ALASKA WORKERS' COMPENSATION BOARD

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

PEDRO ERPELO, Employee, Claimant, v. TRIDENT SEAFOODS, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201102068 AWCB Decision No. 14-0106 Filed with AWCB Anchorage, Alaska, on August 4, 2014

Pedro Erpelo's (Employee) February 20, 2013 workers' compensation claim was heard on July 30, 2014, in Anchorage, Alaska, a date selected on May 8, 2014. Employee appeared by telephone, represented himself and testified. Attorney Jeffrey Holloway appeared and represented Trident Seafoods and Liberty Insurance Corporation (Employer). Tagalog language interpreter Alma Andrews appeared by telephone and provided translation. Member Amy Steele disclosed a potential conflict of interest, and voluntarily recused herself. Thereafter the hearing proceeded with a two-member panel, which constitutes a quorum. The panel orally denied Employee's request for a hearing continuance or cancellation. The panel orally sustained Employer's objection to adding future medical care as an issue for the July 30, 2014 hearing. This decision examines the two oral orders and addresses Employee's claim on its merits. The record closed at the hearing's conclusion on July 30, 2014.

ISSUES

As a preliminary matter, Employee requested a hearing continuance or cancellation. He contended he needed an attorney and one was reviewing his case file but had not had enough time to decide whether or not to represent him.

Employer contended the hearing was scheduled at Employee's request. It contended he had ably represented himself through numerous prehearing conferences, obtained a second independent medical evaluation (SIME), and did not present "good cause" under the appropriate regulations to justify a hearing continuance or cancellation.

1) Was the oral order declining to continue or cancel Employee's July 30, 2014 hearing correct?

Employer contended the designee erred by allowing Employee to add future medical care as an issue for the July 30, 2014 hearing. It contended only permanent partial impairment (PPI) was properly presented for decision.

Employee contended he properly added future medical care as an issue for this hearing at a prehearing conference. He contended the designee was correct in allowing him to add this issue and it should be heard at the July 30, 2014 hearing, along with PPI.

2) Was the oral order sustaining Employer's objection to Employee adding future medical care as an issue for the July 30, 2014 hearing correct?

Employee contends his attending physician properly rated him at 10 percent permanently partially impaired and to date he has only been paid seven percent PPI. He contends he is entitled to three percent more in PPI benefits.

Employer contends it properly paid seven percent PPI based upon the SIME's opinion. It contends Employee's physician did not follow the American Medical Association *Guides the Evaluation of Permanent Impairment*, 6th Edition (*Guides*) in calculating Employee's rating.

3) Is Employee entitled to additional PPI benefits?

FINDINGS OF FACT

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

1) On February 22, 2011, Employee injured his right wrist when his hand was crushed by a "hopper," while he was working for Employer as a seafood processor (Report of Occupational Injury or Illness, February 22, 2011).

2) Employer accepted the injury as compensable and began paying Employee benefits (Compensation Report, October 14, 2011).

3) On January 12, 2013, orthopedic surgeon George Nanos, M.D., saw Employee at Employer's request for an employer's medical evaluation (EME). Dr. Nanos diagnosed as work-related conditions: 1) a right distal radius fracture; and 2) right carpal tunnel syndrome. He diagnosed as non-work-related conditions: 3) right deQuervain tenosynovitis; 4) right wrist radial sensory nerve neuritis; 5) ulnar-sided wrist pain with possible triangular fibrocartilage complex tear; 6) right distal radioulnar joint instability; and 7) right ring finger retinacular cyst. Employee had no pre-existing conditions and no objective physical examination findings. Dr. Nanos opined Employee needed no further curative treatment for his work-related injury. In respect to a PPI rating, Dr. Nanos stated:

> For the conditions considered related to the industrial injury, utilizing the Guides to the Evaluation of Permanent Impairment, 6th Edition, according to 15-3 Wrist Grids for Fracture, the examinee is Class 0, and therefore without ratable impairment. According to 15-21 and 15-23 for peripheral neuropathy impairments, the examinee is also Class 0 and Grade modifier 0, and without ratable impairment. According to Table 15-32 for wrist range of motion impairments, I would rate a 1 percent impairment for minimal loss of wrist extension. According to Table 15-11, this equates to 1 percent of the whole person.

Dr. Nanos released Employee to work without any restrictions (Nanos EME report, January 12, 2013).

4) On or about January 29, 2013, Employer paid Employee $1,770 in lump-sum PPI benefits based on Dr. Nanos' one percent PPI rating (Compensation Report, February 4, 2013).

5) On January 30, 2013, based on Dr. Nanos' report, Employer controverted additional temporary total and temporary partial disability, PPI in excess of one percent and on-going medical treatment arising from the industrial injury (Controversion Notice, January 29, 2013).

6) On February 25, 2013, Employee filed a claim seeking temporary total disability, PPI and transportation costs. In the "reason for filing claim" section, Employee explained "medical treatment is still ongoing," his physician had not yet released him and he was still feeling pain and swelling on his right wrist (Workers' Compensation Claim, February 20, 2013).

7) On May 3, 2013, Employee filed a hearing request on his February 20, 2013 claim (Affidavit of Readiness for Hearing, April 30, 2013).

8) On May 10, 2013, Employer opposed Employee's hearing request stating the case was not ready for hearing as discovery had not been completed (Affidavit of Opposition, May 10, 2013).

9) On September 5, 2013, the parties attended a prehearing conference. The designee advised Employee to seek a referral from his attending physician to another doctor for a PPI rating. The transportation issue was "resolved." Employee amended his claim to request an SIME (Prehearing Conference Summary, September 5, 2013).

10) On September 19, 2013, Employee's attending physician John Bednar, M.D., performed a PPI rating evaluation. Dr. Bednar diagnosed: 1) a radial "TFCC" tear, right wrist; 2) instability, right wrist distal radioulnar joint; 3) status post fracture, right distal radius; 4) status post release, right first extensor compartment; 5) residual median neuropathy, right wrist; and 6) mass, palm, right-hand, rule out retinacular cyst. Dr. Bednar did not believe Employee needed additional therapy or surgery to improve his functional status, and provided a permanent, 10 pound, bimanual, work lifting restriction. As for PPI under the *Guides* 6th Edition, Dr. Bednar opined:

> Using the table 15-3 Grid for distal radial fracture, in my opinion Mr. Erpelo is a Class I Level E with a 5% upper extremity impairment. His radial sided TFC tear which occurred at the time of this distal radial fracture also using table 15-3 is a Class I Level E with a 10% impairment. In addition the residual median neuropathy with chronic EMG change is rated using Table 15-23 with a Grade modifier 1 upper extremity impairment of 2%. This represents a total 17% impairment of the upper extremity or 10% impairment of the whole person (Bednar report, September 19, 2013).

11) Dr. Bednar's PPI rating is not in accordance with the *Guides*' protocol (experience, judgment, observations).

12) On November 5, 2013, the parties attended another prehearing conference and stipulated to moving forward with the SIME. The summary states the parties stipulated to several SIME issues to be addressed (Prehearing Conference Summary, November 5, 2013).

13) On November 25, 2013, Employer's counsel wrote to the designee objecting to statements contained in the November 5, 2013 prehearing conference summary. Employer objected to all SIME issues except PPI (letter, November 22, 2013).

14) On March 3, 2014, the designee scheduled an SIME with orthopedic surgeon David Gaw, M.D., (letter, March 3, 2014).

15) On April 2, 2014, Dr. Gaw saw Employee for an SIME. Dr. Gaw took a medical and injury history, and performed a physical examination. He diagnosed: 1) healed nondisplaced fracture of the distal radius on the right; 2) post-op carpal tunnel release on the right; 3) post-op surgery for deQuervain's disorder on the right; 4) MRI scan findings of a tear involving the triangular fibrocartilage ligament; and 5) mild, right wrist motion loss. As for PPI, Dr. Gaw opined:

> IMPAIRMENT: Based upon the protocol of the sixth edition of the AMA Guidelines, as described on 387, only one diagnosis per region is to be rated. Therefore, Dr. Bednar has erred in assessing this gentleman's impairment as he has rated the triangular fibrocartilage injury as well as the fracture. The triangular fibrocartilage tear/injury, the fractured distal radius *or* the loss of movement can be used in assessing the impairment. *The carpal tunnel syndrome, however, would be rated separately* (Gaw report, April 2, 2014, at 4; emphasis in original).

Dr. Gaw clearly described how he derived his PPI rating by referring to specific pages and tables from the *Guides*, and showed his calculations. Using the diagnosis based rating method, Dr. Gaw rated the right wrist fracture, residual pain and symptoms with normal activity, and mild soreness, and applied the appropriate grade modifiers. Using this method, he determined Employee had four percent PPI to the right upper extremity. However, Dr. Gaw noted as Employee lacked normal wrist movement, the range of motion method could be used in assessing impairment. Range of motion impairment stands alone and is not combined with the diagnosis impairment, according to Dr. Gaw. Therefore, again citing the appropriate pages and tables from the *Guides*, Dr. Gaw determined Employee lacked right wrist flexion and extension equaling six percent PPI to the right upper extremity using this method. Dr. Gaw rated the triangular fibrocartilage complex tear as eight percent PPI to the right upper extremity, which when added to the appropriate grade modifiers for pain and symptoms with normal activity and mild soreness, totaled nine percent PPI to the right upper extremity. Dr. Gaw noted the *Guides* say if it provides more than one method to rate a particular impairment, the method producing

the higher rating must be used. Dr. Gaw found the higher rating for Employee's condition would be the one related to his triangular fibrocartilage complex tear, which is nine percent PPI to the right upper extremity. Furthermore, Dr. Gaw evaluated Employee's carpal tunnel syndrome, applied grade modifiers for test findings, history and physical findings, and derived two percent PPI to the right upper extremity for this condition. Lastly, Dr. Gaw determined Employee's "*Quick*DASH" score used to determine placement within a grade modifier was 39, placing him in the mid-range which is two percent PPI to the right upper extremity. Dr. Gaw combined nine percent for the triangular fibrocartilage complex tear and two percent for carpal tunnel to obtain 11 percent PPI for the upper extremity, which he converted to seven percent PPI to the whole person using the appropriate table and the Combined Values Chart (Gaw report, April 2, 2014).

16) On May 8, 2014, the parties attended a prehearing conference and discussed the SIME report. Employee objected mildly to the designee setting a hearing because he wanted to "settle" his case. The parties briefly discussed settlement but, when they were unable to come to an agreement, the designee set Employee's claim for hearing on July 30, 2014. Employee mentioned he might need "assistance" preparing for hearing and conceded he had the attorney list he was previously provided. However, he did not say he did not want a hearing scheduled because he did not yet have an attorney. The only issue set for hearing at this prehearing conference was the appropriate PPI rating (Prehearing Conference Summary, May 8, 2014).

17) On May 19, 2014, Employee wrote the designee requesting another prehearing conference "in addition to the one scheduled on June 26, 2014" so he could add issues regarding his future medical treatment and work restrictions imposed by his attending physician (letter, May 16, 2014).

18) On June 26, 2014, the parties attended another prehearing conference at which the stated purpose was "to add future medical treatment as an issue for the July 30, 2014 hearing." At the prehearing conference, Employer stated it had paid an additional six percent PPI for a total of seven percent PPI paid, leaving three percent PPI in dispute. Employee asked to delay the hearing, noting a "potential medical appointment" the last week in July. The designee denied his request based on speculation concerning the medical appointment. Employee explained he wanted future medical treatment and the designee asked if there were then-current recommendations for treatment from his treating physician. As Employee explained he had not seen his physician since September 2013, the implicit answer was "no." The designee advised

Employee to ask his doctor if further medical treatment was needed for his work injury. The summary further stated:

> **The designee set a hearing for 7/30/2014 for two hours. The only issue is the degree of permanent partial impairment.** *Future medical treatment is added as an issue for the 7/30/2014 hearing* (Prehearing Conference Summary, June 26, 2014; emphasis in original).

19) On July 7, 2014, Employer through counsel wrote the designee and objected to the June 26, 2014 prehearing conference summary. Employer contended the summary denied Employer due process and was "in error." Employer objected to not having received Employee's May 16, 2014 letter seeking to add future medical treatment as an issue for hearing. Employer contended this could not "be added" as an issue for hearing and stated "procedural due process mandates that the employer be served with a claim actually seeking medical benefits" and be allowed to answer and conduct discovery (letter, July 3, 2014).

20) On July 9, 2014, Employee filed a petition to which he attached a letter to the designee. In response to the designee's instructions at the last prehearing conference, Employee stated he was "restricted" from medical appointments with his physician because Employer had not paid the last two medical bills totaling approximately $310. He also had received a collection letter demanding payment. Employee was attempting to retain an attorney who needed 25 days to review his file. Employee did not specifically request a hearing continuation or cancellation, but implied he was not quite ready for hearing as he lacked legal counsel (Petition, July 9, 2014, with attached July 8, 2014 letter; judgment and inferences from the above).

21) At hearing on July 30, 2014, Employee for the first time requested a Tagalog interpreter. The division had previously arranged for a Spanish interpreter, who appeared but was dismissed. The division obtained Tagalog interpreter Alma Andrews who ably interpreted during the entire hearing (observations).

22) Employee next requested a hearing continuation or cancellation. He contended he needed an attorney to represent him, had obtained a copy of his agency file and had presented this to an attorney. The attorney advised Employee he need 25 more days to review the file and determine whether or not he would offer representation. Employee suggested the division was at fault for not responding quickly enough to his file copy request. Employee said he was confused by legal terms and did not know how to respond to the designated chair's or Employer's counsel's

questions. Several times during the hearing, Employee queried whether he had the "right to an attorney" (Employee).

23) Employer contended Employee had ably represented himself through several prehearing conferences. He succeeded in obtaining an SIME. Employer noted Employee submitted cogent letters and pleadings. Employer objected to a continuance or hearing cancellation because Employee's request for an attorney did not constitute "good cause" as required under the applicable regulation. It also noted the legislature's goal for quick, efficient, predictable delivery of benefits to injured workers who deserve them, at a reasonable cost to employers. Employer argued continuing the hearing would create an unreasonable cost because it would require additional, future hearing preparation (Employer's hearing arguments).

24) After deliberation at hearing, the panel orally denied Employee's request for a hearing continuation or cancellation. The panel noted Employee filed cogent pleadings and letters; attended and participated in numerous prehearing conferences; followed instructions; swore by affidavit on April 30, 2013, that he was ready to have a hearing on his claim; successfully obtained an SIME; did not begin to search for an attorney until after the hearing was set in May 2014; did not raise the attorney, continuance or cancellation issue at the last pre-hearing conference prior to hearing; did not meet the "good cause" definition in 8 AAC 45.074(b)(1); and most importantly, another injured worker wanting a hearing had given up their slot so Employee's case could be heard (record).

25) Employer next objected to adding future medical costs as an issue for hearing. It contended Employee could not add an issue at a prehearing conference but had to file a written claim, so Employer could file a formal answer, and obtain necessary discovery (*id*.).

26) Employee contended the designee was correct in allowing him to add future medical costs as an issue for the July 30, 2014 hearing. However, he could not articulate the basis for this issue and had no evidence to submit. Employee said he had paid some medical bills from his pocket, other bills remained unpaid and he needed more treatment but could not point to a particular medical record so stating (Employee).

27) After deliberation at hearing, the panel sustained Employer's objection because Employee was vague and not prepared. The chair advised Employee he could obtain necessary evidence to support any past or future medical benefit claim, file a new claim and ask for another hearing if

the parties could not resolve the medical issues informally. The July 30, 2014 hearing was limited to the PPI issue (record).

28) As to why he was entitled to three percent more PPI, Employee said his treating orthopedic surgeon was as capable as the other examiners in applying the *Guides* and providing a rating. He provided a 10 percent rating and Employee contended this should be given more weight as Dr. Bednar was much more familiar with his case than the other examiners, had seen him more frequently, performed a more thorough examination and understood his condition and symptoms better than the other two physicians. Employee was unable to articulate an issue with either the EME or SIME examinations, but disagreed with their lower PPI ratings (Employee).

29) Employer contended Dr. Gaw performed the PPI rating strictly and solely in conformance with the *Guides*. As it had paid one percent PPI from the EME rating and an additional six percent PPI from SIME Dr. Gaw's report, Employer contended it had paid all the PPI to which Employee was entitled under the law (Employer's hearing arguments).

30) Dr. Gaw's PPI rating was done strictly and solely in conformance with the *Guides* (experience, judgment and inferences drawn from all the above).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.005. Alaska Workers' Compensation Board**. . . .
> . . .
>
> (h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

> **AS 23.30.110. Procedure on claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability . . . and the board may hear and determine all questions in respect to the claim. . . .

The language "all questions" is limited to questions raised by the parties or by the agency upon notice duly given to parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides**. (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. . . . .

> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
> . . .
>
> (e) **Amendments**. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading.
> . . .

> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will

> schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
>
> (1) identifying and simplifying the issues;
> (2) amending the papers filed or the filing of additional papers. . . .
>
> **8 AAC 45.070. Hearings**. . . .
> . . .
>
> (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing. . . .

Chapter 15, The Upper Extremities, in the AMA *Guides* states:

> **15.1 Principles of Assessment**
> . . .
>
> Most impairment values for the upper extremity are calculated using the Diagnosis-Based Impairment (DBI) method. Impairment class is determined by the diagnosis and specific criteria, considered the 'key factor,' and then adjusted by grade modifiers or "non-key factors" that may include functional history, physical examination, and relevant clinical studies. . . .
> . . .
>
> **15.2 Diagnosis-Based Impairment**
> . . .
>
> . . . An impairment will be defined by class and grade. The impairment class is determined first, by using the corresponding diagnosis-based regional grid. The grade is then determined using the adjustment grids provided in section 15.3.
> Once the impairment class has been determined, based on the diagnosis, the grade is initially assigned the default value, "C." The final impairment grade within the class is calculated using the grade modifiers, or non-key factors, as described in section 15.3. Grade modifiers include functional history, physical examination, and clinical studies. . . . The final impairment grade is determined by adjusting the grade up or down from the default value C by the calculated net adjustment.
> . . .
>
> This process is repeated for each separate diagnosis in each limb involved. In most cases only one diagnosis will be appropriate. If the patient has 2 significant diagnoses, for instance, rotator cuff tear and biceps tendonitis, the examiner should use the diagnosis with the highest impairment rating for the impairment calculation. If an examiner is routinely using multiple diagnoses without objective supporting data, the validity and reliability of the evaluation may be questioned (*id*. at 385-87).

Table 15-3, Wrist Regional Grid, places a person with a triangular fibrocartilage complex tear into Class 1 with a default impairment of eight percent of the upper extremity (*id*. at 396). According to Table 15-6, Adjustment Grid; Summary, if "Clinical Studies" are used to place the person into the appropriate class, they are not used as a non-key modifying factor (*id*. at 406). An examiner may use the *Quick*DASH functional assessment outcome questionnaire to evaluate functional symptoms to assist the examiner in defining the grade modifier for "functional history." However, it is not reflected as an impairment percentage (*id*. at 406). Once the patient is placed in the proper class, the examiner begins with the default "C" impairment and adjusts the rating up or down as much as two percent within the class based upon the three non-key factors. But if a non-key factor is used initially to determine the proper class, that factor is not used again to adjust the default rating up or down within the class (*id*.). "The Combined Values Chart (end-of-book Appendix) is used to determine the combined value of 2 impairment percentages" (*id*. at 419). Table 15-11, Impairment Values Calculated from Upper Extremity Impairment, converts upper extremity impairments to whole person impairments. Under Table 15-11, 11 percent upper extremity impairment converts to seven percent whole person impairment (*id*. at 420).

ANALYSIS

1) Was the oral order declining to continue or cancel Employee's July 30, 2014 hearing correct?

Hearing continuances or cancellations are not favored and will not be routinely granted. A hearing may be continued or canceled for "good cause" only. 8 AAC 45.074(b). The regulation lists 13 specific events constituting "good cause," and one general category giving the panel discretion if "despite a party's due diligence, irreparable harm may result from a failure to grant request a continuance or canceling hearing." 8 AAC 45.074(b)(1)(N). Employee's sole reason for requesting a hearing continuance or cancellation was his request to obtain an attorney. Employer objected to the continuance noting that wanting or needing an attorney was not considered "good cause" under the regulation, and further delay deprived Employer of a summary, simple, speedy, quick, efficient and predictable remedy at a reasonable cost. AS 23.30.001(1); AS 23.30.005(h). Employer further contended the hearing was scheduled based upon Employee's request for hearing filed over a year ago.

Employee successfully filed a claim and represented himself at numerous prehearing conferences. He successfully obtained an SIME. On May 3, 2013, Employee by affidavit swore he was fully prepared for hearing on his February 20, 2013 claim. Employee complied with SIME requirements, reviewed medical binders and formulated SIME questions. Once the SIME was completed, in May 2014, the parties attended another prehearing conference. The designee, noting the only issue was PPI and the SIME was done, set the case for hearing on July 30, 2014. The prehearing conference summary shows Employee raised a mild objection to the hearing, based on the fact he "still wanted to settle." Employee stated he did not want a hearing "that soon as he needed more time to prepare." Employee mentioned he "might need assistance in preparing for the hearing," and conceded he had the attorney list previously provided. Shortly thereafter, Employee wrote a letter requesting another prehearing conference to add future medical care as an issue for the July 30, 2014 hearing. His letter did not mention a continuance, hearing cancellation or the need for an attorney.

On June 26, 2014, the parties attended another prehearing conference. Employee successfully added future medical treatment as an issue for the July 30, 2014 hearing. Employee suggested he might have a medical appointment on July 30, 2014, and the designee advised him the hearing would not be rescheduled based on a speculative appointment. Employee again did not mention he needed or wanted an attorney.

On July 9, 2014, Employee filed a petition requesting "other" relief, and attached a letter stating he had an outstanding medical bill with a provider and had contacted an attorney who was reviewing his case but needed 25 more days to make a decision whether or not to represent him. He did not expressly request a hearing continuance or cancellation. Most importantly, Employee conceded he did not begin looking for an attorney until sometime in May 2014. Given his hearing was scheduled for July 30, 2014, it is not surprising Employee had difficulty locating an attorney to represent him on such short notice. He simply waited too long to begin looking for a lawyer. Well over a year ago, Employee swore he was ready for a hearing. He had well over a year to try to find an attorney. Other injured workers were not able to have their hearings heard on July 30, 2014, because Employee's case, at his request, was set for hearing on that date.

Lastly, several times during the hearing Employee expressed disbelief that he did not have a "right to an attorney." Technically, it is not correct to say any party has a "right" to an attorney in a workers' compensation case. This is not a criminal trial where the accused truly has a right to an attorney and one is appointed to represent them if they are indigent. In workers' compensation cases, it is more correct to say parties have the right to try to find an attorney to represent them. The longer they wait to look for an attorney, and the closer it gets to a scheduled hearing, the less likely it is for a party to successfully obtain legal representation. While in some instances a party's last-minute request for an attorney might be enough to satisfy the "good cause" requirement in 8 AAC 45.074(b)(1)(N), given the facts in this case, it is not. Therefore, Employee's request for a hearing continuance or cancellation was correctly denied.

2) Was the oral order sustaining Employer's objection to Employee adding future medical care as an issue for the July 30, 2014 hearing correct?

A person starts a workers' compensation proceeding by filing a written claim or petition. 8 AAC 45.050(a). The Act and regulations provide for liberal claim amendments. Pleadings may be amended at any time "before award" in the panel's or designee's discretion and the amendments typically relate back to the original pleading. 8 AAC 45.050(e). Designees at prehearing conferences have authority to exercise discretion in making determinations on "identifying and simplifying the issues" and "amending the papers filed" including amending claims. 8 AAC 45.065(a)(1-2); *Simon*. The summary controls the hearing issues. 8 AAC 45.065(c). Accordingly, Employer's argument that Employee had to file another written claim seeking specific medical benefits is not well taken. Employer's suggested procedure is not summary and simple and is not quick, efficient and predictable or a reasonable cost to Employer. AS 23.30.001(1); AS 23.30.005(h). The designee at the June 26, 2014 prehearing conference was within her authority to amend Employee's claim and add future medical benefits, and this decision has authority to hear and decide all issues in respect to the claim. AS 23.30.110(a).

However, the main difficulty with Employee's request, and the reason Employer's objection was sustained, was his inability to articulate his medical issue clearly. At hearing, Employee said he had out-of-pocket medical expenses, unpaid medical bills and needed more medical care. He either had a medical record prescribing more care, which he has yet to file and serve, or needed

to see a physician to obtain such a document. In any event, Employee did not have appropriate evidence to support his added claim and was not prepared to address this issue. Therefore, the oral order sustaining Employer's objection to adding future medical costs as an issue for the July 30, 2014 hearing was correct. If Employee has out-of-pocket work-related medical expenses, unpaid work-related medical expenses, or a medical opinion stating he needs further medical care for his work injury, he may obtain supporting documentation, file it, serve it on Employer and file another claim if the parties cannot informally resolve the issues.

3) Is Employee entitled to additional PPI benefits?

PPI ratings must be based strictly and solely on the whole person determination set forth in the *Guides*. AS 23.30.190(b). Employee has three PPI ratings in this case: One percent from EME Dr. Nanos; 10 percent from attending physician Dr. Bednar; and seven percent from SIME physician Dr. Gaw. Employee contends his attending physician Dr. Bednar gave the best rating because he performed the most thorough examination, knows him and his history intimately, is a competent orthopedic surgeon, knows the *Guides*, and therefore is in a better position to rate him properly. Employer has already paid Employee seven percent PPI based upon Dr. Gaw's SIME report. Therefore, the PPI dispute centers on the additional three percent difference between Dr. Gaw's report and Dr. Bednar's opinion.

With due respect to Dr. Bednar, as between the two, only Dr. Gaw strictly and solely followed the *Guides* protocol in rating Employee's PPI. His physical examination was thorough; he reviewed the appropriate medical history, and most importantly, his report clearly and unequivocally documented how he derived his PPI rating. Most notably, Dr. Gaw acknowledged that when two or more conditions may be rated to the same body part, the ratings are not added or combined. The rater must use the higher rating only. Dr. Gaw rated the triangular fibrocartilage complex tear at nine percent PPI, which was higher than the other work-related conditions for Employee's right wrist. Thus, Dr. Gaw correctly used this higher impairment in his determination. He also determined Employee had two percent PPI for his work-related carpal tunnel syndrome, which affected a different area. Dr. Gaw appropriately combined the nine percent and two percent impairments using the Combined Values Chart to obtain 11 percent PPI for the upper extremity. He then properly converted the upper extremity impairment to

seven percent whole body impairment, as the *Guides* require. Dr. Gaw's PPI rating follows the *Guides* in all respects. Dr. Bednar's does not. Therefore, Dr. Gaw's PPI rating is given the greatest weight. AS 23.30.122. As Employer already paid Employee seven percent PPI, he is not entitled to additional PPI and his claim will be denied.

CONCLUSIONS OF LAW

1) The oral order declining to continue or cancel Employee's July 30, 2014 hearing was correct.
2) The oral order sustaining Employer's objection to Employee adding future medical care as an issue for the July 30, 2014 hearing was correct.
3) Employee is not entitled to additional PPI benefits.

ORDER

Employee's February 20, 2013 claim for additional PPI benefits is denied.

Dated in Anchorage, Alaska, on August 4, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Pam Cline, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of PEDRO ERPELO, employee / claimant v. TRIDENT SEAFOODS, employer; LIBERTY INSURANCE CORPORATION, insurer / defendants; Case No. 201102068; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 4, 2104.

_____

Pamela Hardy, Office Assistant