

Case: *Fred Meyer Stores, Inc. and Sedgwick CMS vs. Nannette Giroux*, Alaska Workers' Comp. App. Comm'n Dec. No. 177 (March 15, 2013)

Facts: In May 2009, Nannette Giroux (Giroux) injured her back working in the bakery department at Fred Meyer Stores, Inc. (Fred Meyer). Fred Meyer paid benefits and sought a reemployment eligibility evaluation in January 2010.

Rehabilitation specialist Carol Jacobsen (Jacobsen) ultimately concluded that Giroux was not eligible for reemployment benefits based on Dr. Gevaert's prediction that she could work as a Cake Decorator or Bakery Manager under the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles (SCODRDOT) definitions, on Giroux's work history, and on a labor market survey that revealed seven jobs in the lower 48 for cake decorators or bakery managers. Based on Jacobsen's report, the rehabilitation benefits administrator (RBA) designee determined that Giroux was not eligible for reemployment benefits in January 2011.

Giroux sought review of the RBA designee's determination before the board. At the hearing, Giroux testified that while she was employed in the bakery department at Fred Meyer, and regardless of her job title, her day-to-day duties required numerous tasks with substantial physical demands, including lifting significant loads, standing for eight hours, climbing, squatting, and kneeling. She further testified that the Bakery Section Manager position at Fred Meyer is not a sedentary job, as the SCODRDOT describes it, but is comprised of 60% stock clerk duties, 20% cake decorator duties, and 20% management duties.

The board reversed the RBA designee's eligibility determination. The board concluded that the RBA designee failed to apply controlling law or regulation because Jacobsen (1) failed to contact the employer to determine Giroux's job title, tasks, and duties, and obtain a written job description if one exists; (2) failed to select the appropriate SCODRDOTs to describe Giroux's job duties; (3) failed to determine whether Giroux held her jobs long enough to meet the Specific Vocational Preparation (SVP); (4) failed to submit to Giroux's doctor the correct SCODRDOTs; and (5) failed to conduct an adequate labor market survey. Fred Meyer appeals.

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."

8 AAC 45.525 on conducting reemployment eligibility evaluations and the *Guide for Preparing Reemployment Benefits Eligibility Evaluations*. The regulation tells the rehabilitation specialist to, among other things, (1) conduct an evaluation that includes interviewing the claimant, (2) correlate the claimant's job descriptions with the SCODRDOT job descriptions, (3) consult the claimant's physician as to the claimant's physical capacities, and (4) submit a report.

The Alaska Supreme Court has held that statutes that are directory require substantial compliance, whereas statutes that are mandatory call for strict compliance. "A statute is considered directory if (1) its wording is affirmative rather than prohibitive; (2) the legislative intent was to create 'guidelines for the orderly conduct of public business'; and (3) 'serious, practical consequences would result if it were considered mandatory.'" *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 197-98 (Alaska 2008).

Issues: Must the rehabilitation specialist strictly comply with the *Guide*? Did Jacobsen substantially comply in conducting her reemployment benefits eligibility evaluation?

Holding/analysis: The board implicitly concluded that strict compliance with the *Guide* was required in order for it to uphold the decision denying eligibility for reemployment benefits. The commission rejected this standard because the *Guide* and regulation are directory rather than mandatory. "8 AAC 45.525 is directory in that it directs the rehabilitation specialist to conduct an evaluation within certain parameters. Its wording is affirmative rather than prohibitive, and it provides guidelines for the orderly conduct of public business, in this instance, the preparation of reemployment benefits eligibility evaluations." Dec. No. 177 at 18.

Because the regulation was directory, the RBA *Guide*, which was based on the regulation is also directory because the commission would not accord the *Guide* a status that would be superior to the regulations it is required to follow. Thus, only substantial compliance with the *Guide* was required.

The commission concluded that Jacobsen substantially complied with the regulation and the *Guide*.

In addition to interviewing Giroux, Jacobsen contacted Fred Meyer to gain more insight into Giroux's jobs, tasks, and duties. Based on that input, Jacobsen selected the SCODRDOTs which most closely encompassed Giroux's duties in the Fred Meyer bakery. Having reviewed Giroux's work history, Jacobsen concluded that Giroux met the SVP for jobs Giroux was physically capable of performing, including Cake Decorator, Bakery Manager, and Management Trainee. Throughout the process of evaluating Giroux for reemployment benefits eligibility, Jacobsen conferred with Dr. Gevaert, seeking his expert medical input in terms of Giroux's

ability to perform the jobs described in the SCODRDOTs. Finally, Jacobsen conducted a labor market survey that showed there were several jobs available that Giroux was capable of doing in the lower 48. *Id.* at 19.

The commission reversed the board decision and reinstated the RBA's determination that Giroux was ineligible for reemployment benefits.