ALASKA WORKERS' COMPENSATION BOARD

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

DAVID PATCHETT, Employee, Claimant, v. SNUG HARBOR SEAFOODS INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201804399 AWCB Decision No. 21-0028 Filed with AWCB Juneau, Alaska on March 30, 2021

Snug Harbor Seafoods Inc. and Liberty Northwest Insurance Corp.'s (Employer) November 13, 2020 petition for review of decision of the reemployment benefits administrator designee (RBA-designee) was heard in Juneau, Alaska on February 23, 2021, a date selected on December 17, 2021. A November 13, 2020 affidavit of readiness for hearing gave rise to this hearing. Attorney Justin Eppler appeared telephonically and represented David Patchett (Employee). Attorney Stacey Stone appeared telephonically and represented Employer. There were no witnesses. The record remained open to receive Employee's supplemental attorney's fees and costs affidavit and Employer's response and closed on February 26, 2021.

ISSUES

Employer contends the RBA-designee abused her discretion in finding Employee eligible for reemployment benefits. It contends it was an abuse of discretion to seek Alfred Lonser's, M.D.,

opinion because Mark Flanum, M.D., already provided an opinion. Employer contends it was abuse of discretion to rely upon Tamara Brothers-McNeil's, PA-C, opinion because she simply regurgitated Dr. Lonser's opinion and Dr. Flanum's opinion was more credible. It requests an order granting its petition.

Employee contends the RBA-designee did not abuse her discretion and correctly found Employee eligible. He contends substantial evidence supports the RBA-designee's decision. Employee requests an order denying Employer's petition.

1) Did the RBA-designee abuse her discretion in finding Employee eligible for benefits?

Employee requests attorney's fees and costs be awarded for time spent and costs incurred for defending against Employer's petition.

Employer contends Employee's attorney's fees and costs were not set as an issue for hearing. Alternatively, it contends the attorney's fees and costs were unreasonable. Employer requests an order denying Employee's attorney's fees and costs.

2) Should Employee's request for attorney's fees and costs be considered?

FINDINGS OF FACT

The following facts are reiterated from *David Patchett v. Snug Harbor Seafoods, Inc.*, AWCB Decision No. 20-0009 (February 27, 2020) (*Patchett I*) and *David Patchett v. Snug Harbor Seafoods, Inc.*, AWCB Decision No. 20-0044 (June 8, 2020) (*Patchett II*) are undisputed or are established by a preponderance of the evidence:

1) On November 2, 2017, Employee reported lower back and left knee pain that began over a month earlier at work. He was driving a large truck and the brake system locked up, causing the truck to lunge forward, raise off the ground three to four feet and slam down. Employee said he felt immediate low back pain radiating down his left leg and his left leg gave out when he attempted to stand. He continued to experience upper thigh pain and numbness extending to his foot. Kent Sandquist, PA-C, ordered a magnetic resonance imaging (MRI). (*Patchett I*).

2) On November 28, 2017, Employee continued to report lumbar pain radiating down his left leg and weakness occasionally causing his left leg to "give out." PA-C Sandquist diagnosed low back pain and referred Employee to Timothy Johans, M.D. (*Id.*).

3) On November 30, 2017, Employee reported low back and left leg pain and weakness since the work injury. He said the truck he was driving on a steep incline stalled out on a hill and when he tried to get it going, it jumped significantly. Employee felt immediately low back and left leg pain and his left leg gave out and he lost bladder control when he got out of his truck. He had hot or burning pain in the anterior thigh and a little past the knee medially into the lower medial leg and tingling in the bottom of his left foot under his toes. Dr. Johans diagnosed a left femoral neuropathy secondary to neurotmesis. He said Employee sustained a direct impact left femoral nerve injury during the injury because the lap belt put pressure on his femoral nerve. Dr. Johans prescribed physical therapy and medications for nerve pain. (*Id.*).

4) On March 22, 2018, Employee's lumbar spine MRI revealed a L4-5 right paracentral and foraminal disc protrusion abutting both the existing L4 nerve and traversing L5 nerve root, a small disc protrusion indenting the thecal sac at L5-S1 and moderate right and mild left foraminal stenosis. (*Id*.)

5) On March 22, 2018, Dr. Johans opined Employee sustained a femoral nerve injury because Employee's MRI revealed right-sided lumbar nerve problems but his left side was "absolutely clean." He concluded surgery was not in Employee's best interest and said, "I really don't have anything else to help him." (*Id*.).

6) On March 23, 2018, Employer filed an employer first report of occupational injury (FROI) stating Employee injured his upper leg while delivering seafood to a facility when he started to move the truck and it lurched forward. (*Id*.).

7) On January 17, 2019, Dr. Johans recommended either femoral nerve or spinal cord stimulation (SCS) because Employee could not handle Cymbalta or gabapentin. He also recommended a formal strength training course for Employee's left hip flexor and knee extensor. Dr. Johans said Employee did not need to see him anymore but he was not at "medical maximum regarding pain management." (*Id*.).

8) On June 13, 2019, Employee followed up with R. Lynn Carlson, M.D., for persistent left leg pain. He declined injections in the past because of his previous response to Lyrica. Dr. Carlson

encouraged Employee to consult with Dr. Lonser, at AA Spine & Pain Clinic Inc., for pain management. (*Patchett II*).

9) On September 4, 2019, R. David Bauer, M.D., an orthopedist, performed an EME and diagnosed an entrapment neuropathy or contusion of Employee's lateral femoral cutaneous nerve. He stated the work injury was the substantial cause of Employee's neuropathy and anterior thigh dysesthesias. Dr. Bauer assessed a one percent permanent partial impairment (PPI) rating. He said there was "no objective physiologic condition" preventing Employee from returning to the job he held at the time of the work injury. Dr. Bauer opined Employee was capable of medium or heavy physical duty work prior to the work injury and he remained capable of such work. (*Patchett I*).

10) On September 10, 2019, Employer denied all benefits based upon Dr. Bauer's September 4, 2019 EME report. It contended there was no medical evidence that time loss was related to the work injury. (*Id*.).

11) On September 13, 2019, Employer denied TTD benefits after March 6, 2019, PPI benefits in excess of one percent, medical costs not reasonably related to the work injury, attorney's fees and costs, penalty, interest and rehabilitation benefits based upon Dr. Bauer's September 4, 2019 EME report. It contended it paid TTD benefits beyond the medical stability date in Dr. Bauer's report which resulted in an overpayment. Employer admitted TTD benefits "as supported by appropriate medical evidence through March 6, 2019," reasonable and necessary medical costs and a one percent PPI rating. (*Id*.).

12) On September 25, 2019, Employee saw PA-C Brothers-McNeil at AA Spine & Pain Clinic Inc., for an initial pain management assessment for low back pain upon referral from Dr. Carlson. Employee complained of low back pain radiating down his left leg after a work accident when he was driving a tractor trailer and was stopped on a downhill slope and the brake did not release when he attempted to move and the truck jumped up and slammed down on the ground breaking the axle in three places. He lost bladder control immediately after the incident for about an hour. PA-C Brothers-McNeil reviewed the March 22, 2018 lumbar spine MRI and discussed a medial branch block versus an epidural steroid injection with Employee. She referred Employee for a lumbar epidural steroid injection (LESI) at L4-5 and L5-S1 with Dr. Lonser. (Brothers-McNeil chart note, September 25, 2019).

13) On October 7, 2019, Dr. Lonser examined Employee and diagnosed lumbar region spiral stenosis, lumbar intervertebral disc degeneration, sacroiliac joint pain and lower limb mononeuropathy. He performed L4-5 and L5-S1 epidural injections. (*Patchett II*).

14) On October 14, 2019, Employee followed up with Dr. Lonser and reported his back felt "a little better" but he still experienced left leg numbness and difficulty walking. He initially had a 50 percent pain reduction from the epidural injection. Dr. Lonser discussed the possible benefit of a repeat epidural injection at a higher level, the diagnostic benefit of a femoral nerve block, the diagnostic and therapeutic benefit of sacroiliac and intra-articular hip injections and answered Employee's questions about SCS. Employee decided to proceed with injections before considering a SCS and chose to proceed with an ultrasound guided left femoral nerve block next. (*Patchett II*).

15) On October 31, 2019, Dr. Lonser opined the substantial cause of Employee's leg and back symptoms was the work injury and Employee had not reached "maximum medical stability." He did not believe Employee would be able to operate a commercial vehicle again due to his inability to sit for long periods. Dr. Lonser predicted Employee will need epidural injections, nerve blocks, medication management and possibly surgical interventions. He disagreed with a one percent PPI rating because Employee sustained life changing injuries causing him not to be able to maintain his job driving commercial vehicles or sit on a plane and causing erectile dysfunction. (*Patchett I*).

16) On March 19, 2020, Employee testified at deposition Sandquist is his regular physician and he referred Employee to Dr. Johans. (Employee Deposition at 15). He was treating his work injury with Dr. Lonser and wanted to continue doing so. (*Id*. at 18).

17) On March 20, 2020, Employee visited PA-C Brothers-McNeil to discuss pain treatment options. Employee stated the LESIs in October 2019 gave him 50 percent pain relief and he wanted another at a higher level as previously discussed with Dr. Lonser. He also needed his Lyrica refilled. Employee reported he walks funny because of pain. PA-C Brothers-McNeil informed Employee a "moratorium had been placed on procedures" and she refilled the Lyrica. (Brothers-McNeil progress note, March 20, 2020).

18) On April 9, 2020, PA-C Costello referred Employee to Steven Humphreys, M.D., for bilateral low back pain with left-sided sciatic and gait abnormality due to pain and fatigue. (Costello progress notes, April 9, 2020).

19) On April 28, 2020, Dr. Humphreys diagnosed lumbar stenosis with neurogenic claudication and cervical myelopathy and referred Employee to David Rankine, M.D., for upper and lower extremity electromyography studies. (Humphreys progress notes, April 28, 2020).

20) On June 8, 2020, *Patchett II* granted Employee's petition requesting second independent medical evaluation (SIME). (*Patchett II*).

21) On July 21, 2020, Dr. Rankine diagnosed left lower leg extremity motor axonal peripheral neuropathy and referred Employee to follow up with Dr. Humphreys. (Rankine progress note, July 21, 2020).

22) On August 21, 2020, a stipulation resolving "certain reemployment issues" was approved; it stated:

> 1. The parties agree that the employee is entitled to a reemployment benefits eligibility evaluation.
> . . . .
>
> 4. Given his engagement in the reemployment process, the employer agrees to pay the employee the amount of $1,068.00 per week under AS 23.30.041(k) as stipend benefits during such time as the employee continues to actively participate in the reemployment process. The employer may suspend or terminate this stipend benefit only by order of the Reemployment Benefits Administrator or the Board.
> . . . .
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> 7. The employer and employee retain their right to dispute the results of the eligibility evaluation, plan development, or employee's noncooperation in the process, as provided by the Act. (Stipulation, August 21, 2020).

23) On September 14, 2020, Dr. Flanum predicted Employee would incur a permanent impairment greater than zero for his work injury and Employee will have the permanent physical capacities to perform the physical demands of the Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" (SCODRDOT) Tractor-Trailer Truck Driver job description but will not have the permanent physical capacities to perform the physical demands of farmer, general; maintenance mechanic; and fisher, net SCODRDOT job descriptions. (Flanum responses, September 14, 2020).

24) On September 15, 2020, the rehabilitation specialist sent PA-C Costello a letter asking him to review the SCODRDOT job descriptions and indicate whether Employee would have the predicted physical capacities to perform those jobs considering his work injury and to opine whether he

would incur a PPI rating greater than zero for his work injury when he reached medical stability and included Dr. Flanum's opinions. (Letter, September 15, 2020).

25) On September 18, 2020, the rehabilitation specialist emailed Employer's and Employee's attorneys that she received a phone call from PA-C Costello the day before regarding the SCODRDOT job description and PPI rating questions. PA-C Costello declined to provide opinions and recommended Employee make an appointment with Dr. Lonser and provide him with the questions. The rehabilitation specialist stated she would send the questions to Dr. Lonser. (Email, September 18, 2020).

26) On September 18, 2020, Employer's attorney replied to the rehabilitation specialist and cc'd Employee's attorney stating:

> Given that Dr. Flanum has responded to the job descriptions pursuant to the requirements under 8 AAC 45.525, I am uncertain why there would be further delay. The code contemplates one physician responding not multiple. Given the time constraints to perform the eligibility evaluation, it seems that the requirements of the code have been met. (Email, September 18, 2020).

27) On September 18, 2020, Employee's attorney replied to Employer's attorney and the rehabilitation specialist stating:

> As far as I know, Dr. Flanum has only seen Mr. Patchett once for 10 minutes for an orthopedic evaluation. Dr. Flanum is a specialist. Mr. Patchett has multiple treating physicians because he has multiple conditions such as chronic pain. Dr. Lonser treated Mr. Patchett for his chronic pain. Dr. Lonser's opinion that Mr. Patchett would not be able to return to his job at the time of injury has been in the board's file for almost a year. Dr. Flanum can answer only from an orthopedic view, but his treating physician for pain needs to weigh in because an employee can be released back to work for one condition, but for another disabling condition he may not be released to work at the time of injury. This is why Dr. Lonser needs to weigh in. And this is also why an SIME evaluation can have multiple specialists weigh in. There should be no difference with respect to a voc rehab eligibility evaluation. (Email, September 18, 2020).

28) On September 22, 2020, Employee sought a finding of unfair or frivolous controversion, attorney's fees and costs, penalty for late paid compensation and interest for Employer's failure to pay AS 23.30.041(k) benefits as agreed in the August 21, 2020 stipulation. (Claim for Workers' Compensation Benefits, September 22, 2020).

29) On September 23, 2020, the rehabilitation specialist asked for an extension of the 30 day deadline under AS 23.30.041(d) to perform an eligibility evaluation and issue a report. (Email, September 23, 2020).

30) On September 23, 2020, PA-C Costello referred Employee for lumbar spine surgery with Dr. Flanum. (Flanum Surgery Order, September 23, 2020).

31) On September 24, 2020, the reemployment technician granted the rehabilitation specialist's request for an extension. (Letter, September 24, 2020).

32) On October 2, 2020, Dr. Flanum performed a right-sided L4-5 microdecompression for lumbar spondylosis with radiculopathy. (Flanum operative note, October 2, 2020).

33) On October 2, 2020, the rehabilitation specialist sent Dr. Lonser a letter asking him to review the SCODRDOT job descriptions and indicate whether Employee would have the predicted physical capacities to perform those jobs considering his work injury and to opine whether he would incur a PPI rating greater than zero for his work injury when he reached medical stability. (Letter, October 2, 2020).

34) On October 20, 2020, PA-C Brothers-McNeil examined Employee and refilled the pregabalin prescription for neuropathy. PA-C Brothers-McNeil predicted Employee will not have the permanent physical capacities to perform the physical demands of the Tractor-Trailer Truck Driver; farmer, general; maintenance mechanic; and fisher, net SCODRDOT job descriptions. (Brothers-McNeil response, October 20, 2020).

35) On October 21, 2020, the rehabilitation specialist found Employee eligible for reemployment benefits based upon PA-C Brothers-McNeil's opinions. After receiving Dr. Flanum's opinion, the specialist forwarded his opinions to PA-C Costello, physician that referred Employee to Dr. Flanum. PA-C Costello deferred to Dr. Lonser, who was treating Employee for his femoral nerve pain. PA-C Brothers-McNeil advised Ms. Davis she reviewed Dr. Lonser's notes from his prior appointments and she would determine whether to refer Employee back to Dr. Lonser for another procedure and she could provide opinions on the SCODRDOT and PPI questions based upon her review of Dr. Lonser's notes from previous appointments and his October 31, 2019 response. (Reemployment Benefits Eligibility Evaluation Report, October 21, 2020).

36) On November 3, 2020, the RBA-designee found Employee eligible for reemployment benefits based on PA-C Brothers-McNeil's opinions. (Letter, November 3, 2020).

37) On November 13, 2020, Employer requested review of the RBA-designee's finding of eligibility per AS 23.30.041(d). It contended the RBA-designee abused her discretion in relying upon PA-C Brothers-McNeil's predictions because she was "not the most knowledgeable" as Employee visited her once. (Petition, November 13, 2020).

38) On November 30, 2020, a stipulation resolving attorney's fees and cost incurred by Employee was approved; it stated:

> 1. The parties agree that the employee's attorney, Justin Eppler, shall be paid the sum of $2,985.00 in attorney's fees and costs to resolve all claims for attorney's fees and costs related to Mr. Eppler's work relating to reemployment benefits between July 17, 2020 and November 6, 2020. . . . (Stipulation, November 30, 2020).

39) On December 17, 2020, Employer contended the September 22, 2020 claim was resolved because reemployment benefits and related attorney's fees have been provided pursuant to the August 21, 2020 and November 30, 2020 stipulations and a hearing was not needed on it. Employee contended the September 22, 2020 the claim had not been resolved because it was unclear from the compensation reports from the division whether Employer paid benefits pursuant to the stipulations and a hearing should be scheduled on the claim. The board designee scheduled a hearing on Employee's September 22, 2020 claim and Employer's November 13, 2020 petition. (Prehearing Conference Summary, December 17, 2020).

40) On February 18, 2021, Employee filed an affidavit of attorney's fees and costs and an affidavit of paralegal fees (Affidavit of Paralegal Costs, February 18, 2021; Affidavit of Attorney's Fees and Costs, February 18, 2021).

41) At hearing, the parties agreed Employee's September 22, 2020 claim was no longer at issue. (Record).

42) On February 23, 2021, Employee filed a supplemental affidavit of attorney's fees and costs. (Supplemental Affidavit of Attorney's Fees and Costs, February 23, 2021).

43) On February 26, 2021, Employer objected to an award of attorney's fees and costs and contended it was not set as an issue for hearing. It also contended the fees are unreasonable. (Employer's Opposition to Employee's Supplemental Affidavit of Attorney's Fees and Costs, February 26, 2021).

PRINCIPLES OF LAW

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).

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .
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> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
> . . . .
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> (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.
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> (c) 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 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 Dictionary of Occupational Titles". . . .

. . . .

Several "abuse of discretion" definitions appear in Alaska law but none appear in the Act. The Alaska Supreme Court stated "abuse of discretion" includes "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska,* 700 P.2d 1295, 1297 (Alaska 1985). An agency's failure to properly apply controlling law or failure to exercise sound, reasonable legal discretion may also be an abuse of discretion. *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

On appeal from the RBA-designee's eligibility decision, the board will affirm the decision if it is supported by substantial evidence. *Yahara v. Construction & Rigging, Inc*., 851 P.2d 69 (Alaska 1993). The board will not reweigh the evidence upon which the RBA designee relied in reaching her determination. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). The board's failure to apply a mandatory statutory provision was harmless error where substantial evidence existed to support the board's position. *Adamson v. University of Alaska*, 819 P.2d 86 (Alaska 1991).

The RBA fails to exercise sound, reasonable and legal discretion where she relies on a rehabilitation specialist's report that fails to consider statutorily mandated factors. *Irvine v. Glacier General Construction,* 984 P.2d 1103, 1107 (Alaska 1999). 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*.

> **AS 23.30.395. Definitions.** . . .
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> (3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
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> (A) a licensed medical doctor
> . . . .
>
> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy. . . .
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> . . . .

8 AAC 45.065. Prehearings. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.
. . . .

8 AAC 45.070. Hearings. . . .
(b) . . . .

(1). . . .

(2) For review of an administrator's decision issued under AS 23.30.041(d), a party shall file a claim or petition asking for review of the administrator's decision and an affidavit of readiness for hearing. The affidavit of readiness for hearing may be filed at the same time as the claim or petition. In reviewing the administrator's decision, the board may not consider evidence that was not available to the administrator at the time of the administrator's decision unless the board determines the evidence is newly discovered and could not with due diligence have been produced for the administrator's consideration.

8 AAC 45.082. Medical treatment. . . .

(b) A physician may be changed as follows:
. . . .

(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; . . . .
. . . .

ANALYSIS

1) Did the RBA-designee abuse her discretion in finding Employee eligible for benefits?

The RBA-designee's decision must be upheld except for an abuse of discretion. AS 23.30.041(d). Employer contends the RBA-designee abused her discretion when she relied on PA-C Brothers-

McNeil's opinion because Dr. Flanum already provided an opinion and Dr. Flanum is a surgeon and PA-C Brothers-McNeil was not knowledgeable and simply regurgitated Dr. Lonser's opinion.

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. *Sheehan*. An abuse of discretion will also be found where a decision fails to apply controlling law, or regulations or demonstrates a failure to exercise sound, reasonable legal discretion. *Collier*. This decision may not reweigh or draw its own inference from the evidence upon which the RBA-designee relied in her denial letter. *Miller*. If, after reviewing and considering admissible evidence on appeal, the reviewers find the RBA-designee's decision is supported by substantial evidence, it must be affirmed. *Yahara*.

The RBA-designee is required to consider Employee's treating physician's opinions. *Irvine*. Employee designated his attending physician by obtaining treatment, advice, an opinion or any type of service from a physician for the work injury. 8 AAC 45.082(b)(2). While Dr. Flanum performed Employee's lower back surgery after a referral by PA-C Costello, PA-C Brothers-McNeil assessed Employee's need for pain management, prescribed him pain medication and referred him to Dr. Lonser for LESIs. Dr. Lonser provided LESIs after examining Employee. Employee testified at deposition he considers Dr. Lonser his treating physician for the work injury. PA-C Brothers-McNeil and Dr. Lonser work at AA Spine & Pain Clinic, Inc. Dr. Lonser and PA-C Brothers-McNeil are Employee's designated treating physicians. *Rogers & Babler*; AS 23.30.095(a); AS 23.30.395(A), (D); 8 AAC 45.082(b)(2). Therefore, the RBA designee's reliance on PA-C Brothers-McNeil's opinion was not arbitrary, capricious or manifestly unreasonable; nor did the RBA-designee fail to apply controlling law, or regulations or demonstrate a failure to exercise sound, reasonable legal discretion. *Rogers & Babler*; *Sheehan*; *Collier*.

PA-C Brothers-McNeil reviewed Employee's medical record and evaluated him for the third time when she issued her opinions regarding the SCODRDOTs and PPI rating. There is no reason why her opinions are not substantial evidence. *Miller*. Employer seeks to reweigh the physician's opinions when it contends Dr. Flanum's opinion should be given more weight than PA-C Brothers-

McNeil, which this decision cannot do. *Yahara*. The RBA-designee did not abuse her discretion by finding Employee eligible for benefits. Employer's petition will be denied.

2) Should Employee's request for attorney's fees and costs be considered?

Prehearing conference summaries will limit the issues for hearing to those that are in dispute at the end of the prehearing. 8 AAC 45.065(c). Unless the prehearing summary is modified, the summary governs the issues and the course of the hearing. *Id*. In this case, the hearing issues identified in the December 17, 2020 prehearing conference summary included Employer's November 13, 2020 petition and Employee's September 22, 2020 claim, which sought attorney's fees and costs for services rendered to enforce the August 21, 2020 and November 30, 2020 stipulations. Employer objected to Employee's request for attorney's fees and costs for time spent and fees incurred on its November 13, 2020 petition. Employee did not raise attorney's fees and costs for time and costs incurred on the November 13, 2020 petition as an issue at the December 17, 2020 prehearing conference. Nor did he request an amendment of the prehearing conference summary to include attorney's fees and costs related to the petition should he prevail. Employee's request for attorney's fees and costs shall not be considered. He has not waived his right to seek attorney's fees and costs.

CONCLUSIONS OF LAW

1) The RBA-designee did not abuse her discretion in finding Employee eligible for benefits.
2) Employee's request for attorney's fees and costs should not be considered.

ORDER

1) Employer's November 13, 2020 petition is denied.

Dated in Juneau, Alaska on March 30, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Christina Gilbert, Member

/s/
Bradley Austin, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of DAVID PATCHETT, employee / claimant v. SNUG HARBOR SEAFOODS INC., employer; LIBERTY NORTHWEST INSURANCE CORP., insurer / defendants; Case No. 201804399; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on March 30, 2021.

/s/
Krystal Gray, Workers' Compensation Tech