ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

JAMES MESSER, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201411801
ASRC ENERGY SERVICES, Employer, and	)	AWCB Decision No. 16-0087
	)	Filed with AWCB Fairbanks, Alaska on September 30, 2016
ARCTIC SLOPE REGIONAL CORP., Insurer, Defendants.	)	

James Messer's claims were heard in Fairbanks, Alaska on January 21, 2016, a hearing date selected on September 21, 2015. Attorney Robert Beconovich appeared and represented James Messer (Employee), who appeared and testified on his own behalf. Attorney Colby Smith appeared and represented ASRC Energy Services and Arctic Slope Regional Corporation (Employer). Employer's adjuster, Katie Weimer, appeared and testified on its behalf. The record was held open at the hearing's conclusion for Employee to supplement his attorney's fees and costs and to receive post-hearing briefs from the parties. The parties later stipulated to postpone filing their post-hearing briefs until a reemployment eligibility determination was made, and later filed their briefs on May 16, 2016. A prehearing conference was held on June 22, 2016 to finalize the issues to be decided, and the record closed following deliberations on August 18, 2016.

ISSUES

Employee contends the Reemployment Benefits Administrator's designee abused her discretion in finding him ineligible for reemployment benefits after his vocational rehabilitation specialist and treating physician had already determined he was eligible for them. He also contends the designee misinterpreted the decision in *Irvine v. Glacier General Construction*, 984 P.2d 1103 (Alaska 1999), and submits it was legal error to reject his treating physician's in favor of his orthopedic surgeon's opinion, when his orthopedic surgeon had not seen Employee in over a year and had not reviewed the physical capacities evaluation and the SIME report. He also objects to the designee not discussing his physical capacities evaluation in her determination, especially given the second independent medical evaluator's opinion that such an evaluation was needed.

Employer contends the designee did not abuse her discretion and thinks Employee is the one who misinterprets *Irvine*. It contends Employee believes, because his treating physician opined he could not return to his previous occupations, his treating physician's opinion should trump his surgeon's and second independent medical evaluator's opinions, and he should automatically be found eligible. Employer contends *Irvine* expressly rejected that very proposition. Instead, Employer contends, when the designee is presented with several opinions; it is up to the designee's discretion to determine which opinion she will rely on.

1) Did the Reemployment Benefits Administrator's designee abuse her discretion in finding Employee ineligible for benefits?

Employee expressly seeks an award of reasonable attorney's fees. He contends a January 21, 2016 compensation report shows Employer voluntarily paid benefits, and under *Childs v. Cooper Valley Elecc. Assoc.*, 860 P.2d 1184 (Alaska 1993), these payments entitle him to additional fees.

Employer contends all benefits due Employee have been provided, so Employee is not entitled to attorney's fees beyond the statutory amounts previously paid.

2) Is Employee entitled to additional attorney's fees and costs?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On November 11, 2008, Employee presented to Carl Thomas, M.D., and complained of mild pain and a feeling of swelling in his right knee after slipping on some ice at work and suddenly catching himself three weeks previous. His knee felt like it was going to "pop," but it did not. (Thomas report, November 11, 2008).

2) On December 23, 2008, Employee saw Dr. Thomas and reported grinding and continued pain in his right knee. Dr. Thomas suspected a cartilage tear and ordered a magnetic resonance imaging (MRI) study. (Thomas report, December 23, 2008).

3) On December 30, 2008, an MRI of Employee's right knee was interpreted to show, 1) intrasubstance degenerative changes to the middle and posterior thirds of the medial meniscus, with a probable extension as a tear through the inferior articular surface, and additional detachment of the posterior horn; 2) mild thinning of the articular cartilage of the patellofemoral articulation; and 3) small joint effusion. (MRI report, December 30, 2008).

4) On December 31, 2008, Dr. Thomas stated, "Tell [Employee] the MRI showed the cartilage is thinned – from aging – but also has a tear probably from his injury." (Thomas note, December 31, 2008).

5) On January 8, 2009, William Hartman, PA-C, evaluated Employee for right knee pain. PA-C Hartman's impressions were patellar bursitis, patellar tendonitis and quod tendonitis of the right knee, as well as osteoarthritis grade II changes in the patellofemoral compartment. Physical therapy was recommended to Employee. (Hartman report, January 8, 2009).

6) On January 8, 2009, PA-C Hartman interpreted x-rays to show, 1) valgus alignment maltracking patella of Employee's bilateral knees, and 2) grade II patellofemoral osteoarthritic changes of Employee's right knee. (Hartman report, January 8, 2009).

7) On January 22, 2009, Employee returned to PA-C Hartman and reported his knee was doing better, but some pain had returned. Employee was given a cortisone injection. (Hartman report, January 22, 2009).

8) On February 11, 2009, Employee report to PA-C Hartman, "My knee is doing great. It's like a new knee." PA-C Hartman decided to see Employee on an as needed basis. (Hartman report, February 11, 2009).

9) On April 29, 2009, Employee followed up with PA-C Hartman and reported good relief from the injection, but working long hours tended to aggravate his knee. He thought it was more of an ongoing, chronic inflammatory problem. PA-C Hartman started Employee on a new anti-inflammatory. (Hartman report, April 29, 2009).

10) On June 10, 2010, Employee began seeking treatment for right knee pain from McAfee Chiropractic. He reported he had previously sought treatment from a "sports medicine M.D, for it and have x-rays and an MRI on it. They say it is arthritis." Employee also reported he had to use a can to get around when he was visiting Orlando. Chiropractic manipulations were administered. (McAfee reports, June 10, 2010; June 12, 2010; July 1, 2010; July 2, 2010; July 6, 2010).

11) On July 6, 2010, David Witham, M.D., evaluated Employee for right knee pain, assessed a medial meniscus tear and ordered a repeat MRI. (Witham report, July 6, 2010).

12) On August 4, 2010, an MRI of Employee's right knee showed: 1) a tear of the posterior horn and body of the medial meniscus; 2) mild myxoid degeneration of the posterior horn and body of the lateral meniscus; 3) moderate chondromalacia patella; 4) mild degenerative osteoarthritis of the tibiofemoral compartment; 5) tiny right knee joint effusion; and 6) mild prepatellar edema. X-rays taken the same day showed mild degenerative osteoarthritis, most notable in the medial tibiofemoral compartment and suprapatellar effusion. (MRI report, August 4, 2010).

13) On August 10, 2010, Employee followed up with Dr. Witham for right knee pain, who noted the most recent MRI confirmed a medial meniscus tear and mild degenerative osteoarthritis of the medial tibiofemoral compartment. He discussed possible surgery with Employee. (Witham report, August 10, 2010).

14) On October 22, 2010, Dr. Witham performed right knee arthroscopy and a partial medial meniscectomy on Employee. (Witham report, October 22, 2010).

15) On December 27, 2010, Employee followed up with Dr. Witham and reported continued pain in his medial joint as well as low grade swelling. (Witham report, December 27, 2010).

16) On January 25, 2011, Dr. Witham evaluated Employee, who reported great improvement with his right knee. Employee still had discomfort with squatting and pain upon kneeling but felt he might be able to return to work in about three weeks' time. (Witham report, January 25, 2011).

17) On February 16, 2011, Dr. Witham evaluated Employee and decided to release him to work in two weeks. Employee still reported discomfort in his medial knee, but Dr. Witham believed this was caused by Employee's underlying arthrosis and not his meniscus tear. Dr. Witham also thought Employee was medically stable, had suffered a mild degree of permanent impairment and suggested an employer medical evaluation (EME) so Employee could be rated. (Witham report, February 16, 2011).

18) On February 25, 2011, John Ballard, M.D., performed an EME and diagnosed right knee medial meniscus tear secondary to the November 3, 2008 injury and preexisting right knee medial osteoarthritis. Dr. Ballard provided Employee with a one percent whole person permanent partial impairment (PPI) rating.

19) On March 7, 2011, Employee saw Dr. Thomas regarding stiffness, pain and swelling in his right knee. Since Employee's job required him to kneel and crawl at times, he did not feel he could return to his normal job duties. Dr. Thomas referred Employee to an orthopedist. (Thomas report, March 7, 2011).

20) On March 22, 2011, Wendy Boucher, M.D., evaluated Employee's right knee. Employee stated he initially felt better after surgery, but felt he had "relapsed" over the last two months. Dr. Boucher administered a steroid injection and instructed Employee to return in two weeks. (Boucher report, March 22, 2011).

21) On April 11, 2011, Employee followed up with Dr. Boucher and reported he now has minimal pain and is able to kneel. Employee had returned to work as a supervisor and would be required to kneel a lot less at work. Dr. Boucher thought Employee's pain was likely the result on ongoing healing from the medial portal site and instructed Employee to follow up on an as needed basis. (Boucher report, April 11, 2011).

22) On July 6, 2014, Employee was injured while working for Employer when he was carrying a toilet down a flight of stairs. The last step was not the same height as the others and Employee came down hard on his right leg. (Alyeska Pipeline Patient Encounter Form, July 6, 2014).

23) A July 11, 2014 right knee MRI was interpreted to show a complex tear involving the free margin of the posterior horn and body of the medial meniscus and tricompartmental degenerative joint disease. (MRI report, July 11, 2014).

24) On July 14, 2014, Employee consulted Jimmy Tamai, M.D., on his MRI results. Dr. Tamai noted clear evidence of tricompartmental degenerative changes, most severe in the medial

compartment. There was evidence of the previous meniscectomy on the medial compartment, but the lateral meniscus appeared normal. Degenerative changes were also seen in the patellofemoral compartment. Dr. Tamai administered a steroid injection and scheduled a follow up visit. (Tamai report, July 14, 2014).

25) On July 17, 2014, Employee saw Dr. Thomas and reported the burning in his knee had worsened and Employee did not think the injection did any good. Dr. Thomas thought the complex tear seen on Employee's MRI was most likely a new finding resulting from his most recent work injury and was the cause of Employee's current symptoms. Dr. Thomas referred Employee to Dr. Witham. (Thomas report, July 17, 2014).

26) On July 22, 2014, Dr. Tamai authored a "letter of medical explanation," stating the most significant findings both on clinical examination and imaging studies were advanced degenerative changes in the knee and the therapy provided was primarily directed at treating this condition. (Tamai addendum, July 22, 2014).

27) On August 5, 2014, Dr. Tamai responded to a letter from Employer inquiring whether he agreed with Dr. Thomas' July 17, 2014 report, wherein Dr. Thomas thought the complex tear seen on Employee's MRI was most likely a new finding resulting from his most recent work injury and is the cause of Employee's current symptoms. Dr. Tamai indicated he did not agree with Dr. Thomas's conclusions and wrote, "CANNOT BE DETERMINED FOR CERTAIN because this is a very common FINDING with tricompartmental knee osteoarthritis – especially with History of prior meniscectomy." (Employer letter, July 25, 2014 (emphasis in original)).

28) On August 13, 2014, Dr. Witham evaluated Employee for right knee pain and assessed recurrent medial meniscus tear, status post partial medial meniscectomy. Dr. Witham recommended a repeat arthroscopy and meniscectomy and also wrote, "Given the circumstances of [Employee's] knee prior to and after the accident, I do not think this is primarily related to the underlying and mild medial compartment arthrosis." (Witham report, August 13, 2014).

29) On August 22, 2014, Scot Youngblood, M.D., conducted an EME and diagnosed: 1) right knee strain without evidence of derangement, substantially caused by the industrial injury of July 6, 2014, not medically stable; 2) right knee osteoarthritis with history of medial meniscus debridement, preexisting and not substantially caused or aggravated by the industrial injury of July 6, 2014, medically stable; 3) exogenous obesity, with a body mass index of 33 reported by the examinee (38 in the medical record), preexisting and not substantially caused by the

industrial injury of July 6, 2014, but giving rise to the right knee osteoarthritis and potentiating any knee problems; and 4) subjective complaints in excess of objective findings. Dr. Youngblood recommended continued physical therapy, use of nonsteroidal medications and a progressive return to work. This treatment, Dr. Youngblood thought, was substantially caused by the July 6, 2014 work injury. Given Employee's arthritis, Dr. Youngblood did not think additional debridement was indicated, but did suggest work restrictions and thought Employee would be medically stable three months after the injury. (Youngblood report, August 22, 2014).

30) On September 3, 2014, Employer controverted right knee surgery based on Dr. Youngblood's August 22, 2014 EME report. (Controversion Notice, September 3, 2014).

31) On September 5, 2014, Employee followed up with Dr. Thomas, who disagreed with Dr. Youngblood's assessment of a simple strain. Dr. Thomas wrote Employee's MRI shows he has a clear medial meniscus tear that Dr. Youngblood was apparently not able to see and he encouraged Employee to have the surgery recommended by Dr. Witham. (Thomas report, September 5, 2014).

32) On September 22, 2014, attorney Robert Beconovich entered his appearance on behalf of Employee. (Entry of Appearance, September 22, 2014).

33) On September 26, 2014, Dr. Witham performed right knee arthroscopy and a partial medial meniscectomy. Arthroscopic examination revealed articular cartilage over the lateral side of the superior portion of the patella worn down to subchondral bone, arthritic changes in the medial compartment with bare bone underlying the medial portion of the medial meniscus. There was cracking of the articular cartilage with fibrillation and cartilage loss over the weightbearing surface of both the medial femoral condyle and tibial plateau. Dr. Witham further debrided Employee's medial meniscus back to a subtotal meniscectomy from the anterior to posterior horn. (Witham report, September 26, 2014).

34) On October 7, 2014, Employee filed a claim through his counsel seeking TTD, PPI, medical and transportation costs, interest, an SIME and attorney's fees and costs. The parties later stipulated to adding reemployment benefits as an issue for hearing. (Claim, September 22, 2014; Prehearing Conference Summary, September 21, 2015).

35) On November 25, 2014, Employee saw Dr. Witham for a post-surgical follow-up. Employee reported continued improvement, but still found he was limited with regards to standing endurance and was still experiencing pain while kneeling on his right knee. The report

then states, "Obviously, these 2 activities are specifically required in his line of work as a plumber." Dr. Witham assessed, "Slow but steady progress post repeat knee arthroscopy and medial meniscectomy." (Witham report, November 25, 2014).

36) On February 2, 2015, Employer controverted TTD, PPI, medical and transportation costs and attorney's fees and costs based on Dr. Youngblood's August 22, 2014 report. (Controversion Notice, February 2, 2015).

37) On February 6, 2015, the parties took Employee's deposition. Employee explained the difference between being a pipefitter and a plumber and testified he did both types of work. He characterized pipefitting as "extreme heavy work" because it involves working on his knees and lifting over 50 pounds. Most of Employee's work involved jobs that were a combination of both trades, but his work with Employer on a corrosion inhibitor crew was 90 percent plumbing. Employee's pipefitting work did not require him to lift over 75 or 100 pounds by himself, but he did have to occasionally lift 50 pounds. Toilets and urinals were the heaviest items Employee had to lift while working as a plumber and he thought they weighed 50 pounds. He lifted toilets "all the time" while working as a plumber. On the date of injury, Employee and an apprentice were installing toilets at a fly camp. At the day's end, they were leaving the fly camp, Employee was going down stairs and the second step was a long step. He stepped off stiff legged, pitched forward, heard a pop and hurt his right knee. Employee was not carrying a toilet at the time. After the injury, Employee's knee would catch and pop every step. Employee had had a previous right knee surgery in 2010, but his symptoms at that time were different and just involved pain and swelling, not clicking and popping. After Employee's 2010 right knee surgery, he did not feel his knee was giving him any problems. He felt like he was "good to go." Employee felt Dr. Witham's most recent right knee surgery helped, but he was still having problems walking or standing on concrete. Shifting weight to his right knee also bothers him, but the popping went away after surgery. Kneeling also causes Employee discomfort. He does not think he is ready to go back to work as a plumber, pipefitter because the work is just too heavy. (Employee dep., February 6, 2015).

38) On February 10, 2015, Dr. Thomas referred Employee to Richard Cobden, M.D., for a PPI rating. (Thomas report, February 10, 2015).

39) On April 2, 2015, Dr. Cobden evaluated Employee for PPI and found him to have a three percent whole person rating. (Cobden report, April 2, 2015).

40) On July 8, 2015, James Scooggin, III, M.D., performed a secondary medical evaluation (SIME) and diagnosed, 1) right knee osteoarthritis, preexisting; 2) right knee previous meniscus tear, industrial, with previous partial medial meniscectomy due to November 3, 2008 industrial injury; 3) industrial injury, July 7, 2014, resulting in additional tearing of residual medial meniscus; and 4) progressive osteoarthritis of the knee including patellofemoral arthritis unrelated to July 6, 2014 industrial injury. Dr. Scooggin wrote, "[Employee] clearly has preexisting osteoarthritis of his knee. Osteoarthritis of the knee is well known to be a progressive condition." He then cited a scholarly publication correlating an increased risk of osteoarthritis with obesity, and adding the most important risk factor for osteoarthritis was advancing age. Dr. Scooggin then opined,

> Many of [Employee's] current symptoms are due to patellofemoral arthritis, and neither of the industrial injuries appears to have involved the patellofemoral joint." He has, on the other hand, had injury to his medial meniscus, for which he has been treated with 2 arthroscopies of the knee, the most recent one being due to the 7/6/14 industrial injury.

While discussing the different causes of Employee's disability and need for medical treatment, Dr. Scooggin thought many of Employee's symptoms were due to patellofemoral arthritis and noted neither industrial injury appeared to have involved his patellofemoral joint. He did, however, think the July 6, 2014 injury aggravated this preexisting condition to produce a permanent change, and was the substantial cause of Employee's disability and need for medical treatment. Dr. Scooggin opined Employee was no longer disabled from the work injury, but he "may have some residual work restrictions from his full duties," which included repetitive kneeling, bending and heavy lifting. He also thought a "work capacity evaluation" might be appropriate although, after reviewing US Department of Labor Selected Characteristics of Occupations Defined in the Revised Directory of Occupational Titles (SCODRDOT) job description for plumber pipefitter, opined Employee does have the functional capacity to perform the job. Dr. Scooggin added, "If he does not feel capable of returning to his regular full duties, then a Work Capacity Evaluation . . . would be appropriate." Additionally, Employee "may have limitations due to his non-industrial patellofemoral arthritis . . . unrelated to the 7/6/14 industrial injury." Later in his report, Dr. Scooggin writes,

> I think the restrictions on kneeling are primarily due to his patellofemoral arthritis, which is not attributable to the 7/6/14 industrial injury. His limitations on prolonged standing and prolonged walking are a combination of his preexisting osteoarthritis of the right knee and the medial meniscus tear. . . . I think his primary restrictions on work capabilities at present are the result of his osteoarthritis of the knee, which was primarily preexisting.

Dr. Scooggin also assigned Employee a seven percent right lower extremity rating, and given Dr. Ballard's two percent right lower extremity rating from the 2008 injury, apportioned a five percent right lower extremity rating to the July 6, 2014 injury. (Scooggin report, August 20, 2015).

41) In Dr. Scooggin's 54-page SIME report considers Employee's right knee medical history, current care, past medical history, a review of Employee's symptoms, Employee's work and social history, Employee's pain status inventory, a review of Employee's medical records, Employee's physical examination and a review of Employee's imaging studies. Dr. Scooggin also provided answerers to specific questions posed by the Board, Employee and Employer. (*Id.*).

42) On August 25, 2015, Employee reported to Dr. Thomas continued right knee pain along with sensations of weakness and wobbling upon standing. Dr. Thomas encouraged Employee to work through the workers' compensation process and suggested using an ACE wrap or knee support. (Thomas report, August 25, 2015).

43) On October 27, 2015, the parties took Dr. Scooggin's deposition, which lasted two and one-half hours. Dr. Scooggin's testimony included the following:

> [By Employer's attorney at 22-23]
> Q. Correct my understanding, but from what you're saying, it sounds like there are several things going on with [Employee's] knee. Is that a fair statement?
>
> A. That's a fair statement.
>
> Q. And is it my understanding that the July 6, 2014 injury with [Employer] is the substantial cause of just the meniscus tear?
>
> A. That's correct.
>
> Q. And is your opinion that the July 6, 2014 injury was not the substantial cause of [Employee's] tri-compartmental arthritis?

A. That's correct.

Q. And are you of the opinion that the July 6, 2014 injury was the substantial cause in aggravating the tri-compartmental arthritis?

A. No.
. . .

Q. And again, your opinion is that this arthritis condition was preexisting and not aggravated or accelerated by the July 6, 2014 injury?

A. No.
. . .

[By Employer's attorney at 32-34]
Q. Are all the limitations that [Employee] currently has with his knee related to his work injury of July 2014?

A. No.

Q. In looking at the job description, which is termed 862.281-022 for pipefitter. . . . Does [Employee] as this SCODDAT [sic] has [sic] written, to perform this job, keeping in mind only his work injury limitations?

A. I do not think the work injury of 7-6-14 is the substantial cause of his inability to do these duties at this time. Does that answer your question?

Q. It does. I believe you also, on page 49 of your report, you made an indication that the employee has the functional capacity to perform the job of plumber, pipefitter, which I am assuming is this same job description we just read. Is that a fair statement?

A. That was my conclusion. Unless he has limitations from other sources, like the rotator cuff problem, which I do not believe is industrial from the standpoint of this injury.
. . .

[By Employee's attorney at 48-53]
Q. Okay. You've seen a bunch of medical records and you've had an analysis for a plumber pipefitter here. And you've discussed to some degree his ability to carry things. And I appreciate that you have an opinion with respect to his shoulder surgery and limitations. But his knee also carries a weight limitation; is that correct? I mean, there's a load to the knee when you're carrying a certain amount of weight; is that accurate?

A. That's correct.

. . .

Q. I'm addressing Page 27 of your report, at the bottom you talked about basically, a job description, what a pipefitter does. And that reflects strength, heavy; exert force, 50 to 100 pounds, occasionally; 25, 50 pounds, frequently; 10 to 20 pounds, constantly. I want to distinguish your opinions with respect to his shoulders from your opinion with respect to his knee and its ability to carry 50 to 100 pounds. Do you think he has the ability to do that? Or I should say does his knee have the ability to do that?

A. . . . [Employee] told me that he thought that he could lift about 50 pounds.

Q. And that's in reference to him hauling 50 pounds of fertilizer into his garden?

A. Correct, which is something he's doing voluntarily in his own time, apparently. So then the questions becomes, can he lift more than that occasionally, which is what the plumber, pipefitter says he has to be able to exert a force of 50 to 100 pounds occasionally or 25 to 50 pounds frequently. And that's the bottom of Page 27.

Q. Right.

A. And I think to a reasonable degree of medical probability, he could do that.

Q. His knee could do that, ignoring his shoulder?

A. Yeah. Leaving his shoulder out of this . . . . So talking about his knee, I think it's reasonable to conclude that he could.

Q. You have a job description and also some understanding what a plumber and pipefitter does; is that correct?

A. Correct.

Q. And, in fact, he works on his knees a lot; is that correct?

A. Correct.

Q. Is his knee or knees, right knee in particular, going to hold up if he has to work on his knees all day long?

A. I think the major issue with that is his patellofemoral arthritis, which may be the limiting factor, which as we talked about, is unrelated to the industrial injury. So that's really the question. And what I suggested was that if he does not feel capable of doing it, then a work capacity evaluation might be appropriate.

Q. So, in fact, your opinion –

A. I think the major limitation is his patellofemoral arthritis.

Q. Your opinions are tempered by a lack of evidence, and a physical capacity evaluation would resolve that one way or the other as far as you're concerned; is that correct?

A. No, I think that's mischaracterizing my statement.

Q. Let me just stumble on here and see if I can get a different characterization. I think its Page 47 of your report. I'm quoting here. . . . "[Employee] may be able to work at his normal occupation. And his major limitation at this time appears to be repetitive kneeling and bending." I that correct?

A. That's correct.

Q. And then you go on to say, "With respect to lifting limitations and his opinion, he can lift 50 pounds, if accommodations can be made at his job to avoid the heaviest lifting duties and repetitive kneeling and bending, that it is possible he can return to his full duties at work." Is that correct?

A. That would be helpful, that's correct.

Q. Then you say based on, I guess, the lack of information, the work capacity evaluation may be appropriate?

A. Work capacity evaluation might add more information to what we know at this point.
. . .

[By Employee's attorney at 61-62]
Q. You stated in writing here, "His limitations on prolonged standing and prolonged walking are a combination of his preexisting osteoarthritis of the right knee and his medial meniscus tear."

A. I think that's a fair statement.
. . .

[By Employee's attorney at 76-77]
Q. We've talked about medical stability, and I would, I guess, simply ask again that you believe a physical capacity evaluation would resolve a lot of the uncertainty; is that correct?

[Employer attorney] Objection. Mischaracterization of testimony.

[Employee's attorney] Q.Would a physical capacity evaluation resolve a lot of the uncertainty in your report?

A. I think it would be helpful. . . . I think it's, once again, he told – the description he gave to me what he was doing in the garden and how much he was carrying suggested that . . . my experience with a well done work capacity evaluation is that are often helpful, but not always.

. . .

Q. Question 17, Page 51. Question 17, your response. . . . "[Employee] clearly had a preexisting condition. The "7-16-14 injury – 7-6-14 injury aggravated this preexisting condition to produce the need for medical treatment." Is that still your opinion?

A. Yes.

. . .

[By Employer's attorney at 78-80]
Q. Dr. Scooggin, just a quick follow-up question. In evaluating the SCODDAT [sic] description we have, which is for the pipefitter, is it still your opinion that [Employee] has the ability to return to this type of job as this SCODDAT [sic] is written?

A. I previously stated that to a reasonable degree of medical probability, [Employee] does have the functional capacity to perform the job of plumber, pipefitter. I think to a reasonable degree of medical probability, it is more probable than not he can do that.

. . .

[By Employee's attorney at 78-79] Q. You have also said he needed a physical capacity evaluation to fully flesh out that question. Isn't that correct?

A. To summarize what I'm trying to say is I think it's more probable than not he can do the functional capacity – I'm sorry – that he can do the job of plumber, pipefitter. I think even by his own description of what he's doing now, he's indicating that he can do the duties, but there remains some question about the heaviest duties of it. And that's why I think that question should be answered or could be answered by a well-done work capacity evaluation. So I think that would be the next appropriate step if there remain questions. If he feels he can't do it, that's what I think would be the next appropriate step.

Q. I don't mean to be argumentative Doctor, but you're read [sic] a lot into carrying 50 pounds of fertilizer to the garden in the back yard, aren't you? That's what you're basing his lifting capacity on.

A. Well, we know he's capable of doing it because he's doing it voluntarily.

Q. Right.

A. Nobody's making him do that. Again, the point is that it is more probable than not that he can do this? "This," meaning the occupational requirements of the plumber, pipefitter. And I think it is more probable than not that he can. I think there is some reasonable question about it. And I think more information is always a good thing.

Q. Well, would you agree that working an 8– or 10– or 12-hour shift as a plumber and pipefitter is quite different from hauling a bag of fertilizer to your garden?

A. I would agree that's a different – we're talking about two different things.
. . .

[By Employer's attorney at 80-81]
Q. Just for my own clarification again, you're confident of your opinion about [Employee's] ability to return to his job without a physical capacity evaluation; is that correct?

A. I think I've been asked that and I've answered that. I think to a reasonable degree of medical probability, he can. I think – I would not disagree with an attempt to get more information with a well-done work capacity evaluation, since I think there seems to be some question about that. And I've stated that I do think he has the functional capacity to perform the job. If there – I think the things that there are some questions about are the kneeling, which I think is due to his osteoarthritis of his knee. I think if there remains – if he does not feel capable of returning to his regular full duties despite my opinion that he can then, a work capacity evaluation with controls to confirm sincerity of effort would be an appropriate next step.
. . .

[By Employee's attorney at 81-82]
Q. But you realize he's going to have to pass a physical to go to work again, right?

A. Well, the issues are that I don't know the answer to is . . . . The issue we know he – he said repeatedly he has pain with kneeling and squatting or stooping, and I believe that. I think that's attributable to his arthritis. We know that he is also staying reasonably active with his chosen hobbies.

Q. Right.

A. So the question is the most strenuous aspects of his job as a plumber, pipefitter. And I think the first step is to find out, is to get additional confirmation

> that he can do it . . . . I think since the issue with this case, I think, is to a reasonable degree of medical probability, he can do it. That doesn't mean that there's no other discussion, as there obviously – we've spent several hours discussing it.

(Scooggin dep., October 27, 2015).

44) On December 10, 2015, Dr. Thomas authored a "To Whom It May Concern" letter explaining Employee initially saw him following a November 11, 2008 work injury where Employee had jarred his knee and felt a pop. Dr. Thomas wrote Employee eventually saw Dr. Witham, who operated on him, and since that surgery Employee has had knee pain, especially when kneeling. Dr. Thomas acknowledged Employee's right knee has wear from aging, but opined a tear in his cartilage and the subsequent pain was the direct result of his work injury. Dr. Thomas concluded by stating Employee has been unable to fully perform his job duties without significant pain. (Thomas letter, December 10, 2015).

45) On December 10, 2015, Employer reinstated benefits and paid Employee for past TTD. (Secondary Report of Injury, December 10, 2016).

46) On December 11, 2015, Employer controverted TTD from January 2, 2015, PPI in excess of two percent, and reemployment benefits based on Dr. Scooggin's October 27, 2015 deposition testimony. (Controversion Notice, December 11, 2015).

47) On December 17, 2015, Employer paid Employee a lump sum PPI. (Secondary Report of Injury, January 7, 2016).

48) Employer began paying Employee benefits as a result of Dr. Scooggin's deposition testimony. It also acknowledges paying Employee $5,899.98 statutory attorney's fees based on recently paid benefits. (Employer's hearing brief, January 14, 2016).

49) On January 15, 2016, Employee filed an affidavit of attorney's fees and costs setting forth 85.8 hours of attorney time billed at $400 per hour for total fees of $34,320. He also listed $2,080.76 in costs for a grand total of $36,400.76 in fees and costs, but deducted Employer's payment of $5,899.98 in statutory fees, leaving an overall balance of $30,630.78. (Fee affidavit, January 15, 2016).

50) At the January 21, 2016 hearing, Employer's adjuster, Katie Weimer, testified regarding TTD and PPI payments set forth in a compensation report completed that same day. She also testified regarding various payments for medical costs she had processed. Ms. Weimer explained Employer's payments resulted from Dr. Scooggin's deposition testimony. (Record).

51) At the January 21, 2016 hearing, Employee testified regarding his duties as a plumber and as a pipefitter. He is required to undergo a fitness for duty test, which he described as "pretty extensive," and including lifting, climbing, bold pressure, respiration and pulse measurements. As a "more permanent" employee, he also participated in mandatory rescue training, which involves putting on tanks and gear, climbing ladders and climbing into 48 inch pipe. He described residual difficulty he has "getting down" on his right knee, and did not think he could perform the squatting, bending and crawling requirements set forth in the job descriptions. Employee confirmed his rotator cuff surgery was not related to his work with Employer. (*Id.*).

52) At the hearing's conclusion, the hearing chair ordered post-hearing briefs from the parties. The parties agreed their briefs and Employee's supplemental attorney's fees would be filed by February 8, 2016. (Record).

53) On January 22, 2016, Employee filed a supplemental affidavit of fees and costs listing an additional 9.9 hours of attorney time billed at $400 per hour, for an additional $3,960 in fees and no additional costs. After supplementation, Employee's grand total in fees and costs amounted to $34,590.78. (Fee affidavit, January 22, 2016).

54) Employee's fee affidavits list 76.2 hours of attorney time prior to December 17, 2015. All Employee's claimed costs were incurred prior to December 17, 2015. (*Id.*; fee affidavit, January 15, 2016; observations).

55) On February 9, 2016, the parties copied the Fairbanks workers' compensation officer on an email exchange between them where they had agreed to a reemployment eligibility evaluation and had further agreed to delay the board ordered, post-hearing, briefing until sometime after the evaluation was completed. (Parties' email, February 9, 2016).

56) On January 20, 2016, Dr. Witham reviewed the job description for Pipe Fitter and completed a check-the-box answer, opining Employee would have the physical capacities to return his job at the time of injury. (Witham response, January 20, 2016).

57) On February 10, 2016, Employee's vocational rehabilitation specialist, Dan Labrosse, completed a reemployment eligibility evaluation report that indicated he had sent SCODROT job descriptions to Employee's treating physician, Dr. Thomas, but since Dr. Thomas had not yet responded with an opinion as to Employee's ability to perform those jobs, Mr. Labrosse was unable to make an eligibility recommendation. (Labrosse report, February 10, 2016).

58) The job descriptions sent by Mr. Labrosse were for Plumber, DOT #862.381-030, and Pipe Fitter, DOT #862.281-022. The job descriptions for both occupations show “heavy” strength demands, and identical “other physical demands,” with the exception of Pipe Fitter, which included an additional “occasional” hearing demand. Neither job description listed prolonged standing, or prolonged walking, as physical demands for the occupations. (Labrosse job descriptions, February 11, 2016; observations).

59) On February 11, 2016, Dr. Thomas reviewed job descriptions for both plumber and pipefitter that had been sent to him by Mr. Labrosse. He completed a check-the-box answer, predicting Employee would not have the physical capacities to perform either job. Dr. Thomas also predicted Employee would have a permanent impairment resulting from the July 6, 2014 work injury. (Thomas responses, February 11, 2016).

60) On February 29, 2016, Mr. Labrosse submitted a reemployment eligibility evaluation in which he recommended Employee be found eligible for reemployment benefits based on Dr. Thomas’ February 11, 2016 responses. Mr. Labrosse’s report did not mention Dr. Witham’s January 25, 2016 opinion or Dr. Scooggins’ August 20, 2015 opinions Employee had the physical ability to return to his former occupations. (Labrosse report, February 29, 2016).

61) On March 1, 2016, Keira Rainey, DPT, conducted a functional capacity evaluation of Employee and concluded, “based on the Functional Job Description (FJD) that was provided to this evaluator,” Employee was not capable of performing the physical demands of a Plumber/Pipefitter. The report did not include the FJD provided to the evaluator as part of its supporting documentation. Some of the reasons stated for the lack of a job match included, Employee’s tendency to bend at his waist, rather than at his knees, while lifting; pain during kneeling; squatting duration limited by right knee pain, and relying on upper extremity support to get into and out of a kneeling position. However, DPT Rainey concluded Employee could perform the “static standing” “dynamic standing,” and “walking” demands of the occupations. The report does not attribute Employee’s limitations to a given cause. (Rainey report, March 1, 2016; observations).

62) On March 7, 2016, Employer wrote the Reemployment Benefits Administrator’s designee (RBA designee), Penny Helgeson, urging her to consider all available medical predictions in the record when making Employee’s reemployment benefits eligibility determination. Employer noted Dr. Thomas’ December 10, 2015 letter referenced a different work injury than the one

presently at issue, then went on to point out Dr. Thomas was a family practice physician, while Drs. Scooggin and Witham are orthopedics, who have opined Employee's work limitations are not the result of the work injury. (Employer letter, March 7, 2016).

63) On March 15, 2016, Employee wrote the RBA designee in response to Employer's "extraordinary" March 7, 2016 letter. Employee noted the parties had agreed the issue of reemployment benefits eligibility would be heard at the January 21, 2016 hearing and then later stipulated the pending eligibility determination would work its way to a conclusion before they submitted their final arguments in the case. Employee next contended, based on his treating physician's opinion, he was "found eligible," and argued it was important for the eligibility determination to be decided on all the evidence, including his recent physical capacities evaluation. (Employee letter, March 15, 2016).

64) On March 16, 2016, the RBA designee authored a letter to the parties in which she acknowledged receipt of Mr. Labrosse's February 29, 2016 report, Employee's March 1, 2016 physical capacities evaluation, Employer's March 7, 2016 letter and Employee's March 15, 2016 letter. She also wrote she had reviewed all documents filed in this case. The designee noted, in *Irvine v. Glacier General Construction*, 984 P.2d 1103 (Alaska 1999), the Alaska Supreme Court held the provisions of AS 23.30.041 expressly grant the RBA discretion in determining an applicant's eligibility. She then identified the medical specialties, and summarized opinions, of Drs. Thomas, Witham and Scooggin. The RBA designee then indicated based on these opinions, including consideration of Dr. Thomas's opinion, she was inclined to rely on the opinions of Drs. Witham and Scooggin in making her eligibility determination and find Employee not eligible for reemployment benefits. She invited the parties to submit additional information prior to making her final determination and gave them until March 29, 2016 to do so. (Helgeson letter, March 16, 2016).

65) On March 28, 2016, Employee authored a five-page letter to the RBA designee, disagreeing with her interpretation of *Irvine*, and further contended her proposed determination finding Employee ineligible for reemployment benefits would be an abuse of discretion. He quoted from *Irvine*, and pointed out the Court decided the statute requires a reemployment specialist to consult and consider the views of an employee's designated physician and that a reemployment specialist has no discretion to ignore the treating physician's opinions. Employee also quoted portions of medical reports from Dr. Witham, including his August 13, 2014 report,

in which he refers to Employee's "mild medial compartment arthritis," and his pointed out a difference of opinion between Dr. Thomas and Dr. Youngblood. He objected to the RBA designee not mentioning the content of his physical capacities evaluation, especially given Dr. Scooggin's repeated deference to such an evaluation. Employee contended the designee's reliance on the opinions of Drs. Witham and Scooggin would constitute legal error, and argued giving controlling weight to Dr. Witham's opinion would be an abuse of discretion, since Dr. Witham had not had contact with Employee for over a year after his surgery. Employee also contended Dr. Scooggin's report was incomplete and inaccurate since he misinterpreted the lifting requirements for a plumber and a pipefitter. (Employee's letter, March 28, 2016).

66) In his March 28, 2016 letter, Employee refers to Mr. Labrosse as "the RBA designee," and contends Mr. Labrosse's "findings of eligibility" are fully supported. (*Id*.).

67) Employee's March 28, 2016 letter was via express mail, but not received by the RBA designee until March 30, 2016. (*Id*.).

68) On March 30, 2016, the RBA designee wrote the parties, informing them she had not received any additional information from them concerning Employee's eligibility for reemployment benefits, and notifying them she was denying Employee's eligibility based on Drs. Witham's and Scooggin's opinions. (Helgeson letter, March 30, 2016).

69) At a June 22, 2016 prehearing conference, the parties agreed the issue for hearing were whether the RBA designee abused her discretion by first finding Employee eligible, then finding him ineligible, for benefits; and reasonable attorney's fees. (Prehearing Conference Summary, June 22, 2016).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
>
> **AS 23.30.005. Alaska Workers' Compensation Board**.
>
> . . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . 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.'
> > . . . .
>
> (r) In this section
> > . . . .
> >
> > (4) 'physical capacities' means objective and measurable physical traits such

> as ability to lift and carry, walk, stand or sit, push, pull, climb, balance, stoop, kneel, crouch, crawl, reach, handle, finger, feel, talk, hear, or see;
>
> (5) 'physical demands' means the physical requirements of the job such as strength, including positions such as standing, walking, sitting, and movement of objects such as lifting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling, fingering, feeling, talking, hearing, or seeing;
>
> (6) 'rehabilitation specialist' means a person who is a certified insurance rehabilitation specialist, a certified rehabilitation counselor, or a person who has equivalent or better qualifications as determined under regulations adopted by the department;
>
> . . . .

Pursuant to AS 23.30.041(e)'s express language, medical evidence of eligibility must satisfy three requirements. First, the evidence must take the form of a prediction. Second, the person making the prediction must be a physician. Third, the prediction must compare the physical demands of the employee's job, as the U.S. Department of Labor describes them, with the employee's physical capacities. *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 281 and n. 9 (Alaska 1996); *citing Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 73 (Alaska 1993).

Employees are eligible for reemployment benefits if their physical capacities are less than the physical demands for their job title as described in the SCODRDOT. *Konecky* at 281; *Yahara* at 73; *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 529 (Alaska 1993). It is irrelevant if the actual work demands in a particular employment situation are more or less than those defined in the SCODRDOT, or if a SCODRDOT description does not reflect the actual physical demands of a specific job. *Konecky* at 282. *But see Vandenberg v. State*, 371 P.3d 602; 609 (Alaska 2016) (when a job title does not adequately describe the job of a claimant, a rehabilitation specialist is not prohibited from considering educational or vocational requirements, or physical strength classifications, when selecting the most appropriate job title or titles from the SCODRDOT). Enforcement of the clear language of AS 23.30.041(e) promotes the legislative intent to ensure a prompt, efficient, more cost-effective, successful, and less litigated rehabilitation system. *Id.* at 281-283.

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than

> 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is generally required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

Filing a controversion exposes an insurer to an attorney's fee award. *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 242 (Alaska 1997). An injured worker is entitled to reasonable attorney fees on issues prevailed upon. *Id*. at 241. Where an insurer resists payment, thus creating the need for legal assistance, the insurer is required to pay the attorney's fees relating to the unsuccessfully controverted portion of the claim. *Id*. Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002). It is reasonable to award an employee half his attorney's fees when he does not prevail on all the issues raised by his claim. *Id*. at 147-148; *Bouse* at 242.

AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009) at 5, *see also Circle De Lumber v. Humphrey*, 130 P.3d 941 (Alaska 2006) (affirming award of attorney's fees based on 35 percent of award). A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.* Attorney's fees awarded under subsection (a) have also been based on a percentage of actual fees claimed, taking into account issues on which a claimant did not prevail. *Soyoung Turner v. Aloha BBQ Grill*, AWCB Decision No. 16-0031 (April 19, 2016).

When an employee files a claim to recover controverted benefits, subsequent payments, though voluntary, are the equivalent of a board award, and attorney's fees may be awarded where the efforts of counsel were instrumental in inducing the payments. *Childs v. Copper Valley Electric Assoc.,* 860 P.2d 1184, 1190 (Alaska 1993). To recover fees under AS 23.30.145(b), an employee must succeed on the claim itself, not a collateral issue. *Childs* at 1193. "Prevailing party status [for civil Rule 82] does not automatically follow if the party receives an affirmative recovery but rather is based on which party prevails on the main issues." *Adamson v. University of Alaska*, 819 P.2d 886 (Alaska 1991)

Attorney fees and costs will be awarded for work expended on the issue decided. *McKinney v. Cordova*, AWCB Decision No. 05-0129 (May 13, 2005); *McCain v. Nana Regional Corp.,* AWCB Decision No. 11-0025 (March 4, 2011).

> **8 AAC 45.445. Activities to be performed only by the certified rehabilitation specialist.** For purposes of AS 23.30.041(m), only the certified rehabilitation specialist assigned to a case may perform the following activities:
> . . . .
>
> (1) selecting appropriate job titles in accordance with 8 AAC 45.525(a)(2);
>
> (2) determining whether specific vocational preparation has been met and which job titles are submitted to a physician;
> . . . .
>
> (9) making a recommendation regarding the employee's eligibility;
> . . . .
>
> **8 AAC 45.525. Reemployment benefit eligibility evaluations.**
> . . . .
>
> (g) In accordance with 8 AAC 45.500, and no later than 30 days after being selected, the rehabilitation specialist whose name appears on the referral letter shall submit to the administrator, with simultaneous copies to the employee and employer,
>
> (1) a report of findings, including a recommendation regarding eligibility for reemployment benefits, together with
>
> (A) copies of all predictions by any physician along with job titles identified under (a)(3) and (b)(4) of this section and job analyses identified under (c)(1) of this section;
> . . . .
>
> **8 AAC 45.530. Determination on eligibility for reemployment benefits.** (a) Within 14 days after receiving a rehabilitation specialist's eligibility evaluation report . . . the administrator will determine whether the employee is eligible or ineligible for reemployment benefits . . . .

The RBA's decision must be upheld absent an abuse of discretion on the administrator's part. AS 23.30.041(d). Several definitions of "abuse of discretion" appear in Alaska law although none appears in the Act. An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive. *Tobeluk v. Lind,* 589 P.2d

873, 878 (Alaska 1979). An abuse of discretion will also be found where a decision fails to apply controlling law or regulations, *Irvine v. Glacier General Construction,* 984 P.2d 1103, 1107 (Alaska 1999); or demonstrates a failure to exercise sound, reasonable legal discretion. *Sheehan v. University of Alaska,* 700 P.2d 1295, 1297 (Alaska 1985); *Manthey v. Collier,* 367 P.2d 884, 889 (Alaska 1962).

The RBA fails to exercise sound, reasonable and legal discretion where s/he relies on a rehabilitation specialist's report that fails to consider statutorily mandated factors. *Irvine* at 1107. One such statutorily mandated factor is an employee's right to have the views of his own treating physician considered. *Id.* Where the board upholds an RBA decision based on a report that did not consider the opinion of an employee's treating physician, it commits legal error. *Id.* However, right to reemployment benefits does not rest entirely upon the opinion of an employee's treating physician. *Id.* The statute vests the RBA with "considerable" discretion, and a favorable opinion from an employee's treating physician does not automatically confer eligibility upon an employee. *Id.* at 1106. The Alaska Supreme Court has expressly declined to hold an employee is entitled to reemployment benefits based solely upon the favorable opinion of an employee's treating physician. *Id.* at 1107-1108.

> **AS 44.62.570. Scope of Review.**
> . . . .
>
> (b) . . . . Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
>
> (c) . . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by
>
> (1) the weight of the evidence; or
>
> (2) substantial evidence in the light of the whole record.

On appeal to the Alaska Worker's Compensation Appeals Commission and the courts, decisions reviewing RBA designee determinations are subject to reversal under the abuse of discretion standard in AS 44.62.570. When applying this standard, "[i]f, in light of the

record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978). If, in light of all the evidence, the RBA's decision is not supported by substantial evidence, the RBA must be found to have abused his discretion and the case remanded for reexamination and further action.

ANALYSIS

1) Did the Reemployment Benefits Administrator's designee abuse her discretion in finding Employee ineligible for benefits?

Employee contends the RBA designee abused her discretion by first finding Employee eligible for reemployment benefits, then finding him ineligible. At other places in the record, Employee contends his treating physician and his rehabilitation specialist found him eligible for benefits, and refers to his rehabilitation specialist as the "RBA designee."

The roles physicians, rehabilitation specialists and the RBA play in the eligibility determination process are separate, distinct and set forth in statute and regulation. Physicians make *predictions* whether or not an employee has the physical capacity to return to his former occupation or other occupations he held within 10 years of the date of injury. AS 23.30.041(e). Rehabilitation specialists conduct evaluations and make *recommendations* regarding an employee's eligibility. AS 23.30.041(d); 8 AAC 45.445(9); 8 AAC 45.525(g)(1). Finally, the RBA makes eligibility *determinations* whether or not an employee is eligible for benefits. AS 23.30.041(d); 8 AAC 45.530(a). While Dr. Thomas predicted Employee could not return to his former occupations, and rehabilitation specialist Labrosse recommended Employee be found eligible for benefits, the sole determination in this case occurred on March 30, 2016, when the RBA designee found Employee ineligible for benefits based on Drs. Witham's and Scooggin's opinions. There is no evidence demonstrating reversal of a determination, or "finding," by the RBA designee.

Employee also contends the designee misinterpreted the decision in *Irvine*, and submits it was legal error to reject his treating physician's opinion in favor of his orthopedic surgeon's and the SIME physician's opinions. Employee believes *Irvine* stands for the proposition he should

automatically be granted eligibility based on his treating physician's favorable opinion, or that that opinion should "trump" those of the other doctors. As Employer points out, the Alaska Supreme Court expressly rejected that proposition multiple times in *Irvine*. *Id*. at 1106; 1107; 1107-1108. Although the Court did hold the statute requires consideration of employee's treating physician's opinion, it also made repeatedly clear that opinion was not controlling, and concluded the statute gives the RBA designee "considerable discretion" in making her determinations. *Id*.

Several definitions of "abuse of discretion" appear in Alaska law although none appears in the Act. An abuse of discretion occurs where a decision is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive. *Lind.* An abuse of discretion will also be found where a decision fails to apply controlling law, or regulations, *Irvine*; or demonstrates a failure to exercise sound, reasonable legal discretion. *Sheehan*; *Collier*. The remainder of Employee's objections to the adverse determination relate to Dr. Scooggin's opinions. Dr. Scooggin opined Employee's restrictions on kneeling were primarily due to his preexisting patella femoral osteoarthritis, while his restrictions on prolonged standing and walking resulted from a combination of the preexisting osteoarthritis and the work-related medial meniscus tear. It is Dr. Scooggin's later opinion on the cause of Employee's work restrictions that is the source of Employee's disagreement with the determination.

The parties deposed Dr. Scooggin and queried him repeatedly on his opinions concerning Employee's work restrictions. Time after time, Dr. Scooggin expressed his opinion Employee's work restrictions were not the result of his work-related torn meniscus. As in his report, Dr. Scooggin explained Employee's restrictions on kneeling, squatting and stooping were the result of his preexisting patellofemoral arthritis, while Employee's restrictions on prolonged standing or walking were the result of a combination of his preexisting patellofemoral arthritis and the torn meniscus. Although kneeling, crouching and stooping are listed as physical demands on the job descriptions rehabilitation specialist Labrosse sent Dr. Thomas for plumber and pipefitter, prolonged standing or walking are not. Meanwhile, if Employee had any lifting restrictions at all, Dr. Scooggin opined those would have been caused by Employee's, admittedly, non-work related rotator cuff tear. Employee also questioned Dr. Scooggin repetitively on "uncertainty" in

his report caused by a "lack of information" and a "lack of evidence," referring to the lack of a physical capacities evaluation. Dr. Scooggin answered; a physical capacities evaluation might be "helpful," or an "appropriate next step," only if Employee felt he could not perform his job duties – for whatever reason. Examining the record as a whole, including Dr. Scooggin's SIME report and deposition testimony, there is no reason why his opinions are not substantial evidence. *Miller*.

Employee also objects to the designee's determination not discussing the result of his physical capacities evaluation, especially given his belief Dr. Scooggin thought such an evaluation was needed. Putting aside the issue of Dr. Scooggin's actual opinions on the necessity for such an evaluation, the evaluation Employee later performed is not as helpful to his cause as he believes. First, the report states it was "based on the Functional Job Description (FJD) provided" to the evaluator, but the FJD provided to DPT Rainey is not attached as part of the report's supporting documentation. Notably, the FJD apparently contained standing and walking requirements that are not set forth in the SCODRDOT descriptions for plumber and pipefitter. Even so, the report concluded Employee *could* perform the "static standing," "dynamic standing," and "walking" requirements, which Dr. Scooggin opines would be limited by a combination of both Employee's preexisting patellofemoral osteoarthritis and his work-related knee injury. Meanwhile, the limiting activities documented in the report, such as squatting, kneeling and crawling, result solely from Employee's preexisting arthritis in Dr. Scooggin's opinion. Although the report does document a difference in opinions between the Dr. Scooggin and DPT Rainey on the cause of Employee's lifting restrictions, that singular difference, in light of the entire record, does not form the basis of an abuse of discretion. *Lind*; *Sheehan*; *Collier*.

Here, the designee had two, summary, check-the-box opinions, one opining Employee could return to his previous occupations, and the other opining he could not. Additionally, the designee had before her the SIME report of Dr. Scooggin. Dr. Scooggin's 54-page report considers Employee's history of his present illness, Employee's current care, Employee's past medical history, a review of Employee's symptoms, Employee's work and social history, Employee's pain status inventory, a review of Employee's medical records, Employee's physical examination and a review of Employee's imaging studies. Dr. Scooggin also provided answerers

to specific questions posed by the Board, Employee and Employer. Additionally, the parties deposed Dr. Scooggin for two and one-half hours, where he repeatedly answered questions concerning Employee's work restrictions. Lastly, Dr. Scooggin is neither Employer's expert, nor Employee's, but rather the board's expert. The RBA designee's reliance on Dr. Scooggin's opinions, along with Employee's orthopedic surgeon's opinion, was not arbitrary, capricious or manifestly unreasonable. *Lind*. The RBA designee did not abuse her discretion.

2) Is Employee entitled to additional attorney's fees and costs?

Employee expressly seeks an award of reasonable attorney's fees. Statutory attorney's fees can be paid under AS 23.30.145(a) when benefits are controverted and later awarded, and reasonable attorney's fees can be paid under AS 23.30.145(b) when an employer otherwise resists the payment of benefits. *Moore*. When an employee files a claim to recover controverted benefits, subsequent voluntary payments can be the equivalent of an award. *Childs*. Here, Employer initially controverted benefits based on Dr. Youngblood's EME report, and Employee retained an attorney, who filed a claim on his behalf. Employer then continued to litigate Employee's claim, and resisted paying benefits by serving an additional controversion, and deposing Employee and Dr. Scooggin, before finally paying benefits, along with statutory attorney's fees, in late December of 2015. As set forth below, the litigation efforts of Employee's attorney up to that point in time were instrumental in inducing Employer's voluntary payments. *Id*. Under the instant scenario, attorney's fees can be awarded under either §145(a) or §145(b).

In making attorney's fee awards, the law requires the nature, length and complexity of the professional services performed on the employee's behalf be considered, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails. *Bignell*. Employee's counsel is an experienced litigator and has represented injured employees in workers' compensation cases for many years. Employer controverted payment of Employee's medical bills and continued to deny its obligation to pay them throughout litigation, until its final payment of PPI on December 17, 2015. Litigation in this case involved complex medical issues, and given these complexities, the final outcome of litigation was not certain.

Employee's counsel provided affidavits of attorney's fees and costs, which show he worked for 76.2 hours prior to December 17, 2015, billed at a rate of $400, for a grand total of $30,480 in fees. Less Employer's previous payment of statutory fees in the amount of $5,899.98, Employer's balance on Employee's reasonable attorney's fees is $24,500.02. All of Employee's $2,080.76 in costs were incurred prior to December 17, 2015. Employer has not objected to Employee's fees or costs. Therefore, Employee will be awarded $26,580.78 in total fees and costs.

CONCLUSIONS OF LAW

1) The Reemployment Benefits Administrator's designee did not abuse her discretion.
2) Employee is entitled to an additional $26,580.78 in reasonable attorney's fees and costs.

ORDERS

1) Employee's claim for reemployment benefits is denied.
2) Employee's claim for reasonable attorney's fees is granted.
3) Employer shall pay Employee's attorney, Robert Beconovich, $26,580.78 in fees and costs.

Dated in Fairbanks, Alaska on September 30, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Robert Vollmer, Designated Chair

/s/

Julie Duquette, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JAMES MESSER, employee / claimant; v. ASRC ENERGY SERVICES, employer; ARCTIC SLOPE REGIONAL CORP., insurer / defendants; Case No. 201411801; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 30, 2016.

/s/______________________________

Jennifer Desrosiers, Office Assistant II