ALASKA WORKERS' COMPENSATION BOARD

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

PATRICIA KNAPP, f / k / a / PATRICIA VIKEN, Employee, Claimant, v. FAIRBANKS RESOURCE AGENCY, Employer, and ARROWOOD INDEMNITY CO., Insurer, Respondents.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200304713 AWCB Decision No. 13-0122 Filed with AWCB Fairbanks, Alaska on October 1, 2013

Patricia Knapp's (Employee) February 16, 2012 petition seeking a second independent medical evaluation (SIME) was heard on August 8, 2013 in Fairbanks, Alaska. This hearing date was selected on May 17, 2013. Employee appeared and represented herself. Attorney Michael A. Budzinski appeared and represented Fairbanks Resource Agency (Employer). The record closed at the hearing's conclusion on August 8, 2013.

ISSUES

The parties generally agree on the need for a SIME; however, they disagree on its scope. Employee contends the SIME should not only address the issues of causation and medical treatment for her left shoulder symptoms, but should also include the issues of disability, permanent partial impairment (PPI) and medical stability related to that condition. Employer contends the 2005 Compromise and Release (C&R) agreement resolved disability and

reemployment benefits and only left open medical benefits. Therefore, Employer contends the SIME should only address causation and medical treatment, regardless of the body part.

1) What issues should the SIME address?

The parties seek an interpretation of a 2005 C&R. Employee, who originally injured her right shoulder and neck in 2003, contends her condition has progressed to now include her left shoulder. She contends the 2005 C&R only settled issues related to her right shoulder condition and, even though she currently seeks only medical benefits, she contends the agreement would not preclude potential disability and reemployment benefits arising from her left shoulder condition.

Employer contends the 2005 C&R settled disability and reemployment benefits arising from any condition as a result of the 2003 work injury. It seeks an order precluding any benefits other than medical benefits based on the 2005 C&R.

2) Does the 2005 C&R preclude additional disability and reemployment benefits arising from the 2003 work injury?

FINDINGS OF FACT

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

1) Employee has an extensive medical history, including chronic right shoulder pain, cervical pain and headache. She frequently treated with many providers for these conditions since 2002 and her medical record consists of approximately 1,000 pages. (Record; observations).

2) On March 5, 2002, Employee reported she injured neck while working as a nurse's aide for Employer when she and a co-worker lifted a client. Employee stated she had neck and shoulder pain following the incident. (Ballard report, November 8, 2008).

3) The record does not contain contemporaneous documents specifically describing the March 5, 2002 work injury. (Record, observations).

4) On March 7, 2002, David Eastram, M.D. ordered Employee off work following a reported right shoulder injury. (Eastram prescription form, March 7, 2002; observations).

5) On April 26, 2002, Employee sought treatment for headaches, which begin in her trapezious region and extend up. Findings included muscle spasm in trapezious with tenderness on palpation. Headache due to chronic recurrent trapezious muscle spasm was diagnosed. (Morrell report, April 26, 2002).

6) On May 15, 2002, Employee sought treatment from Robert Dingeman, M.D. for right shoulder pain after lifting one of her impaired clients while working for Employer. On physical examination, Dr. Dingeman noted right trapezial spasm and guarding. He diagnosed right shoulder supraspinatus syndrome and ordered a non-steroidal anti-inflammatory drug and physical therapy. (Dingeman report, May 15, 2002).

7) Treatment with Dr. Dingeman included a cortisone injection to cortisone injection to Employee's right acromioclavicular (AC) joint, a TENS unit and physical therapy. (Dingeman reports, June 7, 2002; June 25, 2002; Certificate of Medical Necessity, June 25, 2002).

8) July 23, 2002 x-rays showed no abnormalities of Employee's right shoulder. (Zuckerman report, July 23, 2002).

9) On July 23, 2002, Dr. Dingeman performed an arthroscopic acromioplasty and bursectomy of the right AC joint. (Dingeman report, July 23, 2002).

10) Employee saw Dr. Dingeman for several follow-up evaluations. She continued to complain of right trapezious spasm and shoulder pain. Employee also had complaints of headaches. Dr. Dingeman referred Employee for a neurological consultation. (Dingeman reports, July 25, 2002; August 8, 2002; August 21, 2002; Dingeman letter, September 9, 2002).

11) On October 15, 2002, Dr. Dingeman noted a neurological consultation resulted in negative findings for intrinsic radiculopathy, structural lesion or an increase in cranial pressure. A cervical spine x-ray was unremarkable. (Dingeman report, October 15, 2002, Hatten report, October 15, 2002).

12) An October 21, 2002 cervical magnetic resonance imaging (MRI) study showed no disk herniation or nerve root impingement, but mild disk bulging was noted at multiple levels from C3-4 through C5-6. (Chen report, October 21, 2002).

13) Employee continued to complain of diffuse discomfort in her right trapezial area and occasional discomfort in her right AC joint. (Dingeman report, November 13, 2002; Dingeman report, December 2, 2002).

14) On March 19, 2003, Employee injured her right shoulder and neck while shaking hands with Employer's client when the client jerked her hand. (Report of Occupational Injury or Illness, March 25, 2003).

15) Employer accepted the March 19, 2003 injury as compensable and began paying benefits. (Compensation report, April 4, 2003).

16) Employee continued to complain of "unrelenting" and "dramatic" pain in her posterior right shoulder as well as loss of motion in that shoulder. Dr. Dingeman administered a cortisone injection to Employee's AC joint. (Dingeman reports, April 3, 2002; April 7, 2002)

17) On April 30, 2003, a right shoulder x-ray showed a resection of the distal clavicle but was otherwise unremarkable. Dr. Dingman performed an open partial claviculectony and repeated acromioplasty. (Hatten report April 30, 2003; Dingeman report, April 30, 2003).

18) Employee continued to complain of right shoulder pain, neck aches, headaches and shoulder weakness and limited range of motion. Dr. Dingeman opined Employee was medically stable as of August 20, 2003. (Dingeman report, May 5, 2003; May 19, 2003; May 30, 2003; July 23, 2003; August 20, 2003).

19) On September 10, 2003, Loren Jensen, M.D. performed an employer medical evaluation (EME). Dr. Jensen opined the cause of Employee's shoulder condition was the lifting incident in March 2002 and the hand-shaking injury on March 19, 2003 was an exacerbation of 2002 lifting injury. Dr. Jensen stated Employee was medically stable at the time of her exam and rated her shoulder condition as a five percent whole person permanent impairment. (Jensen report, September 10, 2003).

20) During the fall of 2002, Employee began treating with Mark Wade, M.D. (Wade report October 7, 2003).

21) On December 8, 2003, Dr. Dingeman concurred with Dr. Jensen's five percent permanent impairment rating. (Dingeman response to adjuster letter, October 6, 2003).

22) On May 9, 2004, Employee continued to have consistent shoulder pain. X-rays taken that day showed evidence of either a nonunion clavicle fracture or an incomplete clavicle osteotomy. Dr. Wade ordered a computer tomography (CT) scan. (Wade report, May 9, 2004).

23) On March 23, 2004, Dr. Wade stated the CT scan clearly showed a nonunion of the distal clavicle. He opined Employee likely suffered an undiagnosed, inter-operative traumatic injury that caused a coincidental fracture of the clavicle. Dr. Wade thought the nonunion was the

source of Employee's chronic pain and planned surgical intervention to excise the distal fragment of the nonunion site. (Wade report, March 23, 2004).

24) On April 15, 2004, Employee returned to Dr. Wade seeking answers to questions about her right shoulder. She specifically asked about what Dr. Wade thought happened during her previous surgery. Dr. Wade explained he was not present during the procedure and it was difficult for him to ascertain what happened, but he though Employee may have sustained a partial, incomplete distal clavicle resection, which resulted in the nonunion. He explained to Employee "no doubt this is the source of her pain." Employee indicated she wanted to proceed with the proposed surgery. (Wade report, April 15, 2004).

25) On April 22, 2004, Employee saw Dr. Wade, who assessed a failed distal clavicle excision with nonunion. He stated "I think the pain [Employee] is having is definitely involved with the nonunion at the distal clavicle site." (Wade report, April 22, 2004).

26) On April 23, 2004, Dr. Wade performed a revision excision of the distal clavicle with osteophyte take-down, an anterior acromioplasty with subacromial decompression and extensive lysis of adhesions. He also inserted a Marcaine pump. (Wade report, April 23, 2004).

27) Following surgery, Employee was doing very well with respect to range of motion and postoperative stiffness. Employee pain was "significantly less," she was "very pleased with her right shoulder and she was returning to her normal lifestyle." (Wade reports, June 15, 2004; July 27, 2004).

28) As of November 1, 2004, Dr. Wade thought Employee was medically stable and could return to her job at the time of injury. He opined Employee had no permanent impairment. (Wade responses to October 6, 2004 adjuster's letter, undated).

29) On November 11, 2004, Employee returned to Dr. Wade complaining of pain across her right shoulder and into her neck. Employee reported "all of her pain has returned." Dr. Wade stated: "I do not think that she should have the type of pain she is having given the surgical release. Range of motion, [sic] she has regained in her right shoulder. I think she has a chronic pain syndrome." Dr. Wade referred Employee to a pain clinic. (Wade report, November 11, 2004).

30) On December 6, 2004, Employee began treating with Lawrence Stinson, M.D. for pain management of her shoulder condition. (Stinson report, December 6, 2004).

31) On December 7, 2004, Dr. Stinson diagnosed right suprascapular neuralgia and right subacromial bursitis and administered a Marcaine injection. (Stinson report, December 7, 2004).

32) On January 4, 2005 and January 18, 2005, Dr. Stinson performed radio frequency ablation of Employee's right suprascapular nerve. (Stinson reports, January 4, 2005; January 18, 2005).

33) On January 31, 2005 Employee complained to Dr. Stinson of significant right neck pain and "occipital frontal" headache. (Stinson report, January 31, 2005).

34) On February 1, 2005, Dr. Stinson diagnosed cervicothoracic and suprascapular myofacial pain and administered trigger point injections in the right paracervical, suprascapular, trapezius and rhomboid musculature. (Stinson report February 1, 2005).

35) On February 28, 2005, Dr. Stinson ordered a cervical magnetic resonance imaging (MRI) study. (Stinson report, February 28, 2005).

36) A March 3, 2005 MRI showed mild disk bulging at C3-4 and C4-5. There was no traumatic disk herniation, nerve root impingement, spinal stenosis, ligamentous injury or soft tissue edema. Bony alignment, marrow and spinal cord signals were all normal. (MRI report, March 3, 2005).

37) On March 9, 2005, the parties entered into a compromise and release agreement (C&R), which was approved on April 19, 2005. The C&R's claim history reports both the March 5, 2002 and March 19, 2003 right shoulder and neck injuries. Relevant portions of the C&R stated:

> In order to resolve all disputes between the parties with respect to compensation rate or compensation for disability under the Alaska Workers' Compensation Act including, but not limited to: 1) claims for any and all kinds of disability benefits including temporary partial, temporary total, permanent partial and permanent total; 2) compensation rate adjustment; 3) interest; and 4) penalties; the employer and carrier will pay to the employee a maximum of ELEVEN THOUSAND, TWO-HUNDRED AND NINETY FOUR DOLLARS ($11,294.00), as outlined below, for full consideration thereof. The employee accepts such compromise amount in full and final settlement and in payment of all compensation rate or compensation for disability under the Alaska Workers' Compensation Act including, but not limited to: 1) claims for any and all kinds of disability benefits including temporary partial, temporary total, permanent partial and permanent total; 2) compensation rate adjustment; 3) interest; and 4) penalties which the employee might be presently owed or to which the employee might become entitled at any time in the future pursuant to the terms of the Alaska Workers' Compensation Act.
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> It is further agreed . . . the employer and carrier will continue to pay the employee's tuition costs through North Star Computing for the medical

receptionist plan . . . up to the outlined plan expense of FOUR THOUSAND, NINE HUNDRED AND THIRTY DOLLARS ($4,930.00) . . . . The employer further agrees to continue providing .041(k) stipend wages until the Board approves this Agreement. Final payment of the balance of tuition costs represents a compromise amount in full and final settlement and in payment of reemployment plan costs as outlined in AS 23.30.041(1).

Upon approval of this Agreement, the employer will pay a lump sum of .041(k) benefits in the amount of FOUR-THOUSAND AND FIFTY DOLLARS ($4,050.00), representing .041(k) wages from plan commencement on January 17, 2004 through plan completion on May 15, 2004, less the amount of any wages paid from January 13, 2004 through the date of Board approval of this agreement . . . . The employee accepts this compromise amount in full and final settlement and in payment of all compensation benefits as outlined in AS 23.30.041(k).

The employer agrees to provide an additional ([sic] TWO-THOUSAND, THREE-HUNDRED AND FOURTEEN DOLLARS ($2,314.00) directly to the Sylvan Learning Center for benefits outlined in the reemployment plan . . . as a compromise amount in full and final settlement and in payment of all other reemployment plan benefits as outlined in AS 23.30.041.

As to transportation costs, the employee may submit any travel expenses related to medical or vocational travel to her adjuster for approval and payment for dates of travel up to the date of the Board's approval of this Agreement. Upon Board approval of this Agreement, the employer and carrier will provide a lump sum payment for any vocationally-related travel, based a five-day work week, from the date of Board approval of this Agreement until the date of the employee's last class on April 28, 2005. This lump sum payment reflects a full and final settlement of all vocationally-related travel expenses only, with medically-related travel remaining open pursuant to the provisions of AS 23.30.095(m).

It is agreed the employer and carrier will be responsible under the terms of the Alaska Workers' Compensation Act for reasonable and necessary medical benefits, which although incurred in the future, are attributable to the condition described herein. . . .

It is the intent of the parties to this agreement to compromise all benefits which might be due to the employee pursuant to the terms of the Alaska Workers' Compensation Act, with the exception of future medical benefits as outlined above. To this end, and for such purpose, the parties agree that, upon final approval of this Compromise and Release by the Alaska Workers' Compensation Board and payment of the amounts recited herein, this Compromise and Release shall be enforceable and shall forever discharge the liability of the employer and carrier to the employee . . . for all benefits which could be due or might be due in the future . . . with the exception of future medical benefits as outlined above. It is agreed that the employee's condition and disability, including any condition

> and disability . . . which may arise in the future, or be continuing or progressive in nature, and that the nature and extent of such condition and resulting disability may not be fully known at this time. By execution of this Compromise and Release, the employee acknowledges an intent to release the employer and carrier from any and all liability arising out of or in any way connected to the condition referred to above, and any known or as yet undiscovered disabilities, injuries or damages associated with such condition. This Compromise and Release shall be effective in discharging the employer and carrier of all liability whatsoever nature for all past, present, and future compensation benefits . . . with the exception of future medical benefits as outlined above. . . . [T]he parties mutually waive any right they may have to set aside this settlement agreement . . . . [T]he parties agree that the payments made and the claims released . . . shall be final and binding . . . .

(C&R Agreement, April 19, 2005).

38) Employee continued to treat extensively with Dr. Stinson through 2007. Subsequent treatment concentrated on Employee's complaints of cervical pain and headache and consisted of prescription medicine, including: Medrol Dosepak, Vicodin, morphine, Toradol, Tramadol, Valium, Lidoderm patches, Lidociane gel, methadone, Neurotonin, Cymbalta, Lyrica, topical Ketamine along with Clonidine and Combunox, Baclofen, Topamax, Roserem; cervical epidural steroid injection; Marcaine nerve root injection; radio frequency ablation; physical therapy; and acupuncture. (*E.g.* Stinson reports, March 14, 2005; April 14, 2005; May 6, 2005; May 12, 2005; June 10, 2005; July 7, 2005; October 13, 2005; October 28, 2005; December 9, 2005; March 8, 2006; September 15, 2006; December 21, 2006; June 7, 2007; September 27, 2007; December 6, 2007; Fairbanks Memorial Hospital EMR report, March 25, 2005; Advance Physical Therapy reports, July 14, 2005; July 19, 2005; August 11, 2005; August 18, 2005; August 23, 2005; September 15, 2005; September 20, 2005; September 22, 2005; September 27, 2005; October 11, 2005; November 15, 2005; November 17, 2005; November 19, 2005; December 29, 2005; January 10, 2006; January 12, 2006; February 14, 2006; February 16, 2006; March 2, 2006; March 7, 2006; March 9, 2006; March 14, 2006; March 21, 2006; Triplehorn reports, August 23, 2007; September 7, 2007).

39) On March 15, 2006, Loren Jensen, M.D. performed an employer's medical evaluation (EME). Upon physical examination, Employee complained of pain on palpation to her right shoulder and cervical spine, even with the lightest touch test. Dr. Jensen was unable to complete portions of the examination due to Employee's pain complaints. X-rays showed an unremarkable shoulder. Dr. Jensen diagnosed chronic pain syndrome, right shoulder, status post

multiple surgeries and did not find any evidence of a cervical spine condition. Dr. Jensen did not think a neurosurgical evaluation was appropriate, but suggested an assessment by a chronic pain specialist since she did not have expertise in that area. (Jensen report, March 15, 2006).

40) On September 14, 2006, Employee told Dr. Stinson she did not wish to participate in any further physical therapy or continue taking the wide variety of medications since these modalities had not been effective for her. Dr. Stinson agreed and stated it was unlikely further outpatient treatment would be effective and suggested several out-of-state pain management programs. (Stinson report, September 14, 2006).

41) In 2006 and 2007, Dr. Stinson and Employee continued to discuss out-of-state pain management programs, particularly Stanford University. (*Id.*; Stinson reports, November 9, 2006; December 21, 2006; January 4, 2007; February 1, 2007; March 29, 2007; Stinson letter, December 15, 2006).

42) Employee eventually did contact the Stanford pain management program, but cancelled a June 2007 appointment because her neighbors had their house "blow up" as the result of a propane leak. The explosion damaged Employee's house and she had to be present for repairs. (Stinson report, April 26, 2007).

43) In 2008, Employee began complaining of lumbar spine pain and sought treatment, primarily from the Fairbanks Memorial Hospital (FMH) Emergency Department. (*E.g.* FMH Emergency Department reports, June 24, 2008; September 3, 2008; FMH Pain Clinic report, August 29, 2008; October 28, 2008).

44) On November 8, 2008, John Ballard, M.D., performed an EME. Dr. Ballard diagnosed chronic, right quadrant pain type syndrome. There was no evidence of pain behavior or symptom magnification on examination and Dr. Ballard thought Employee was "honest and straightforward" in her presentation. He opined the March 5, 2002 injury and the three shoulder surgeries were the cause of Employees' condition. Dr. Ballard did not believe Employee required further orthopedic treatment, pain management injections or surgery, but did think a pain management program was reasonable. (Ballard report, November 8, 2008).

45) In 2009, Employee sought treatment for right shoulder and cervical pain from Marc Slonimski, M.D. Dr. Slonimski diagnosed Employee with torticollis and recommended botulinum toxin injections, which Employee declined. Medications prescribed included

Topamax and Flector patches. Dr. Slonimski referred Employee to Nancy Croft, M.D. for pain management. (Slonimski reports, March 12, 2009; April 2, 2009; May 28, 2009).

46) Employee briefly treated with Dr. Croft for her cervical pain. Dr. Croft diagnosed degenerative disk disease of the cervical spine, cervical spondylosis and cervical facet arthrosis. She ordered an MRI, which showed a small protrusion at C4-5producing a mild narrowing of the central canal and disk bulging at C5-C6-C7. The disk bulge at C6-7 was more prominent to the right of midline and produced mild canal compromise. Medications prescribed included Topamax, Roserem, and Zanaflex. (Cross reports, August 4, 2009; September 8, 2009).

47) A September 22, 2009 cervical x-ray showed the vertebral bodies to be intact and in normal alignment. There was minor spurring anteriorly at C5-6. Disk spaces were adequately maintained and flexion and extension views showed normal movement. No thickening was shown in pre-vertebral soft tissue. (Gill report, September 22, 2009).

48) On October 15, 2009, Employee returned to Dr. Slonimski for pain management treatment. Dr. Slonimski considered a spinal cord stimulator. (Slonimski reports, October 15, 2009; November 3, 2009; March 2, 2010; March 16, 2010).

49) May 1, 2010, Dr. Ballard performed an EME. His diagnosis continued to be chronic pain syndrome of the upper right quadrant, but now was spreading to the left side of her neck. Dr. Ballard stated the March 19, 2003 injury was the substantial factor for Employee's condition and her need for treatment. However, he stated it was impossible to objectively determine if a musculoskeletal condition was causing her symptoms and he could not opine why Employee had failed to respond to treatment. Later in his report, Dr. Ballard stated the March 5, 2002 work injury was the substantial factor for Employee's condition, as he did in his 2008 report, based on Employee's continuing symptoms. The only future treatment he recommended was a neuropsychological evaluation to determine if there was psychological or somatic basis for Employee's symptoms. (Ballard report, May 1, 2010).

50) On May 18, 2010, Employee returned to Dr. Stinson for pain management treatment. Employee desired to proceed with spinal cord stimulator trial. (Stinson reports, May 18, 2010; July 13, 2010; September 7, 2010).

51) On November 30, 2010, spinal cord stimulator leads were implanted. (Stinson report, November 30, 2010).

52) On December 9, 2010, Employee reported the spinal cord stimulator did not provide her with greater than eighty percent coverage of her most painful areas. The spinal cord stimulator leads were removed. (Runser report, December 9, 2010).

53) On May 26, 2011, Employee filed the instant claim in response to a May 19, 2011 controversion seeking only medical benefits and requesting an SIME. (Claim, May 26, 2011).

54) On August 31, 2011, Dr. Stinson wrote a "To Whom It May Concern" letter and stated Employee would likely require medication, including muscle relaxants and analgesics on an intermittent basis for the rest of her life as a result of her chronic neck and shoulder pain. (Stinson letter, August 30, 2011).

55) On September 27, 2011, Employee saw Dr. Stinson complaining of bilateral neck and shoulder pain. Employer said her shoulder pain, which was previously right-sided, is now "just as bad" on her left. Employee also continued to report headaches at the base her skull. Employee and Dr. Stinson decided to try botox injections to alleviate muscle spasm. (Stinson report, September 27, 2011).

56) At a May 17, 2013 prehearing, the parties agreed to present the instant issues at hearing for determinations. (Prehearing Conference Summary, May 17, 2013).

PRINCIPLES OF LAW

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

Employment may still be the substantial cause of an employee's disability or need for medical treatment even though the employee had a preexisting condition.

> It is a fundamental principle in workers' compensation law that the employer must take the employee "as he finds him." A pre-existing condition does not disqualify a claim if the employment aggravates, accelerates or combines with the preexisting condition to produce the disability for which compensation is sought."

Keays v. Amerigas, Inc., AWCB Decision No. 11-0178 (December. 19, 2011) (citations omitted).

> **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 injury or the process of recovery requires . . . .
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> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .
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> **AS 23.30.110. Procedure on Claims.** . . . . (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination. . . .

8 AAC 45.090(b) provides for orders requiring an employer to pay for an employee's examination pursuant to AS 23.30.095(k) or §110(g). Section 095(k) and §110(g) are procedural in nature, not substantive, for the reasons outlined in *Deal v. Municipality of Anchorage*, AWCB Decision No. 97-0165 (July 23, 1997) at 3; *see also Harvey v. Cook Inlet Pipe Line Co.*, AWCB Decision No. 98-0076 (March 26, 1998). Considering §135(a) and §155(h), wide discretion exists under AS 23.30.110(g) to consider any evidence available when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims, to best "protect the rights of the parties."

The Alaska Workers' Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under §095(k) and §110(g). With regard to §095(k), the Commission referred to its decision in *Smith v. Anchorage School District*, AWCAC Decision No. 050 (January 25, 2007), at 8, in which it confirmed:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

The Commission further stated in *dicta*, before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME will assist the board in resolving the dispute. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008), at 4.

The Commission outlined the board's authority to order an SIME under §110(g), as follows:

> [T]he board has discretion to order an SIME when there is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it. . . . Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filing in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties.

Id. at 5.

Under either §095(k) or §110(g), the Commission noted the purpose of ordering an SIME is to assist the board, and is not intended to give employees an additional medical opinion at the expense of employers when employees disagree with their own physician's opinion. *Id.* When deciding whether to order an SIME, the board typically considers the following criteria, though the statute does not require it:

1) Is there a medical dispute between Employee's physician and an EME?

2) Is the dispute significant? and

3) Will an SIME physician's opinion assist the board in resolving the disputes?

Deal v. Municipality of Anchorage (ATU), AWCB Decision No. 97-0165 (July 23, 1997), at 3. *See also*, *Schmidt v. Beeson Plumbing and Heating*, AWCB Decision No. 91-0128 (May 2, 1991). Accordingly, an SIME pursuant to §095(k) may be ordered when there is a medical dispute, or under §110(g) when there is a significant gap in the medical or scientific evidence.

Further the Commission holds an SIME may be ordered when, because of a lack of understanding of the medical evidence, the parties' rights cannot be ascertained. It stated:

> Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the parties in the dispute before the board.

Bah at 8.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

When a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice it may be filed at a later date when it becomes timely. *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000) (applied in *Bankhead v. Yardarm Knot, Inc.*, AWCB Decision No. 13-0084 (July 18, 2013).

The doctrine or ripeness pertains to whether there is an actual controversy between the parties. *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Decision No. 153 (June 14, 2011) at 5 (citing *Brause v. State, Dept. of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001)). "Ripeness asks whether there yet any need for the court to act." *Id*.

> The concept of ripeness can be explained in both abstract and practical formulations. The abstract formulation is that ripeness depends on 'whether ... there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' On a more practical level, our ripeness analysis fundamentally 'balances the need for decision against the risks of decision.' We examine 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'

Settje at 5 (quoting *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (citations omitted)).

Consideration of the "risks of the decision" refers to the risks of deciding hypothetical cases. *Settje* at 6 n.76.

Previous decisions have addressed whether certain issues were ripe for hearing. For examples, PPI was an issue ripe for hearing when the EME physician opined the employee did not suffer a work injury, when the SIME physician opined the employee did not sustain a permanent impairment and when Employee understood she needed a rating to obtain PPI benefits but failed to obtain one. *Settje* at 6. The issue of a reemployment benefits evaluation was not ripe for hearing when neither party requested an evaluation and the Reemployment Benefits Administrator had not ruled on any request. *Kha Do v. Kuykendall, Inc.*, AWCB Decision No. 09-0185 (December 4, 2009) at 21. Compensation rate adjustment was not an issue ripe for hearing when the prehearing conference summary did not list it as an issue for hearing. *Id*. The issue of PPI was not ripe for hearing when Employee was not yet medically stable. *Id*. Similarly, PPI and reemployment benefits were not issues ripe for hearing when the employee had not yet undergone recommended surgery. *Ramondino v. Sportsman's Warehouse Inc.*, AWCB Decision No. 12-0214 (December 20, 2012) at 2-3.

> **AS 23.30.155. Payment of compensation.** . . . . (h) The board may upon its own initiative at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been increased, reduced, terminated, changed, or suspended, upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been increased, reduced, terminated, changed, or suspended, make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

ANALYSIS

1) What issues should the SIME address?

The parties agree on the need for an SIME, but disagree on the issues to be addressed. Employer contends the SIME should only address the issues of causation and medical treatment. Employee contends a more comprehensive SIME should be performed and the evaluation should also include the issues of disability, permanent impairment and medical stability. When it

entered the 2005 C&R agreement, Employer agreed to remain responsible for medical benefits, which Employee has subsequently claimed. In this case, there is both a dispute of medical opinion and a gap in the medical evidence. First, Dr. Ballard's May 1, 2010 report recommended no further treatment other than a neuropsychological evaluation. Since then Dr. Stinson has recommended botox injections and has stated Employee will require lifetime muscle relaxants and analgesics. Second, even after Employee's extensive treatment, there remains a gap concerning the etiology of her complaints. As early as 2004, Dr. Wade struggled to understand an organic basis for Employee's symptoms. Since then, the record clearly demonstrates numerous other physicians have wrestled with this dilemma as well. Additionally, the multitude of treatments attempted has failed. Therefore, given the present dispute over medical benefits, the issues of causation and treatment clearly need to be addressed by the SIME physician. AS 23.30.010(a); AS 23.30.095(a).

Furthermore, although Employee's initial condition involved her right shoulder and neck, beginning in 2011, she now complains of symptoms involving her left shoulder as well. Employer is correct. The issues of causation and medical treatment need to be addressed regardless of body part. Perhaps Employee's relatively recent, left shoulder complaints are a progression of symptoms related to the original 2002 and 2003 work injuries, perhaps not. In either case, an SIME inquiry including the issues of causation and medical treatment for Employee's left shoulder symptoms will assist the board in determining the parties' rights in the instant dispute. AS 23.30.110(g); AS 23.30.155(h).

2) Does the 2005 C&R preclude additional disability and reemployment benefits arising from the 2003 work injury?

The parties essentially seek a declaratory judgment on whether or not the 2005 C&R precludes an award of disability and reemployment benefits for Employee's left shoulder symptoms. To date, Employee has only claimed medical benefits, so there is not yet an actual controversy between the parties concerning disability and reemployment benefits. Rather, the parties seek a prospective decision on hypothetical claims.

Until such claims are made, the need for a ruling is unknown. The parties did not identify a need for a ruling at hearing and neither did they identify any potential hardship in the absence of a ruling. Furthermore, it is not immediately apparent what hardship would befall the parties by withholding consideration of the issue. Therefore, the decision sought is not ripe for determination and a ruling will not issue. *Settje*. Any potential, future controversies between the parties will be decided as the needs arise.

CONCLUSIONS OF LAW

1) The SIME will address the issues of causation and medical treatment, including Employee's left shoulder symptoms.

2) A determination of whether the 2005 C&R precludes hypothetical claims for disability and reemployment benefits arising from Employee's left shoulder symptoms is not ripe for adjudication.

ORDER

The SIME shall be conducted as set forth above.

Dated in Fairbanks, Alaska on October 1, 2013.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 Decision and Order in the matter of PATRICIA KNAPP employee / claimant v. FAIRBANKS RESOURCE AGENCY, employer; ARROWOOD INDEMNITY CO., insurer / defendants; Case No. 200304713; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on October 1, 2013.

/s/_____
Nicole Hansen, Office Assistant II