nos. 11 and 12, referencing *Vandenberg IV*.

19 *Vandenberg IV.*

The State restarted Ms. Vandenberg's stipend benefits on April 8, 2016. The time between termination of stipend benefits on April 4, 2014, and the restart on April 8, 2016, is a total of 735 days.[20] The parties, on June 23, 2016, stipulated that Ms. Vandenberg was eligible for reemployment benefits.[21] The State continued to pay stipend benefits through the hearing on October 26, 2016, for a total of an additional 201 days.[22] The issue at hearing was whether Ms. Vandenberg is entitled to ongoing stipend benefits until a reemployment plan is approved or accepted. The Board found that, although an employee might be entitled to stipend benefits while her case is on appeal, the Board was bound by the decision in *Griffiths* and could not award more than 262 days of stipend benefits.[23] The Board reasoned, since Ms. Vandenberg had already received more than 936 days of stipend benefits, she was not entitled to additional stipend benefits or attorney's fees.[24]

3. Standard of review.

"The goal of statutory construction is to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others."[25] A statute is interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.[26] Statutes dealing with the same subject are *in pari materia* and are to be construed together.[27] If one statutory "section deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible;

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20 *Vandenberg V* at 4, No. 13.

21 *Id.*, No. 14.

22 *Id.*, No. 16.

23 *Id.* at 11.

24 *Id.*

25 *Shehata v. Salvation Army*, 225 P. 3d 1106, 1114 (Alaska 2010).

26 *See, Municipality of Anchorage v. Adamson*, 301 P. 3d 569, 575 (Alaska 2013) (citations omitted).

27 *See, Benner v. Wichman*, 874 P. 2d 949, 958, n.18 (Alaska 1994).

but if there is a conflict, the specific section will control over the general."[28] On questions of law, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.[29]

4. Discussion.

a. Is the limitation for payment of AS 23.30.041(k) stipend benefits to 242/247 days as enunciated in Griffiths dictum?

At issue in this appeal is the meaning of AS 23.30.041(k) and whether this Commission's decision in *Griffiths* controls the amount of time an injured worker in the reemployment process is entitled to .041(k) stipend benefits prior to starting an approved reemployment plan.[30] The language at issue is:

> Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter.

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[28] *See*, *Matter of Hutchinson's Estate*, 577 P.2d 1074, 1075 (Alaska 1978).

[29] AS 23.30.128(b).

[30] *Griffiths*, App. Comm'n Dec. No. 119.

> The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

This language indicates that when the injured worker is no longer receiving TTD benefits and has exhausted any PPI benefits then a reduced benefit called the stipend or gap benefit is to be paid during the on-going reemployment process. The only time limitation in the statute is a two-year limit for stipend benefits once the injured worker starts an approved reemployment plan.

The State contends the Board was correct in holding that this Commission mandated a finite amount of time for which an injured worker who is actively involved in the reemployment process may receive stipend benefits pursuant to the *Griffiths* decision. The time limit in *Griffiths*, in the opinion of the State, is not dicta, but is an essential component of the decision. The State further asserts there is no defined stipend benefit in the statute so, in essence, no benefits are owed to any employee in the reemployment process once TTD and PPI benefits have been fully paid until the employee starts a reemployment plan. The State also asserts, once Ms. Vandenberg was found ineligible for reemployment benefits, she was no longer in the reemployment process, even though she was actively appealing the finding of ineligibility and was ultimately found entitled to a reemployment plan. Once the Court found her entitled to a reemployment plan, she reentered the reemployment process but was no longer entitled to stipend benefits because she had already been paid more than the number of days the *Griffiths* decision determined to be the maximum amount of time for developing a reemployment plan.

Ms. Vandenberg, on the other hand, argues that the time limitation in *Griffiths* is dictum and, therefore, not binding on either the Board or the Commission. As to payment of benefits while in the reemployment process, she points to the express language in .041(k) which states an injured worker is entitled to 70 percent of the employee's spendable weekly wage if TTD ceases and PPI benefits are exhausted prior to the completion or termination of the reemployment process. Ms. Vandenberg further contends the Board erred in finding that *Griffiths* controls the amount of .041(k) benefits she is entitled to receive since she has not completed the reemployment process. The

language limiting the time for payment of .041(k) benefits is dictum she asserts. She also contends she vigorously pursued her rights and, therefore, was fully engaged in the reemployment process when she appealed the denial/finding of ineligibility. Additionally, she was vindicated by the Court in her contention as to the appropriate SCODRDOT job descriptions to be used to define her work history. She is now in the process of having a reemployment plan developed.

If the holding in *Griffiths* is dictum it does not have to be followed and the effect of the dictum is limited to the facts in *Griffiths*. Dictum is "[a] statement of opinion or belief considered authoritative because of the dignity of the person making it . . . . 'As a dictum is by definition no part of the doctrine of the decision, and as the citing of it as a part of the doctrine is almost certain to bring upon a brief maker adverse comment, lawyers are accustomed to speak of a dictum rather slightingly . . . .'" [31] The Court has stated that obiter dictum is language not necessary to the decision and is, therefore, not binding.[32] The Court remarked this was especially true where the issue was not briefed in the original decision.[33]

Griffiths seems to limit stipend benefits to 247 days (its conclusion states 242 days) although the parties assert the amendments in 2005 change that calculation to 262 days.[34] However, a close reading of *Griffiths* shows inconsistency in how the time frames were calculated as well as the actual limit of days. At the outset, the time limitations in *Griffiths* demonstrate imprecision and fluidity and cannot, therefore, be controlling. Furthermore, the time line set out in *Griffiths* does not take into consideration human error in meeting the time lines, delays or necessary extensions of the time, or other intervening human activities which delay the process and which are not the result of either employee or employer malfeasance. Moreover, like the Court stated in *Carter,* an

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31 *Black's Law Dictionary*, Eighth Ed., 485 (2004).

32 *Scheele v. City of Anchorage*, 385 P.2d 582, 583 (Alaska 1963).

33 *Id.*

34 *Vandenberg V* at 9, n.1; 11.

issue which has not been briefed should not be decided.[35] In *Griffiths*, there was no briefing on the issue of a time limitation for stipend benefits.[36]

Furthermore, *Griffiths* appears to be in conflict with *Carter*.[37] The Court stated "[w]hen an employee exhausts PPI benefits before completion or termination of the reemployment process, AS 23.30.041(k) 'provides a fall-back source of income.'"[38] The Court continued "[g]iven this purpose, we think that the legislature did not intend that there should be a gap between the expiration of PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing eligibility evaluations before their PPI benefits expire."[39] The Court further expressly refused to decide if .041(k) benefits were "payable for more than two years if they start before acceptance or approval of a reemployment plan" because that issue had not been briefed or argued to the Court (emphasis added).[40]

Both *Carter* and *Griffiths* affirm the two-year limitation on stipend benefits once a plan is accepted or approved. However, *Carter* also clearly established payment of stipend benefits between the exhaustion of TTD and PPI benefits and the start of a reemployment plan. The only requirement is that an employee be in the vigorous pursuit of reemployment benefits.[41]

The language at issue as noted above states:

> If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment

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35 *Carter*, 199 P.3d 1150, 1160.

36 *Griffiths*, App. Comm'n Dec. 119 at 3-4.

37 *Id.*

38 *Carter*, 199 P.3d at 1160, citing *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 530 (Alaska 1993).

39 *Id.*, citing *Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224, 230 n. 45 (Alaska 2000) (stating in dictum that if employee had actively pursued reemployment benefits it might have been appropriate to award reemployment benefits retroactively to remove gap between expiration of PPI and initiation of reemployment benefits).

40 *Id.*

41 *Carlson*, 995 P. 2d at 230.

> benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process . . . .

This language envisions an injured worker being paid some benefits while in the process of eligibility, plan development, and plan activation. The reduced amount of the benefit is designed to encourage an injured worker to move as quickly as possible through the process. The statute removed the onus of seeking reemployment benefits from the employee and placed the burden on the RBA and the rehabilitation specialist. While an employee may seek a rehabilitation evaluation after 60 days, the statute requires the RBA to arrange for appointment of a rehabilitation specialist and set in motion the evaluation process once an employee has been off work for 90 or more days. By the very language of the statute, the process is expected to start while an employee is still receiving TTD benefits. The statute anticipates that most injured workers will be through the process before their TTD and PPI benefits are exhausted. However, the statute also anticipates some employees will exhaust those benefits and be entitled to stipend benefits before a plan is started.

The revision of the reemployment process intended moving an injured worker expeditiously through the process by starting it while an employee was still receiving TTD and putting the onus for starting the process on the RBA. It is up to the legislature to find a remedy for delays not caused by the employee or employer, perhaps by mandating some penalty for rehabilitation specialists who do not timely or competently perform their tasks. The burden of being without benefits due to delays caused by others – the RBA, rehabilitation specialist, and/or doctors – should not fall on the injured worker in the form of being without benefits.

Therefore, the Commission finds it misstated the time frame for the payment of AS 23.30.041(k) benefits when it limited the time to 242/247 days in *Griffiths.* First, there is confusion in *Griffiths* about the precise length of time for paying stipend benefits because the decision refers to both 242 days and 247 days. In addition, the statute was

revised and the parties agree that by using the *Griffiths* calculations the time would actually be 262 days. The Court, in *Carter*, stated that .041(k) benefits could be paid for at least two years before the start of a reemployment plan. "We do not decide whether subsection .041(k) benefits may be payable for more than two years if they start before acceptance or approval of a reemployment plan."[42] (Emphasis added.) The Commission, in *Griffiths*, ignored that finding when it decided the maximum length of time for stipend benefits was 242/247 days. The subject had not been briefed and the Court, while implicitly approving at least two years of stipend benefits in addition to the two years of stipend benefits for the actual plan, declined to address a longer payment of stipend benefits. The Commission, in *Griffiths*, ignored this approval of at least two years (730 days) of stipend benefits when it limited stipend benefits to 242/247 days. The time for paying stipend benefits was also not briefed to the Commission in *Griffiths*. In addition, the calculations in *Griffiths* failed to take into consideration that the evaluation process, for a number of reasons, may take longer than the recommendations in the statute.

The Commission relies on the statement of the Court in *Carter:* "we think that the legislature did not intend that there should be a gap between the expiration of PPI benefits and the commencement of reemployment benefits for employees who are vigorously pursuing eligibility evaluations before their PPI benefits expire. We therefore conclude that the reemployment process begins when the employee begins his active pursuit of reemployment benefits."[43] The limitation of 242/247 days in *Griffiths* is dictum and, thus, is not controlling. Since Ms. Vandenberg was actively pursuing reemployment benefits during the appeal process, she is entitled to additional stipend benefits until she is enrolled in an approved or accepted reemployment plan. At that point, she will be entitled to up to the statutory two years of stipend benefits depending on the length of her plan. The language limiting the time for paying stipend benefits is held to have been dictum and is not binding on the Board or the Commission.

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42 *Carter*, 199 P.3d at 1160.

43 *Id.*

b. Does the doctrine of stare decisis preclude review of Griffiths?

Does stare decisis require *Griffiths* to be followed? The short answer is no. Even if the holding of *Griffiths* is not dictum, the doctrine of stare decisis permits the Commission to change a decision and adopt a new holding.

The Court, in *Thomas v. Anchorage Equal Rights Commission*, laid out several principles for deciding if stare decisis should preclude changing a prior decision. A decision that is "clearly erroneous" need not be followed.[44] A decision is "clearly erroneous" if it "proves to be unworkable in practice."[45] Further, stare decisis does not apply where "more good than harm would result" from overruling that decision.[46]

The time limitations in *Griffiths* do not reflect reality in the reemployment process and are unworkable. Any number of delays beyond the control of either the employee or the employer, prolong the process. Reemployment eligibility determinations are frequently not accomplished within the time mandated by AS 23.30.041(c). For example, the RBA may not receive timely notice an injured worker has been off work. The RBA may not notify timely an injured worker of his or her rights under the Act when the worker has been off work for 45 consecutive days. The RBA may fail to timely request an eligibility evaluation when the worker has been off work for 90 consecutive days. The RBA may have difficulty finding a rehabilitation specialist to perform the eligibility evaluation and may have to contact more than one or two rehabilitation specialists before finding one to perform the evaluation. The rehabilitation specialist may require more than 60 days to perform the evaluation and issue the report. The rehabilitation specialist must interview the employee and determine the appropriate SCODRDOT descriptions and then must obtain a prediction from the employee's doctor as to the employee's ability to perform the job at the time of injury or those jobs held within the ten-year work history. Frequently, doctors do not respond timely to requests from the rehabilitation specialist

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[44] *Thomas v. Anchorage Equal Rights Commission*, 102 P.3d 937, 943 (Alaska 2004).

[45] *Id.*

[46] *Id.* at 946.

about the injured worker's permanent physical capacities and physical abilities to perform jobs described in the SCODRDOT descriptions. The doctors frequently must be prompted to respond. In some locations, rehabilitation specialists are assigned so many evaluations that they cannot complete them within the allowed time. In other instances, rehabilitation specialists' reports may not fully comply with the regulations and additional time for revisions is required. Many times after the evaluation has been completed and eligibility determined, the development of the reemployment plan may take more time than authorized by the Act for reasons beyond an employee's control. In some cases, an employee's doctor may state the employee is not medically able to participate in the plan development, such as for a period of time following surgery. More importantly, if either party objects to an eligibility decision or to a reemployment plan, the Act requires a hearing within 30 days. In some cases, this deadline cannot be met simply because there is no time available on the Board's docket within the requisite time frame.[47]

While the Act does specify timing for certain actions in AS 23.30.041, the reality is the time lines are not always followed or enforceable. The burden for failure of the time lines should not fall on the shoulders of an injured worker who is diligently and vigorously pursuing her right to reemployment benefits. *Griffiths* failed to acknowledge the time lines as guidelines requiring some elasticity. By imposing strict time constructs for getting an employee through the eligibility process, the limitations in *Griffiths* are impractical and unenforceable. The time constraints likewise do not afford the parties the opportunity to exercise their rights to challenge the findings of the RBA. The time limitations in *Griffiths* are "clearly erroneous" as they are "unworkable in practice."[48] There is clearly "more good than harm" in overruling the decision in *Griffiths*. The Commission finds the doctrine of stare decisis applicable here and the time limitations enunciated in *Griffiths* are no longer applicable. To that extent, *Griffiths* is overruled.

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[47] *See, e.g., Hessel v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 12-0154 at 30-39 (Sept. 26, 2012).

[48] *Thomas,* 102 P.3d at 946.

c. Does the holding in Griffiths violate Ms. Vandenberg's due process rights?

Ms. Vandenberg asserts the *Griffiths* decision violates her constitutional due process rights because the right to appeal is due process of law. She contends the limitation on the duration of stipend benefits as enunciated in *Griffiths* deprives her of her due process rights to appeal an adverse ruling by the RBA. She stated "[s]ubstantive due process is denied when a legislative enactment has no reasonable relationship to a legitimate governmental purpose."[49]

The State contends the holding in *Griffiths* supports a legitimate governmental purpose and, therefore, any due process rights Ms. Vandenberg has are not violated by *Griffiths.* The Commission has the function of construing legislation and there is "no unlimited right to 'gap stipend' created by the legislature."[50]

The Commission does not have jurisdiction to declare a statute unconstitutional. The Court, in *Alaska Public Interest Research Group v. State*, held that "[a]dministrative agencies do not have jurisdiction to decide issues of constitutional law."[51] The Commission is an administrative agency.[52] Therefore, the Commission must decline to decide whether the holding in *Griffiths* violates Ms. Vandenberg's due process rights. Moreover, the findings in this decision render that question moot.

5. Conclusion.

The limitations in *Griffiths* on the length of time an employee actively engaged in the reemployment process may be paid AS 23.30.041(k) stipend benefits is overruled and no longer applicable. Whether there is an outside limit to the time for payment of AS 23.30.041(k) stipend benefits is not addressed, as the outside limit, if any, was not

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49 Petitioner's Opening Brief at 12.

50 Respondent's Opening Brief at 12.

51 *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

52 *Id.*

briefed. This matter is REMANDED to the Board to consider the payment of stipend benefits to Ms. Vandenberg and the issue of attorney's fees.

Date: *14 September 2017* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

This is a non-final order remanding the Board's decision so that the Board may consider the payment of stipend benefits and the issue of attorney fees. This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted. For the date of distribution, see the box below.

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. *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 a petition for review within 10 days after the date of this order's distribution. 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), 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 Memorandum Decision on Petition for Review No. 240 issued in the matter of *Laurie E. Vandenberg vs. State of Alaska*, AWCAC Appeal No. 16-018, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 14, 2017.

Date: *September 15, 2017*

K. Morrison, Appeals Commission Clerk