

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GALE CONWELL,	)	
	)	
Employee,	)	
Claimant,	)	
	)	
v.	)	INTERLOCUTORY
	)	DECISION AND ORDER
M&M SUPERMARKETS, INC.,	)	
	)	AWCB Case No. 202508218
Employer,	)	
and	)	AWCB Decision No. 25-0068
	)	
THE OHIO CASUALTY INSURANCE	)	Filed with AWCB Anchorage, Alaska
COMPANY,	)	on October 21, 2025
	)	
Insurer,	)	
Defendants.	)	
	)	

Gale Conwell's (Employee) September 17, 2025 petition for a second independent medical evaluation (SIME) was heard on the written-record on October 21, 2025, in Anchorage, Alaska, a date selected on September 22, 2025. The September 17, 2025 petition gave rise to this hearing. Attorney Keenan Powell represents Employee; attorney Rebecca Holdiman-Miller represents M&M Supermarkets, Inc., and its insurer (Employer). The record closed at the hearing's conclusion on October 21, 2025.

ISSUE

Employee contends that conflicting medical opinions existing between her attending physicians and Employer's medical evaluator (EME) warrant an SIME. She seeks an SIME addressing these numerous medical disputes.

Employer did not offer a position on Employee's petition, but this decision presumes it opposes Employee's request for an SIME.

Shall this decision order an SIME?

FINDINGS OF FACT

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

1) On June 10, 2025, Jennifer Wooley, MD, saw Employee for a normal primary-care visit. In addition to discussing her primary-care issues, Employee stated:

Patient reports that she went to pick up a 12 pack of soda while at work, felt/heard a pop in her shoulder, and now can't raise her arm. She really can't lift weight with it her R [right] upper extremity, and if she tries she has severe pain in her anterior shoulder/upper arm. She has taken some Advil without much improvement. She denies history of any injury to that joint.

Dr. Wooley diagnosed right-shoulder pain after Employee's lifting incident, and suspected a biceps tendon injury with possible rupture, or perhaps a labral injury. She recommended Employee have a magnetic resonance imaging (MRI) scan for her right shoulder to assess the injury and any need for surgical repair. Dr. Wooley restricted Employee's lifting while awaiting imaging. (Wooley report, June 10, 2025).

2) On June 23, 2025, Employee's right-shoulder MRI demonstrated advanced degenerative changes in the joints, tears, other defects and "debris." (MRI report, June 23, 2025).

3) On June 25, 2025, Employer denied Employee's right to disability benefits on grounds there was no medical evidence attaching the presumption of compensability that the claim was related to the industrial exposure, or that there was any medical documentation supporting disability. (Controversion Notice, June 25, 2025).

4) On July 17, 2025, Henry Krull, MD, orthopedic surgeon, saw Employee on referral for her right shoulder. He charted a June 6, 2025 work-related injury date. Dr. Krull recorded:

Patient presents to the clinic today for initial evaluation, R [right] shoulder pain. She was at work and picked up a case of soda, when swinging it she felt immediate pain and a burning sensation. This occurred in early June and pain has gotten worse. She has limited mobility when lifting above her head. . . . The patient denies any previous history of similar pain. She is right-hand dominant.

No previous shoulder injury or surgery. No left-sided symptoms. She is concerned that she may need surgery for her shoulder. . . .

Dr. Krull diagnosed a right-shoulder injury. He added:

. . . She has had no improvement in symptoms since her injury 5 weeks ago. We talked about treatment options which include surgical repair and an initial course of supervised rehabilitation. I would favor an initial course of rehabilitation since she has not really had any treatment. . . . I recommend that she continue to be off work during this time, until we sort out whether she has a surgical problem or not. (Krull report, July 17, 2025).

5) On July 24, 2025, a physical therapist at Revolution Sport & Spine Therapy began providing physical therapy (PT) to Employee on referral. The therapist recorded:

[Employee] states she was at work as a cashier when she picked up a 12 pack of soda to move it to the other end of the counter when she felt a pop in her shoulder and felt pain and burning. She states she has difficulty raising her arm, and is unable to lift much weight. . . .

Prior to the injury she reports she had not [sic] pain or difficulty performing any activities using her shoulder. . . .

The therapist considered this “work-related.” From Employee’s history, the therapist gleaned that the injury occurred on June 7, 2025. She recommended Employee have four-weeks of PT with two visits per week. The therapist expected improvement, with goals met in 12 weeks. (Alice Spencer, DPT report, July 17, 2025).

6) By August 5, 2025, Employee reported minimal improvement since beginning PT. (Spencer report, August 5, 2025).

7) On August 19, 2025, Employee reported little improvement and was still restricted to lifting over one pound with her right-upper-extremity. She was going to follow-up with Dr. Krull to consider further options. (Spencer report, August 19, 2025).

8) On August 21, 2025, Dr. Krull saw Employee for follow-up. She reported having more pain than normal and felt she was getting worse. Dr. Krull charted, “The primary complaint is chronic and persistent R [right] shoulder pain after industrial injury.” Employee wanted surgery, which was scheduled for September 3, 2025. Dr. Krull stated:

Notes: Patient suffered an industrial injury about 2-1/2 months ago. She is not improving with conservative treatment. She has been doing therapy for the last 5 to 6 weeks, with no improvement. She is indicated for right shoulder arthroscopy with repair. I believe her split tear in the bicep tendon is the primary culprit. She also has a labral tear that may require repair. She has a partial rotator cuff tear, and tendinosis, but I do not expect to have to repair the rotator cuff. She has notable glenohumeral joint and acromioclavicular joint arthrosis. I believe she has rotator cuff syndrome and symptomatic acromioclavicular arthrosis that may have been made worse by her injury, as she did not have pain in this area prior to her industrial injury. . . . (Krull report, August 21, 2025).

9) On September 3, 2025, Matthew Winterton, MD, orthopedic surgeon, saw Employee for an EME. He charted Employee's history:

In June 2025, the claimant reports sustaining a right shoulder injury while working at [Employer], where they [sic] had been employed for about four years. The claimant stated she picked up a 12-pack of Pepsi and turned to set it down at the checkout counter when she felt a pop in her shoulder with burning and pain radiating to the elbow. The claimant continued to work for two days following the injury, performing light duties as a cashier, and was subsequently placed on work restrictions.

Dr. Winterton diagnosed right-shoulder arthritis. When asked to identify all causes contributing to Employee's claimed symptoms, disability or need for treatment, he stated:

All causes include the claimant's genetics and age. While she reports no antecedent trauma to the shoulder, the claimed injury mechanism is insufficient to have caused the shoulder findings including the possible HAGL [Humeral Avulsion of the Glenohumeral Ligament] lesion.

Dr. Winterton concluded that Employee's "age is the substantial cause" of her symptoms, disability or need for treatment. He also ruled out the June 7, 2025 work-injury as the substantial cause of her symptoms, disability and need for medical treatment noting that there was no "acute injury" shown on MRI; everything was chronic. Dr. Winterton added that the injury could not have caused the HAGL lesion, which is typically associated with shoulder instability such as a dislocation event. He did not believe the work injury changed the course of Employee's treatment, because she has chronic shoulder arthritis. Dr. Winterton had no recommendations for additional treatment for the work-injury and in his view, the injury was not the substantial cause for "any treatment." However, he added that a "reasonable first approach" was normally a shoulder diagnostic injection, which Employee said she had never received. Any treatment

beyond the shoulder injection was, in his view, “secondary to her underlying age-related degenerative arthritis alone.” Dr. Winterton opined that Employee was medically stable effective September 3, 2025. He said the work injury would not result in any ratable permanent impairment and opined that her motion loss and physical exam demonstrated “substantial pain behavior.” Employee could return to her job at the time of injury, in his opinion. (Winterton report, September 3, 2025).

10) On September 9, 2025, Employer denied Employee’s right to temporary total disability (TTD), permanent partial impairment (PPI), medical and related transportation, and reemployment benefits. It based this denial on Dr. Winterton’s September 3, 2025 EME report. (Controversion Notice, September 9, 2025).

11) On September 17, 2025, Employee claimed TTD, PPI and medical benefits with related transportation costs, an unfair or frivolous controversion, a penalty for late-paid compensation, interest, attorney fees and costs. (Claim for Workers’ Compensation Benefits, September 17, 2025). She also requested an SIME, and provided the completed SIME form as well as associated medical records delineating the medical disputes. (Petition, September 17, 2025).

12) On September 22, 2025, the Workers’ Compensation Division served a hearing notice on Employee, her attorney and Employer’s insurer. (Written Record Hearing Notice, September 22, 2025). On September 25, 2025, Luke McKinnon signed for the hearing notice sent to the insurer. (United States Postal Service, Domestic Return Receipt, September 25, 2025).

13) On September 25, 2025, Dr. Krull commented on Employer’s Controversion Notice and Dr. Winterton’s September 3, 2025 EME report. He stated:

I disagree ENTIRELY with the controversion, and disagree strongly with the conclusions of the IME performed on 9/3/25. It is well documented that the patient suffered an acute injury at work in June, 2025. It is well documented that she had no preexisting shoulder pain or shoulder problem, and was not and had not been under the care of any medical provider for a shoulder problem prior to her industrial injury. Her IME physician, Dr. Winterton opines that all of her symptoms, and her abnormalities seen on MRI are CHRONIC and DEGENERATIVE, despite the fact that she had no prior problems with her shoulder EVER. It is well documented that the patient suffered an acute injury ASSOCIATED WITH A “POP”, which I believed to be the primary event leading to her superior labral tear and biceps tendon tear. Yes, there was underlying degeneration, with degenerative biceps tendinopathy, and some degenerative arthritis in the shoulder, but he [sic] degeneration did NOT cause her labral tear and biceps tendon tear. The “HAGL” lesion seen on MRI was not appreciated at

the time of the surgery, but I agree with Dr. Winterton that HAGL injuries are commonly seen in young people with acute injuries. It is therefore irrelevant. Nevertheless, I disagree with Dr. Winterton's conclusion that her industrial shoulder injury was not the cause of the pathology that ultimately resulted in shoulder repair surgery, and I also disagree with his conclusion that AGE and associated DEGENERATION was the cause of her MRI findings, operative findings, and ultimately the need for arthroscopic surgical treatment. . . . (Krull letter, September 25, 2025; emphasis in original).

14) On October 13, 2025, Employer answered Employee's September 17, 2025 claim. It denied liability for TTD and PPI benefits as well as medical costs and related transportation expenses, an unfair or frivolous controversion finding, a penalty, interest, attorney fees and costs. Employer relied on EME Dr. Winterton's report to support its denials. (Answer to Employee's Workers' Compensation Claim, October 13, 2025).

15) On October 13, 2025, Employer denied Employee's claim for TTD, PPI, medical and related transportation benefits, an unfair or frivolous controversion finding, a penalty, interest, attorney fees and costs. It based this denial on Dr. Winterton's EME report. (Controversion Notice, October 13, 2025).

16) On October 13, 2025, Employee amended her previous claim to add reemployment benefits. (Claim for Workers' Compensation Benefits, October 13, 2025).

17) On October 13, 2025, Employee cited opinions from her attending physicians and the EME physician and noted medical disputes in the following areas: "causation"; "compensability"; "medical treatment"; "functional capacity"; and "medical stability." She also identified PPI benefits and her ability to enter a reemployment plan as non-SIME issues that could be addressed in an SIME. (Employee's SIME Hearing Brief, October 13, 2025).

18) Shoulder surgery is expensive, recovery times are lengthy and ratable impairment is common. Impartial medical opinions are often helpful to fact-finders as they resolve medical-legal issues. (Experience).

19) No answer to Employee's SIME petition -- or a hearing brief -- from Employer was found in Employee's agency file. (Observations).

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 . . . quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers; . . .

The Board may base its decision on testimony, evidence, 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 23.30.095. Medical treatments, services, and examinations. . . .

(k) In the event of a medical dispute regarding . . . 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. The cost of an examination and medical report shall be paid by the employer. . . .

The Alaska Workers’ Compensation Appeals Commission (Commission) in *Bah v. Trident Seafoods Corp.*, AWCAC Dec. No. 073 (February 27, 2008) addressed the Board’s authority to order an SIME under §095(k) and other sections of the Alaska Workers’ Compensation Act (Act). *Bah* stated in *dicta*, that before ordering an SIME it is necessary to find the medical dispute is significant or relevant to a pending claim or petition. *Bah* said when deciding whether to order an SIME, the Board considers three criteria, though the statute requires only one:

- 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?

Section .095(k) is procedural, not substantive. *Deal v. Municipality of Anchorage*, AWCAC Dec. No. 97-0165 (July 23, 1997). Wide discretion exists to consider any evidence available in deciding to order an SIME to assist in investigating and deciding medical issues in claims, to best “protect the rights of the parties.” *Bah*. An SIME’s purpose is for an independent medical expert to provide an opinion about contested issues. *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1097 (Alaska 2008). An SIME is not a discovery tool for parties; it is an investigative tool for the Board to assist it by providing a disinterested opinion. *Olafson v. State Dept. of Transp.*, AWCAC Dec. No. 06-0301 (October 25, 2007).

ANALYSIS

Shall this decision order an SIME?

Employee contends that numerous medical disputes between her attending physicians and the EME physician warrant an SIME under §.095(k). Employer has not answered Employee's SIME petition or filed a hearing brief. *Rogers & Babler*. Therefore, while Employer's position is not known on the SIME issue, this decision presumes it is in opposition.

1) Are there medical disputes between Employee's physician and an EME?

Attending physicians Drs. Wooley and Krull both opined that Employee's June 7, 2025 right-shoulder injury was work-related and caused her symptoms, need to treat those symptoms, current and ongoing physical limitations and resultant disability. Their opinions go to "causation." Both recommended additional treatment, which addresses "medical stability" and "the amount and efficacy of the continuance of or necessity of treatment." Drs. Wooley and Krull both restricted Employee's physical exertion, which goes to "functional capacity" and ultimately to her "ability to enter a reemployment plan." She may or may not be able to be retrained depending upon her eventual recovery.

By contrast, EME Dr. Winterton opined that Employee's right-shoulder symptoms, disability or need for treatment were not work-related at all. He concluded Employee's "age" was the substantial cause of her symptoms, disability and need for treatment. Dr. Winterton ruled out the work event as "a cause" of anything in Employee's right shoulder. This contradicts the attending physicians' "causation" opinions. In his opinion, she needs no further diagnostic testing or treatment and is medically stable. Dr. Winterton said the work injury was not the substantial cause for the need of any medical care except an initial diagnostic injection. He stated Employee was medically stable effective September 3, 2025. These opinions dispute Drs. Wooley's and Krull's recommended medical care, which affects "medical stability" and "the amount and efficacy of the continuance of or necessity of treatment." Dr. Winterton released Employee to her normal job and said there would be no PPI rating. This contradicts her attending physicians' work limitations, which goes to "functional capacity" and ultimately to Employee's "ability to enter a reemployment plan" upon recovery. Moreover, experience shows that even arthroscopic

shoulder surgery regularly causes a ratable PPI under the applicable statutes and guides. *Rogers & Babler*.

Therefore, the medical disputes directly or by inference include “causation,” “medical stability,” “ability to enter a reemployment plan,” “degree of impairment, functional capacity,” and “the amount and efficacy of the continuance of or necessity of treatment” under §.095(k). *Bah*.

2) Are the medical disputes significant?

Employee claims TTD, PPI and medical and transportation benefits, and Employer has controverted those claims. She has already undergone right-shoulder surgery. Experience shows that recovery time for shoulder surgery can be lengthy, and surgery is expensive. *Rogers & Babler*. If Employee prevails on her claim, she could be entitled to significant benefits under the Act for which Employer would be responsible. Therefore, the disputes are significant.

3) Will an SIME physician’s opinion assist the panel in resolving the disputes?

Two qualified orthopedic surgeons disagree adamantly on the medical issues in this case. It is usually helpful to a lay panel to have an impartial-expert third-opinion on medical issues. *Rogers & Babler*. This case is no exception and exemplifies dramatic disputes between qualified experts where an SIME could assist the fact-finders. Therefore, an SIME physician’s opinion will assist a panel in resolving these disputes and this claim. *Deal; Bah; Seybert; Olafson*.

While PPI and Employee’s ability to enter a reemployment plan are not expressly in dispute, this decision to order an SIME will include these issues as well. *Deal; Bah*. Adding PPI and the reemployment issue comports with the legislature’s intent that the Act be interpreted to ensure quick and efficient delivery benefit delivery, if Employee is entitled to it, at a reasonable cost to Employer under §.001(1). Adding these issues will also prevent the need for another SIME later. The SIME physician can weigh-in on PPI, if Employee is found medically stable, and give opinions about potential physical limitations to reemployment.

CONCLUSION OF LAW

This decision shall order an SIME.

ORDER

- 1) Employee's request for an SIME is granted.
- 2) An SIME will be performed by an orthopedic surgeon selected from the authorized list. If, at the time of processing, the designee determines that no physician on the authorized list is available or qualified to perform the examination under 8 AAC 45.092(e), the designee will notify the parties and request that they provide the names, addresses, and curriculum vitae of physicians in accordance with 8 AAC 45.092(f). The SIME physician may refer Employee to a specialist if he or she deems it necessary.
- 3) The medical disputes for the SIME to address include: "causation," "medical stability," "ability to enter a reemployment plan," "degree of impairment," "functional capacity," and "the amount and efficacy of the continuance of or necessity of treatment" related to Employee's right-shoulder symptoms.
- 4) All filings regarding the SIME must be sent to workerscomp@alaska.gov, and served concurrently on opposing parties.
- 5) Employer will make two copies of Employee's medical records in its possession, including medical providers' depositions, put the copies in chronological order by treatment date, starting with the first medical treatment and proceeding to the most recent medical treatment, number the pages consecutively, and put them in two binders. This must be done on or before **November 4, 2025**. Employer must serve one binder on Employee and file one with the Division, with an affidavit verifying the binders contain all medical records in its possession, by **no later than 5:00 PM Alaska time on November 4, 2025**.
- 6) The binders may be returned for reorganization if not properly Bates-stamped and prepared in accordance with this decision.
- 7) **Not later than 10-days after receipt of the binders**, Employee must review the binders to determine if they contain all Employee's medical records in his possession. If the binders are complete, Employee must file an affidavit with the Division verifying the binders contain all medical records in Employee's possession. If the binders are incomplete, Employee must make two copies of any additional medical records missing from the first binders. Each copy must be put in a separate binder (as described above). Then one set of the supplemental binders and an affidavit verifying the medical records' completeness must be filed with the Division. The remaining supplemental binder must be served upon Employer together with an affidavit

verifying that it is identical to the binder filed with the Division. **Employee is directed to file the binders with the Division and serve a binder on Employer within 10 days of receipt.**

8) Any party who receives additional medical records or physicians' depositions after the binders have been prepared and filed with the Division, is directed to make two supplemental binders as described above with copies of the additional records and depositions. **Within seven days** after receiving the records or depositions, the party must file one supplemental binder with the Division, and serve one supplemental binder on Employer together with an affidavit verifying that it is identical to the binder filed with the Division. All service must be made on Employer's attorney.

9) The assigned workers' compensation officer will review, prepare, and submit to the SIME physician questions in accordance with 8 AAC 45.092(h).

10) The parties may review their rights under 8 AAC 45.092(j) to question an SIME physician after the parties receive the physician's report.

11) **The parties are advised that a failure to comply with the above orders timely may result in the SIME going forward notwithstanding a party's noncompliance.**

12) Long-distance travel may be required. If Employee requires travel accommodations, she must request an accommodation from Employer. The accommodation request must be accompanied by a letter from Employee's attending physician in their workers' compensation case, pursuant to and within the constraints of AS 23.30.095(a) and 8 AAC 45.082(b), detailing the necessary accommodation.

Dated in Anchorage, Alaska on October 21, 2025.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Michael Dennis Member

Unavailable for signature
Brian Zematis, 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 Gale Conwell, employee / claimant v. M & M Supermarkets, Inc., employer; The Ohio Casualty Insurance Company, insurer / defendants; Case No. 202508218; 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 October 21, 2025.

_____/s/
Trisha Palmer, Workers' Compensation Technician