ALASKA WORKERS' COMPENSATION BOARD

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

CHARLIE HAYS, Employee, Petitioner,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201203775
ARCTEC ALASKA, Employer,	)	AWCB Decision No. 15-0095
and	)	Filed with AWCB Fairbanks, Alaska on August 5, 2015
ARCTIC SLOPE REGIONAL CORP., Insurer, Respondents.	)	

Charlie Hays' (Employee) March 25, 2015 oral petition for a second independent medical evaluation (SIME) was heard in Fairbanks, Alaska on May 21, 2015, a date selected on March 25, 2015. Attorney Michael Jensen appeared telephonically and represented Employee. Attorney Robert Bredesen appeared telephonically and represented Arctec Alaska (Employer). There were no witnesses. The record closed at the hearing's conclusion on May 21, 2015.

ISSUE

Employee contends his SIME form documents significant disputes of medical opinion between his treating physicians and Employer's medical evaluator (EME) over his left shoulder, left arm, low back, right shoulder, left wrist and neck conditions. He also contends he recently underwent an L5-S1 decompression procedure and Employer continues to deny benefits related to that condition, as well. Employee contends, if this case were to go to a merits hearing, the board would likely order an SIME, so ordering one now would be more efficient.

Employer opposes Employee's petition on numerous bases. It contends this case is not ready for either an SIME or a merits hearing. Employer contends this case originally involved a 2012 right shoulder injury, but Employee has reported a number of injuries with Employer over the years and his most recent claim appears to be nothing more than an attempt to "shoehorn" all his prior injuries and other bodily ailments into one case number. It contends this case now involves over 30 years of medical treatment for the various injuries claimed, and these records are only now being gathered, so this case is not ripe for an SIME. It further contends there are numerous problems with the questionnaires Employee uses to establish medical disputes for an SIME. Employer contends the questionnaires' questions are "compound," "confused," "malformed," "incomprehensible" and so seriously flawed they cannot even be used as a basis for establishing the presumption of compensability. It also contends Employee's questionnaires are based on a May 18, 2012 injury and a December 11, 2012 physical therapy incident, yet there is no record either of a May 18, 2012 work injury or any record of physical therapy on December 11, 2012. Additionally, Employer contends Employee relies on the physician who treated his right shoulder for opinions concerning his spinal conditions, but Employee's treating physician for both his cervical and lumbar spine conditions is a different doctor, and that doctor has never expressed any opinions indicating those conditions are related to any injury with Employer. It also makes various other contentions denying the work-relatedness or compensability of Employee's left shoulder, left arm, low back, left wrist and neck conditions, and contends Employee's petition for an SIME should be denied.

Should an SIME be ordered for Employee's left shoulder, left arm, low back, right shoulder, left wrist and neck conditions?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:
1) Employee has reported at least 33 injuries with 12 different employers, dating back to 1982. These injuries include: AWCB Case No. 198417628 (back); AWCB Case No. 199025753 (right shoulder); AWCB Case No. 199824566 (back); AWCB Case No. 200012692 (left hand); AWCB Case No. 200026447 (left shoulder); AWCB Case No. 200026448 (left elbow) and AWCB Case

No. 200601618 (neck). (Incident Claims and Expense Reporting system (ICERS) Case Information).

2) Around 1990, Employer underwent a right shoulder Mumford procedure and rotator cuff repair surgery. (Gootee report, March 14, 2012).

3) Employee has reported seven injuries with Employer, dating back to 2009. These include: AWCB Case No. 200914198 (lower back strain); AWCB Case No. 200918157 (lower back strain); AWCB Case No. 201001297 (right index finger); AWCB Case No. 201004236 (left wrist); AWCB Case No. 201009399 (lower back strain); AWCB Case No. 201109725 (back strain) and AWCB Case No. 201203775 (right shoulder strain). (Incident Claims and Expense Reporting system (ICERS) Case Information).

4) On March 8, 2012, Employee reported injuring his right shoulder while lifting a heavy bucket at work. (Report of Occupational Injury or Illness, March 12, 2012).

5) On March 15, 2012, a right shoulder magnetic resonance imaging (MRI) study showed multiple abnormalities, including a high grade supraspinatus tendon tear with retraction. (MRI report, March 15, 2012).

6) On March 22, 2012, Christopher Manion, M.D. performed right shoulder rotator cuff repair surgery. (Operative Report, March 22, 2012).

7) On April 17, 2012, Employee began over nine months of physical therapy at First Choice Physical Therapy. (First Choice report, April 17, 2012 to February 1, 2013).

8) On September 19, 2012, Employee reported to Dr. Manion he had tripped over a log about a week earlier and landed on his right, outstretched hand, which increased his shoulder discomfort. (Manion report, September 19, 2012).

9) The record does not contain a report from First Choice dated December 11, 2012. (Record; observations).

10) On December 31, 2012, Employee reported he was performing physical therapy about two-and-a-half to three weeks previous, when he felt a "pop" in his right shoulder, which caused him significant pain since. (Heald report, December 31, 2012).

11) On January 2, 2013, a computed tomography (CT) study showed a possible superior labrum, anterior to posterior (SLAP) tear, and a partial thickness tear of the supraspinatus tendon. Dr. Manion's physician's assistant, Duane Heald, recommended a subacromial steroid

injection and an intraarticular glenohumeral injection under fluoroscopy. (CT report, January 2, 2013; Heald report, January 4, 2013).

12) On January 15, 2013, a designee for the Reemployment Benefits Administrator (RBA) found Employee ineligible for reemployment benefits based on Dr. Manion's prediction he would have the physical capacities to return to his job at the time of injury. (RBA letter, January 15, 2013).

13) On February 6, 2013, Employee reported continued right shoulder pain along with significant neck stiffness. Dr. Manion was "really concerned" about Employee's cervical spine and ordered an MRI, which showed severe bilateral foraminal stenosis at C4-5 and mild annular bulges at C3-7. (Manion report, February 6, 2013; MRI report, February 6, 2013).

14) On February 15, 2013, James Eule, M.D., evaluated Employee's cervical condition on referral from Dr. Manion. Dr. Eule ordered a CT myelogram to further evaluate surgical options. (Eule report, February 15, 2013).

15) A February 27, 2013 CT myelogram showed multilevel degenerative disease throughout Employee's cervical spine, which was most pronounced at C3-7. (CT report, February 27, 2013).

16) On March 13, 2013, Dennis Chong, M.D., performed an employer's medical evaluation (EME). He diagnosed: 1) right shoulder labral tear with chronic impingement, status post historical previous rotator cuff repair, related to the March 8, 2012 injury; 2) status post right shoulder reconstructive surgery, related to the March 8, 2012 injury; 3) learned voluntary chronic contraction of right shoulder girdle musculature; and 4) chronic preexisting multilevel cervical spine degenerative disease with presumptive diagnosis of spinal stenosis, unrelated to the March 8, 2012 work injury. Dr. Chong did not think Employee's right shoulder was medically stable and cautioned against a third arthroscopic shoulder procedure since Employee's recovery from his March 22, 2012 surgery was unsuccessful. (Chong report, March 13, 2013).

17) On March 21, 2013, Dr. Eule recommended a four-level cervical decompression and fusion to Employee. During the visit, Employee told Dr. Eule he had reported neck pain to Dr. Manion at the time of the March 8, 2012 work injury and asked Dr. Eule for his opinion on whether the work injury met the "State's definition" of "the substantial factor" for his need for cervical treatment. (Eule report, March 21, 2013).

18) On March 26, 2013, in response to an inquiry from Employer's adjuster, Dr. Eule opined the March 8, 2012 work injury was not the substantial cause of Employee's need for cervical spine treatment. (Eule responses, March 26, 2013).

19) On April 11, 2013, Dr. Chong issued an addendum to his March 13, 2013 EME report clarifying that, despite likely preexisting rotator cuff pathology, the March 8, 2012 injury resulted in the "final tear," which resulted in Employee's disability and need for treatment. (Chong addendum, April 11, 2013).

20) On April 24, 2013, in response to an inquiry from Employer's adjuster, Dr. Manion indicated he was recommending Employee continue with physical therapy and possible diagnostic arthroscopic surgery. He opined the March 8, 2012 work injury was not the substantial cause of Employee's current need for shoulder treatment, but rather were caused by the September 2012 trip and fall. Dr. Manion also thought Employee's right shoulder condition was medically stable. (Manion responses, March 26, 2013).

21) On May 17, 2013, Employee saw Dr. Eule for a preoperative visit in advance of a four-level cervical fusion. Dr. Eule discussed potentially using Infuse, a bone grafting agent, during Employee's surgery and potential swallowing problems associated with its use. (Eule report, May 17, 2013).

22) On May 20, 2013, Dr. Eule performed anterior cervical decompressions and fusions at C3-7 and bone grafts using Infuse. Dr. Eule's report indicates he had again discussed potential complications with using Infuse, including severe swelling of the throat and difficulty swallowing and breathing, with Employee prior to surgery. (Operative report, May 20, 2013).

23) On May 30, 2013, Dr. Chong issued an addendum to his March 13, 2013 EME report. In response to Dr. Manion's April 24, 2013 treatment recommendations, he opined Employee's need for further shoulder treatment was likely a result of the September 2012 trip and fall, and also thought Employee's right shoulder was medically stable as a result of the March 8, 2012 work injury. Dr. Chong rated Employee's right shoulder permanent impairment as a two percent whole person impairment. (Chong addendum, May 30, 2013).

24) On June 4, 2013, Employee was seen at Dr. Eule's office for a post-operative visit. Employee was "still having some difficulty swallowing," but appeared "to be doing well." (Moates-Atkins report, June 4, 2013).

25) On July 9, 2013, Employee saw Dr. Eule for a post-operative visit. Employee reported he felt "dramatically better." He still has "a little bit" of pain in his shoulder, "but it feels like it is actually in his shoulder now." Dr. Eule opined Employee was doing "reasonably well." (Eule report, July 9, 2013).

26) On August 20, 2013, Employee saw Dr. Eule for a follow-up visit and reported stepping backwards into a hole, which "really jarred his neck and he was pretty sore for a couple of days, but that got better." Dr. Eule noted Employee's trachea moved well during swallowing and he hoped Employee's swallowing would continue to improve. He also was "a little bit concerned" about apparent "toggling" around the screws at C6-7 that appeared on x-rays that day. Dr. Eule thought it would now be safe for Employee to see Dr. Manion for his shoulder complaints. (Eule report, August 20, 2013).

27) On August 26, 2013, Employee saw Dr. Manion for further evaluation of his right shoulder. Employee reported he was having some difficulty swallowing, as well as breathing difficulty when he tilts his head back. Dr. Manion discussed a possible diagnostic arthroscopy and biceps tenotomy, but did not want to proceed while Employee was still healing from his neck surgery. (Manion report, August 26, 2013).

28) On October 22, 2013, Employee saw Dr. Eule for a follow-up visit and complained of swallowing difficulties and reported choking "pretty regularly." Employee appeared grossly intact neurologically, and his balance and coordination seemed to be improved. X-rays that day showed "good solid fusion" at all levels with no loss of instrumentation fixation. Dr. Eule thought Employee should begin physical therapy to improve his range of motion and referred Employee to a speech therapist for a swallow evaluation. He also encouraged Employee to speak to his ear, nose and throat (ENT) doctor about his swallowing problems. (Eule report, October 22, 2013).

29) On November 21, 2013, Employee was diagnosed with dysphagia at the Mat-Su Regional Medical Center. (Hays report, March 26, 2014).

30) On December 6, 2013, Employee was seen at Dr. Eule's office for a follow-up. He reported falling and landing on the back of his head about two or three weeks previously. Employee sought treatment at the local emergency room, but was still concerned about having problems with his balance and coordination. Employee also reported falling two or three more times since his initial fall. He felt a little bit clumsy in general. Dr. Eule decided to monitor

Employee's gait and balance abnormalities, and contemplated ordering an MRI and a neurological referral if these abnormalities trended downward. (Eule report, December 6, 2013).

31) On January 29, 2014, Employee saw Dr. Eule for increasing neck pain after falling in early December, and reported worsening right shoulder pain as well. Dr. Eule noted there might be "a little bit" of motion at C5-6 on the flexion and extension films taken that day and decided to order a CT myelogram to evaluate whether there was any fracture or pseudoarthrosis that was "adding to the problem." (Eule report, January 29, 2014).

32) A February 4, 2014 cervical CT myelogram showed lucencies around fixation screws at and lucency in the center aspect of the fusion hardware at C7. The report states: "Please correlate for interval injury that may account for these findings." There was no evidence of vertebral body fracture. (CT report, February 4, 2014).

33) On February 18, 2014, Employee saw Dr. Eule for a follow-up after the cervical CT myelogram. Dr. Eule had "some concern" for psuedoarthrosis at C6-7 and he did not see "any good bridging bone there." He also had "some concern" that C5-6 may not be healed as well. Dr. Eule thought C3-4 and C4-5 appeared to be "somewhat healed, not robustly, but at least reasonably." He opined Employee might have "just stirred things up" after his fall and contemplated adding posterior cervical instrumentation to get Employee's fusion to heal the rest of the way. (Eule report, February 18, 2014).

34) On March 27, 2014, Dr. Manion performed a right shoulder diagnostic arthroscopy along with extensive debridement of the glenohumeral joint and subacromial space. (Operative report, March 27, 2014).

35) On April 8, 2014, Employee resumed physical therapy sessions at First Choice for his right shoulder. Physical therapy sessions were conducted two and three times per week. (First Choice report, April 8, 2014 to September 16, 2014).

36) On April 15, 2014, Employee followed-up with Dr. Eule for continuing neck pain. Dr. Eule ordered a left-sided intralaminar injection at C7-T1. (Eule report, April 15, 2014).

37) On April 22, 2014, Employee received a left C7-T1 epidural steroid injection. (Levine report, April 22, 2014).

38) On May 7, 2014, Employee saw Dr. Manion for a follow-up visit on his right shoulder and reported continued trapezial discomfort and neck pain. Dr. Manion thought there was nothing

further he could do for Employee's right shoulder from a surgical standpoint, and thought some of Employee's complaints were related to his cervical pathology. (Manion report, May 7, 2014).

39) On May 30, 2014, Dr. Eule spent "a lot of time" reviewing x-rays and the CT myelogram with Employee. He thought Employee had "a very difficult problem," and he "hate[d]" to think about considering surgery again," but thought Employee was running out of options since he had failed to improve with conservative treatment. Dr. Eule considered performing a posterior fusion and ordered an MRI "to look for soft tissue things" he may have missed. (Eule report, May 30, 2014).

40) On June 13, 2014, a cervical MRI showed improved alignment and significantly improved canal diameter compared to a prior study. Previously noted C3-4 and C4-5 stenosis was no longer present. However, neural foraminal stenosis was noted at C3-4. (MRI report, June 13, 2014).

41) On July 3, 2014, Employee followed-up with Dr. Eule after his most recent cervical MRI. After reviewing the films with Employee, Dr. Eule thought the "good new [was] there [was] nothing dramatically wrong with [Employee's] neck, but the bad news [was] that he is still having pain." Dr. Eule decided to order a C3-4 transforaminal epidural steroid injection. (Eule report, July 3, 2014).

42) On July 10, 2014, Employee received a left C3-4 epidural steroid injection. (Gevaert report, July 10, 2014).

43) On September 10, 2014, Dr. Manion ordered a work hardening program for Employee's right shoulder. (Manion order, September 10, 2014).

44) On September 18, 2014, Employee began daily work hardening sessions at First Choice. (First Choice reports, September 18, 2014 to October 9, 2014).

45) On October 2, 2014, Employee followed-up with Dr. Eule for neck pain and reported the last injection had provided him with dramatic relief on his left side but he was still having pain on the right shoulder and behind the shoulder blade on the right side. Employee also reported "tweaking his back" while doing work hardening. Dr. Eule thought Employee's neck was "reasonably stable" at that point and did not think Employee's symptoms were coming from his neck. He also doubted Employee's ability to return to work and questioned whether work hardening was going to be a "valid" effort for him. (Eule report, October 2, 2014).

46) On October 10, 2014, Employee saw James Glenn PA-C, who performed a "Medicaid Consultation" for lower back pain. Employee reported he was performing work hardening about a week-and-a-half previous, when he had an immediate onset of pain "in the small of [his] back and bilateral butt cheeks." He also reported left foot numbness and tingling pain into his right posterior thigh and knee. After reviewing x-rays taken that day, PA Glenn thought Employee might have a wedge compression fracture at his L1 vertebra. He ordered an MRI and a discontinuation of Employee's work hardening. (Glenn report, October 10, 2014).

47) An October 17, 2014 lumbar MRI showed an anterior compression fracture of the superior end plate of L1, which was likely chronic, and a small diffuse disc bulge at L5-S1 without significant canal stenosis, but moderately severe bilateral neural foraminal stenosis. (MRI report, October 17, 2014).

48) On October 21, 2014, Employee returned to see PA Glenn who, after reviewing the MRI and consulting with a radiologist, also thought Employee's fracture was old and ordered resumption of Employee's work hardening program. (Glenn report, October 21, 2014).

49) On October 17, 2014, Employee saw Dr. Manion for a follow-up visit. Dr. Manion noted Employee was "a very sickly gentleman," was "still deconditioned," and had "multiple other issues going on." He thought nothing further could be done for Employee's right shoulder from a surgical standpoint, and planned to refer Employee to a pain management program, "once he gets his back sorted out." Dr. Manion did not think Employee's "constellation of problems" was still related to the work injury, and Employee may need job retraining or require permanent disability. (Manion report, October 17, 2014).

50) On November 20, 2014, Employee followed-up with PA Glenn for his lower back pain. PA Glenn ordered an epidural steroid injection. (Glenn report, November 20, 2014).

51) On November 21, 2014, Employee resumed his work hardening program at First Choice. (First Choice report, November 21, 2014).

52) On December 3, 2014, Employee received an L5-S1 interlaminar epidural steroid injection. (Johnson report, December 3, 2014).

53) On January 12, 2015, Employee saw Dr. Manion for a "Medicaid Established Patient New Condition." Employee reported increased pain and grinding in his left shoulder after starting his work hardening program. "He [was] also complaining of left wrist pain from a work injury." Dr. Manion noted Employee's appointment was listed under Medicaid, but Employee contended

it should be through workers' compensation. Dr. Manion advised Employee to file a claim "to make sure that happens." X-rays taken that day showed significant AC joint arthrosis. Dr. Manion reminded Employee to make sure he gets his left wrist "worked up through Workmen's Compensation and as far as the shoulder is concerned, to make sure that is Workmen's Compensation as well." (Manion report, January 12, 2015).

54) On January 12, 2015, Duane Heald, PA-C, who works in Dr. Manion's practice, provided responses to two sets of questions posed by Employee. The first set of questions inquires about Employee's "current left shoulder, left arm and/or back symptoms and/or conditions." The second set of questions asks about Employee's "right shoulder symptoms and/or conditions." Both sets of questions purportedly relate to Employee's "May 18, 2012" injury. Following each question, two lines, labeled "YES" and "NO," were provided for PA Heald to indicate his responses, as well as spaces for "COMMENTS." Without comments, PA Heald marked "Yes" lines indicating Employee's "May 18, 2012" injury was the substantial cause of his "current left shoulder, left arm and/or back symptoms and/or conditions;" Employee would not be suffering his "current left shoulder, left arm and/or back symptoms or conditions" if he had not been injured on "May 18, 2012;" Employee's "left shoulder, left arm and/or back symptoms or conditions" required ongoing medical treatment; Employee's "left shoulder, left arm and/or back symptoms or conditions" had not reached medical stability; and Employee's "left shoulder, left arm and/or back symptoms or conditions" will result in a whole person permanent partial impairment. Similarly, PA Heald also checked the corresponding "YES" lines on the "right shoulder symptoms and/or conditions" questionnaire indicating the "May 18, 2012 injury and the resulting December 11, 2012 physical therapy incident" was the substantial cause of Employee's "current right shoulder symptoms and/or conditions;" Employee would not be suffering his "current right shoulder symptoms and/or conditions if it had not been for the "May 18, 2012 injury" and the "resulting December 11, 2012 physical therapy incident;" Employee's "right shoulder symptoms or conditions" required ongoing medical treatment; Employee's "right shoulder symptoms or conditions" had not reached medical stability; and Employee's "right shoulder symptoms or conditions" will result in a whole person permanent partial impairment. (Heald responses, January 12, 2015).

55) On January 13, 2015, Employer controverted benefits related to Employee's back condition on the basis his work injury involved his right shoulder. (Controversion Notice, January 13, 2015).

56) On January 20, 2015, First Choice wrote a "To Whom It May Concern" letter that contends Employee aggravated a pre-existing back condition while participating in work hardening for his right shoulder injury. The letter references numerous chart notes documenting Employee's back complaints. It also contends, "[o]n November 25, 2014 [Employee] said he had been in Anchorage to talk to the workers' compensation company and his lawyer. He told us 'I think my shoulder, my back, my neck and my other shoulder and wrist were all work related. I found claim numbers for all of it.'" (First Choice Physical Therapy letter, January 20, 2015).

57) On January 21, 2015, a left shoulder MRI showed a near circumferential labral tear and nearly a full thickness tear of the supraspinatus muscle. (MRI report, January 21, 2015).

58) On January 22, 2015, Dr. Chong performed an employer's medical evaluation (EME) and diagnosed: 1) status post right shoulder rotator cuff repair, related to the March 8, 2012 work injury; 2) status post right shoulder reconstructive surgery, related to the March 8, 2012 work injury; 3) aggravation of right shoulder subsequent to trip and fall over log in September 2012, unrelated to the March 8, 2012 work injury, 4) chronic, preexisting multilevel cervical spine degenerative disease, unrelated to the March 8, 2012 work injury; 5) status post anterior cervical discectomy and fusion C3-7 with plating, unrelated to the March 8, 2012 work injury; 6) dysphagia with massive weight loss as a complication of anterior cervical discectomy and fusion, unrelated to the March 8, 2012 work injury; 7) likely preexisting multilevel lumbar spine degenerative disease with spondylosis, unrelated to the March 8, 2012 work injury; and 8) chronic low back subsequent to fall in mud with twisting injury while fishing in August 2014, unrelated to the March 8, 2012 work injury. He opined Employee had recovered from his work related, right shoulder injury by September 2013, or six months after the surgical repair in March of 2012. Dr. Chong thought Employee's severe emaciation as a result of his dysphagia substantially affected his right shoulder function, but the March 2014 surgery resulted from physical therapy to address his neck pain and severe deconditioning, not the March 8, 2012 work injury. Although Employee's right shoulder impairment had substantially increased since 2013, Dr. Chong attributed any increase in impairment to severe deconditioning and emaciation resulting from dysphagia. He also thought the reasonableness of Employee's physical therapy

was "questionable" given his severely emaciated state. The only work restriction Dr. Chong attributed to the March 8, 2012 work injury was light-duty work with a 35-pound lifting restriction and "rare overhead shoulder activities." (Chong report, January 22, 2015).

59) On January 26, 2015, First Choice Physical Therapy filed claim seeking medical costs for Employee's right shoulder injury. The provider also included an annotation on its claim form that states: "* 9-22-14 patient said back was hurting him * addendum to shoulder claim due to exacerbation of old back injury." It also filed its January 20, 2015 "To Whom it May Concern" letter along with its claim. (First Choice Claim, January 26, 2015; First Choice Physical Therapy letter, January 20, 2015).

60) On February 2, 2015, Employee filed a claim seeking ongoing temporary total disability benefits (TTD) from March 8, 2012 for injuries to his right shoulder, left shoulder, left wrist, low back and neck. He attached a letter explaining the injuries for which he sought compensation. Employee contended he injured his left shoulder 10 to 12 years previous when he fell through a "crawl hole" on a "demo" project; he injured his back stacking pallets in 2009; he injured his wrist when he struck it with a hammer in 2010; he injured his back, right leg and foot while carrying timber in 2011; he injured his right shoulder lifting a paint bucket in 2012; and he aggravated a 1982 neck injury while he was wearing a shoulder sling for his right shoulder injury and this aggravation necessitated cervical fusion. Employee concluded his explanation with: "These have all been bothering me since they happened and I am filing for disability." (Employee's Claim, undated).

61) On February 2, 2015, Employer controverted benefits for right shoulder "personal injury" of September 2012, cervical spine, lumbar spine, chronic low back pain and dysphagia on the basis of Dr. Chong's January 22, 2015 EME report. (Controversion Notice, February 2, 2015).

62) On February 26, 2015, Employer controverted Employee's claimed TTD on the basis of causation, medical stability and statutory defenses. (Controversion Notice, February 26, 2015).

63) On March 19, 2015, Employee, now represented by an attorney, served a claim seeking TTD from April 25, 2013 to March 26, 2014, and from September 11, 2014 continuing, permanent partial impairment (PPI) beyond two percent, medical and related transportation costs, interest, reemployment benefits and attorney's fees and costs for "cumulative trauma" to his left shoulder, left arm and low back. (Claim, March 19, 2015).

64) On March 22, 2013, Employer controverted benefits related to Employee's cervical condition based on Dr. Chong's March 13, 2013 EME report. (Controversion Notice, March 22, 2013).

65) At a March 25, 2015 prehearing conference, Employee's attorney clarified his March 19, 2015 claim was intended to supersede Employee's February 2, 2015 claim, rather than amending or supplementing it. He also proposed a second independent medical evaluation (SIME), which Employer opposed. The parties agreed to a May 21, 2015 hearing on the SIME issue. (Prehearing Conference Summary, March 25, 2015).

66) On March 27, 2015, Employee completed an SIME form, which sets forth disputed medical opinions based on PA Heald's January 12, 2015 responses. The form lists body parts in dispute as left shoulder, left arm, low back, right shoulder, left wrist and neck. (Employee's SIME form, March 27, 2015).

67) On April 14, 2015, Employer controverted benefits sought in Employee's March 19, 2015 claim on the bases Employee's claim is barred by statutes of limitations, there were no unpaid medical bills for Employee's low back, Employer was not aware of any PPI rating greater than 2 percent and Employee had never reported a left shoulder or left arm injury while working for it. (Controversion Notice, April 14, 2015).

68) On April 16, 2015, Employee served an affidavit of readiness for hearing (ARH) on specified issues in his March 19, 2015 claim, including vocational rehabilitation benefits, attorney's fees and costs, interest, and an SIME. (Employee's ARH, April 16, 2014).

69) On April 17, 2015, Employer served a medical summary including employment health questionnaires, fit-for-duty physical examinations and laboratory test results dating back to 2008. The summary also contains medical reports from 2009 pertaining to treatment Employee sought for a displaced disc at L5-S1 and lumbago. (Employer's Medical Summary, April 17, 2015; observations).

70) On April 24, 2015, Employer served an affidavit of opposition to Employee's April 16, 2015 ARH, opposing a hearing on numerous bases, including its contention it has not been afforded adequate time to complete discovery and was still awaiting records from its discovery requests. (Employer's Affidavit of Opposition, April 24, 2015).

71) On May 1, 2015, Employee served a medical summary that included 764 pages of hospital records from Alaska Regional Hospital. The records show Employee underwent a bilateral L5-

S1 microdecompression on March 18, 2015, and was subsequently hospitalized on April 15 and 16, 2015 for a post-operative lumbar wound infection that required irrigation and debridement of the wound. The records are not arranged in chronological order, with 2013 cervical spine treatment records interspersed with 2015 lumbar spine treatment records. (Employee's Medical Summary, May 1, 2015; observations).

72) On May 12, 2015, Employee served a medical summary consisting of a one-page disability slip from Dr. Eule, dated April 24, 2015. (Employee's Medical Summary, May 12, 2015; observations).

73) On May 12, 2015, Employer served a medical summary containing additional treatment records from 2013, including an emergency department report documenting Employee's November 9, 2013 slip and fall, dysphagia treatment and barium swallow studies, and an urgent care report where Employee sought treatment for dizzy spells following his cervical fusion. (Employer's Medical Summary, May 12, 2015; observations).

74) On May 13, 2015, Employee served a medical summary consisting of 2012 and 2013 status reports authored by Employer's nurse case manager. (Employee Medical Summary, May 13, 2015; observations).

75) On May 13, 2015, Employer served a medical summary consisting of a single, 2012 medical report where Employee sought treatment for a right shoulder injury. (Employer's Medical Summary, May 13, 2015; observations).

76) On May 18, 2015, Employee filed a medical summary consisting of a single, May 13, 2015 treatment record from First Choice Physical Therapy. (Employee's Medical Summary, May 15, 2015; observations).

77) On May 20, 2015, Employer filed a medical summary consisting of right shoulder treatment records from 2012. (Employer's Medical Summary, May 20, 2015; observations).

78) The Workers' Compensation Division's Medical Summary form requires medical records to be listed in chronological order. (Workers' Compensation Division, Form 07-6103, rev. May 20, 2012).

PRINCIPLES OF LAW

> **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, not exceeding two years from and after the date of injury to the employee. . . . The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. 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.
. . . .

(h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.
. . . .

(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. . . .

AS 23.30.110. Procedure on Claims. (a) . . . the board may hear and determine all questions in respect to the claim.
. . . .

(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing.
. . .

(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. . . .

The regulation at 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* 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 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.

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 the SIME 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 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.

The decision to order an SIME rests in the discretion of the board, even if jointly requested by the parties. *Olafson v. State Department of Transportation*, AWCAC Decision No. 06-0301 (October 25, 2007), at 6. Although a party has a right to request an SIME, a party does not have a right to an SIME if the board decides an SIME is not necessary for the board's purposes. *Id*. at 8. A party does not have "veto" rights over the board's choice of physician. *Id*. at 10. An SIME is not a discovery tool exercised by the parties; it is an investigative tool exercised by the board to assist it by providing disinterested information. *Id*. at 15.

> **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. . . .

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). The board may use relaxed evidentiary standards while conducting its hearings. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249; 1257 (Alaska 2007). AS 23.30.135 gives the workers' compensation board wide latitude in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29 (Alaska 1970).

> **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.
>
> **8 AAC 45.052. Medical summary.** (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.
> . . . .
>
> **8 AAC 45.070. Hearings**
> . . . .
>
> (b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed. . . . The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the

> affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.
> . . . .
>
> **8 AAC 45.090. Additional examination.**
> . . . .
>
> (b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section.

ANALYSIS

Should an SIME be ordered for Employee's left shoulder, left arm, low back, right shoulder, left wrist and neck conditions?

Employee contends his SIME form documents significant disputes of medical opinion between his treating physicians and Employer's medical evaluator such that an SIME should be ordered. Statutes, as well as decisional authority, make clear an SIME is to benefit the board, only the board may order one, and it has considerable discretion in doing so. AS 23.30.095(k); AS 23.30.110(g); AS 23.30.135(a); AS 23.30.155(h); *Olafson*; *Bah*. The circumstances under which an SIME may be ordered were set forth in detail in the oft-cited *Bah* decision, and include the existence of a medical dispute between an employer's physician and an employee's physician. *Id*.; AS 23.30.095(k).

Here, Employer's points are well taken. As it contends, Employee's "left shoulder, left arm and/or back symptoms and/or conditions" questionnaire does not sufficiently identify which particular condition or symptoms are in dispute. Although Employee's questionnaire provided space for PA Heald to clarify what specific condition or symptoms were disputed, he did not avail himself of the opportunity to do so. Additionally, as Employer points out, Employee's treating physician for both his cervical and lumbar symptoms is Dr. Eule, not Dr. Manion or PA Heald, who treat Employee for his shoulder symptoms. Therefore, it is unknown on what basis PA Heald opines. Furthermore, the medical record does not appear to document any separate, identifiable left arm condition whatsoever, unless Employee is referring to the 2010 left wrist

injury. Given these uncertainties alone, Employee's questionnaire does not sufficiently identify a medical dispute that would merit an SIME. *Bah*; AS 23.30.095(k).

Additionally, both of Employee's questionnaires, as Employer contends, are based on a date of injury that does not appear in the record. While inadvertent or typographical errors are understandable, for examples, "May" instead of "March," or "18" instead of "8," here, these errors, if they are errors at all, are repeated throughout both Employee's questionnaires. This could either mean Employee's errors were simply compounded by "cutting and pasting" them while writing the questionnaires, or it could mean he deliberately and repeatedly set forth the dates he did based on a theory of the case that is not readily apparent. The same is true with respect to the "December 11, 2012 physical therapy incident" that appears in his right shoulder questionnaire. As Employer points out, there is no record any physical therapy occurred on that date. Employee is, of course, entitled to his theory of the case, and he may modify his theory as he sees fit and as additional facts are discovered. However, until Employee's theory of his case is further clarified, an SIME will not be ordered. *Id*.

Furthermore, Employee has twice, recently and dramatically, expanded the scope of his claim, as Employer points out. Although this case began as a right shoulder injury, according to Employee's March 19, 2015 claim, it now involves, at a minimum, his left shoulder, left arm and low back as well. Nevertheless, the record is not entirely clear at this point what medical conditions are now at issue. Prior to being represented by an attorney, Employee filed a claim on February 2, 2015 for injuries to his right shoulder, left shoulder, left wrist, low back and neck. Later, at the March 25, 2015 prehearing conference, Employee's attorney clarified his March 19, 2015 claim was intended to supersede Employee's own February 2, 2015 claim, rather than amending or supplementing it. Meanwhile, Employee continues to file records on medical summaries that document his cervical spine treatment. Thus, it is unclear whether Employee is still seeking an award of benefits for a cervical spine injury, or whether he is filing cervical spine records because he thinks them relevant to his lower spine condition. Further confounding this uncertainty is Employee's SIME form calls for an evaluation of his left shoulder, left arm, low back, right shoulder, left wrist and *neck* conditions. Employee's claimed injuries require further clarification before an SIME will be ordered. *Id*.

Moreover, by both statute and regulation, an ARH requires a party to attest he has completed necessary discovery, obtained necessary evidence and is fully prepared for hearing. AS 23.30.110(c); 8 AAC 45.070(b). On April 20, 2015, Employee filed just such an ARH, which included the instant SIME issue. Yet, he continued to file medical summaries up to three days before this hearing. As Employer contends, depending on what injuries Employee now claims, the parties may well need to collect medical records dating back 30 years - or more. For its part, Employer continues to file medical summaries, including one just a day prior to this hearing. Clearly both parties' discovery efforts are ongoing and have yet to be completed. Also, incident to the medical records issue, the reports in Employee's 764-page, May 1, 2015 medical summary appear in random, not chronological order, as required by the form prescribed by the director. AS 23.30.095(h); 8 AAC 45.052(b). Therefore, given the recently expanded scope of Employee's claim, discovery will need to be completed, and the medical records put in order, before an SIME is ordered. *Bah*. For each of the reasons set forth above, an SIME will not be ordered at this time.

CONCLUSIONS OF LAW

An SIME will not be ordered for Employee's left shoulder, left arm, low back, right shoulder, left wrist and neck conditions.

ORDER

Employee's March 25, 2015 oral petition for an SIME is denied.

Dated in Fairbanks, Alaska on August 5, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

/s/_____
Lake Williams, 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 Interlocutory Decision and Order in the matter of CHARLIE HAYS, employee / petitioner; v. ARCTEC ALASKA, employer; ARCTIC SLOPE REGIONAL CORP., insurer / respondents; Case No. 201203775; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 5, 2015.

/s/_____
Darren R. Lawson, WC Technician