Alaska Workers' Compensation Appeals Commission

Felipe M. Espindola, Appellant, vs. Peter Pan Seafoods, Inc. and Seabright Insurance Company, Appellees.	Final Decision Decision No. 271 October 28, 2019 AWCAC Appeal No. 17-019 AWCB Decision No. 17-0111 AWCB Case Nos. 201211994, 200904843

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0111, issued at Anchorage, Alaska, on September 20, 2017, by southcentral panel members Ronald P. Ringel, Chair, and Robert Weel, Member for Industry.

Appearances: Felipe M. Espindola, self-represented appellant; Michelle M. Meshke, Meshke Paddock & Budzinski, PC, for appellees, Peter Pan Seafoods, Inc. and Seabright Insurance Company.

Proceedings: Appeal filed October 30, 2017; Order on Motion for Extension of Time to File Notice of Appeal issued November 7, 2017; Alaska Supreme Court appeal filed November 24, 2017; Memorandum Opinion and Judgment No. 1697 issued October 10, 2018; jurisdiction returned to Commission effective October 24, 2018; briefing completed May 7, 2019; oral argument held August 8, 2019.

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

By: Deirdre D. Ford, Chair.

1. Introduction.

Felipe M. Espindola worked for Peter Pan Seafoods, Inc., insured by Seabright Insurance Company (Peter Pan), when he sustained an injury in 2009 and another in 2012. The Alaska Workers' Compensation Board (Board) heard Mr. Espindola's claim on August 9, 2017, and issued its decision on September 20, 2017.[1] The Board denied his

[1] *Espindola v. Peter Pan Seafoods, Inc. and Seabright Ins. Co.*, Alaska Workers' Comp. Bd. Dec. No. 17-0111 (Sept. 20, 2017) (*Espindola*).

claim and Mr. Espindola filed an untimely appeal to the Alaska Workers' Compensation Appeals Commission (Commission), which denied his request for an extension of time stating he had not shown good cause for the extension. Mr. Espindola appealed to the Alaska Supreme Court (Court) which remanded the matter to the Commission to allow Mr. Espindola to proceed with his appeal. As part of his appeal, Mr. Espindola has asked the Commission to consider additional medical evidence not presented to the Board. The Commission heard oral argument on August 8, 2019, and now affirms the Board's decision.

2. Factual background and proceedings.[2]

Mr. Espindola has a long history of low back pain dating back to at least 2001, and he sought treatment for his low back several times between 2001 and 2008.[3]

On March 6, 2009, while working for Peter Pan, Mr. Espindola developed pain in his lower back after spreading cod bellies in a tote.[4] He was using a wooden support to break apart cod bellies when the support slipped. He completed the season with Peter Pan without any modifications to his work, and returned to his home in Grandview, Washington.[5] On April 29, 2009, Mr. Espindola saw ARNP Michelle Gaul at the Grandview Farm Workers' Clinic who diagnosed a lumbar strain.[6] The August 14, 2009, magnetic resonance imaging (MRI) showed mild to moderate degenerative disc disease at L4-5 and L5-S1 with mild annular bulges.[7]

On October 13, 2009, Mr. Espindola saw Carlos N. Caso, PA-C, at Orthopedics Northwest, PLLC, who determined the work injury was an exacerbation of Mr. Espindola's

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[2] 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.

[3] Exc. 004-012.

[4] Exc. 173-174.

[5] Felipe Espindola Dep., Mar. 3, 2016, at 28:9-17, 32:13-21.

[6] Exc. 017.

[7] Exc. 018-019.

preexisting degenerative disc disease. PA-C Caso prescribed physical therapy and home exercise. At the time he saw PA-C Caso, Mr. Espindola was harvesting apples.[8]

In June and July 2010, Mr. Espindola received three epidural steroid injections,[9] but none of the injections provided significant relief.[10]

In 2012, Mr. Espindola was trimming fish that had been filleted by a machine that left a lot of bones. He was working on the side of the processing line that required him to move his right hand to the right while trimming the fish, and he experienced no problems. On August 5, 2012, he transferred to the other side of the processing line, which required him to move his right hand to the left. His arm progressively got numb.[11] On August 6, 2012, Mr. Espindola reported the injury to Peter Pan, and was seen at Kanakanak Hospital where he stated the injury occurred while he was trimming fillets in a different direction and "pain started in his little finger . . . and gradually it has gone all the way up to his neck. No known injury to his neck or shoulder or arm." He was placed in a sling and told not to use the arm for three days.[12]

Mr. Espindola saw Paul Furan, PA-C, on September 18, 2012, and gave the following history of his shoulder injury:

> On the day that the patient became aware of his injury he had been working for 3 days at a new position doing the work that he had been doing for some time but now doing it backwards or left handed. He states that he began to feel a pain in the point of the shoulder of the right arm and then began to notice some sensation of numbness in the little finger.[13]

On October 4, 2012, PA-C Furan diagnosed cervical and right shoulder strains.[14]

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8 Exc. 020-024.

9 R. 301-303, 307.

10 R. 298.

11 Espindola Dep. at 35:22 – 36:11, 37:13-21; R. 032-035.

12 R. 032-035; Exc. 039-040; R. 269-270.

13 Exc. 041-042.

14 Exc. 043.

Mr. Espindola next saw PA-C Furan on May 13, 2013, who noted medical care was put on hold because Mr. Espindola had returned to Alaska to work.[15] On May 21, 2013, Mr. Espindola saw Eric B. Lowe, PA-C, whom he told the shoulder injury had occurred when he was "doing repetitive overhead work activity. It was not a single episode of injury or trauma."[16]

The August 2, 2013, MRI of Mr. Espindola's right shoulder showed a small impingement-related tear of the supraspinatus tendon and mild to moderate glenohumeral joint arthropathy.[17] On August 6, 2013, PA-C Lowe reviewed the MRI and administered a steroid injection.[18] The August 12, 2013, MRI of the lumbar spine showed degenerative disc disease at L4-5 and L5-S1 with disc protrusions.[19]

Mr. Espindola saw Paul Reiss, M.D., on September 20, 2013, for an Employer's Medical Evaluation (EME). Dr. Reiss reviewed Mr. Espindola's medical records since the 2009 injury and examined Mr. Espindola. Mr. Espindola explained to Dr. Reiss the 2012 shoulder injury occurred when the machinery "was not cutting well, and he says there was too much bone on a fish. There was no sudden event, but he noticed during the day some pain in the right axilla." Dr. Reiss diagnosed degenerative disc disease in Mr. Espindola's lumbar spine, noting the August 2009 MRI showed only degenerative changes, with no disc herniation attributable to a traumatic event. He concluded there was no permanent aggravation of Mr. Espindola's preexisting degenerative disc disease, and the 2009 injury was no longer the substantial cause of the condition. He also stated the work activities Mr. Espindola described could not be the cause of his shoulder condition and could not have permanently aggravated the arthritis in his shoulder.[20]

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15 R. 250.

16 R. 248.

17 Exc. 045-046.

18 Exc. 047-048.

19 R. 238.

20 Exc. 050-060.

On October 15, 2013, Peter Pan controverted all benefits for both the 2009 and 2012 injuries based on Dr. Reiss's EME Report.[21]

Mr. Espindola returned to the Yakima Valley Farm Workers Clinic on February 25, 2014, and saw Abby Myers, PA-C. He told PA-C Myers that he had injured his right shoulder about two years before "while lifting heavy objects at work."[22]

The June 3, 2014, x-rays of Mr. Espindola's lumbar spine showed only mild degenerative changes at L4-5 and L5-S1.[23]

On June 20, 2014, Peter Pan again controverted all benefits related to both the 2009 and 2012 injuries based on Dr. Reiss's EME Report.[24] On July 21, 2014, Mr. Espindola had an MRI of the right shoulder that showed a new interstitial laminar tear in the infraspinatus and a cyst in the glenoid.[25]

Mr. Espindola attended another EME with Dr. Reiss on January 22, 2015. Dr. Reiss examined Mr. Espindola and reviewed the medical records since his September 2013 evaluation. He diagnosed degenerative disc disease in Mr. Espindola's lumbar spine that predated and was not permanently aggravated by the 2009 work injury. Dr. Reiss noted the multiple lumbar MRIs have shown only degenerative changes. He concluded the 2009 injury caused only a temporary strain, which had long resolved. Dr. Reiss diagnosed degenerative arthritis of the right shoulder that predated the 2012 injury. He also diagnosed possible arthrosis of the glenohumeral joint, but stated that could not be the result of the 2012 work injury as Mr. Espindola did not describe any overhead work, only a change in the direction he had been moving his arm.[26]

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21 R. 001.

22 R. 398-401.

23 R. 593.

24 R. 005.

25 R. 385.

26 Exc. 069-079.

On February 19, 2015, Peter Pan again controverted all benefits related to Mr. Espindola's low back and right shoulder based on Dr. Reiss's January 22, 2015, EME report.[27]

Peter Pan took Mr. Espindola's deposition on March 3, 2016. He explained that at the time of the 2012 injury, he was removing bones from the fillets that had come from the machine. The fish was on a moving conveyor belt, and he was cutting in the opposite direction from what he was used to doing. At one point he felt a "click" in his shoulder, and, then, with continued movement his arm got numb.[28]

On March 16, 2016, Dr. Reiss reviewed Mr. Espindola's deposition transcript, particularly Mr. Espindola's description of how the injuries occurred, and responded to questions from Peter Pan's adjuster. Dr. Reiss noted that Mr. Espindola had described the 2009 injury as occurring while pushing a hamper with fish in it, and he felt a "click" in his shoulder while cutting fish in 2012. Dr. Reiss stated that while Mr. Espindola's descriptions provided some clarification, they did not change his opinions, because his opinions were based on the diagnostic studies and physical exams.[29]

On September 28, 2016, Mr. Espindola saw James F. Scoggin, III, M.D., for a Board-ordered Second Independent Medical Evaluation (SIME). Mr. Espindola reported to Dr. Scoggin that the 2012 shoulder injury occurred when he was cutting fillets from right to left, which was the reverse of his usual pattern. While cutting, he hit a bone and felt a pop with immediate pain and numbing in his right shoulder. Dr. Scoggin opined Mr. Espindola's low back condition was not caused by the 2009 work injury, noting Mr. Espindola had a continuous history of low back pain beginning long before the injury. As to Mr. Espindola's right shoulder, Dr. Scoggin diagnosed glenohumeral joint arthropathy, which was not related to the 2012 work injury, and a posterior labral tear, with associated cysts, which were substantially caused by the work injury.[30]

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27 Exc. 183-184.

28 Espindola Dep. at 42:12-22, 37:18-21.

29 R. 625-626.

30 Exc. 086, 163, 166, 168.

In his deposition, Dr. Scoggin agreed there were inconsistencies in how Mr. Espindola had described the 2012 injury, but he restated his opinion that the substantial cause of Mr. Espindola's labral tear and pain was the cutting activities Mr. Espindola did that day.[31]

At the August 9, 2017, hearing, Dr. Reiss testified that when he examined Mr. Espindola in 2013, about a year after the 2012 injury, Mr. Espindola moved his arms freely during the exam, "talking with his hands," and removing his shirt using both arms. He opined that because memories fade, histories of injury closer in time to the event are usually more reliable. He noted that the day after the injury, Mr. Espindola reported there had been no injury, just a gradual onset of pain. This was consistent with Mr. Espindola's description of the injury at the September 20, 2013, EME, when Mr. Espindola said there was no sudden event, he just noticed pain in his axilla during the day. Dr. Reiss noted the first mention of a "click" was in Mr. Espindola's deposition, and the first mention of "hitting a bone" in the medical records was Mr. Espindola's description of the incident to Dr. Scoggin. Dr. Reiss explained that while the August 2, 2013, MRI showed a small tear of the supraspinatus tendon, the location of the tear was such that it would not have been caused by the motion Mr. Espindola described.[32]

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.[33] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[34] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind

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[31] James F. Scoggin, III, M.D., Dep., Jan. 25, 2017, at 12:18 – 13:4, 14:7-12, 14:20-22.

[32] Hr'g Tr. at 16:8-15, 23:1-4, 23:13-20, 24:13-24, 25:6-8, 27:10-16, 29:3-11, 32:13-14, Aug. 9, 2017.

[33] AS 23.30.128(b).

[34] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

is a question of law."[35] 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.[36] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment.[37] 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.[38]

4. Discussion.

The Board found Mr. Espindola did not prove by a preponderance of the evidence that his work for Peter Pan, for either his 2009 low back injury or his 2012 shoulder injury, was now the substantial cause of his current need for medical treatment.[39] Mr. Espindola appealed this decision to the Commission, asserting the Board had not properly considered all of his medical records. He specifically asserts the records of Dr. Jesus Campos, Dr. Vicente R. Diaz, Dr. Scoggin, Dr. Brian, Dr. David, and Dr. Mark Merrell were not considered or not given the proper weight. The records of Dr. Jesus Campos, Dr. Vicente R. Diaz, Dr. Brian, and Dr. David were not part of the file before the Board at the time of the hearing.[40] Dr. Mark Merrell's records are part of the Board's record and were considered by Dr. Scoggin, the SIME physician.[41] The Board specifically reviewed both Dr. Scoggin's report and his deposition testimony in reaching its conclusion.

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[35] *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).

[36] AS 23.30.122.

[37] AS 23.30.128(b).

[38] AS 23.30.122; AS 23.30.128(b).

[39] *Espindola* at 12.

[40] Review of Record on Appeal; Mr. Espindola is reminded that, if he has new medical evidence not available at the time of the hearing, he may file a new claim with the Board to consider this new evidence.

[41] *See*, Exc. 126, 137, 138, 152-153.

The Commission reviews the Board's decision utilizing the test of whether there is substantial evidence in the record to support the Board's findings and conclusions. The Court has defined substantial as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[42] Therefore, the Commission looks to see if the Board's decision is supported by substantial evidence in the record as a whole. The quantum of evidence necessary to support the conclusion is a legal question for which the Commission exercises its independent judgment.

a. Is the Board decision finding the low back not compensable supported by substantial evidence in the record?

The Commission reviews the Board's findings to determine whether the decision is supported by substantial evidence in the record as a whole.[43] Moreover, the Board, not the Commission, determines what weight to give to the evidence before the Board. "A finding by the board concerning the weight to be accorded to a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."[44]

In a workers' compensation hearing, the Board applies the test under AS 23.30.120 that a claim is presumed to be compensable in the absence of substantial evidence to the contrary. This test is a three-part inquiry. At the first step, an injured worker must raise the presumption the claim is compensable by establishing a preliminary link between work and the need for medical treatment.[45] Only evidence tending to show the link is considered and competing evidence is disregarded.[46] Furthermore, the Board does not make credibility determinations at this stage.[47]

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42 *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978).

43 AS 23.30.128(b).

44 AS 23.30.122.

45 *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011) (citations omitted) (*McGahuey*).

46 *Id.*

47 *Id.*

Once the injured worker establishes the necessary link between work and the claim for medical treatment, the employer must rebut the presumption with substantial evidence to the contrary. The employer must produce evidence that "(1) provides an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the disability, or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability." The evidence rebutting the presumption is viewed in isolation and without regard for a credibility determination.[48] The presumption may be rebutted by presentation of the opinion of "a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not a substantial cause of the disability."[49] The weight to be given to the doctor's opinion is determined later, once the Board has determined the presumption of compensability has been overcome.[50]

The Board held Mr. Espindola raised the presumption of compensability for his low back injury and/or pain through his testimony and the medical report from October 13, 2009, of PA-C Caso that work exacerbated Mr. Espindola's preexisting degenerative disc disease. This evidence established the necessary link between work and disability from the low back condition.

Since Mr. Espindola was able to establish the preliminary link between work and his low back condition, Peter Pan had to rebut the presumption with substantial evidence. Peter Pan presented the EME report of Dr. Reiss, his testimony, and the SIME report of Dr. Scoggin. Both Drs. Reiss and Scoggin stated Mr. Espindola's current low back pain was unrelated to the 2009 incident at Peter Pan. Dr. Scoggin noted Mr. Espindola had a long history of back pain, dating at least to 2006.

Any current pain was due to degenerative changes and not the work at Peter Pan. Dr. Reiss stated in his EME report that while Mr. Espindola had a traumatic injury to his

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[48] *McGahuey*, 262 P.3d 613, 620; *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[49] *Id.*

[50] *Id.*

low back in 2009, it was temporary in nature and had resolved. Dr. Reiss stated any ongoing pain was related to his preexisting degenerative disc disease. The Board found these two reports substantial evidence rebutting the presumption of compensability.

Once the employer rebuts the presumption, the injured worker must prove that work is the substantial cause of the disability by a preponderance of the evidence. At this step, the Board evaluates the credibility of the evidence and the weight to be given to the evidence. While Mr. Espindola was able to demonstrate an injury to his low back by his work in 2009 with Peter Pan, the Board found the evidence from Dr. Reiss and Dr. Scoggin that his low back injury from Peter Pan had resolved to be compelling. The doctors stated the current back pain was not substantially caused by the work at Peter Pan, but was the result of his preexisting and ongoing degenerative disc disease. The Board found these doctors' reports to be substantial evidence, and Mr. Espindola was unable to prove his claim by a preponderance of the evidence.[51]

The evidence of Drs. Reiss and Scoggin is substantial evidence because it is the kind of evidence a reasonable person might accept as adequate to support a conclusion. This evidence is bolstered by Mr. Espindola's own testimony that he was able to work for Peter Pan from January to April and from June to September from 2002 through 2013.[52] When not working for Peter Pan he worked in agriculture in the State of Washington, picking apples and cherries.[53] He has also continued to work in agriculture pruning grapes.[54] The Board considered all of the medical records submitted by the parties. The Board chose to rely on the reports of Drs. Reiss and Scoggin as the most significant evidence.

The Board's conclusion that Mr. Espindola's work with Peter Pan is not the substantial cause of the current need for medical treatment for the low back is supported by substantial evidence in the record as a whole.

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51 AS. 23.30.122.

52 Espindola Dep. at 26:1-4, 19-22.

53 Espindola Dep. at 26:12-18; Hr'g Tr. at 59:4-12, 62:20-24.

54 Hr'g Tr. at 63:1-15.

b. Is the Board decision finding the shoulder condition not compensable supported by substantial evidence in the record?

Just as the Board analyzed whether Mr. Espindola's claim for medical treatment for his low back was compensable, the same analysis had to be made with regard to his claim for medical treatment for his shoulder. That is, Mr. Espindola needed to establish a preliminary link between his work with Peter Pan and his shoulder problem. Once he made the link, Peter Pan had to rebut the presumption his claim was compensable with substantial evidence to the contrary. Once Peter Pan produced such evidence, Mr. Espindola had to prove that his work with Peter Pan was the substantial cause of his shoulder condition by a preponderance of the evidence.

The Board found that Mr. Espindola raised the presumption his shoulder was injured while working for Peter Pan in 2012, through his own testimony and Dr. Scoggin's opinion that the work was the substantial cause of his need for medical treatment. Contemporaneous medical records also indicate he sought immediate treatment at Kanakanak Hospital and then at Sunnyside Worker Care for the shoulder injury.[55] Therefore, Mr. Espindola established the presumption his work at Peter Pan was the substantial cause of his shoulder condition.

Peter Pan then needed to rebut the presumption with substantial evidence that the work at Peter Pan was not the substantial cause of his current need for medical treatment. Peter Pan had to produce evidence that "provides an alternative explanation which would exclude work-related factors as a substantial cause of the disability, or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability." The evidence rebutting the presumption is viewed in isolation and without regard for a credibility determination.[56] The presumption may be rebutted by presentation of the opinion of "a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not a substantial cause of the disability."[57]

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[55] Exc. 037-043.

[56] *Id.*; *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

[57] *Id.*

Peter Pan was able to rebut the presumption with the medical reports of Dr. Reiss, who in his first EME report stated Mr. Espindola had preexisting degenerative arthritis of the right shoulder before the incident of August 5, 2012. He opined the work activities were not of the type of activity to cause osteoarthritis of the shoulder and he found no objective findings for the shoulder pain.[58] There was no permanent aggravation of the shoulder and at the time of the visit Mr. Espindola was medically stable.[59] The alternate explanation for his ongoing shoulder complaints was the preexisting osteoarthritis.[60] Dr. Reiss also based his opinion on Mr. Espindola's description of the onset of pain following working on machinery that did not cut properly and there was too much bone in the fish. There was no sudden event, just the gradual development of pain.[61]

Dr. Reiss reiterated this opinion in his supplemental report of March 16, 2016, after reviewing the deposition of Mr. Espindola. "While an additional clarification of the history many years later certainly provides additional information with respect to both claims, I do not see how this can change the opinions of the IME, which is based on a much wider set of information, including the chart notes, the diagnostic studies, and the physical examination performed at the time of the independent medical evaluation."[62] These reports of Dr. Reiss are the kind of expert opinion upon which Peter Pan could rely to rebut the presumption of compensability. The Board properly found that Peter Pan rebutted the presumption that work with Peter Pan was the substantial cause of any need for ongoing medical treatment through the report of Dr. Reiss.

Since Peter Pan was able to rebut the presumption, Mr. Espindola was required to prove his claim by a preponderance of the evidence. It is at this point in the analysis that the credibility of the evidence, and the weight to be afforded it, is determined. Credibility

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58 Exc. 056.

59 Exc. 058-059.

60 Exc. 057.

61 Exc. 053.

62 R. 0625-0626.

findings by the Board are binding on the Commission.[63] The Board found the report by Dr. Scoggin to be less credible than the reports by Dr. Reiss. This finding is binding on the Commission.

The Board supported its determination by noting that Mr. Espindola changed his description as to how the shoulder injury occurred over the years. Initially, Mr. Espindola stated there was not a specific incident, just a gradual onset of pain over the day. Then, in May 2013, he told PA-C Lowe that the pain developed after doing overhead activity.[64] In February 2014, he reported to PA-C Myers that the shoulder pain was from lifting heavy objects.[65] Then, at his deposition in March 2016, he first recalled that there was a click at the time of the injury.[66] Then, he told Dr. Scoggin in September 2016, that he hit a bone with his knife, causing pain.[67] Dr. Scoggin admitted the discrepancies in his deposition, but continued to rely on Mr. Espindola's description.[68] The Board also discounted Dr. Scoggin's testimony because he did not explain the difference between the supraspinatus tear on the August 2, 2013, MRI and the infraspinatus tear on the July 21, 2014, MRI.

Because the Board accepted Dr. Reiss's opinion over that of Dr. Scoggin, the Board found Mr. Espindola was unable to prove by a preponderance of the evidence that the work at Peter Pan was the substantial cause of his current need for medical treatment for the shoulder. Moreover, this finding is supported by substantial evidence in the record as a whole. First, the reports speak for themselves. Next, the Board's acceptance of the reports of Dr. Reiss over the report of Dr. Scoggin is binding on the Commission. Dr. Reiss's reports are bolstered by the testimony of Dr. Reiss at hearing, who stated that

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63 AS 23.30.122; *See also*, *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013).

64 R. 248.

65 R. 398-401.

66 *Espindola* at 11.

67 Exc. 86.

68 Scoggin Dep. at 13:18 – 14:8.

doctors rely on early reports of the mechanism of injury because memories fade over time. Therefore, reports at the time of injury are usually the more reliable.[69] Dr. Reiss also testified that when he saw Mr. Espindola in September 2013, Mr. Espindola was able to move his arms freely, including use of his shoulders.[70]

Mr. Espindola asserts the Board ignored the medical records of his treating doctors. He specifically references the reports of Dr. Jesus Campos, Dr. Vicente R. Diaz, Dr. Scoggin, Dr. Brian, Dr. David, and Dr. Mark Merrell. However, the records of Dr. Jesus Campos, Dr. Vicente R. Diaz, Dr. Brian, and Dr. David were not part of the record before the Board at the time of the hearing, although there are physical therapy reports from a Bryan Davis.[71] The Commission reviews the Board decision based on the Board's record at the time of hearing. "The matter on appeal shall be decided on the record made before the board, a transcript or recording of the proceedings before the board, and oral argument and written briefs allowed by the commission."[72] Therefore, the Commission is not able to consider any reports from Dr. Jesus Campos, Dr. Vicente R. Diaz, Dr. Brian, or Dr. David.

Dr. Mark Merrell's records are part of the Board's record and were reviewed by Dr. Scoggin, the SIME physician.[73] Although, in 2012, PA-C Furan ascribed his early complaints to the work at Peter Pan, later medical reports are not so explicit.[74] For example, Johnathan Perry, M.D., in September 2014, met with Mr. Espindola and noted Mr. Espindola had "a long history of right shoulder pain."[75] He did not explicitly attribute Mr. Espindola's current problems to Mr. Espindola's work with Peter Pan. [76] The Board

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69 Hr'g Tr. at 23:1-4.

70 Hr'g Tr. at 16, L. 8-15.

71 Review of Record on Appeal.

72 AS 23.30.128(a).

73 *See*, Exc. 126, 137, 138, 152-153,

74 Exc. 042;

75 R. 0351-352.

76 *Id.*

noted its specific concerns about the weight to afford the SIME by Dr. Scoggin due to his reliance on Mr. Espindola's changing description of the work injury and his failure to explain the differences between the two shoulder MRIs.

As noted above, it is the Board who decides upon which doctor's reports and testimony to rely. The Board chose to rely on the report of Dr. Reiss and his testimony at hearing. Relying on the testimony of Dr. Reiss, the Board found Mr. Espindola had not proved his claim by a preponderance of the evidence. This finding is supported by substantial evidence in the record as a whole.

c. Is the Board decision finding that Peter Pan did not controvert Mr. Espindola's claim in bad faith supported by substantial evidence in the record?

Mr. Espindola asserts the Board erred in finding that Peter Pan did not controvert his claim frivolously or unfairly. The test for finding a controversion to be frivolous or unfair is whether the employer possessed sufficient evidence at the time of the controversion that if the employee did not introduce evidence in opposition to the controversion, the Board would find the employee was not entitled to benefits. [77] An employer may rely on a responsible medical opinion in filing a controversion.[78] An employer is authorized by statute to have an injured worker attend a medical examination with a doctor of the employer's choosing.[79]

Here, Peter Pan exercised this right and had Mr. Espindola examined by Dr. Reiss. Dr. Reiss concluded Mr. Espindola's current low back complaints were the result of his long-standing degenerative disc disease which pre-dated his work with Peter Pan, and he stated the low back condition will continue to degenerate.[80] He further stated there were no objective findings to support further medical treatment for the low back.[81] Dr. Reiss

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77 *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

78 *Stafford v. Westchester Fire Ins. Co. of New York, Inc.*, 526 P.2d 37, 42 (Alaska 1974.

79 AS 23.30.095(e).

80 Exc. 056.

81 *Id.*

further analyzed Mr. Espindola's shoulder complaints and attributed his ongoing complaints to his pre-existing osteoarthritis of the shoulder. Peter Pan based its controversions on this report.

Dr. Reiss is a medical doctor and Peter Pan was entitled to rely on his medical opinions. In looking at his report standing alone, if Mr. Espindola had not submitted any medical opinions in opposition, the Board would have denied Mr. Espindola any entitlement to benefits. Therefore, the controversion was not frivolous or unfair. The Board properly resolved this issue contrary to Mr. Espindola.

d. Mr. Espindola's new evidence may not be considered by the Commission on an appeal.

Mr. Espindola asserts the Board failed to consider his treating doctors in reaching its conclusion that he failed to prove his claim by a preponderance of the evidence. Specifically, he asserts the reports of Dr. Jesus Campos, Dr. Vicente R. Diaz, Dr. Scoggin, Dr. Brian, Dr. David, and Dr. Mark Merrell were not considered. The reports of Drs. Scoggin and Merrell are addressed above. No reports from Drs. Brian and David are found in the record, although there are physical therapy reports from Bryan Davis. More importantly, there are no reports from Dr. Jesus Campos and Dr. Vicente R. Diaz in the record before the Board.

The Commission may not rely on new records that were not before the Board. "The matter on appeal shall be decided on the record made before the board. . . ."[82] This statute is mandatory and plainly states the Commission may not consider evidence that was not submitted to the Board for consideration at hearing. Therefore, the Commission has not considered any information from Dr. Jesus Campos and Dr. Vicente R. Diaz.

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[82] AS 23.30.128(a).

5. Conclusion.

The Board's decision is AFFIRMED.

Date: ____*28 October 2019*_____ Alaska Workers' Compensation Appeals Commission

Signed
Michael J. Notar, Appeals Commissioner

Signed
S. 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. 271, issued in the matter of *Felipe M. Espindola vs. Peter Pan Seafoods, Inc. and Seabright Insurance Company*, AWCAC Appeal No. 17-019, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 28, 2019.

Date: *October 29, 2019*

Signed

K. Morrison, Appeals Commission Clerk