

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSE GONZALEZ, )  
)  
Employee, )  
Claimant, ) INTERLOCUTORY  
) DECISION AND ORDER  
v. )  
) AWCB Case No. 201909943  
OCEAN BEAUTY SEAFOODS, LLC, )  
) AWCB Decision No. 24-0001  
Employer, )  
and ) Filed with AWCB Anchorage, Alaska  
) on January 19, 2024  
LIBERTY INSURANCE CORPORATION, )  
)  
Insurer, )  
Defendants. )  
)

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Jose Gonzalez's (Employee) December 6, 2023 request for a ruling on whether his claim for past benefits could be heard prior to the second independent medical examination's (SIME) completion was heard on the written record in Anchorage, Alaska, on December 20, 2023, a date selected on December 6, 2023. Employee made his request at a prehearing conference, which gave rise to this hearing. Attorney Elliott Dennis appeared and represented Employee. Attorney Jeffrey Holloway appeared and represented Ocean Beauty Seafoods, LLC, and Liberty Insurance Corporation (Employer). The record closed on December 23, 2023 after deliberations.

## ISSUE

Employee concurs the parties await an addendum to the SIME, but contends a hearing on compensability of his October 25, 2022 claim should proceed while awaiting the SIME addendum.

Employer contends the board ordered SIME is not complete because the SIME physician recommended additional diagnostic testing related to Employee's shoulder injury. Employer contends the SIME physician's opinions are relevant to Employee's claims' compensability and a hearing on the merits is premature.

**Should Employee's case be heard prior to the SIME process being complete?**

FINDINGS OF FACT

All factual findings in *Gonzalez v. Ocean Beauty Seafoods, LLC*, AWCB Decision Numbers: 21-0013 (February 22, 2021) (*Gonzalez I*), 21-0109 (November 22, 2021) (*Gonzalez II*), and 21-0122 (December 22, 2021) (*Gonzalez III*) are incorporated herein. The following facts and factual conclusions are reiterated from *Gonzalez I-III*, are undisputed, or are established by a preponderance of the evidence:

- 1) On July 20, 2019, Employee reported he injured his shoulder while working for Employer. (First Report of Injury, July 26, 2019).
- 2) On July 23, 2019, John Koller, M.D., diagnosed Employee with a "right arm, shoulder strain, trapezius strain." (Koller report, July 23, 2019).
- 3) On July 24, 2019, an x-ray showed "unremarkable radiographic appearance of the scapula" and "prominent acromioclavicular joint line spurring." However, Wendell Wilmoth, M.D., noted "[g]iven the complex morphology of the scapula and close composition to other structures, if there is high clinical suspicion for injury, CT could provide better evaluation if clinically indicated." (Wilmoth report, July 24, 2019).
- 4) On July 29, 2019, Employee was released to work with no restrictions. Although the release form states "John M. Koller, MD" as the signee, the signature on this form is different from Dr. Koller's signature shown on other documents. (Return to Work/School Release, July 29, 2019; observation; judgment).
- 5) On November 14, 2019, magnetic resonance imaging (MRI) showed (1) supraspinatus tendinosis and tiny intrasubstance tear, (2) infraspinatus tendinosis with large intrasubstance tear distally, (3) SLAP tear in the superior labrum, (4) multiloculated cyst in the scapular notch, (5) AC joint degenerative hypertrophic change extending inferiorly, contacting the supraspinatus

muscle at the musculotendinous junction and mildly displacing it, and (6) type II acromion. (MRI Report, James Bise, D.O., November 14, 2019).

6) On November 19, 2019, Employee claimed temporary total disability benefits, compensation rate adjustment, penalty, and interest. (Claim for Workers' Compensation Benefits, November 19, 2019).

7) On February 21, 2020, at Employer's request, Eric Hofmeister, M.D., diagnosed Employee with (1) right posterior shoulder girdle contusion substantially caused by the July 20, 2019 work injury, and (2) right shoulder superior labral tear, multiloculated cyst, acromioclavicular joint hypertrophy, and degenerative acromioclavicular joint and rotator cuff, not substantially caused by the July 20, 2019 work injury. Dr. Hofmeister opined Employee's need for medical treatment ended as of July 29, 2019, "when Dr. Koller released him back to full work without restrictions" He said Employee's work injury reached medical stability, and he could "return to all physical capacities required for the job he held at the time of injury as a fish roe processor." Dr. Hofmeister also opined Employee could "return to the medium-work force" and "be full-time gainfully employed," his inability to "return to very heavy work would be related to his preexisting right shoulder condition." (Hofmeister EME report, February, 21, 2020).

8) On March 19, 2020, Employer denied TTD benefits beyond February 21, 2020, reemployment benefits, medical and transportation benefits beyond July 29, 2019, based on Dr. Hofmeister's opinions. (Controversion Notice, March 19, 2020).

9) On April 21, 2020, Dr. Koller wrote:

"[. . .] [the EME physician] concluded that [Employee] had degenerative arthritis in his shoulder joint and that it was a preexisting condition to his injury and that actually he had met medical stability just in nine days after his injury. He commented that I had given him a full work release at that time but I did not review his chart and did not see anything in there where I had given him a work release. In fact, I was not even in town at the time. He had seen a PA on July 23, 2019. She gave him a light duty release but then on July 25, 2019, she re-sent it and took him back off work. He then continued with physical therapy through until September 2019 at which time he saw Dr. Wood on September 8, 2019, and he continued him on his off duty status. I followed up with him some time shortly after that and after review and discussion with physical therapist here in Kodiak, decided that he should get the MRI and that led to him eventually being referred to OPA. I did not see him for the visit on July 29, 2019, nor did I give him a full work release. It is just not documented in the chart. But in any case after reviewing the IME, I disagree with the evaluation and assessment. It is unclear if

the evaluator reviewed his actual MRI images which shows SLAP rotator cuff tear. The patient did not have symptoms of degenerative arthritis of his shoulder prior to the July 20, 2019, injury. On this basis, his claim was controverted. . .” (Koller report, April 21, 2020).

10) On June 30, 2020, Aaron Humphreys, M.D., conducted a right shoulder arthroscopy with SLAP repair, distal clavicle resection, subacromial decompression, and mini open rotator cuff repair. He diagnosed (1) superior glenoid labrum lesion of right shoulder, (2) right rotator cuff tear, (3) right shoulder rotator cuff syndrome, and (4) osteoarthritis of right acromioclavicular joint. (Humphreys report, June 30, 2020).

11) On September 2, 2020, Dr. Humphreys said Employee’s “range of motion [w]as lacking” and “[p]hysical therapy needs to be significantly more aggressive.” He recommended Celebrex and gabapentin for pain control and noted Employee was given hydrocodone and Flexeril by Dr. Koller. (Humphrey report, September 2, 2020).

12) On September 2, 2020, Employee claimed TTD, permanent partial impairment (PPI), medical benefits, transportation costs, attorney fees and costs, and interest. (Amended Claim for Workers’ Compensation Benefits, September 2, 2020).

13) On September 22, 2020, Employer admitted TTD benefits through July 28, 2019, medical and transportation costs incurred prior to July 29, 2019, and denied TTD benefits, medical and transportation costs, from July 30, 2019, forward, PPI benefits, attorney fees and costs, and interest, based on Dr. Hofmeister’s EME report. (Answer to Employee’s Amended Workers’ Compensation Claim; Controversion Notice, September 22, 2020).

14) On October 27, 2020, Employer requested an SIME contending there were four medical disputes: (1) treatment, (2) degree of impairment, (3) functional capacity, and (4) medical stability. It listed Dr. Humphrey and Chris Hurley, PT as Employee’s attending physicians and Dr. Hofmeister as the EME physician. (Petition; SIME Form, October, 27, 2020).

15) On November 17, 2020, Employee opposed Employer’s request for an SIME contending “no actual dispute exists.” (Employee Opposition to Employer’s Petition for SIME, November 17, 2020).

16) On February 22, 2021, *Gonzalez I* denied Employer’s October 27, 2020 SIME petition. (Gonzalez I, February 22, 2021).

17) On March 10, 2021, Employee followed up with Dr. Koller for his ongoing right shoulder pain and to evaluate his physical therapy progress. Dr. Koller noted Employee’s progress was

very slow. He ordered continued physical therapy twice a week for 8 weeks and ordered a right shoulder MRI. Dr. Koller took Employee off work for 30 more days. He believed Employee could probably return to light work in 30 days. (Koller clinic note, March 10, 2021).

18) On March 25, 2021, Dr. Koller noted Employee was still having significant right shoulder pain and range of motion (ROM) limitations and ordered a right shoulder MRI and took Employee off work for an additional 30 days. He thought Employee might be able to tolerate light duty work. (Koller note, March 25, 2021).

19) On March 25, 2021, a second right shoulder MRI demonstrated new postsurgical changes to the rotator cuff and a small, full thickness infraspinatus tendon tear. In addition, it showed AC joint line spurring with a small joint effusion, biceps tendinopathy, and subacromial/subdeltoid bursitis. (MRI report, March 25, 2021).

20) On April 3, 2021, Dr. Koller noted Employee had participated in physical therapy since his June 30, 2020 surgery and had experienced gradual improvement; however, he still reported continued pain right shoulder weakness. Dr. Koller discussed the MRI results and referred Employee to Dr. Humphreys for evaluation. He kept Employee off work for an additional 30 days. (Koller clinic note, April 3, 2021).

21) On May 3, 2021, Dr. Humphreys found Employee had some residual AC arthritis, and the superficial spurring shown on the MRI was causing inflammation. He recommended an open Mumford surgery to deal with the residual spurring at the AC joint. (Humphreys' report, May 3, 2021).

22) On May 7, 2021 Dr. Hofmeister examined Employee for a second EME. He reviewed Employee's medical record, including imaging studies, and performed a physical examination. Dr. Hofmeister diagnosed: (1) right posterior shoulder girdle contusion, with the substantial cause being the work injury of July 20, 2018 (sic), (2) right shoulder superior labral cyst, AC joint hypertrophy, and degenerative changes of the AC joint and rotator cuff, not substantially caused by the work injury. According to Dr. Hofmeister, substantial factors in Employee's need for treatment included ongoing degenerative changes to his right shoulder, aging, possible genetic predisposition, and the work injury, which was a right shoulder traumatic contusion. Dr. Hofmeister opined the most significant factor bringing about Employee's disability was his ongoing right shoulder degenerative changes. Dr. Hofmeister again opined Employee's right shoulder contusion had reached medical stability. However, he also opined Employee had not

reached medical stability regarding his right shoulder pain and disability, but this was not attributable to the work injury. He recommended serial corticosteroid injections to assist with further range of motion and minimizing pain as well as a work hardening program. However, this recommended treatment was not due to the work injury. Dr. Hofmeister predicted Employee would reach medical stability over the next four months. He found Employee had no permanent partial impairment cause by his right shoulder contusion work injury. Dr. Hofmeister said Employee would not have the physical capacities to return to his job at the time of injury but would be able to perform medium work. The most significant factor in Employee's inability to perform his job of injury was ongoing subjective volitional decreased range of motion, ongoing pain, and ongoing subjective symptoms in excess of objective findings. Dr. Hofmeister opined Employee could return to work without restrictions resulting from the July 20, 2019 work injury. (EME report, May 7, 2021).

23) On June 8, 2021, Dr. Koller performed a right shoulder AC joint injection and Employee's pain improved. Employee reported Dr. Humphreys had recommended debridement in his shoulder, but he did not want to proceed with surgery at that time, as he felt he was making good gains with physical therapy and wanted to continue with that for the time being. Dr. Koller took Employee off work for another 30 days. He noted Employee was not yet medically stable and not ready for a PPI rating. (Koller clinic note, June 8, 2021).

24) On July 7, 2021, Employee followed up with Dr. Koller for his right shoulder rotator cuff injury and AC joint arthritis secondary to trauma. Employee reported he had two to three weeks of improvement with increased range of motion in his right arm after his AC joint injection of cortisone and Marcaine, but these positive effects had worn off. He had continued to participate in physical therapy but did not realize any substantial improvement. (Koller clinic note, July 7, 2021).

25) On July 21, 2021, Dr. Koller there was essentially no change in Employee's right shoulder complaints or discomfort due to his rotator cuff tear and work injury. Dr. Koller noted Employee had an upcoming appointment with Dr. Humphreys and directed Employee to continue with physical therapy. He said Employee "might be capable of light duty work." (Koller clinic note, July 21, 2021).

26) On August 2, 2021, Employee requested a hearing on his September 2, 2020, amended WCC, which sought a determination on the compensability of his medical treatment. (Affidavit of Readiness for Hearing, August 2, 2021).

27) On August 11, 2021, Employer filed its SIME petition, or in the alternative, requested *Gonzalez I* be modified. (SIME petition, August 11, 2021).

28) On August 18, 2021, Employee again opposed Employer's SIME petition. (Opposition to SIME petition, August 18, 2021).

29) On November 22, 2021, *Gonzalez II* ordered an SIME. (*Gonzalez II*).

30) On May 11, 2022, SIME physician Dr. Thomas Gritzka opined Employee's work injury on July 20, 2019 was the substantial cause of his need for medical treatment. Dr. Gritzka noted Employee had developed on going pain in his right quadrilateral space. He believed that when Employee injured his shoulder an auxiliary nerve was affected creating a new neurologic shoulder injury. Dr. Gritzka found the treatment to date to be reasonable and necessary but that further electrodiagnostic testing was required to address the neurological issues Employee was experiencing. He said Employee was not medically stable and further surgery may be required depending upon the electrodiagnostic testing results. Dr. Gritzka diagnosed Employee with "quadrilateral space syndrome." (Gritzka SIME report, May 11, 2022).

31) On June 17, 2022, Employee requested a hearing on his September 2, 2020 claim. (Affidavit of Readiness for Hearing, June 17, 2022).

32) On June 27, 2022, Employer opposed Employee's hearing request, because Employee requested a hearing on the record and Employer would be calling witnesses. Employer noted discovery requests were still pending; therefore, a hearing was premature. (Employer's Affidavit of Opposition, June 27, 2022).

33) On September 20, 2022, Employer requested a continuance of the November 14, 2022 hearing and Dr. Gritzka's deposition scheduled for October 5, 2022. Dr. Gritzka had recommended diagnostic studies, to be followed by an addendum report, and Employee had not yet had the studies performed. Employer contended the SIME process was not complete, and therefore a hearing was premature. Employer also filed a petition for a Social Security Offset. (Petitions, September 20, 2022).

- 34) On October 25, 2022, Employee filed an amended claim for TTD, PPI, attorneys fees and costs, transportation costs, medical costs, interest, and reemployment benefits. (Amended Claim, October 25, 2022).
- 35) On November 14, 2022, Employer denied TTD benefits beyond July 29, 2019, PPI benefits and reemployment benefits. (Controversion Notice, November 14, 2022).
- 36) On November 7, 2023, Employee requested a hearing on his October 25, 2022 claim. (Affidavit of Readiness for Hearing, November 7, 2023).
- 37) On November 27, 2023, Employer requested a SIME. Employer noted that the previous SIME completed over 18 months ago indicated additional tests and diagnostics were required to finalize the opinion. Employer requested a more current and final opinion from Dr. Gritzka. (Petition, November 27, 2023).
- 38) On November 28, 2023, Employee requested a hearing on Employer's petition for a SIME. (Affidavit of Readiness for Hearing, November 28, 2023).
- 39) On December 6, 2023, the parties agreed to a procedural written record hearing to address whether Employee's claim should be bifurcated on the issue of causation and past benefits while the parties simultaneously complete the SIME process. (Prehearing Conference Summary, December 6, 2023).
- 40) On December 14, 2023, the designee amended the December 6, 2023 prehearing conference summary at the request of Employee's attorney. The amended summary clarified that Employee's attorney does not consider the SIME with Dr. Gritzka to be a new SIME but rather an addendum report based on additional filings. (Amended Prehearing Conference Summary, December 14, 2023).
- 41) On December 15, 2023, Employee requested his case move forward to hearing on the compensability of past and future TTD, past and future medical treatment, interest, and attorney fees and costs as soon as possible. Employee acknowledged there is an outstanding report from Dr. Gritzka based on his previous SIME and contended the SIME process should continue simultaneously with the merits hearing. (Employee's Hearing Brief, December 15, 2023).

#### PRINCIPLES OF LAW

**AS 23.30.001. Legislative intent.** It is the intent of the legislature that



(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers . . . ;

. . . .

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

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

**AS 23.30.095. Medical treatments, services, and examinations. . . .**

(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 23.30.010. 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. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise 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.

**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. . . .

Bifurcation is appropriate where a party has raised a potentially dispositive issue and the relevant law and facts were substantially independent of the other issues to be considered separately. *Nelson v. Klukwan, Inc.*, AWCB Decision No. 09-0071 (April 13, 2019).

**8 AAC 45.092. Second independent medical evaluation. . . .**

(i) The report of the physician who is serving as a second independent medical examiner must be done not later than 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. The board will presume the evaluation ended after the injured worker was examined. If the evaluation ended at a later date, the physician must state in the report the date the evaluation was done. . . .

*Roberge v. ASRC Construction Holding Company*, AWCAC Decision No. 269 (September 24, 2019) held an SIME had not been completed and a final report had not been provided by the SIME physician when the report included numerous references to the need for an EMG and a nerve conduction study.

ANALYSIS

**Should Employee’s case be heard prior to the SIME process being complete?**

On November 22, 2021, an SIME was ordered with an orthopedic surgeon due to medical disputes between Dr. Humphrey and Dr. Hofmeister. Employee was ordered to attend an SIME with Dr. Gritzka. AS 23.30.095. On May 11, 2022, Dr. Gritzka concluded further evaluation was necessary for a possible quadrilateral compartment syndrome in Employee’s shoulder. After reviewing additional medical records and completing evaluation of Employee Dr. Gritzka opined the work injury was substantial enough to cause Employee’s shoulder condition, but recommended additional diagnostic testing to assess whether there was neurologic component to his shoulder pain. The SIME was not complete because Dr. Gritzka said electrodiagnostic studies were needed to complete his evaluation. 8 AAC 45.092(i); *Roberge*.

Employee is attempting to separate parts of his claim, contending a hearing on causation and past benefits is ripe and future benefits can be determined upon receipt of Dr. Gritzka's new opinion. The Act requires fact-finders to evaluate the relative contribution of different causes of the disability or need for treatment when determining whether or not work is the substantial cause. AS 23.30.010(a). Dr. Gritzka said Employee's injury could have a neurologic component to it that was unclear in the absence of electrodiagnostic testing. He added that upon receipt of the studies requested he will complete his evaluation.

Therefore, Employee's claim cannot be separated. AS 23.30.135(a); *Nelson*. It would not be quick, fair, efficient or predictable to determine compensability of Employee's claim prior to obtaining a complete SIME report, which may or may not support work is the substantial cause of Employee's past and future disability and need for medical treatment *Rogers & Babler*; AS 23.30.001(1), (4); AS 23.30.010(a). The electrodiagnostic studies' results and medical records must be submitted to Dr. Gritzka for review so that he can issue an addendum SIME report. Upon receipt of the report the parties may request a hearing on Employee's claims.

CONCLUSION OF LAW

Employee's case should not be heard prior to the receipt of the SIME physician's addendum report.

ORDER

- 1) The parties are ordered to submit to the designee the electrodiagnostic studies and their results, and all medical records since the May 11, 2022 SIME within 14 days.
- 2) The designee will send the submitted SIME records to Dr. Gritzka and ask him to issue an addendum report to include a discussion of quadrilateral space syndrome.

Dated in Anchorage, Alaska on January 19, 2024.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Kyle Reding, Designated Chair

\_\_\_\_\_  
/s/

Randy Beltz, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of JOSE GONZALEZ, employee / claimant v. OCEAN BEAUTY SEAFOODS LLC, employer; LIBERTY INSURANCE CORPORATION, insurer / defendants; Case No. 201909943; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 19, 2024.

/s/ Lorvin Uddipa  
Workers' Compensation Technician