

Alaska Workers' Compensation Appeals Commission

Imhotep M. Narcisse,
Appellant,

vs.

Trident Seafoods Corporation and
Liberty Insurance Corporation,
Appellees.

Final Decision

Decision No. 242 January 11, 2018

AWCAC Appeal No. 16-012
AWCB Decision Nos. 16-0070 and 16-0083
AWCB Case No. 201212049

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0070, issued at Anchorage, Alaska, on August 18, 2016, by southcentral panel members William Soule, Chair, Patricia Vollendorf, Member for Labor, and Linda Hutchings, Member for Industry; and, Final Decision and Order on Reconsideration and Modification No. 16-0083, issued at Anchorage, Alaska, on September 14, 2016, by southcentral panel members William Soule, Chair, Patricia Vollendorf, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: Imhotep M. Narcisse, self-represented appellant; Jeffrey D. Holloway, Holmes Weddle & Barcott, PC, for appellees, Trident Seafoods Corporation and Liberty Insurance Corporation.

Commission proceedings: Appeal filed November 18, 2016; briefing completed September 5, 2017; oral argument held on October 30, 2017.

Commissioners: Michael J. Notar, S. T. Hagedorn, and Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Imhotep M. Narcisse (Mr. Narcisse) sustained an injury while working for Trident Seafoods Corporation, which is insured by Liberty Insurance Corporation (Trident Seafoods). The Alaska Workers' Compensation Board (Board) heard his claim on July 19,

2016, at which hearing attorney Thomas Geisness represented Mr. Narcisse.¹ Mr. Narcisse filed a petition for reconsideration on September 6, 2016, and the Board issued its final decision and order on reconsideration and modification on September 14, 2016, denying both the request for reconsideration and the request for modification.² Mr. Narcisse then requested an extension of time to file his Notice of Appeal, which was granted by the Alaska Workers' Compensation Appeals Commission (Commission), and he filed his Notice of Appeal on November 18, 2016. After briefing by the parties was completed, the Commission heard oral argument on October 30, 2017, at Anchorage, Alaska. The Commission now reverses the Board in part and affirms the Board in part.

2. *Factual background and proceedings.*³

On August 8, 2012, Mr. Narcisse developed neck pain while working for Trident Seafoods as a processor in Kodiak. Mr. Narcisse claims the pain arose from working while keeping his head and neck bent forward.⁴

On September 27, 2012, Mr. Narcisse was incarcerated and his incarceration lasted until he was released in late 2013, at which time he returned to California.⁵ While in jail, Mr. Narcisse received medical treatment for a September 2012, neck and back injury.⁶ On October 23, 2012, Mr. Narcisse told medical providers he had a work injury to his "neck and back." Mr. Narcisse regularly sought medical treatment from the Department of Corrections, especially following an assault, which resulted in bilateral rib fractures.⁷

¹ *Narcisse v. Trident Seafoods Corporation and Liberty Insurance Corporation*, Alaska Workers' Comp. Bd. Dec. No. 16-0070 (Aug. 18, 2016) (*Narcisse I*).

² *Narcisse v. Trident Seafoods Corporation and Liberty Insurance Corporation*, Alaska Workers' Comp. Bd. Dec. No. 16-0083 (Sept. 14, 2016) (*Narcisse II*).

³ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁴ *Narcisse I* at 4, No. 1.

⁵ *Id.*, No. 2; *id.* at 11, No. 37.

⁶ *Narcisse II*, at 2, No. 2.

⁷ *Id.*, No. 3; R. 1237-1238.

On January 28, 2013, Mr. Narcisse for the first time said his “whole body” was in pain from “assault and work-related injuries” to his “neck, *shoulders* and back.”⁸

After Mr. Narcisse’s release from prison, Trident Seafoods paid him temporary total disability (TTD) benefits at a \$110.00 weekly rate from November 4, 2013, through February 21, 2014.⁹

On December 2, 2013, Mr. Narcisse filed a workers’ compensation claim (WCC) for benefits for his neck, shoulders, and back expressly seeking temporary partial disability (TPD) and a compensation rate adjustment. In the hand-written portion, Mr. Narcisse said he wanted compensation for the “days I was not working” and for “expenses” while he was awaiting a flight home from Kodiak. Mr. Narcisse provided his mailing address in Rodeo, California.¹⁰

On January 10, 2014, Trident Seafoods filed a controversion of Mr. Narcisse’s claim for TTD benefits from August 8, 2012, through November 3, 2013, and from November 12, 2013, “forward,” and his claim for TPD and a rate adjustment. The controversion did not mention per diem expenses. The controversion was based in part on a release to return to work by his treating physician Robert Wagner, M.D.¹¹ Trident Seafoods served this controversion on Mr. Narcisse by mail at his Rodeo, California, address, and included the following warning:

2. When must you request a hearing (Affidavit of Readiness for Hearing form)? If the insurer/employer filed this controversion notice after you filed a claim, you must request a hearing before the AWCB within two years after the date of this controversion notice. You will lose your right to the benefits denied on the front of this form if you do not request a hearing within two years.

The form also advised: **“IF YOU ARE UNSURE WHETHER IT IS TOO LATE TO FILE A CLAIM OR REQUEST A HEARING, CONTACT THE NEAREST AWCB OFFICE.”**¹²

⁸ *Narcisse II* at 2, No. 4 (emphasis in original).

⁹ *Narcisse I* at 4, No. 3.

¹⁰ *Id.*, No. 4.

¹¹ R. 000012.

¹² *Narcisse I* at 4, No. 5 (emphasis in original).

On February 5 2014, Mr. Narcisse and Trident Seafoods' attorney attended a prehearing conference (PHC) at which his December 2, 2013, claim and Trident Seafoods' January 10, 2014, controversion were discussed. In framing the issues, the Board designee treated Mr. Narcisse's claim as one for TPD and a compensation rate adjustment. The Board's designee then provided Mr. Narcisse with a list of Anchorage workers' compensation attorneys for his consideration and stated:

STATUTE OF LIMITATIONS: MR. NARCISSE was told that, if a controversion notice is served and filed, after the date of filing of his workers' compensation claim, he must serve and file an Affidavit of Readiness requesting a hearing, in accordance with 8 AAC 45.070, within two years of the controversion to avoid possible dismissal of his claim. AS 23.30.110(c) provides: 'If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.' The parties have confirmed that in this matter the relevant post-claim controversion was received by the board on 1/10/2014, and that a hearing must be requested by 1/10/2016. Some events in the case may toll (extend) this deadline as to some claims, however, MR. NARCISSE is urged to remain aware of this earliest deadline and the possibility of his claim being barred if a hearing is not timely requested.

The Board designee also provided the pamphlet "Workers' Compensation and You" to Mr. Narcisse and referred him to the division's website where an electronic version was also available. The division mailed a PHC summary reiterating the above advice to Mr. Narcisse at his Rodeo, California, address.¹³ Neither party objected to the statement detailing Mr. Narcisse's claims set forth in the February 5, 2014, PHC summary.¹⁴

On February 11, 2014, Yung Chen, M.D., saw Mr. Narcisse on referral from Trident Seafoods. Dr. Chen reiterated Mr. Narcisse's history stating he "suffers from chronic neck pain, back pain, and shoulder pain after a work-related injury since 2012." He recommended additional referrals and care. However, Dr. Chen did not offer any opinion

¹³ *Narcisse I* at 5, No. 6.

¹⁴ *Id.*, No. 7.

regarding causation for his recommended referral and treatment.¹⁵ Dr. Chen seemed unaware of Mr. Narcisse's prior injury to the shoulder from his ironworker days.¹⁶

On February 21, 2014, Joseph Lynch, M.D., saw Mr. Narcisse for an employer's medical evaluation (EME). Dr. Lynch opined the substantial cause of Mr. Narcisse's diagnosed medical conditions was mostly age and tobacco related. Prolonged postural positions as described by Mr. Narcisse were not a substantial factor in any diagnosed medical condition. Dr. Lynch did not specifically address a question concerning the date Mr. Narcisse became medically stable. In Dr. Lynch's opinion, Mr. Narcisse needed no further medical care for his work injury, because he could identify no work-related condition arising from the injury. Dr. Lynch approved Mr. Narcisse to return to work as a Crab Meat Processor and found no objective reason why he could not return to employment.¹⁷

On February 24, 2014, Trident Seafoods filed a new controversion notice controverting Mr. Narcisse's request for reimbursement for per diem expenses related to his stay in Kodiak in October 2013. Trident Seafoods served this notice on Mr. Narcisse by mail at his Rodeo, California, address. This controversion included the same express warning and advice about requesting a hearing as set forth in the January 10, 2014, notice.¹⁸

On March 10, 2014, Trident Seafoods filed another controversion denying Mr. Narcisse "all benefits" based on the report from Dr. Lynch. Dr. Lynch had opined Mr. Narcisse's work with Trident Seafoods was not the substantial cause of his "condition, symptoms, disability or need for treatment" and the notice stated no benefits were due under AS 23.30.010. Trident Seafoods served this notice on Mr. Narcisse by mail at his

¹⁵ *Narcisse I* at 6, No. 8.

¹⁶ *Id.* at 12, No. 38; Joseph Lynch, M.D. Dep., June 28, 2016, at 21:15-21; R. 001197.

¹⁷ *Narcisse I* at 6, No. 9.

¹⁸ *Id.*, No. 10.

Rodeo, California, address. This notice included the same express warning and advice about requesting a hearing as in the January 10, 2014, notice.¹⁹

On March 17, 2014, Mr. Narcisse filed another claim for benefits, this time seeking TTD, medical costs and related transportation expenses, a compensation rate adjustment, an unspecified penalty, interest, an “unfair or frivolous” controversion finding, and “other” referring to an unspecified “Amount withheld 2-21-14 to present.” Mr. Narcisse did not complete the space in box 18 specifically designated to amend “a prior claim.” Mr. Narcisse listed his same Rodeo, California, address.²⁰

On April 10, 2014, Trident Seafoods filed another controversion controverting Mr. Narcisse’s claims for TTD, medical costs and related transportation expenses, compensation rate adjustment, penalty, interest, unfair or frivolous controversion finding, “Amount withheld February 21, 2014, to present,” and controverting his right to reemployment benefits. Trident Seafoods served this notice on Mr. Narcisse by mail at his Rodeo, California, address. This controversion included the same express warning and advice about requesting a hearing as in the January 10, 2014, notice.²¹

On April 29, 2014, the parties attended a PHC to discuss what the Board designee referred to as Mr. Narcisse’s March 17, 2014, “amended claim.” The summary for this PHC, which the division served on Mr. Narcisse at his Rodeo, California, address and on his Seattle, Washington, attorney, Thomas Geisness, stated:

Notice to Claimant:

AS 23.30.110(c) provides: ‘If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.’ In other words, when Employee files a workers’ compensation claim and Employer controverts the claim, to avoid possible dismissal of Employee’s claim, Employee must file with the board and serve on all opposing parties an affidavit of readiness for hearing within two years of the controversion. The board has an affidavit of readiness for hearing form Employee can complete and file. If Employee has not completed all

¹⁹ *Narcisse I* at 6, No. 11.

²⁰ *Id.*, No. 12.

²¹ *Id.* at 6-7, No. 13.

discovery and cannot file the affidavit of readiness for hearing within two years of Employer's controversion, but still wants a hearing, Employee should provide written notice to the board and serve notice on all opposing parties.²²

The designated chair at the April 29, 2014, PHC assumed Mr. Narcisse had amended his November 26, 2013, claim when he filed his March 12, 2014, claim.²³ No party objected to the April 29, 2014, PHC summary.

On May 23, 2014, Trident Seafoods filed another controversion notice controverting Mr. Narcisse's claim for attorney's fees and costs. Trident Seafoods served a copy by mail on attorney Geisness.²⁴

On June 10, 2014, the parties attended another PHC at which Mr. Narcisse stated he hoped to obtain an opinion disputing the EME report and would then ask for his benefits to be reinstated or for a second independent medical evaluation (SIME). The division served a PHC summary by mail on Mr. Narcisse at his Rodeo, California, address and on attorney Geisness, and included the same "Notice to Claimant" found in the April 29, 2014, PHC summary.²⁵

On October 20, 2014, Trident Seafoods petitioned for an SIME.²⁶ Mr. Geisness, on November 12, 2014, entered his appearance as counsel for Mr. Narcisse.²⁷ On November 12, 2014, the parties attended a PHC at which they stipulated to conducting an SIME.²⁸

On June 4, 2015, the parties attended another PHC to discuss the SIME. The PHC summary states the parties had previously stipulated to an SIME but Mr. Narcisse had failed to file his SIME questions, the SIME medical binders, and a fully executed SIME

²² *Narcisse I* at 7, No. 14.

²³ *Id.*, No. 15.

²⁴ *Id.*, No. 17.

²⁵ *Id.* at 7-8, No. 18.

²⁶ *Id.* at 8, No. 19.

²⁷ *Id.*, No. 20.

²⁸ *Id.*, No. 21.

form. Mr. Narcisse's attorney promised to file this material before June 8, 2015, and to provide Mr. Narcisse's new address in Seattle.²⁹

On October 2, 2015, Thomas Gritzka, M.D., evaluated Mr. Narcisse for an SIME. In his opinion, the substantial cause of Mr. Narcisse's disability and need for medical treatment from August 8, 2012, until December 8, 2012, were his work activities while working for Trident Seafoods. This activity, in Dr. Gritzka's opinion, aggravated Mr. Narcisse's preexistent, mild cervical degenerative spondylosis. However, Mr. Narcisse's work with Trident Seafoods was not consistent with an aggravation of a pre-existing right shoulder condition or a new left shoulder condition. Dr. Gritzka opined Mr. Narcisse's brief work with Trident Seafoods probably did not affect his low back pain. Mr. Narcisse temporarily exacerbated a pre-existing neck condition, which resolved by December 8, 2012, and Mr. Narcisse could return to work on that date. Dr. Gritzka recommended no further treatment for Mr. Narcisse's work injury.³⁰ The Board received Dr. Gritzka's SIME report on October 27, 2015.³¹

On March 25, 2016, the parties attended another PHC and the Board designee noted the completed SIME. Mr. Narcisse's attorney stated the parties were trying to resolve the case, "but Mr. Narcisse wanted to schedule a hearing." Trident Seafoods' attorney objected to a hearing being set because no affidavit of readiness for hearing (ARH) had been filed, and additionally, Trident Seafoods' witnesses' availability for hearing were unknown. Mr. Narcisse questioned why he was not receiving benefits and stated the SIME report had been favorable to him. He stated the matter was being "swept under the rug." The Board designee explained there were issues still in dispute and a hearing would be required to resolve them. The Board designee suggested another PHC

²⁹ *Narcisse I* at 8, No. 22.

³⁰ *Id.*, No. 23.

³¹ *Id.*, No. 24.

on April 18, 2016.³² On March 29, 2016, Mr. Narcisse filed a formal hearing request on an unspecified claim.³³

On April 18, 2016, the parties attended a PHC at which the issues and defenses were reviewed. The Board designee noted Mr. Narcisse had filed a hearing request “on his claims” since the last PHC. Trident Seafoods’ attorney said he had not received it but stipulated to a hearing on July 19, 2016.³⁴

On June 28, 2016, Trident Seafoods deposed Dr. Lynch, its EME physician. Based upon his record review and examination, Dr. Lynch concluded the work injury with Trident Seafoods was the substantial cause of Mr. Narcisse’s symptoms, disability, and need for treatment to his neck up to November 19, 2012.³⁵ His work injury would not have prohibited Mr. Narcisse from working after November 19, 2012. Dr. Lynch agreed with Dr. Gritzka’s opinion that Mr. Narcisse’s neck strain had resolved but believed it resolved by November 19, 2012, rather than by December 8, 2012, as Dr. Gritzka opined.³⁶ In Dr. Lynch’s opinion, Mr. Narcisse’s shoulders and low back issues are not work-related. In his view, Mr. Narcisse’s work-related neck strain was medically stable by November 19, 2012. Dr. Lynch opined any recommended medical treatment was not causally connected to Mr. Narcisse’s work injury.³⁷

In its hearing brief, Trident Seafoods contended Mr. Narcisse’s two claims should be denied because he did not timely file a hearing request as required by AS 23.30.110(c). It further contended Mr. Narcisse had no legal excuse for failing to request a hearing within two years of Trident Seafoods’ post-claim controversions. Alternatively, Trident Seafoods contended Mr. Narcisse’s work injury was merely a neck strain that resolved by December 8, 2012, at the latest. Trident Seafoods further contended the employment

³² *Narcisse I* at 8-9, No. 25.

³³ *Id.* at 9, No. 26.

³⁴ *Id.*, No. 27.

³⁵ *Id.*, No. 28.

³⁶ *Id.*

³⁷ *Id.*

was not the substantial cause of Mr. Narcisse's bilateral shoulder and low back symptoms or conditions. Further, Trident Seafoods contended Mr. Narcisse was not entitled to reimbursement for food and lodging in Kodiak because these expenses were personal and not related to his injury. Trident Seafoods contended Mr. Narcisse was medically stable by November 19, 2012, and, therefore, not entitled to additional TPD or TTD benefits. It contended Mr. Narcisse was not entitled to medical or transportation costs after December 8, 2012, at the latest, based on Dr. Gritzka's SIME report. Trident Seafoods contended Mr. Narcisse was not entitled to a compensation rate adjustment or a penalty, interest, or a finding Trident Seafoods had frivolously or unfairly controverted his benefits. Therefore, Trident Seafoods contended Mr. Narcisse was not entitled to attorney's fees or costs.³⁸

At hearing, Trident Seafoods again contended Mr. Narcisse's November 26, 2013, claim should be denied under AS 23.30.110(c). Trident Seafoods additionally contended, because "compensability" was disputed in the first claim, which should be denied under AS 23.30.110(c), Mr. Narcisse's March 12, 2014, claim should also be denied under AS 23.30.110(c) because it raised the same "compensability" issue.³⁹

Mr. Narcisse did not file a hearing brief.⁴⁰

Trident Seafoods filed no pre-claim controversion notices in this case.⁴¹

The record contains no evidence Mr. Narcisse requested a hearing or requested a time extension in which to request a hearing before his verbal statement he wanted a hearing set, made on March 25, 2016.⁴² Mr. Narcisse's March 25, 2016, Affidavit of Readiness for Hearing, filed on March 29, 2016, was the first and only request by Mr. Narcisse for a hearing.⁴³

³⁸ *Narcisse I* at 9-10, No. 29.

³⁹ *Id.* at 10, No. 30.

⁴⁰ *Id.*, No. 31.

⁴¹ *Id.*, No. 32.

⁴² *Id.*, No. 33.

⁴³ *Id.*, No. 34.

Mr. Narcisse has not contended he did not receive each controversion notice and PHC summary warning him about his obligation to timely request a hearing on his claims. Mr. Narcisse offered no evidence suggesting he had an inability to file or a legal excuse from filing a timely hearing request on his claims.⁴⁴

At hearing on July 19, 2016, Mr. Narcisse, who understood and spoke English clearly, testified he began working for Trident Seafoods in Kodiak around June 30, 2012, as a processor. One job he performed, sorting, resulted in neck pain and range-of-motion loss. The sorting tables were "set up for shorter people," which required Mr. Narcisse to "stoop down" and bend his head forward to complete his tasks. Mr. Narcisse performed this task for one, eight-hour day. Mr. Narcisse reported his neck difficulties to his supervisor who reassigned him to a different task. Over the next few days, Mr. Narcisse's neck pain got worse, and never got better. Mr. Narcisse sought medical care with Providence Hospital. He took a day off at his doctor's instruction, and returned to work the next day performing modified duty for Trident Seafoods at the "case-up" section. Around this time, Mr. Narcisse's work with Trident Seafoods slowed down and he was working perhaps four days per week. When Mr. Narcisse's neck did not improve, on or about September 24, 2012, Trident Seafoods' human resources person told him to see North Pacific Medical Clinic for additional care. By this point, Mr. Narcisse's neck and left shoulder were bothering him. North Pacific Medical Clinic recommended cervical x-rays and physical therapy.

Mr. Narcisse decided to go home to California, but before he could leave Kodiak, he was arrested for alleged assault and robbery. Eventually, a jury acquitted Mr. Narcisse of all charges in October 2013, and he was released from jail, at which time he returned to California. While in jail, Mr. Narcisse requested treatment for his neck and left shoulder because sharp pains continued in both areas. He was also assaulted while in prison, resulting in bilateral fractures of his ribs. Mr. Narcisse had difficulty lifting his arm over his head and had reduced motion in his cervical spine.

⁴⁴ *Narcisse I* at 11, No. 36.

In California, Mr. Narcisse first sought treatment at a county hospital until Trident Seafoods suggested he contact U.S. HealthWorks. Mr. Narcisse's California providers prescribed pain medication and physical therapy, and released him to "light duty" work. Mr. Narcisse attended physical therapy as prescribed, from around November 2013 through January 2014. Physical therapy referred him to an orthopedic specialist, and Mr. Narcisse selected Peninsula Orthopedics, which prescribed medication, suggested neck injections, and referred Mr. Narcisse to a shoulder specialist. He also had neck, shoulder, and back magnetic resonance imaging scans.

Once Mr. Narcisse saw Trident Seafoods' EME physician, Trident Seafoods controverted his claim. Without other resources, Mr. Narcisse returned to the county hospital and received additional physical therapy and a functional capacity evaluation. He eventually returned to Seattle and saw physicians at Harborview Medical Center, who provided a left shoulder injection, which improved Mr. Narcisse's symptoms. Mr. Narcisse's neck remains unchanged. He did not mention his back.⁴⁵

On cross-examination, Mr. Narcisse agreed he had back and shoulder injuries in California before working for Trident Seafoods and had been retrained as a real estate salesperson. While working for Trident Seafoods, Mr. Narcisse earned \$7.75 per hour. Mr. Narcisse remembered the adjuster asking him to provide income tax earning records for 2010 and 2011. He said he did not provide the information because he had no records and agreed his 2010 earnings were \$263.65 and his earnings in 2011 were zero. Mr. Narcisse also conceded he did not list his left shoulder on his injury report filed in August 2012. Mr. Narcisse said his left shoulder started hurting around September 24, 2012. After his work injury, Mr. Narcisse continued to work for Trident Seafoods for pay through September 23, 2012. The day he was scheduled to leave, Mr. Narcisse was arrested and spent 13 months in jail. Mr. Narcisse admitted he was assaulted by a prison inmate in December 2012, and suffered several broken ribs and a broken nose. Mr. Narcisse denied any increase in his neck or left shoulder symptoms following the prison assault. Mr. Narcisse's ribs hurt so badly, he did not think about anything else.

⁴⁵ *Narcisse I* at 11-12, No. 37.

Mr. Narcisse submitted numerous requests for medical attention while in prison. He eventually got some medication and an examination near the time he was to be released. Though he was initially cleared for work, Mr. Narcisse never worked while he was in jail and toward the end of his incarceration was “work restricted.” Mr. Narcisse could not recall if he told his orthopedic physician he had been assaulted while in prison. Though his functional capacity evaluation showed he could work lifting up to 50 pounds, Mr. Narcisse never got a “full medical release” and never returned to work for Trident Seafoods thereafter. Mr. Narcisse maintained he never received a termination notice from Trident Seafoods. Mr. Narcisse tried to work “under the table” in December 2015 for a friend, but Mr. Narcisse thought his efforts were “not useful.” Medicaid paid for some treatment, but it “only does so much.” Mr. Narcisse was seen throughout 2014 and 2015 at Harborview Medical Center and was not sure why Trident Seafoods did not have all related medical records. Mr. Narcisse showed these medical records, which he carried in his backpack, to Dr. Gritzka and every other physician he had seen. Mr. Narcisse was under the impression when he signed medical record releases that Trident Seafoods would obtain and file his relevant medical records. He did not reference a specific record supporting his case.⁴⁶

Mr. Narcisse claimed treatment beginning February 21, 2014, and continuing, including injections into his cervical spine and a shoulder evaluation. Though Mr. Narcisse also wanted an order requiring Trident Seafoods to pay an outstanding medical bill from Peninsula Orthopedics in California, Mr. Narcisse could not specifically identify the bill other than to say it was somewhere between \$100.00 and \$300.00. He relied primarily for claim support on unspecified medical records from U.S. HealthWorks and Peninsula Orthopedics.⁴⁷

In his closing argument, Mr. Narcisse maintained he asked for a hearing on “March 25, 2016,” and the “last controversion” he received from Trident Seafoods was dated May 20, 2014, making his hearing request timely in his view. Mr. Narcisse offered

⁴⁶ *Narcisse I* at 12-13, No. 38.

⁴⁷ *Id.* at 13, No. 39.

to gather and provide missing medical records. Mr. Narcisse contended Trident Seafoods accepted his left shoulder and neck as work-related injuries. In Mr. Narcisse's view, he still needs continued treatment and evaluation for his neck and left shoulder. Mr. Narcisse referenced no specific medical record legally supporting his claims for TTD or past or ongoing medical claims.⁴⁸

Trident Seafoods objected to Mr. Narcisse obtaining and filing any missing medical records. Trident Seafoods contended Mr. Narcisse should have gathered and filed medical records upon which he intended to rely before the SIME and certainly before the hearing. Since Trident Seafoods already paid for an expert physician's opinion and perpetuation deposition, it would be unfair to allow Mr. Narcisse to provide additional medical evidence post-hearing that was not produced at least 20 days before the hearing and not subject to Trident Seafoods' expert's analysis.⁴⁹

After deliberating, the panel issued an oral order denying Mr. Narcisse's request to supplement the hearing record with medical records, given Trident Seafoods' objection.⁵⁰ The Board, in its final decision, reaffirmed its oral order.⁵¹

In its closing argument, Trident Seafoods noted it never accepted Mr. Narcisse's left shoulder as a compensable injury and it was never reported on an injury report. Trident Seafoods relied on Dr. Lynch's EME report stating the left shoulder was never a work injury. Trident Seafoods asserted Mr. Narcisse's claims were barred because they were controverted and Mr. Narcisse did not request a hearing within two years of the earliest applicable controversion notices. Trident Seafoods maintained it had already paid medical benefits related to Mr. Narcisse's neck through March 2014. Trident Seafoods further stated it paid time loss benefits from October 2013 through February 2014. As to compensability issues, Trident Seafoods relied on Drs. Lynch and Gritzka, who said Mr. Narcisse's work-related injury was medically stable by, respectively, November 19,

⁴⁸ *Narcisse I* at 13, No. 40.

⁴⁹ *Id.*, No. 41.

⁵⁰ *Id.*, No. 42.

⁵¹ *Id.* at 30.

2012, and December 8, 2012. Both said the shoulders and back were not work-related injuries. Both opined Mr. Narcisse suffered only a cervical strain, which subsequently resolved. Further, as for disability benefits, Trident Seafoods paid Mr. Narcisse TTD from September 24, 2012, through October 1, 2012, and again from October 19, 2013, through February 21, 2014, thus resulting in an overpayment according to opinions from Drs. Lynch and Gritzka. Mr. Narcisse never filed evidence of any outstanding medical bills or transportation expenses, and so these claims should be denied. No future medical treatment for his work injury with Trident Seafoods was needed as both Drs. Lynch and Gritzka opined the work injured had fully resolved. Since Mr. Narcisse never provided any evidence to support any compensation rate, Trident Seafoods paid the minimum weekly rate and, thus, no compensation rate adjustment was appropriate. Mr. Narcisse never provided any evidence supporting a penalty. Since no benefits were unpaid when due, no interest was awardable.⁵²

On August 18, 2016, *Narcisse I* was served on Mr. Narcisse and his attorney at their addresses of record.⁵³ On September 6, 2016, Mr. Narcisse timely filed his undated petition for reconsideration.⁵⁴ Because the petition's service certificate states Mr. Narcisse served a true and correct copy on the "insurer" and "employer" on the date listed, and no date is listed, it is unknown whether Mr. Narcisse served his petition on the parties. The petition does not state he served it on Trident Seafoods' attorney.⁵⁵

Mr. Narcisse's petition for "reconsideration or modification," stated: "(1) left shoulder was a reported injury (2) failure to review all relevant medical records as well as continuing medical records. Only get treatment through welfare and takes long time." Mr. Narcisse provided no argument, analysis, or statutory or decisional law to support his

⁵² *Narcisse I* at 13-14, No. 43.

⁵³ *Narcisse II* at 4, No.15.

⁵⁴ *Id.*, No. 17.

⁵⁵ *Id.*, No. 18.

petition.⁵⁶ Attached to the petition was a May 13, 2016, medical report from William Anderson, M.D., at Swedish Spine, Sports & Musculoskeletal Medicine.

According to Dr. Anderson's report, Mr. Narcisse's chief complaint was "neck pain, back pain and left shoulder pain following an on-the-job injury dated August 8, 2012." Mr. Narcisse reported chronic neck and back pain since August 2012, while working at a seafood processing plant where he developed lower back pain "almost immediately after starting the job about a month prior." According to Mr. Narcisse's history, "there was no specific injury event." On or about August 8, 2012, Mr. Narcisse said he developed neck pain while repetitively bending, and developed left shoulder pain "around that time." Mr. Narcisse told Dr. Anderson he was incarcerated in 2012 and involved in an altercation where he sustained rib fractures. "He reports no change in his neck or back pain related to this incident." As for Mr. Narcisse's left shoulder, an ultrasound showed mild acromioclavicular arthrosis without synovitis, mild supraspinatus tendinopathy, left partial thickness articular supraspinatus degenerative fraying and subacromial subdeltoid bursopathy. Dr. Anderson noted "[Mr. Narcisse's] pain and overall level of disability seemed out of proportion to his objective imaging and physical examination findings." Mr. Narcisse did not tell Dr. Anderson about any prior work injuries. Dr. Anderson reviewed Dr. Lynch's February 21, 2014, EME report, Dr. Gritzka's October 2, 2015, SIME report, and physical therapy and functional capacity evaluation records. He diagnosed: (1) chronic neck pain; (2) chronic lower back pain; (3) mild multilevel cervical disc degeneration of uncertain clinical significance; (4) mild L4-5 facet arthropathy of uncertain clinical significance; (5) chronic left shoulder pain, well-controlled following ultrasound-guided injection; and (6) left supraspinatus tendinopathy and subacromial bursopathy. Dr. Anderson recommended physical therapy for Mr. Narcisse's neck and shoulder and referral to "pain services" for evaluation. He again found Mr. Narcisse's "pain and level of disability seem out of proportion to his objective imaging and physical examination findings."

⁵⁶ *Narcisse II* at 4, No. 19.

Dr. Anderson reported he had a “lengthy discussion” with Mr. Narcisse and opined his neck pain began from repetitive stress secondary to prolonged, awkward positioning while working for Trident Seafoods. However, Dr. Anderson said Mr. Narcisse developed a chronic pain syndrome related to this, and Dr. Anderson “would have expected straightforward myofascial pain to have resolved by now after cessation of the offending activity.” Mr. Narcisse’s cervical and lumbar spine imaging studies did not reveal findings caused by any injury or occupational exposure. However, Mr. Narcisse had significant worsening in his low back pain after he stopped working. Dr. Anderson estimated Mr. Narcisse’s current low back pain was 25 percent due to occupational exposure. Dr. Anderson further stated, “It is also my opinion that his left shoulder pain began as a result of repetitive stress due to prolonged awkward positioning while working at a seafood processing plant.” He further stated, “None of his current symptoms are related to injuries suffered during the altercation while he was incarcerated in late 2012.” Dr. Anderson recommended additional treatment for Mr. Narcisse’s neck, back, and left shoulder “in connection” with his workers’ compensation claim.⁵⁷ Dr. Anderson’s May 13, 2016, report was not filed with the Board until September 6, 2016.⁵⁸

The Board issued its Final Decision and Order on Reconsideration and Modification declining to reconsider or modify *Narcisse I*⁵⁹.

3. *Standard of review.*

The Board’s findings of fact shall be upheld by the Commission on review if the Board’s findings are supported by substantial evidence in light of the record as a whole.⁶⁰ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁶¹ “The question of whether the quantum of evidence

⁵⁷ *Narcisse II* at 4-6, No. 20.

⁵⁸ *Id.* at 6, No. 21.

⁵⁹ *Id.* at 11.

⁶⁰ AS 23.30.128(b).

⁶¹ *See, e.g., Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.”⁶² The weight given to witnesses’ testimony, including medical testimony and reports, is the Board’s decision to make and is thus conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁶³ On questions of law and procedure, the Commission does not defer to the Board’s conclusions but rather exercises its independent judgment.⁶⁴ However, the Board’s conclusions with regard to credibility are binding on the Commission, since the Board has the sole power to determine credibility of witnesses.⁶⁵

Discovery disputes are reviewed for abuse of discretion.⁶⁶ An abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.⁶⁷ Furthermore, the Commission’s decision must be based on the record before the Board, the briefs of the parties, and oral argument before the Commission. The Commission does not accept or review new evidence.⁶⁸

4. Discussion.

a. Was Mr. Narcisse’s request for hearing untimely under AS 23.30.110(c)?

The Board dismissed Mr. Narcisse’s claim for benefits in his November 2013 WCC, finding he had not timely requested a hearing following controversion by Trident Seafoods. The Alaska Workers’ Compensation Act (Act), under AS 23.30.110(c), states “[i]f the employer controverts a claim on a board-prescribed controversion notice and the

⁶² *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

⁶³ AS 23.30.122.

⁶⁴ AS 23.30.128(b).

⁶⁵ AS 23.30.122; AS 23.30.128(b).

⁶⁶ *State v. Carpenter*, 171 P.3d 41 (Alaska 2007); *Landers v. Municipality of Anchorage*, 915 P.2d 614 (Alaska 1996).

⁶⁷ *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

⁶⁸ AS 23.30.128(a).

employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.”⁶⁹ The Alaska Supreme Court (Court) has held that the language in AS 23.30.110(c) is directory and not mandatory.⁷⁰ The time for requesting a hearing may be expanded at the Board’s discretion when facts support an expansion of the time for requesting a hearing.

On its face, Mr. Narcisse’s request for hearing on the November 2013 WCC was untimely as the Board held. However, the Board has frequently held that the time period in AS 23.30.110(c) is tolled,⁷¹ or expanded, when the parties request an SIME. The Commission, in *Omar v. Unisea, Inc.*, implicitly accepted the Board practice of tolling the time limitation in AS 23.30.110(c) during the SIME process.⁷² In *Omar*, the Commission remanded the issue because the Board had not considered the ARH which Mr. Omar had filed two years earlier. The Board had simply found two later filed ARHs untimely, even considering the time during the SIME process, and had not reviewed the earlier ARH before it dismissed Mr. Omar’s claim. The remand asked the Board to consider the earlier ARH and its impact, if any, on a dismissal of Mr. Omar’s claim under AS 23.30.110(c). The Commission accepted the Board’s tolling practice without fully discussing it.

The Commission also, in *Alaska Mechanical, Inc. v. Harkness*, reviewed the Board policy of extending the time limitation in AS 23.30.100(c) when the SIME process is commenced prior to the running of the time period.⁷³ The Commission held that more than a stipulation for an SIME is required before the time limitation is tolled. In *Harkness*, the employee’s attorney never initiated the SIME form although he had been instructed to do so.

⁶⁹ AS 23.30.110(c).

⁷⁰ *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 197 (Alaska 2008).

⁷¹ *Black’s Law Dictionary*, 8th ed., at 1525 (2004), defines “toll” as “(of a time period, esp. a statutory one) to stop the running of; to abate [toll the limitations period]”.

⁷² *Omar v. Unisea, Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 053 (Aug. 27, 2007).

⁷³ *Alaska Mechanical, Inc. v. Harkness*, Alaska Workers’ Comp. App. Comm’n Dec. No. 176 (Feb. 12, 2013).

In *Fishell v. Alaskan Employers Services*, the Board discussed the Board's history of holding that "the SIME process tolls the .110(c) deadline for the period the parties are actively in the SIME process."⁷⁴ The Board dismissed Mr. Fishell's claim because he failed to request a hearing in any manner and the parties had not started the process for requesting an SIME.

The Board, in *Snow v. Tyler Rental, Inc.*, found that the signing of the SIME form commenced the tolling of AS 23.30.110(c) until the process was completed.⁷⁵ In *Turpin v. Alaska General Seafoods*, the Board held the deadline was tolled when the employee filed a request for an SIME.⁷⁶ In *McKitrick v. Municipality of Anchorage*, the Board found the time tolled when the employer petitioned for an SIME and the Board ordered the SIME.⁷⁷ In *Aune v. Eastwind, Inc.*, the time for filing an ARH was tolled when the parties stipulated to an SIME and the Board designee at a PHC ordered an SIME prior to the two-year time limit in AS 23.30.110(c) passing.⁷⁸

Thus, there is a long history of the Board tolling the statute of limitations for requesting a hearing when the parties have agreed to, and participated in, the SIME process. Mr. Narcisse filed his first WCC on December 2, 2013, which Trident Seafoods controverted on January 10, 2014. Without any tolling process, Mr. Narcisse would have been obligated to request a hearing by January 10, 2016. He was fully advised of the need to request a hearing, both by language on the controversion and by the reminder in the PHC summary sent to him and to his attorney.

⁷⁴ *Fishell v. Alaskan Employers Servs.*, Alaska Workers' Comp. Bd. Dec. No. 14-0070 (May 23, 2014).

⁷⁵ *Snow v. Tyler Rental, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 11-0015 (Feb. 16, 2011).

⁷⁶ *Turpin v. Alaska Gen. Seafoods*, Alaska Workers' Comp. Bd. Dec. No. 09-0054 (Mar. 18, 2009).

⁷⁷ *McKitrick v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 10-0081 (May 4, 2010).

⁷⁸ *Aune v. Eastwind, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 01-0259 (Dec. 19, 2001).

However, on November 12, 2014, the parties agreed to, and stipulated to at the PHC, an SIME. The parties at the PHC on June 4, 2015, further discussed the SIME process, and Mr. Narcisse's attorney promised to file his SIME questions, the SIME medical binders, and a fully executed SIME form.⁷⁹ Mr. Narcisse's attorney complied with these directives, because Thomas Gritzka, M.D., evaluated Mr. Narcisse for an SIME on October 2, 2015.⁸⁰

Thus, according to Board practice, the statute of limitations in AS 23.30.110(c) was tolled from June 4, 2015, to October 2, 2015, a period of 120 days. Therefore, the ARH which previously was due by January 10, 2016, now became due on May 10, 2016, because the time was tolled during the SIME process. This comports with a long practice by the Board and with the Court's dislike of dismissing a claim for failure to request a hearing timely.

The Court has held that AS 23.30.110(c) is directory and not mandatory. In *Kim*, the Court reiterated its distaste for dismissing a claim under AS 23.30.110(c) when an employee had made some effort to move the hearing process forward. "[T]he notion [is] that a statute of limitations defense is disfavored."⁸¹ Moreover, the Court, in interpreting a question of law, adopts "the rule of law that is most persuasive in light of precedent, reason, and policy."⁸² Tolling the time in which to request a hearing by the time involved in the SIME process is in line with the directive from the Court that AS 23.30.110(c) is directory and not mandatory, and is subject to the Board's authority to expand the time for requesting a hearing. Moreover, this policy comports with the legislative directive to construe the Act "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"⁸³ Tolling the time limitation in AS 23.30.110(c) during the SIME process helps to

⁷⁹ *Narcisse I*, at 8, No. 22.

⁸⁰ *Id.*, No. 23.

⁸¹ *Kim*, at 198.

⁸² *Id.*, at 196.

⁸³ AS 23.30.001.

encourage claimants to prosecute their claims timely.⁸⁴ During the SIME process, the time is tolled from when the Board rules on the request for an SIME until the SIME has been completed. The claimant only has the remainder of the AS 23.30.110(c) time period in which to request a hearing.⁸⁵

As the Court in *Kim* noted, the two-year time period is tolled when some action by the employee demonstrates a need for additional time before requesting a hearing. Clearly, a request for an SIME is a demonstration that additional time is needed before a hearing is held. Tolling the AS 23.30.110(c) time limitation for requesting a hearing during the SIME process comports with the Court's directives in similar situations and still furthers the process for moving claims forward expeditiously with sufficient evidence for hearings.

The Commission reverses the Board's Conclusion of Law that Mr. Narcisse's request for hearing on his November 26, 2013, WCC was untimely and reverses the denial of his claim for TPD and a compensation rate adjustment. However, this reversal does not mean that Mr. Narcisse is entitled to those benefits, as is discussed below.

b. Did the Board properly deny Mr. Narcisse's claim for additional TTD and medical benefits?

Mr. Narcisse contends the Board did not properly consider his evidence of additional time loss and medical treatment related to the 2012 injury with Trident Seafoods. Mr. Narcisse initially sought TPD and a compensation rate adjustment in his November 2013 WCC, and then sought TTD and medical benefits in his second WCC in March 2014. The Board denied the benefits from the November 2013 WCC because the Board held the ARH for that WCC was untimely. The Commission now finds evidence in the record affirming the denial of these benefits because Mr. Narcisse presented no evidence in support of either TPD or a compensation rate adjustment.

The Board considered the merits of the March 2014 WCC and denied those benefits because there was no evidence to support Mr. Narcisse's claim for TTD and ongoing

⁸⁴ *Kim*, at 197.

⁸⁵ *Id.* at 198.

medical benefits. The Commission affirms the Board's finding in this regard as the evidence in the record as a whole supports this decision.

The Commission must affirm the Board's findings on facts if there is substantial evidence in the record as a whole to support the findings. The same evidence the Board relied on for denying the claim for TTD under the March 2014 WCC also supports denial of TPD under the November 2013 WCC. To obtain either TPD or TTD, Mr. Narcisse had to prove by a preponderance of the evidence his work injury was the substantial cause of an inability to work.

Mr. Narcisse was paid TTD from September 24, 2012, through October 1, 2012.⁸⁶ He was incarcerated from September 24, 2012, until October 2013. He was not entitled to either TTD or TPD while in prison because he was unavailable for work for reasons other than the injury with Trident Seafoods.⁸⁷ "The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment."⁸⁸ Following his release from prison, Mr. Narcisse was paid TTD from November 4, 2013, through February 21, 2014, at which point he was released to return to work by both Dr. Lynch and Dr. Gritzka. He would not have been entitled to TPD during the time in which he was paid TTD.

To be entitled to additional TTD or TPD Mr. Narcisse had to show by a preponderance of the evidence that he was not medically stable from the work injury and disabled from working due to the work injury.⁸⁹ An injured worker must produce a modicum of evidence establishing a link between the work injury and any ongoing disability.⁹⁰ Once an injured worker establishes the link, the employer may overcome the

⁸⁶ R. 000003.

⁸⁷ *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 266 (Alaska 1974).

⁸⁸ *Id.*

⁸⁹ AS 23.30.185; AS 23.30.200.

⁹⁰ See, e.g., *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991).

presumption with substantial evidence the work injury is not the substantial cause of any disability.⁹¹

First, the Board found Mr. Narcisse was unable to establish the presumption because he provided no medical record indicating he is now disabled from work because of the injury at Trident Seafoods.⁹² However, the Board went on to state that if the records of Dr. Chen were considered to be adequate to raise the presumption, then the medical opinions of Drs. Lynch and Gritzka overcame the presumption with substantial evidence. Once the presumption is rebutted, Mr. Narcisse had to prove by a preponderance of the evidence that his disability or inability to work is the result of the work injury with Trident Seafoods. He could not do this because he was unable to provide any medical record stating the Trident Seafoods injury is the substantial cause of his inability to work. Both the report by Dr. Chen and the late-filed, but not accepted, report from Dr. Anderson allude to the work injury as the cause of his current complaints, but neither affirmatively states the 2012 work injury is the substantial cause. Both Drs. Lynch and Gritzka ruled out the work injury as the substantial cause of any inability to work at this time, finding the cervical strain had resolved by November/December 2012 and Dr. Lynch released Mr. Narcisse to work as a crab processor, his work at the time of injury.⁹³ The medical reports from U.S. HealthWorks in 2013 also indicated Mr. Narcisse was released to modified work.⁹⁴ Mr. Narcisse provided no evidence to the contrary. Therefore, the Board's finding that no TTD is owed to Mr. Narcisse is supported by substantial evidence in the record and this same evidence supports the finding that TPD is likewise not owed to him.

⁹¹ AS 23.30.120; AS 23.30.010(a).

⁹² AS 23.30.120.

⁹³ R. 001205–206.

⁹⁴ R. 001159.

In denying TTD, the Board relied on Drs. Lynch and Gritzka, finding their reports to be credible.⁹⁵ This finding of credibility is binding on the Commission.⁹⁶ Dr. Lynch found Mr. Narcisse sustained a cervical strain from his work at Trident Seafoods but this injury had resolved by November 19, 2012. Dr. Gritzka opined the work injury resolved by December 8, 2012. Neither TPD nor TTD may be paid after the date of medical stability.⁹⁷

Moreover, Trident Seafoods paid Mr. Narcisse TTD benefits once he was released from prison, until Trident Seafoods controverted further benefits based on the EME report of Dr. Lynch, which the Board found to be credible medical evidence. From the date of disability, September 24, 2012, to the date of medical stability, November 19, 2012, is 56 days, and to December 8, 2012, is 75 days. TTD was paid by Trident Seafoods from September 24, 2012, through October 1, 2012, and from November 4, 2013, through February 21, 2014, a period of 116 days. Trident Seafoods paid TTD for more days than Mr. Narcisse was owed TTD benefits. Therefore, no additional TPD or TTD is owed to Mr. Narcisse and this finding is supported by substantial evidence in the record as a whole. He has been paid all the temporary time loss he might have been owed.

Likewise, Mr. Narcisse is not entitled to a compensation rate adjustment. He admitted at hearing he did not provide Trident Seafoods with tax returns for 2010 and 2011 because he did not have these records. According to his testimony at hearing, Mr. Narcisse earned \$263.65 in 2010 and nothing in 2011.⁹⁸ Pursuant to AS 23.30.220(a), as an hourly employee, Mr. Narcisse's compensation rate is based on his earnings from all occupations in either of the two calendar years immediately prior to the year of injury. Since Mr. Narcisse admitted to almost no earnings in either 2010 or 2011, Trident Seafoods was correct in paying him TTD at the minimum compensation

⁹⁵ *Narcisse I* at 27.

⁹⁶ AS 23.30.122.

⁹⁷ AS 23.30.185; AS 23.30.200(a).

⁹⁸ *Narcisse I* at 12.

rate of \$110.00 per week.⁹⁹ Therefore, even if the Board had reached the merits of his claim for benefits in his November 2013 WCC, Mr. Narcisse would not have been awarded a compensation rate adjustment because he was paid at the proper rate under the Act.

The Board also correctly denied Mr. Narcisse any medical benefits for 2013 and 2014 because he did not prove entitlement to these benefits by a preponderance of the evidence. Immediately after Mr. Narcisse stopped working at Trident Seafoods he was arrested on an assault charge and was incarcerated for about a year before he was exonerated and released. While in prison, he received medical treatment. After his release, Narcisse sought payment for medical treatment in 2013 and 2014 but did not submit either medical reports or medical bills to identify what needed to be paid or reimbursed.

The Board relied on the reports of Dr. Lynch and Dr. Gritzka who found that Mr. Narcisse had suffered a cervical strain from his work with Trident Seafoods. Both doctors opined the cervical strain resolved in 2012, differing only in whether it resolved by November 19 or December 8, 2012. Both doctors agreed that no other symptoms or body parts were affected by the work with Trident Seafoods and the work with Trident Seafoods was not the substantial cause of any ongoing problems. Both doctors affirmed that Mr. Narcisse needed no additional medical treatment for the cervical strain. The Board found these medical opinions to be credible and credibility findings are the sole province of the Board.

Furthermore, Mr. Narcisse has not produced any medical evidence showing the work with Trident Seafoods to be the substantial cause of any need for ongoing medical treatment related to the neck, shoulder, or low back. Mr. Narcisse was unable to prove his claim by a preponderance of the evidence. Mr. Narcisse claimed medical care after February 21, 2014; but the credible medical evidence is that the cervical strain resolved by November or December 2012. Mr. Narcisse's claim for ongoing medical treatment was properly denied by the Board.

⁹⁹ AS 23.30.175(a).

c. *Did the Board properly deny Mr. Narcisse's request to supplement the record post-hearing?*

The Board's regulation at 8 AAC 45.120(f) requires a party to file any document in the possession of the party with the Board at least 20 days before a hearing. If the document has been filed with the Board, the Board, in its discretion, may rely on the document in reaching a decision. One of the issues before the Board, on Mr. Narcisse's March 12, 2014, WCC, was his request for medical treatment arising out of his August 8, 2012, injury while working for Trident Seafoods. In order to prove his current need for medical treatment arose out of this injury, Mr. Narcisse had to prove his claim by a preponderance of the evidence.¹⁰⁰

At hearing, Mr. Narcisse requested an opportunity to supplement the Board's record with additional medical evidence, apparently for medical treatment received after December 2014. Some medical records from Neighbor Care Health for physical therapy through August 2015 were provided to Dr. Gritzka, the SIME physician, and through his report became part of the Board's file.¹⁰¹ Mr. Narcisse further testified to some treatment at Harborview emergency room in 2015 but no records were provided to the Board.¹⁰² Moreover, the substantial evidence in the record, through the medical report and deposition of the EME physician Dr. Lynch and the SIME report of Dr. Gritzka, is that Mr. Narcisse's cervical strain injury with Trident Seafoods in 2012 had resolved by November/December 2012. No other medical reports in the Board's file contradicts their opinions. Further, Mr. Narcisse was represented by counsel at prehearing conferences in this matter and at hearing and, if additional evidence to contradict Drs. Lynch and Gritzka were available, Mr. Narcisse's attorney should have known of his obligation to file it timely with the Board. No additional records were provided.

At the PHC on April 18, 2016, both Mr. Narcisse and his attorney, Mr. Geisness, appeared by telephone and participated. The parties agreed that the issues for hearing

¹⁰⁰ AS 23.30.120; *Humphrey v. Lowe's HIW, Inc.*, 337 P.3d 1174, 1180 (Alaska 2014) citing *Cowen v. Wal-Mart*, 93 P.3d 420,424 (Alaska 2004).

¹⁰¹ Hr'g Tr. at 59:11 – 61:5, July 19, 2016.

¹⁰² Hr'g Tr. at 63:4 – 64:4

in July 2016 included medical and transportation costs. In the PHC summary, the Board designee reminded everyone of the need to file timely, per the regulations, in preparation for hearing. Mr. Narcisse is the person with the best knowledge about his medical treatment and thus had within his control the medical records, if any, necessary to support his contention he needed ongoing medical treatment for his 2012 injury with Trident Seafoods. Mr. Narcisse's attorney filed a statement that Mr. Narcisse intended to rely at hearing on "medical records already submitted as evidence."¹⁰³ Mr. Narcisse did not file any new medical evidence prior to the hearing in July 2016. Neither Mr. Narcisse nor his attorney offered any coherent reason for failing to file Dr. Anderson's May 2016 medical report prior to hearing. The Board, exercising its discretion, declined to keep the record open.

Abuse of discretion is reviewed to ascertain if a decision is "arbitrary, capricious, manifestly unreasonable, or stems from an improper motive."¹⁰⁴ There is no evidence proffered by Mr. Narcisse that the decision to close the record following the hearing and the Board's denial to accept any additional medical records from Mr. Narcisse was in any sense arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive. Mr. Narcisse and his attorney were on notice of the need to file timely any evidence upon which they wished to rely at hearing and chose not to file the proffered medical records timely. Moreover, the overwhelming evidence in the record is that Mr. Narcisse's cervical strain resulting from his work with Trident Seafoods had resolved by November/December 2012. Medical records from 2016 are immaterial to the issue of whether any need for past medical treatment from 2013 to 2015 was related to the 2012 work injury. Therefore, the Board's decision to close the record at hearing was not an abuse of discretion and is fully supported by substantial evidence in the record.

Moreover, Mr. Narcisse filed the medical report dated May 13, 2016, from Dr. Anderson with his Petition for Reconsideration to the Board. This report was considered by the Board in its decision declining to reconsider or modify *Narcisse I*. The

¹⁰³ R. at 001135.

¹⁰⁴ *Sheehan*, at 1295.

Board found, and the Commission affirms, that this new medical record does not demonstrate the 2012 work injury with Trident Seafoods is the substantial cause of any need for ongoing medical treatment for the work injury. Dr. Anderson did say that while Mr. Narcisse's neck pain began with the work injury, the pain should have resolved after he stopped working, and he found Mr. Narcisse's complaints of pain to be "out of proportion to his objective imaging and physical examination findings."¹⁰⁵ Furthermore, even if the Board had admitted this medical record, this report standing alone is insufficient to overcome the Board's reliance on the opinions of Drs. Lynch and Gritzka which were closer in time to the work injury and which the Board found credible.¹⁰⁶ The Board found the reports of Drs. Lynch and Gritzka to be credible medical evidence and properly relied on this evidence. The Board's findings of credibility are binding on the Commission.¹⁰⁷ The Commission finds the Board correctly excluded the medical report from Dr. Anderson dated May 13, 2016.

It is noted that new medical evidence may always be filed with the Board on a new WCC, and Mr. Narcisse is entitled to file a new claim for medical benefits if he has new evidence linking the work injury to his current condition. There is no statute of limitations on claims for ongoing medical care.¹⁰⁸ "However, in Alaska, new medical treatment entitles a worker to restart the statute of limitations for medical benefits."¹⁰⁹ Mr. Narcisse will have to prove any new claim for medical benefits by a preponderance of the evidence.

5. Conclusion.

The Commission REVERSES the Board's decision that the ARH relating to the November 2013 WCC was untimely, but finds that the evidence in the record does not support an award of the benefits sought in the November 2013 WCC. The Commission

¹⁰⁵ *Narcisse II* at 5, No. 20.

¹⁰⁶ *Narcisse I* at 27.

¹⁰⁷ AS 23.30.122.

¹⁰⁸ *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 440 (Alaska 2000).

¹⁰⁹ *Id.*

AFFIRMS the Board's decision that Mr. Narcisse is not entitled to the benefits sought in the March 2014 WCC.

Date: 11 January 2018 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 242 issued in the matter of *Imhotep M. Narcisse vs. Trident Seafoods Corporation and Liberty Insurance Corporation*, AWCAC Appeal No. 16-012, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 11, 2018.

Date: January 12, 2018



Signed

K. Morrison, Appeals Commission Clerk