

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JEFFERY L. DALE,)	
)	
Employee,)	
Claimant,)	INTERLOCUTORY
)	DECISION AND ORDER
v.)	
)	AWCB Case No. 201912497
LYNDEN, INC.,)	
)	AWCB Decision No. 21-0073
Employer,)	
and)	Filed with AWCB Fairbanks, Alaska
)	on August 10, 2021
ACE AMERICAN INSURANCE CO.,)	
)	
Insurer,)	
Defendants.)	

Employee Jeffrey Dale's April 16, 2021 Petition for Review of Reemployment Benefit Decision was heard on June 17, 2021 in Fairbanks, Alaska, a date selected on April 28, 2021. The April 16, 2021 petition gave rise to this hearing. Attorney Robert Beconovich appeared and represented Employee. Attorney Aaron Sandone appeared and represented Lynden, Inc. (Employer) and Ace American Insurance Co. (Insurer). Witnesses included Employee and Traci Dale (Employee's spouse). The record closed after the hearing's conclusion on August 6, 2021 to accept supplemental filings from the parties and to provide for additional deliberations with a third panel member.

ISSUES

Employee contends that the Rehabilitation Benefits Administrator (RBA) abused her discretion in finding him not eligible for reemployment benefits as the opinion of his treating physician was not considered prior to the determination.

Employer contends that the RBA did not abuse her discretion in finding Employee not eligible for reemployment benefits.

1) Did the RBA abuse her discretion in finding Employee ineligible for reemployment benefits?

Employee contends he should prevail on the petition for review and that he is entitled to an award for attorney's fees and costs.

Employer contends that Employee should not prevail on the petition for review and is not entitled to an award for attorney's fees and costs.

2) Is Employee entitled to an award for attorney's fees and costs?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) On March 15, 2019, Employee was injured when he slipped and fell on ice at work. (First Report of Injury, September 11, 2019).
- 2) On March 19, 2019, Employee was examined by Gina Escobar, M.D. of Solstice Medicine and Wellness; he had pain along the left shoulder blade that radiated down to his deltoid, worse with driving. On Friday, he "slipped and fell on the ice which caused him to hit his head on the step of his truck. He reports he passed out but is unsure how long. He has a headache." (Escobar Record, March 19, 2019).
- 3) On March 20, 2019, Employee underwent an eye examination by Katherine Johnson, M.D. Employee reported "head trauma Friday after slipping and hitting head on step on vehicle and ground. Additionally, patient was accidentally struck in the right eye last night." Diagnoses included Horner's Syndrome (new), ptosis of left eyelid (stable), anisocoria (new), acute head trauma (new), and diabetic and hypertensive retinopathy. (Johnson Record, March 20, 2019). Dr. Johnson sent Employee to the Emergency Room for magnetic resonance imaging (MRI) which showed no signs of bleeding, arterial dissection, or any causes of Horner's Syndrome. Patient was stable and diagnosed with post concussive syndrome. (ER Record, March 20, 2019).

4) On April 16, 2019, Employee was examined by Dr. Escobar for follow up of left shoulder and neck pain, and other general medical conditions. Chart notes indicated “Dr. Johnson noted he had anoscula (sic). She ordered an MRI/MRA of his head which was normal. He ha[d] shots in his eyes due to complications with his diabetes.” Employee continued to complain of left sided neck pain radiating down towards his shoulder. Employee had pain associated with his left neck since a fall in March where he hurt his shoulder. He had pain along the left shoulder blade that radiated down his deltoid that got worse with driving. Employee was starting to have numbness down his arm. Left shoulder x-ray showed calcific tendinopathy of rotator cuff. Two years prior he had fallen off his trailer. (Escobar Report, April 16, 2019).

5) On May 15, 2019, Employee was evaluated by Dr. Escobar. Diagnoses applicable to the work injury were pain in left shoulder and spondylosis with radiculopathy, cervical region. (Escobar Record, May 15, 2019).

6) On June 12, 2019, Employee was examined by Casey Blood, N.P. of Goldstar Longevity and Wellness. Chart notes indicated this was a referral from Dr. Escobar. (Blood Record, June 12, 2019). No copy of any written referral from Dr. Escobar was provided. (ICERs Database).

7) On June 20, 2019, Employee was evaluated by Mark Wade, M.D. for shoulder pain. A June 13, 2019 MRI was reviewed. Conservative treatment was discussed, a cortisone injection supplied, and physical therapy recommended. (Wade Record, June 20, 2019).

8) On June 27 and July 25, 2019, Employee was examined by NP Blood. The examinations primarily covered general medical concerns without addressing shoulder or cervical complaints. Chart notes indicated “chronic back pain”; Employee was referred to chiropractic care. (Blood Reports, June 27 and July 25, 2019).

9) On September 9, 2019, Employee was examined by Dr. Escobar. Chart notes provided “[h]e would like to switch his care back to our clinic he had initially been seen by us and switched his care elsewhere. At that time he was convinced by his wife to follow up with another provider primarily for weight loss management.” Employee continued to complain of left shoulder pain that had improved with one injection. An appointment had been set up with Dr. Wade, with surgery anticipated. (Escobar Record, September 9, 2019).

10) On September 10, 2019, Employee was evaluated by Dr. Wade, who reviewed a June 13, 2019 MRI of Employee’s left shoulder which showed degenerative changes, low-grade partial-thickness tearing and tendinopathy of the supraspinatus and subscapularis tendon, superior labral

tear, and tendinopathy of the intra-articular portion of the biceps tendon. Treatment options were discussed including surgery. (Wade Record, September 10, 2019).

11) On October 4, 2019, Employee underwent an Employer's Independent Medical Examination (IME) conducted by Amit Sahasrabudhe, M.D. Dr. Sahasrabudhe found that the substantial cause of Employee's left shoulder disability and need for treatment was the March 15, 2019 work injury. Arthroscopic surgery was recommended and reasonable. Employee was not medically stable, and was anticipated to have a ratable permanent impairment after medical stability. Employee was released to full duty without restrictions. (Sahasrabudhe IME Report, October 4, 2019).

12) On November 4, 2019, Employee underwent left shoulder surgery performed by Dr. Wade. (Operative Report, November 4, 2019). Dr. Wade took Employee off work through December 12, 2019. (Wade Note, November 15, 2019). On December 12, 2019, Dr. Wade released Employee to light duty work. (Wade Release, December 12, 2019).

13) Employee received chiropractic treatments from Todd Lovell, D.C. and associated providers at Ridgeview Chiropractic at various times, including between July 18, 2019 and February 19, 2021. (Lovell Reports, assorted dates).

14) On February 6, 2020, Dr. Lovell's chart notes included "referred to North Star Radiology for MRI on left shoulder and x-ray for cervical spine with flexion and extension, these were ordered per Tracy Davis, [Employee]'s work comp nurse." (Lovell Record, February 6, 2020). The same notation remained in records dated February 11, 2020, February 13, 2020, and February 20, 2020. (Lovell Records, February 11, 13, and 20, 2020).

15) On February 14, 2020, Dr. Lovell referred Employee to Kurt Menzer, M.D. (Lovell Referral, February 14, 2020).

16) On March 4, 2020, Employee saw Dr. Mentzer for an evaluation of his left shoulder. (Mentzer Record, March 4, 2020). On June 23, 2020, Employee underwent a second left shoulder surgery performed by Dr. Mentzer (Operative Report, June 23, 2020).

17) On July 15, 2020, Employee was seen by Elizabeth Elander, PA at Dr. Mentzer's office for a post-operative check of the left shoulder. Employee was released to work with sedentary to light duty limitations. (Elander Record, July 15, 2020).

18) On August 10, 2020, Employee was released to work with light duty restrictions. (Mentzer Order, August 10, 2020).

19) On September 24, 2020, Employee was evaluated by Dr. Mentzer and given a work release with light duty restrictions. (Mentzer Order, September 24, 2020).

20) On October 15, 2020, rehabilitation specialist Patricia Harmon was assigned to complete a reemployment benefits eligibility evaluation. (Assignment letter, October 15, 2020). On October 29, 2020, Harmon sent an inquiry to Dr. Mentzer, requesting predictions regarding Employee's ratable permanent impairment and capacity to perform the physical demands of three enclosed SCODRDOT job descriptions (904.383-010 TRACTOR-TRAILER-TRUCK DRIVER, 904.683-010 LOG-TRUCK DRIVER, and 902.683.010 DUMP-TRUCK DRIVER). (Harmon Letter, October 29, 2020). She issued a preliminary report dated October 13, 2020 [this appears to be a typographical error] and filed on November 16, 2020 providing background information and prior job history, but noting that no recommendation could issue until she received physical capacity and permanent partial impairment predictions from Dr. Mentzer [who was listed on the report as Employee's treating physician and "Declared Attending Physician"]. (Harmon Report, November 16, 2020). On December 9, 2020, Harmon provided an updated report, noting that Dr. Mentzer had predicted Employee would have a PPI rating of greater than zero, but did not make any prediction on the job descriptions provided other than "[t]o be determined." Dr. Mentzer was again listed as Employee's treating and "declared attending" physician. (Harmon Report, December 11, 2020).

21) On December 3, 2020, Employee saw Dr. Mentzer for a follow-up evaluation based on continued shoulder pain. Left shoulder rehabilitation had been compromised by repetitive cervical spine spasms and headaches. Referral for massage therapy was provided and Employee was encouraged to continue with left shoulder rehabilitation. He was released to return to work on December 3, 2020 with light duty restrictions. (Mentzer Record, December 3, 2020).

22) On December 3, 2020, Dr. Mentzer referred Employee for a consult with osteopathic manipulation medicine. (Mentzer Referral, December 3, 2020).

23) On December 14, 2020, Employee underwent an EME with Donald J. Schroeder, M.D. with the emphasis of the exam on Employee's ongoing neck complaints. Dr. Schroeder reviewed Employee's medical records, an MRI of his cervical spine, and surveillance video of Employee. History indicated Employee had been a truck driver for approximately 20 years driving 18-wheelers between Fairbanks and Prudhoe Bay, Alaska. Employee was injured when he was exiting his truck; the ground was icy, he slipped and hit his head and left shoulder. Dr. Schroeder

found that the substantial cause of Employee's cervical spine problems were in all medical probability related to the preexisting degenerative condition that may have been temporarily aggravated by his injury. No intervening factors were found. No further treatment was recommended. Dr. Schroeder found Employee medically stable in relation to the cervical spine. No permanent partial impairment was anticipated relating to the cervical spine. Any spinal limitations were secondary to the preexisting chronic degenerative disc disease. (Schroeder EME, December 14, 2020).

24) From January 5, 2021 through at least April 20, 2021, Employee sought medical treatment with various providers at McKinley Orthopedic and Sports Medicine for osteopathic manipulative therapy (OMT) and surgical consultations, including Jennifer Malcolm, D.O., Kim Driftmier, M.D., and Shannen McNamara, PA-C. (McKinley Orthopedic Records, January 5 – April 20, 2021).

25) On January 20, 2021, Employee was examined by Dr. Mentzer, reporting intense left bicep pain, with continued pain in his shoulder and neck. He was found to have achieved "maximal medical improvement" of the left shoulder. A chronic irreparable left upper extremity long head of biceps proximal tendon rupture was noted. Employee continued to have issues with his cervical spine and headaches. Dr. Mentzer requested a functional capacity evaluation to assess permanent restrictions. Employee was advised to visit his referring physician for routine follow-up. (Mentzer Record, January 20, 2021).

26) On February 4, 2021, Dr. Malcolm referred Employee to Dr. Carey and Dr. Driftmier for surgical evaluation. (Malcolm Record, February 9, 2021).

27) On February 10, 2020, [this appears to be a typographical error] Harmon prepared an update report filed on February 11, 2021, again noting no recommendation could issue until predictions were received from Dr. Mentzer. (Harmon Report, February 11, 2021).

28) On February 25, 2021, PA-C McNamara completed a physician's report indicating Employee was not medically stable and not released for work. (McNamara Report, February 25, 2021).

29) On March 1, 2021, Dr. Driftmier prepared a physician's report indicating Employee was not medically stable, and not released for work. (Driftmier Report, March 1, 2021).

30) On March 3, 2021, Employee's Nurse Case Manager Tracy M. Sipperley, BS, RN, CCM asked whether Employee could "return to regular duty work without restrictions at this time?" Dr.

Mentzer replied on the same day and indicated Employee could return to unrestricted regular duty work. He maintained that Employee had reached medical stability and that he would have a ratable impairment. (Mentzer Response, March 3, 2021).

31) On March 3, 2021, Dr. Mentzer predicted that Employee would have a PPI rating greater than zero, and that he would not have the ability to perform the physical demands of the three job descriptions provided by Harmon. (Mentzer Record, March 3, 2021).

32) On March 5, 2021, Employer denied temporary total disability (TTD) and temporary partial disability (TPD), reemployment, and medical benefits for Employee's spine and left shoulder except for home exercise and aerobic conditioning program(s). The basis for the controversion was a March 3, 2021 report by Dr. Mentzer and a December 14, 2020 report by Dr. Schroeder, "wherein the doctors opine that [Employee] is medically stable for all of his medical conditions. Furthermore, both physicians opine that the employee can return to his job at the time of injury." (Controversion Notice, March 5, 2021).

33) Employer paid Employee permanent partial impairment (PPI) benefits from March 6, 2021 through April 13, 2021. (ICERs database).

34) On March 8, 2021, Employee was examined for a left shoulder PPI rating by Jared Kirkham, M.D. on referral from Kurt Mentzer, M.D. A February 10, 2020 MRI showed a full-thickness tear of the long head of the biceps tendon, small SLAP tear, calcific tendinopathy of the supraspinatus and infraspinatus tendons, and partial-thickness tear of the supraspinatus. Dr. Kirkham found Employee had reached "maximal medical improvement." A four percent whole person PPI rating was provided. (Kirkham Record, March 8, 2021).

35) On March 11, 2020 [this appears to be a typographical error], Harmon issued an updated evaluation report filed March 15, 2021, again listing Dr. Mentzer as the attending physician. He had predicted that Employee would not have physical capacities to perform the three jobs for which descriptions had been provided. A copy of a response to Employer's nurse case manager from Dr. Mentzer dated March 3, 2021, contradicted his predictions to Harmon, finding that Employee would be able to perform the job duties of the three positions at issue. Employee brought a copy of a Functional Capacity Evaluation (FCE) by Denton Scow, PT to Harmon on March 11, 2021. Harmon recommended Employee be found eligible for reemployment benefits based on Dr. Mentzer's prediction and the FCE. (Eligibility Report, March 15, 2021).

36) On March 23, 2021, Dr. Mentzer provided updated predictions: Employee would have a PPI rating greater than zero percent, and that with proposed treatment, physical therapy, and work hardening, Employee would have the physical capacities to perform the physical demands of the three job descriptions provided. (Mentzer response, March 23, 2021).

37) On March 24, 2021, Dr. Menzer electronically signed an order: “Please note that the vocational paperwork signed by me on March 23, 2021 is the corrected version. I certify that the March 3, 2021 vocational paperwork was completed incorrectly.” (Mentzer Order, March 25, 2021).

38) On March 24, 2021, Employee’s attorney entered an appearance. (Entry of Appearance, March 24, 2021).

39) On March 24, 2021, a medical opinion from Dr. Malcolm dated March 16, 2021 was filed indicating that after review of imaging, performance of physical examinations, and review of the EME report, “it [was] the accident that started his pain. His injury from the accident on March 15, 2019 is responsible for his disability and pain.” (Malcolm Opinion, March 24, 2021). This opinion was filed on a medical summary on March 24, 2021 by Employee’s attorney, with email service to Employer’s adjuster. (Medical Summary, March 24, 2021).

40) On March 31, 2021, the RBA-Designee issued a letter to Harmon noting the revised predictions from Dr. Mentzer, and asking her to review “Dr. Mentzer’s March 23, 2021 predictions and file an updated report with your recommendation . . .” as well as to be sure to copy Employee’s attorney on all future reports and correspondence. Employee’s attorney was listed as a courtesy copy recipient of this correspondence. (RBA Correspondence, March 31, 2021).

41) On March 31, 2021, Harmon provided an updated eligibility report, listing Dr. Mentzer as the treating physician and as the “Declared Attending Physician,” and recommending that Employee be found not eligible for reemployment benefits based on Dr. Mentzer’s prediction. (Eligibility Report, April 1, 2021).

42) On April 6, 2021, Dr. Driftmier issued a medical opinion that the work accident was the cause of Employee’s neck and radicular pain. (Driftmier Opinion, April 6, 2021). This was filed on a medical summary by Employee’s attorney and copied to Employer’s adjuster and to Harmon at the incorrect email address listed on her letterhead. (Medical Summary, April 7, 2021). The medical summary was refiled the same day by Employee’s attorney with email service to

Employer's adjuster and Harmon at the corrected email address. (Medical Summary 2nd, April 7, 2021).

43) No evidence was provided to clarify how Dr. Mentzer was identified as either Employee's treating physician or declared attending physician as listed in Harmon's eligibility report. (Agency file).

44) On April 13, 2021, the RBA issued her eligibility determination, finding Employee not eligible for reemployment benefits based on the March 31, 2021 evaluation report of Harmon. (Eligibility Determination, April 13, 2021).

45) On April 16, 2021, Employee timely sought review of the RBA's decision. (Petition for Review, April 16, 2021).

46) On April 20, 2021, Employee treated with Dr. Malcolm. Chart notes indicated that referral to Dr. Carey was discussed regarding reevaluation of the left shoulder for surgery. Employee reported the shoulder was declining rather than improving. Employee was convinced his main cause of pain was his biceps but "given the prior procedure I expect the RTC and labrum and degenerative changes are mor [sic] to blame than the biceps." (Malcolm Record, April 20, 2021).

47) On May 12, 2021, Employee testified he had worked for Employer a few months at the time of the work injury and continued to work full time until November of 2019. He had not worked since. Employee testified to how the work injury occurred. Immediately after his fall, his face, shoulder, arm, and neck were hurting. The fall broke his glasses; Employee hit the step into the truck cab at an angle across his forehead and eye. He hit his forehead on the second step and hit his face on the ground. He did not seek medical care on the date of injury. He eventually went to see his regular doctor Gina Escobar. At that time his head, neck, and shoulder were hurting. He saw Dr. Johnson to get replacement glasses; she was concerned about Horner's Syndrome and sent him to the hospital to have an MRI as his pupils were different sizes. He thought Dr. Escobar had referred him to Dr. Wade, orthopedic surgeon. He started physical therapy after that, which made his pain worse. Dr. Wade performed shoulder surgery in November 2019; it was not successful. Employee was being seen by Dr. Todd [Lovell] at Ridgeview Chiropractic for his neck. Tracy Davis set up an appointment with Dr. Lovell to talk to him about what was wrong with his neck and shoulder; "Dr. [Lovell] requested another MRI per Tracy." Shortly after that they got the MRI and Davis said Employee needed to have another surgery on his shoulder. She told Employee she would not let him go back to Dr. Wade. Davis told Employee "they use Dr. Mentzer in Anchorage.

We set up an appointment with him.” Dr. Lovell provided a referral to Dr. Mentzer but “that came from Tracy Davis.” “I believe what happened was Tracy asked Dr. Todd [Lovell] for a referral, and that’s where we came up with Dr. Mentzer . . . [b]ecause Tracy had told me that that’s – Dr. Mentzer was a very good surgeon and that’s – she had lots of patients that went to Dr. Mentzer.” It was just verbal; she did not provide a list of physicians. After that, Dr. Lovell provided a referral to Dr. Mentzer. Employee did not remember if he had been referred to Dr. Lovell; he had seen a chiropractor all his life. Dr. Mentzer referred Employee to Dr. Malcolm. Dr. Malcolm referred Employee to Drs. Carey and Driftmier in her same office. Dr. Driftmier is a neck and spine surgeon, and Dr. Carey is an orthopedic surgeon who looked at Employee’s shoulder. Dr. Carey recommended another shoulder surgery. OMT with Dr. Malcolm has helped his headaches. He started with Dr. Malcolm in January or February 2021. Employee had been interviewed by Harmon as part of the reemployment eligibility evaluation process; she asked him about his employment history for the past 10 years. She did not discuss medical treatment with him. Employee did not recall any discussion regarding who he was treating with. He did not ask Harmon to send the job descriptions to any other physicians. Employee thought he had previously received a permanent impairment rating. (Deposition of Jeffery Dale, May 12, 2021).

48) One June 17, 2021, Employee’s hearing testimony was generally consistent with his deposition. Employee was accompanied at his appointment with Dr. Lovell by a nurse who he understood was there to ensure his quality of care. Employee did not feel he had discretion to disagree with the nurse; he thought her role in the workers’ compensation claim was to help him get the best medical care and treatment and make sure he was fixed to his pre-accident standard. He asked the nurse who he should treat with and she recommended Dr. Jiang for pain management, OMT in Fairbanks, and Advanced Physical Therapy (APT). Employee was not familiar with medical providers in Fairbanks and Anchorage. Nurse Davis initiated the referral to Dr. Mentzer. She requested that Dr. Mentzer refer Employee for OMT therapy, and Dr. Mentzer referred him to Dr. Malcom. Dr. Malcolm had Employee see Dr. Carey and Dr. Driftmier earlier this year. Dr. Carey said Employee needs another surgery. Dr. Mentzer referred Employee for a functional capacities exam (FCE). Employee has only driven a truck for the past 10 years. He did not recall treating with NP Blood in June 2019, but thought he continued treating with Dr. Escobar. Employee was credible. (Employee, June 17, 2021).

49) At hearing Traci Dale's testimony generally supported Employee's testimony regarding his inability to work and treatment received after the work injury. Davis was regularly in the chiropractor's office with Employee after the surgery had occurred. She thought Davis was her husband's nurse from workers' compensation. No other physicians were discussed with Dr. Lovell and Davis other than Dr. Mentzer. Employee's second shoulder surgery was not successful. He underwent physical therapy in Anchorage and Fairbanks. Employee was currently treating with Dr. Malcolm. He had continued neck concerns. Dr. Johnson had been treating Employee before the work injury but the Horner's Syndrome was new. Dale was a credible witness. (Dale, June 17, 2021).

50) On June 11, 2021, Employer filed its hearing brief. Its analysis regarding the change of attending physician included in part that on June 12, 2019, Employee "began treating with Casey Blood, NP at Goldstar Longevity and Wellness. This represents [Employee]'s one time change of physician under 8 AAC 45.081." (Employer brief, June 11, 2021). Employer impliedly accepted this change of physician. (*Rogers & Babler*). Employer's brief also represented that Employee "again changed physicians to Dr. Escobar at Solstice Medicine and Wellness. This represents Mr. Dale's second change of physician under 8 AAC 45.082." (Employer brief, June 11, 2021).

51) No evidence of a written acceptance of change of designated physician by Employer was provided. (Agency file).

52) On June 11, 2021, Employee requested 49.20 hours of attorney's fees at \$450 per hour, and \$165.30 in costs. (Affidavit of Attorney's Fees and Costs, June 11, 2021). On June 21, 2021, Employee requested an additional 5.7 hours of attorney time at \$450 per hour. (Final affidavit of Attorney's Fees and Costs, June 21, 2021).

53) On July 22, 2021, Employee underwent an EME with Amit Sahasrabudhe, M.D. Dr. Sahasrabudhe found that the substantial cause of Employee's "left shoulder related symptoms disability and need for treatment is the industrial accident in question." He found additional treatment "extremely unlikely" to further benefit Employee's left shoulder. Employee was found to have reached medical stability as of July 22, 2021. (Sahasrabudhe EME report, July 22, 2021).

54) On July 30, 2021, specific benefits were denied by Employer: TTD/TPD after March 3, 2021; reemployment benefits; all benefits related to the spine; all left shoulder medical benefits except home exercise and/or aerobic conditioning programs and palliative OMT treatment. (Controversion Notice, July 30, 2021).

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The general purpose of workers' compensation statutes is to provide workers with a simple, speedy remedy to be compensated for injuries arising out of their employment. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978). The board may base its decisions not only on direct testimony 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 23.30.041. Rehabilitation and reemployment of injured workers. (a) The director shall select and employ a reemployment benefits administrator. The director may authorize the administrator to select and employ additional staff. . . .

(b) The administrator shall

(1) enforce regulations adopted by the board to implement this section;

(2) recommend regulations for adoption by the board that establish performance and reporting criteria for rehabilitation specialists;

(3) enforce the quality and effectiveness of reemployment benefits provided for under this section;

....

(6) maintain a list of rehabilitation specialists who meet the qualifications established under this section;

(7) promote awareness among physicians, adjusters, injured workers, employers, employees, attorneys, training providers, and rehabilitation specialists of the reemployment program established in this subsection.

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, or an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. The administrator may grant up to an additional 30 days for performance of the eligibility evaluation upon notification of unusual and extenuating circumstances and the rehabilitation specialist's request. 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 of 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 an 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 the 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."

(f) An employee is not eligible for reemployment benefits if

(1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;

(2) the employee previously declined the development of a reemployment benefits plan under (g) of this section, received a job dislocation benefit under (g)(2) of this section, and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury;

(3) the employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury; or

(4) at the time of medical stability, no permanent impairment is identified or expected.

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the process of recovery requires . . . [w]hen 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 consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.

(b) If the employee is unable to designate a physician and the emergency nature of the injury requires immediate medical care, or if the employee does not desire to

designate a physician and so advises the employer, the employer shall designate the physician. Designation under this subsection, however, does not prevent the employee from subsequently designating a physician for continuance of required medical care.

....

AS 23.30.395. Definitions. In this chapter

(3) “attending physician” means one of the following designated by the employee under AS 23.30.095(a) or (b):

- (A) a licensed medical doctor;
- (B) a licensed doctor of osteopathy;
- (C) a licensed dentist or dental surgeon;
- (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
- (E) a licensed advanced practice registered nurse; or
- (F) a licensed chiropractor;

The RBA’s decision must be upheld absent an abuse of discretion. Abuse of discretion exists when a decision has been issued “which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive.” *Sheehan v. Univ. of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962). Failure to apply controlling law or to exercise sound legal judgment may equate to an abuse of discretion. *Manthey; Corbell v. Gen’l Teamsters Local 959*, AWCB No. 01-0175 at 3 (September 10, 2001). Failure to consider statutory mandates is an abuse of discretion. In determining eligibility for reemployment benefits, the RBA must consider the opinion of Employee’s treating physician. *Irvine v. Glacier Gen’l Const.*, 984 P.2d 1109 (Alaska 1999). Failure to do so would “deprive [Employee] of a choice that AS 23.30.041(e) apparently meant to give him.” *Id.* at 1107.

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; an employee does not designate a physician as an attending physician if the employee gets service

....

(B) from a physician

- (i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;
- (ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or
- (iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

....

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 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 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 reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

8 AAC 45.180. Costs and attorney's fees.

....

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed.

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

....

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim

Attorney's fees in Alaska workers' compensation cases should be "fully compensatory and reasonable" to ensure injured workers have "competent counsel available to them." *Childs v. Copper Valley Elec. Ass'n.*, 860 P.3d 1184, 1190 (Alaska 1993); *Wise Mechanical Contractors v. Bignell*, 718 P.3d 971 (Alaska 1986).

The factors set out in ARPC 1.5(a) are reviewed to determine attorney's fee awards. *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.2d 784, n. 51 (Alaska 2019). Those factors are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Each factor is to be considered and findings or explanation made as to why the factor was not relevant. The presumption of compensability does not apply to the amount of fees and their reasonableness. *Rusch*. If an attorney's fee award under AS 23.30.145(a) and (b) is reasonable, then an award of statutory fees on benefits awarded and divided between actual fees incurred through hearing and fees on future benefits is also reasonable. *State of Alaska v. Wozniak*, AWCAC Dec. No. 276 (March 26, 2020).

ANALYSIS

1) Did the RBA abuse her discretion in finding Employee ineligible for reemployment benefits?

The RBA's finding of ineligibility for reemployment benefits must be upheld absent an abuse of discretion. *Sheehan; Manthey*. Abuse of discretion may apply where the decision was arbitrary, capricious, manifestly unreasonable, or stems from an improper motive. *Sheehan*. Not applying controlling law or following statutory mandates is an abuse of discretion. *Irvin; Manthey; Corbell*.

The RBA's ineligibility finding is based upon the eligibility report and recommendation of RS Harmon, including physician predictions of Employee's physical capacity to perform the demands of specified job descriptions. The only physician from whom Harmon obtained job predictions was Employee's most recent surgeon, Dr. Mentzer, who was identified as Employee's attending physician in the eligibility report. Based this alone, the RBA's determination that Employee was not eligible for reemployment benefits is not arbitrary, capricious, or manifestly unreasonable, nor does it appear to stem from an improper motive.

The RBA is required, however, to consider the predictions of Employee's attending physician. *Irvine*. A review of the medical records to date, as well as the Employee's deposition testimony and the hearing testimony of both Employee and his spouse, reveal the following about Employee's attending physician:

1. Employee sought treatment with Dr. Escobar approximately four days after the work injury, thus designating her as his attending physician. 8 AAC 45.082(b)(2).
2. Employee then transferred his care to NP Blood approximately three months after the work injury, constituting Employee's single change of physician. AS 23.30.095(a). Employee could not make an additional change of attending physician without the written consent of Employer. *Id.*
3. No evidence of Employer's written consent to any further change was provided.
4. NP Blood referred Employee for chiropractic care; referral to a specialist does not equate to a change of attending physician. AS 23.30.095(a).
5. Employee began chiropractic treatments with Dr. Lovell.
6. Dr. Lovell referred Employee to Dr. Mentzer. Testimony at hearing indicated this referral stemmed from Employer's nurse case manager, Davis. Dr. Lovell's chart notes indicate Davis had provided the names of providers or directed a referral on at least one other occasion -- the note that appears in the records from February 6, 2020 through February 20, 2020 states "referred to North Star Radiology . . . these were ordered per Tracy Davis, [Employee]'s work comp nurse." Dr. Mentzer is not Employee's attending physician. 8 AAC 45.082(b)(2)(B)(i-iii).

Employee's attending physician is NP Blood, who does not appear to have examined Employee for two years.

The RBA could not reasonably have known of the issues regarding the referral to Dr. Mentzer at the time she reviewed the eligibility report and recommendation from Harmon. Deposition and hearing testimony clarifying this matter could not have reasonably been developed and provided to the RBA before she made her initial eligibility finding; Employee's attorney did not file an entry of appearance until March 24, 2021, seven days before Harmon filed her revised recommendation

and report on March 31, 2021, and 20 days before the RBA issued her eligibility determination on April 13, 2021.

The RBA did not consider the opinion of Employee's attending physician prior to making her eligibility determination. This constitutes an abuse of discretion requiring remand to the RBA for further action. *Irvine; Manthey*.

2) Is Employee entitled to an award for attorney's fees and costs?

Employee requests attorney's fees and costs. AS 34.30.145(a)-(b); 8 AAC 45.180(b). Attorney's fees may be awarded when an employer controverts payment of benefits, and an attorney is successful in obtaining benefits for his client. AS 23.30.145(a); *Childs*. Employer controverted Employee's reemployment benefits, providing for an attorney's fee award under AS 23.30.145(a). Employee filed his initial fee affidavit on June 22, 2021; the record was held open to accept a supplemental filing as stipulated by the parties at hearing. Employee filed his final affidavit of attorney's fees and costs on June 21, 2021.

Employee timely filed and successfully argued his petition for review and is entitled to an award of attorney's fees and costs relating to the petition. AS 23.30.145(a); 8 AAC 45.180(f). Employee did not file any evidence relating to the factors required to be reviewed under *Rusch*. Pursuant to *Rusch*, the eight factors of Alaska Rule of Professional Conduct 1.5(a) are as follows:

1. *The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.*

This case was somewhat novel and complex, and legal counsel's experience was of great benefit in timely spotting issues related to the petition. *Rogers & Babler*.

2. *The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.*

To some extent, the acceptance of any case would preclude the attorney involved from using that time for another matter. *Rogers & Babler*.

3. *The fee customarily charged in the locality for similar services.*

Fees awarded to attorneys of like experience are commonly awarded by Fairbanks hearing panels at \$400 per hour, with recent awards reaching \$450 per hour. *Rogers & Babler*.

4. *The amount involved and the results obtained.*

The amount involved is limited by reemployment statutes and regulations. Employee's counsel obtained a positive result, successfully obtaining remand to the RBA for further action. *Rogers & Babler*. Employee's right to future reemployment benefits is uncertain at this time.

5. *The time limitations imposed by the client or the circumstances.*

The time limitations imposed by the client and the circumstances were substantial, requiring counsel to review medical records containing multiple referrals and to research and file a petition in a shortened timeframe. *Rogers & Babler*.

6. *The nature and length of the professional relationship with the client.*

No specific information was provided relevant to this factor other than the fee affidavit; it indicated that approximately three months had passed from the time of the first consultation to the hearing.

7. *The experience, reputation and ability of the lawyer or lawyers performing the services.*

The attorney performing the service is highly experienced and has a good reputation. He regularly obtains positive results for clients in workers' compensation matters. *Rogers & Babler*.

8. *Whether the fee is fixed or contingent.*

This matter, like nearly all workers' compensation cases, is based on a contingent fee. *Rogers & Babler*.

After consideration of the above factors, recent awards at \$450 per hour, and no objection being received from opposing counsel, attorney's fees will be awarded at the rate of \$450 per hour.

Employee requested a total of 54.90 hours of attorney time; no objection was made by Employer's attorney. A review of the billed hours does not reveal duplicate billings or excessive hours charged

for the referenced work. No reductions will be made; Employee will be awarded attorney's fees in the amount of \$24,705.00 through hearing on June 17, 2021.

Employee requested deposition costs in the amount of \$165.30, related to the hearing. Employer made no objection. No additional costs were requested. Employee will be awarded costs in the amount of \$165.30.

Employee additionally requested attorney's fees for future benefits. AS 23.30.145(a); *Wozniak*. Fees are allowed only on the amount of actually controverted and awarded. AS 23.30.145(a). While Employer has controverted reemployment benefits, they have not been awarded to date and thus an award of future fees would be premature. Fees will not be awarded on future reemployment benefits.

Employee is entitled to \$24,705.00 in fees and \$165.30 in costs, for a total award of \$24,870.30. In light of the benefit obtained for Employee and the time expended, this is a reasonable, fully compensatory amount. AS 23.30.145(a); *Bignell; Childs*.

CONCLUSIONS OF LAW

- 1) The RBA abused her discretion in finding Employee ineligible for reemployment benefits.
- 2) Employee is entitled to an award of attorney's fees and costs.

ORDER

- 1) Employee's April 16, 2021 Petition for Review of Reemployment Benefit Administrator's Decision is GRANTED.
- 2) The RBA Designee's determination that Employee is ineligible for reemployment benefits is VACATED and REMANDED to the RBA Designee.
- 3) The RBA shall instruct the rehabilitation specialist:
 - a. To obtain any and all medical records filed on medical summaries not currently in her files;
 - b. To obtain any and all medical records not yet filed on medical summaries;

- c. To obtain the predictions of NP Blood (or any attending physician designated by Employee for whom Employer has issued a written consent to change of physician) concerning Employee's permanent impairment, if any, and their predictions on Employee's ability to perform jobs in his ten-year work history in accordance with 8 AAC 45.525(a) and (b);
- d. To explain the reemployment process to NP Blood or any designated attending physician as noted in #3, above, and inform them what information, in the form of predictions, is needed from them;
- e. To consider the predictions of the attending physician in forming her recommendation; and
- f. To issue other direction or instruction to the rehabilitation specialist as the RBA Designee, in her discretion, deems appropriate.

4) Employee's request for attorney's fees and costs is GRANTED. Employer shall pay Employee's attorney \$24,705.00 in fees and \$165.30 in costs.

Dated in Fairbanks, Alaska on August 10, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Cassandra Tilly, Designated Chair

/s/
Julie Duquette, Member

/s/
Lake Williams, 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

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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 JEFFERY L DALE, employee / claimant v. LYNDEN INC, employer; ACE AMERICAN INS CO, insurer / defendants; Case No. 201912497; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on August 10, 2021.

/s/
Ronald C. Heselton, Office Assistant II