

# Alaska Workers' Compensation Appeals Commission

Richard Roberge,  
Appellant,

vs.

ASRC Construction Holding Company and  
Arctic Slope Regional Corporation,  
Appellees.

## Final Decision

Decision No. 269      September 24, 2019

AWCAC Appeal No. 19-001  
AWCB Decision No. 18-0128  
AWCB Case No. 201410169

Final decision on appeal from Alaska Workers' Compensation Board Decision and Order No. 18-0128, issued at Juneau, Alaska, on December 14, 2018, by southern panel members Kathryn Setzer, Chair, Bradley Austin, Member for Labor, and Charles Collins, Member for Industry.

Appearances: Eric Croft, The Croft Law Office, LLC, for appellant, Richard Roberge; Nora G. Barlow, Barlow Anderson, LLC, for appellees, ASRC Construction Holding Company and Arctic Slope Regional Corporation.

Commission proceedings: Appeal filed January 9, 2019; briefing completed June 17, 2019; oral argument was not requested.

Commissioners: Michael J. Notar, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

### *1. Introduction.*

Richard Roberge injured his left shoulder while working for ASRC Construction Holding Company, insured by Arctic Slope Regional Corporation (collectively ASRC). A dispute arose over whether his ongoing left side complaints, including left cubital tunnel and carpal tunnel syndrome, and/or thoracic outlet syndrome, were substantially caused by the work injury.

Mr. Roberge requested a Second Independent Medical Evaluation (SIME) in a petition dated November 17, 2015. The parties subsequently agreed to an SIME in a prehearing on February 11, 2016. Lorne K. Drenfeld, M.D., and Floyd H. Pohlman, M.D.,

performed their respective examinations on September 22, 2016, and September 23, 2016. Dr. Direnfeld's September 28, 2016, report was received by the Alaska Workers' Compensation Board (Board) on October 3, 2016, and Dr. Pohlman's report was received by the Board on October 20, 2016.

Mr. Roberge filed an Affidavit of Readiness for Hearing (ARH) on August 27, 2018, which ASRC opposed, and ASRC petitioned to dismiss his claim for a late filing of the ARH pursuant to AS 23.30.110(c) (.110(c)). The Board held a hearing on the petition to dismiss and on December 14, 2018, issued its decision finding Mr. Roberge was late in filing the ARH and granting ASRC's petition to dismiss.<sup>1</sup> Mr. Roberge timely filed an appeal with the Alaska Workers' Compensation Appeals Commission (Commission).

The Commission now affirms the finding of the Board that the time limitation in .110(c) was tolled beginning February 11, 2016, when the parties stipulated to the SIME at the prehearing conference, and the stipulation was memorialized in the prehearing conference summary. The Commission reverses the Board's decisions on the petition to dismiss and the late filing of the ARH, and remands the matter to the Board for a hearing on the merits. The time for filing an ARH has not yet run under .110(c) because the SIME report by Dr. Direnfeld has not yet been completed, since the requested testing has not yet been performed. The Board's finding that the ARH was untimely is reversed and the matter remanded to the Board for a hearing on the merits.

2. *Factual background and proceedings.*<sup>2</sup>

On May 14, 2014, Mr. Roberge injured his left shoulder while carrying rebar.<sup>3</sup> HGraeme French, M.D., an orthopedic surgeon, on May 18, 2015, recommended electrical diagnostic testing for left carpal tunnel syndrome and low ulnar nerve compression.<sup>4</sup>

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<sup>1</sup> *Richard Roberge v. ASRC Construction Holding Company, Alaska Workers' Comp. Bd. Dec. No. 18-0128 (Dec. 14, 2018)(Roberge).*

<sup>2</sup> 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.

<sup>3</sup> Exc. 001.

<sup>4</sup> Exc. 004.

On July 31, 2015, Theresa McFarland, M.D., orthopedic surgeon, and Lewis B. Almaraz, M.D., neurologist, evaluated Mr. Roberge for an Employer's Medical Evaluation (EME), and opined his work injury was not the substantial cause of his need for electromyogram (EMG) and nerve conduction studies. Rather they said his intervening development of left cubital tunnel and carpal tunnel syndrome was the substantial cause of his need for these studies.<sup>5</sup>

Dr. French, on September 2, 2015, wrote a letter addressed to the claims adjuster disagreeing with Drs. McFarland's and Almaraz's conclusions in the July 31, 2015, EME report. He referred Mr. Roberge to Kaj Johansen, M.D., a specialist in treating neurogenic thoracic outlet syndromes.<sup>6</sup>

On September 28, 2015, ASRC denied medical treatment for Mr. Roberge's right shoulder and medical, temporary total disability (TTD), temporary partial disability (TPD), and permanent partial impairment (PPI) benefits related to thoracic outlet syndrome or nerve injury based on the July 31, 2015, EME report.<sup>7</sup> ASRC, on October 5, 2015, denied medical treatment for Mr. Roberge's left shoulder and medical, TTD, TPD, and PPI related to thoracic outlet syndrome or nerve injury based on the July 31, 2015, EME report.<sup>8</sup>

On November 5, 2015, Mr. Roberge's attorney entered an appearance for Mr. Roberge.<sup>9</sup> Mr. Roberge, on November 5, 2015, filed his claim seeking TTD from August 19, 2015, through stability, PPI greater than six percent, medical costs, penalty, interest, and attorney fees. Mr. Roberge also sought a weekly compensation rate of \$1,143.00, medical treatment recommended by Dr. French, authorization for a referral to Dr. Johansen, and an SIME.<sup>10</sup> On November 17, 2015, Mr. Roberge petitioned for an SIME, and filed a completed SIME form. He contended a dispute existed between

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<sup>5</sup> Exc. 007-021.

<sup>6</sup> R. 858-859.

<sup>7</sup> Exc. 026.

<sup>8</sup> Exc. 027.

<sup>9</sup> Exc. 031.

<sup>10</sup> Exc. 028-029.

Dr. French, Mr. Roberge's treating physician, and Drs. McFarland and Almaraz, the EME physicians, regarding compensability, degree of impairment, treatment, medical stability, and functional capacity. Mr. Roberge contended Dr. French's September 2, 2015, letter and the July 31, 2015, EME report contained the medical opinions in dispute.<sup>11</sup>

ASRC, on December 2, 2015, filed a controversion notice denying TTD from August 19, 2015, and ongoing, PPI greater than six percent, all medical benefits after July 31, 2015, compensation rate adjustment, penalty, interest, and attorney fees and costs based on the July 31, 2015, EME report. ASRC served Mr. Roberge and his attorney with a copy of the controversion notice by the United States Postal Service.<sup>12</sup> On the same day, ASRC answered Mr. Roberge's November 5, 2015, claim, stating:

Employer and Insurer agree that there is a medical dispute between the treating physician and the IME physician. Employer, however, by acknowledging the existence of a medical dispute does not agree that an SIME is warranted. Employer will only stipulate to an SIME once the Employer and Mr. Roberge agree upon the SIME issues and submit an executed SIME form. Until such time, Employer and Insurer maintain that the SIME process has not begun.<sup>13</sup>

On January 7, 2016, at a prehearing conference, the parties discussed the following:

The parties are still in the discovery process. Employee advised medical releases have been signed and sent to Employer. Employer said they would like to take deposition in February of Employee and Dr. French.

The parties are discussing Employee being sent for SIME(s) evaluations(s) and are looking at setting deadlines in March. The parties will be discussing the SIME specialty(ies) needed and will further discuss the process at the February 11, 2016 10:00 am prehearing [conference].<sup>14</sup>

On January 7, 2016, ASRC's attorney emailed a representative from Mr. Roberge's attorney's office and stated:

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<sup>11</sup> Exc. 036-037.

<sup>12</sup> Exc. 041.

<sup>13</sup> Exc. 042-044.

<sup>14</sup> Exc. 045-047.

I talked with Katie [Weimer] and she is willing to authorize an EMG before the SIME. However, the tests need to be done by someone other than to whom Dr. French has referred Mr. Roberge. I can contact a nurse case manager in Idaho for a list of names. I won't go through an IME vendor. Let me know what you think.<sup>15</sup>

Mr. Roberge's attorney's office responded on January 18, 2016, providing the names and contact information for two medical providers, including CDA Spine. The email also stated, "Here are two places Mr. Roberge is looking into for NCS [nerve conduction studies]. Are you having any luck?"<sup>16</sup> Mr. Roberge's attorney's office again emailed ASRC's attorney on January 29, 2016, and stated, "Mr. Roberge contacted CDA Spine and they will do the nerve conduction testing. If you[r] client will authorize I'll get Mr. Roberge to get in as quickly as possible."<sup>17</sup>

On February 2, 2016, ASRC's attorney emailed Mr. Roberge's attorney's office and stated, "I obtained authority from my client to move forward with the testing! Sorry about the delay."<sup>18</sup>

On February 11, 2016, at a prehearing conference, the parties stipulated to an SIME and set deadlines to submit SIME medical binders, SIME questions, and a mutually signed SIME form.<sup>19</sup>

Also, on February 11, 2016, the Reemployment Benefits Administrator (RBA) Designee sent a letter to the parties, noting the reemployment benefits specialist asked Mr. Roberge's treating physician to provide a prediction regarding Mr. Roberge's permanent physical capacities as it relates to his ability to perform the physical demands as represented in DOT/SCODRDOT job descriptions. In response to the questions posed

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<sup>15</sup> Exc. 048. The Commission finds the refusal by ASRC to authorize the EMG/Nerve Conduction Study unless it was done by someone approved by ASRC to be disturbing and possibly prohibited conduct under AS 23.30.095(i). ASRC had already controverted all medical treatment and did not need to attempt to direct further treatment or testing.

<sup>16</sup> Exc. 049-50.

<sup>17</sup> Exc. 049.

<sup>18</sup> Exc. 049.

<sup>19</sup> Exc. 051-055.

by the specialist, Mr. Roberge's physician responded in the affirmative by checking the box marked "Yes" for each of the jobs represented by the DOT/SCODRDOT job descriptions, and added a qualifier to his prediction indicating his response is predicated on Mr. Roberge receiving treatment for a specific condition, neurogenic thoracic outlet syndrome. Based on all the information received, the RBA Designee stated she would find Mr. Roberge not eligible for reemployment benefits and set a deadline of close of business on February 24, 2016, to receive any additional information Mr. Roberge, ASRC, or the specialist would like her to consider.<sup>20</sup>

On February 22, 2016, Mr. Roberge filed his claim seeking review of the RBA eligibility determination and attorney fees and costs.<sup>21</sup> Also, on February 22, 2016, Mr. Roberge filed an ARH on his February 22, 2016, claim.<sup>22</sup>

On February 25, 2016, the RBA Designee found Mr. Roberge ineligible for reemployment benefits.<sup>23</sup>

On March 9, 2016, ASRC's attorney emailed Mr. Roberge's attorney's office, asking "Any luck with the studies?"<sup>24</sup>

On March 18, 2016, ASRC filed a controversion notice denying an appeal of the RBA eligibility evaluation and attorney fees and costs.<sup>25</sup>

On March 31, 2016, at a prehearing conference, the parties discussed the following:

The parties want to put the SIME process on hold and not take any action on the ARH or scheduling a hearing until after Employee has had nerve conduction and EMG studies. Those results will help them determine the next steps before proceeding.<sup>26</sup>

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<sup>20</sup> Exc. 056-057.

<sup>21</sup> Exc. 058-059.

<sup>22</sup> Exc. 061.

<sup>23</sup> Exc. 062-063.

<sup>24</sup> Exc. 064.

<sup>25</sup> Exc. 065-066.

<sup>26</sup> Exc. 067-069.

On April 6, 2016, Employee filed SIME medical binders.<sup>27</sup>

On April 11, 2016, ASRC filed SIME medical binders.<sup>28</sup>

On April 14, 2016, ASRC's attorney emailed Mr. Roberge's attorney's office and stated, "Wondering if we are making any progress on EMG studies. Let me know!"<sup>29</sup>

On May 16, 2016, ASRC filed a controversion notice denying AS 23.30.041(k) stipend.<sup>30</sup>

On June 2, 2016, the Board received a mutually signed SIME form. The form was signed and dated by a representative from Mr. Roberge's attorney's office on November 17, 2015, and by ASRC's attorney on June 2, 2016. It listed compensability, degree of impairment, treatment, medical stability, and functional capacity as the disputes at issue, and attached Dr. French's September 2, 2015, letter and Drs. McFarland's and Almaraz's July 31, 2015, EME report.<sup>31</sup>

On June 9, 2016, the parties were notified by letter sent by first class mail that the SIME with Dr. Direnfeld, neurologist, was scheduled on September 22, 2016, at 8:30 a.m., and the SIME with Dr. Pohlman, orthopedist, was scheduled on September 23, 2016, at 10:00 a.m.<sup>32</sup>

On October 3, 2016, the Board received Dr. Direnfeld's SIME report, and copies were mailed to the parties on October 4, 2016. Dr. Direnfeld stated, "Additional investigations that would be helpful in clarifying Mr. Roberge's diagnosis include an EMG and nerve conduction study in the upper extremities."<sup>33</sup>

On October 10, 2016, ASRC's attorney sent Mr. Roberge's attorney's office a letter stating:

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<sup>27</sup> Exc. 070-071.

<sup>28</sup> Exc. 072-073.

<sup>29</sup> Exc. 074.

<sup>30</sup> Exc. 075-76.

<sup>31</sup> Exc. 077-078.

<sup>32</sup> Exc. 079-081.

<sup>33</sup> Exc. 082-146.

Dr. Direnfeld believes that the most likely cause of Mr. Roberge's left hand sensory symptoms includes median nerve entrapment at the wrist and ulnar nerve entrapment at the wrist or the elbow. He feels additional investigation would be helpful in clarifying Mr. Roberge's diagnosis including an EMG nerve conduction study in the upper extremities.<sup>34</sup>

We were aware of the need for EMG conduction studies and my client communicated to your office on 1/7/16 that the studies were authorized. On 1/18/16, Patty Jones sent an email indicating that Mr. Roberge had identified two clinics in Idaho who could perform the studies and then on 1/29/16 Ms. Jones followed up with an email indicating that Mr. Roberge had, in fact, selected one of the two clinics. On 2/2/16, I again communicated to Ms. Jones that my client had authorized Mr. Roberge to proceed with the studies. In March, not having heard anything, I emailed Ms. Jones inquiring as to the status of the studies. At this point, we had put the SIME process on hold pending the EMG studies. In April, I emailed your office inquiring into the status of the studies. In May, the Board contacted us regarding the status of the SIME and the SIME was thereafter scheduled.

Thus, I was surprised to find in Dr. Direnfeld's SIME report that Mr. Roberge told Dr. Direnfeld that the Employer declined to pay for EMG and nerve conduction studies. (SIME p. 3). As described above, the Employer authorized the EMG studies nine months before the SIME exam occurred and any suggestion by Mr. Roberge to the contrary is false. The authorization for the EMG studies remain in place and Mr. Roberge should expedite obtaining the studies.<sup>35</sup>

On October 20, 2016, the Board received Dr. Pohlman's SIME report and it noted the parties were copied.<sup>36</sup> Both ASRC's and Mr. Roberge's hearing briefs state Mr. Roberge received Dr. Pohlman's SIME report on October 24, 2016.<sup>37</sup>

On December 16, 2016, Mr. Roberge's attorney's office emailed ASRC's attorney and asked, "Would your client agree to the testing recommended by the SIME doctors?"<sup>38</sup>

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<sup>34</sup> Exc. 132-133.

<sup>35</sup> Exc. 152.

<sup>36</sup> Exc. 153-182.

<sup>37</sup> *Roberge* at 7, No. 34; R. 398; R.465.

<sup>38</sup> Exc. 184.

ASRC's attorney, On December 19, 2016, emailed Mr. Roberge's attorney's office and stated, "I'll let you know and [get] back to you on this."<sup>39</sup>

On February 6, 2017, Dr. French performed scalene block injections to evaluate Mr. Roberge's neurogenic outlet syndrome. Dr. French noted significant improvement in sensation in Mr. Roberge's ring and little fingers following the anterior scalene injection and near complete return of normal sensation in the entire hand following the pectoralis minor injection. He referred Mr. Roberge to Dr. Johansen for decompression of Mr. Roberge's left brachial plexus because his response to the injections suggested he would have a 90 percent chance of significant improvement of neurologic function in his left arm.<sup>40</sup>

On February 13, 2017, a representative from Mr. Roberge's attorney's office emailed ASRC's attorney and stated, "I dropped the ball on this. Do you have any response to my December 16 email to you?"<sup>41</sup> On February 13, 2017, ASRC's attorney emailed Mr. Roberge's attorney's office and stated, "We will not agree at this point. We authorized the procedure for the SIME and Mr. Roberge never took any action. It's now too late."<sup>42</sup>

On February 13, 2017, ASRC filed a medical summary form with Dr. French's February 6, 2017, Medical Report and served it on Mr. Roberge by email.<sup>43</sup>

On April 5, 2017, Mr. Roberge filed a letter addressed to Dr. Direnfeld and served upon ASRC, stating:

Thank you for your evaluation of Mr. Roberge and your report dated September 28, 2016.

On Page 51, you recommend further testing. "Additional investigations that would be helpful in clarifying Mr. Roberge's diagnosis include an EMG and

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<sup>39</sup> Exc. 184.

<sup>40</sup> Exc. 185-189.

<sup>41</sup> Exc. 190.

<sup>42</sup> Exc. 190.

<sup>43</sup> R. 845.

nerve conduction study in the upper extremity.” The insurance company has not agreed to this further testing.

On February 6, 2017, Mr. Roberge had a scalene block injection that provided Mr. Roberge substantial but temporary relief. “The patient had near complete return of normal sensation in the entire hand following the pectorals minor injection, including near normal sensation in the thumb and index finger.”

Please review this medical record. If the results of the injection change any of your conclusions, let the Board and the parties know in a supplemental report. In particular, please inform us if you still feel that an EMG and nerve conduction study would be diagnostically useful.<sup>44</sup>

On April 24, 2017, the Board received a letter from Dr. Direnfeld responding to Mr. Roberge’s April 5, 2017, letter stating the recommendations he made “continue to apply.”<sup>45</sup> Mr. Roberge filed a claim, dated May 26, 2017, requesting medical treatment recommended by Dr. Direnfeld.<sup>46</sup>

On June 5, 2017, ASRC noticed the taking of a video deposition of Dr. Direnfeld for August 17, 2017.<sup>47</sup> On June 19, 2017, ASRC filed a controversion notice denying the EMG nerve conduction studies recommended by Dr. Direnfeld.<sup>48</sup> On June 28, 2017, ASRC noticed the cancellation of the video deposition of Dr. Direnfeld.<sup>49</sup>

On August 27, 2018, Mr. Roberge requested a hearing on his November 5, 2015, claim.<sup>50</sup> On September 6, 2018, ASRC opposed Mr. Roberge’s August 27, 2018, ARH contending it was untimely under .110(c).<sup>51</sup> On September 6, 2018, ASRC petitioned to dismiss Mr. Roberge’s claim under .110(c).<sup>52</sup>

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<sup>44</sup> Exc. 191.

<sup>45</sup> Exc. 192-195.

<sup>46</sup> Exc. 196.

<sup>47</sup> Exc. 199.

<sup>48</sup> Exc. 201.

<sup>49</sup> Exc. 203.

<sup>50</sup> Exc. 205.

<sup>51</sup> Esc. 206-207.

<sup>52</sup> Exc. 208.

ASRC contended the February 11, 2016, prehearing conference did not toll the two-year time period because Mr. Roberge delayed the SIME process when he failed to obtain the nerve conduction and EMG studies. It contended filing of the mutually signed SIME form on June 2, 2016, demonstrated that the parties were actively in the SIME process, which tolled the time under .110(c) until Dr. Pohlman's SIME report was received on October 24, 2016. ASRC contended Mr. Roberge had until April 26, 2018, to file his ARH, making his August 27, 2018, ARH untimely. (December 2, 2015 + 2 years = December 2, 2017; June 2, 2016, through October 24, 2016 = 145 days; December 2, 2017 + 145 days = April 26, 2018). Alternatively, ASRC contended the February 11, 2016, prehearing conference tolled the two-year period under .110(c) and Mr. Roberge had until August 16, 2018, to file his ARH, making Mr. Roberge's August 27, 2018, ARH untimely. (February 11, 2016, through October 24, 2016 = 257 days; December 2, 2017 + 257 days = August 16, 2018). It contended 8 AAC 45.092(k) states that communication to an SIME physician occurring after 30 days after receipt of the SIME report cannot be admitted into evidence nor considered by the board at hearing. ASRC contended Mr. Roberge's April 5, 2017, letter to Dr. Dierenfeld did not toll the running of .110(c) because Mr. Roberge failed to file and serve the letter within 30 days after receiving Dr. Dierenfeld's SIME report. ASRC requested an order granting its petition to dismiss Mr. Roberge's November 5, 2015, claim.<sup>53</sup>

Mr. Roberge contended the SIME process began on November 17, 2015, when he petitioned for an SIME before ASRC's December 2, 2015, after-claim controversion. He contended the two-year time period under .110(c) began running when the parties received Dr. Pohlman's SIME report on October 24, 2016. Mr. Roberge contended his April 5, 2017, letter to Dr. Dierenfeld tolled the two-year time period again and time began running again on April 25, 2017, when he received Dr. Dierenfeld's response. Mr. Roberge contended he was required to file his ARH by November 12, 2018. (October 24, 2016 + 2 years = October 24, 2018; April 5, 2017 through April 25, 2017 = 19 days; October 24,

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<sup>53</sup> R. 465-467.

2018 + 19 days = November 12, 2018). Mr. Roberge contended his August 27, 2018, ARH was timely.<sup>54</sup>

ASRC further contended there is no authority to carve out an exception to the two-year time period under .110(c) for the SIME process, and further contended Mr. Roberge's November 17, 2018, petition was not sufficient evidence to demonstrate the parties were actively in the SIME process. ASRC contended the evidence demonstrated the parties were actively in the SIME process only when the parties filed the mutually signed SIME form on June 2, 2016, and the two-year time period tolled. It contended neither party timely noticed a deposition or sent interrogatories under 8 AAC 45.092(j)(1). ASRC contended there was no admissible outstanding discovery and no reason why Mr. Roberge could not have filed an ARH on April 26, 2018. It contended the parties resolved the dispute over the nerve conduction and EMG studies on February 2, 2016, when ASRC authorized Mr. Roberge's January 29, 2016, selection of CDA Spine to conduct the studies. ASRC contended Mr. Roberge delayed the SIME process because he did not obtain the studies.<sup>55</sup>

Mr. Roberge additionally contended his November 17, 2015, petition was sufficient evidence to demonstrate the parties were actively in the SIME process and it tolled the two-year time period under .110(c). He asserted there was a legitimate dispute regarding whether the nerve conduction and EMG studies should be completed before the SIME and who should conduct the studies as evidenced by the January 7, 2015, email and March 31, 2018, prehearing conference summary. Mr. Roberge further asserted he cooperated with the SIME process. His April 5, 2017, letter did not violate 8 AAC 45.092(j)(1) because Mr. Roberge filed the letter with the board and served it on ASRC under 8 AAC 45.092(j)(2). Mr. Roberge stated dismissing a claim is disfavored and his claim should be decided on the merits. He contended he aggressively pursued the SIME and could not file an ARH while in the SIME process.<sup>56</sup>

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<sup>54</sup> R. 398-399.

<sup>55</sup> Hr'g Tr. at 6:24 – 7:3; 8:14-17; 9:4-13; 11:21-24; 13:19-23, Nov. 6, 2018.

<sup>56</sup> Hr'g Tr. at 17:7-8; 23:1-5; 26:4-24; 27:2-23.

### 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.<sup>57</sup> Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>58</sup> "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."<sup>59</sup> 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.<sup>60</sup> On questions of law and procedure, the Commission does not defer to the Board's conclusions but rather exercises its independent judgment.<sup>61</sup> 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.<sup>62</sup>

Discovery disputes are reviewed for abuse of discretion.<sup>63</sup> An abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.<sup>64</sup> 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.<sup>65</sup>

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<sup>57</sup> AS 23.30.128(b).

<sup>58</sup> *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

<sup>59</sup> *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)).

<sup>60</sup> AS 23.30.122.

<sup>61</sup> AS 23.30.128(b).

<sup>62</sup> AS 23.30.122; AS 23.30.128(b).

<sup>63</sup> *State v. Carpenter*, 171 P.3d 41 (Alaska 2007); *Landers v. Municipality of Anchorage*, 915 P.2d 614 (Alaska 1996).

<sup>64</sup> *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

<sup>65</sup> AS 23.30.128(a).

#### *4. Discussion.*

The issue before the Commission is a legal issue. The question is when does the SIME process toll the time limitation in .110(c) and, further, when does the tolling cease and the time for filing an ARH begin again. This issue is subject to the Commission's independent judgment.

A clear demarcation as to when the SIME process starts for the tolling of the statute of limitations in .110(c) is needed. Parties have been debating this issue for years. Here the parties stipulated to an SIME at the prehearing on February 11, 2016, as documented in the prehearing conference summary.<sup>66</sup> At the prehearing on March 31, 2016, the parties indicated that a hearing should not be set on the February 22, 2016, ARH and the SIME process should be on hold until Mr. Roberge is able to have the EMG/Nerve Conduction Study.<sup>67</sup> Nonetheless, on April 6, 2016, Mr. Roberge filed the SIME medical binders with the Board and ASRC filed its binders on April 11, 2016.<sup>68</sup> On June 2, 2016, the parties filed a mutually signed SIME form, listing issues in dispute.<sup>69</sup> The Board, on June 9, 2016, scheduled the SIME with Dr. Direnfeld for September 22, 2016, and the SIME with Dr. Pohlman for September 23, 2016.<sup>70</sup> The parties were fully engaged in the SIME process both before and after the filing of the SIME form.

The Board's regulations provide alternative means of securing an SIME. 8 AAC 45.092(g) provides that the parties may file a completed SIME form showing the dispute and a stipulation signed by all parties agreeing to the type of evaluation and the kind of medical practitioner to perform the evaluation. Alternatively, a party may petition the Board to order an SIME with a completed SIME form and the medicals reflecting the dispute. Mr. Roberge complied with this section of the regulation. Conceivably the time

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<sup>66</sup> Exc. 051-055.

<sup>67</sup> Exc. 067-069.

<sup>68</sup> Exc. 070-071; 072-073.

<sup>69</sup> Exc. 077-078.

<sup>70</sup> Exc. 079-081.

for requesting a hearing in .110(c) was tolled when these documents were filed with the Board.

In *Kim v. Alyeska Seafoods, Inc.*, the Alaska Supreme Court (Court) held that the language in .110(c) is directory and not mandatory.<sup>71</sup> The Court added, “substantial compliance is sufficient to toll the time-bar, and the Board has discretion to extend the deadline for good cause.”<sup>72</sup> The Court further stated, “strict compliance with the affidavit requirement is unnecessary because subsection .110(c) is directory, not mandatory.”<sup>73</sup> However, a claimant may not simply ignore the strictures of .110(c) and must be actively moving the claim forward.<sup>74</sup> The Court, in *Tipton v. ARCO Alaska, Inc.*, reiterated the statement that “[t]he defense of statute of limitations is ‘generally disfavored.’”<sup>75</sup> In *Tipton*, the Court held that a new ARH is not needed every time a hearing is cancelled. Yet the idea of a hearing not being held on the merits of a claim is strongly disfavored by the Court and the Board has an obligation to determine if there is a way around the running of the .110(c) defense.

The Commission has looked at the defense in .110(c) on several occasions. In *Tonoian v. Pinkerton Security*, the Commission affirmed the Board’s decision dismissing her claim because she simply failed to prosecute her claim.<sup>76</sup> A party must be prosecuting a claim reasonably and diligently to avoid the claim being dismissed under .110(c).<sup>77</sup>

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<sup>71</sup> *Kim v. Alyeska Seafoods, Inc.*, 197 P.3d 193, 194 (Alaska 2008).

<sup>72</sup> *Id.* at 194.

<sup>73</sup> *Id.* at 196.

<sup>74</sup> *Id.* at 198.

<sup>75</sup> *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 912 (Alaska 1996).

<sup>76</sup> *Tonoian v. Pinkerton Security*, Alaska Workers’ Comp. App. Comm’n Dec. No. 029 (Jan. 30, 2017). *See, Pan Alaska Trucking, Inc. v. Crouch*, 773 P.2d 947, 949 (Alaska 1989), where the Court noted Mr. Crouch’s claim faltered on the two-year limitation, “not because it was a significant obstacle, but because Crouch failed to pay it any heed.”

<sup>77</sup> *Id.*

In *Omar v. Unisea, Inc.*, the Commission remanded a dismissal under .110(c) when Mr. Omar had previously and timely filed an ARH, which had been returned for failure to indicate proper service.<sup>78</sup> The Board failed to address the significance of the earlier ARH in its decision to dismiss Mr. Omar's claim because the later filed ARH was untimely under .110(c).

In *Alaska Mechanical, Inc. v. Harkness*, the Commission found that the SIME process had not properly commenced, sufficient to avoid dismissing the claim under .110(c).<sup>79</sup> The parties had indicated at a prehearing that a dispute existed which might warrant an SIME. However, Mr. Harkness's attorney indicated he would start the SIME form, but he never initiated it and no form was ever filed with the Board. More importantly, the Commission found no evidence to support the allegation that the parties had stipulated to an SIME. Neither party ever submitted the requisite medical binders to the Board. The Commission indicated that more than an indication that an SIME might be warranted is needed to start the SIME process for purposes of tolling the .110(c) deadline.<sup>80</sup>

In *Narcisse v. Trident Seafoods Corporation*, the Commission found that the parties had indeed stipulated at a prehearing to an SIME in November 2014, and at a prehearing in June 2015 set deadlines for the SIME process. While the record was unclear whether those deadlines were met, it was clear that Thomas Gritzka, M.D., performed the SIME in October 2015. The Commission determined that the .110(c) deadline was tolled from the time of the June prehearing until the SIME report was received.<sup>81</sup> *Narcisse* stands for the proposition that when the SIME process is proceeding the time limitation in .110(c) is tolled.

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<sup>78</sup> *Omar v. Unisea, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 053 (Aug. 27, 2007).

<sup>79</sup> *Alaska Mechanical, Inc. v. Harkness*, Alaska Workers' Comp. App. Comm'n Dec. No. 176 (Feb. 12, 2013).

<sup>80</sup> *Id.*

<sup>81</sup> *Narcisse v. Trident Seafoods Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 242 (Jan. 11, 2018).

Nonetheless, for purposes of tolling the statute of limitations in .110(c), a bright line for tolling the limitation period in .110(c) is needed. The Commission finds that a stipulation by all parties at a prehearing is the best demarcation for tolling the .110(c) time limitation. At that point, the parties are in agreement that discovery is not yet complete, and that there is insufficient evidence available for setting the matter on for hearing. Therefore, the statute of limitations in .110(c) was effectively tolled on February 11, 2016, per the prehearing conference summary. While the SIME form is necessary for scheduling the examination, a late filing of the fully signed form does not negate the fact that an SIME had already been agreed to by the parties. Many times there is a delay in the SIME form being finalized and to ignore the stipulation by the parties about the need for the SIME is to place form over substance, which is disfavored.

However, the start of the tolling of the limitation in .110(c) is not the complete story. Here, the parties have asserted that the statute of limitations in .110(c) started again once the SIME reports were filed with the Board and served on the parties. Here, Dr. Direnfeld's first report was received by the Board on October 3, 2016, and served on the parties on the next day.<sup>82</sup> Dr. Pohlman's report was filed on October 20, 2016, and received by the parties on October 24, 2016.

The Commission finds that Dr. Direnfeld, in several places in his report, stated "[a]dditional investigations that would be helpful in clarifying Mr. Roberge's diagnosis include an EMG and nerve conduction study in the upper extremities."<sup>83</sup> "An EMG and nerve conduction study is recommended. Although unlikely, the results of this study could conceivably impact the answer to this question" which is whether Mr. Roberge's work injury aggravated, accelerated, or combined with a pre-existing condition to cause the disability or need for medical treatment.<sup>84</sup> He then added "[i]t is important to emphasize the recommendation that an EMG and nerve conduction study should be performed to confirm the diagnosis and to clarify the locus of the lesion accounting for

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<sup>82</sup> *Roberge* at 6, No. 31.

<sup>83</sup> Exc. 132.

<sup>84</sup> Exc. 133.

the sensory symptoms in the ulnar distribution in Mr. Roberge's case. This data is of particular importance in determining the best approach to the treatment. . . ."<sup>85</sup> "I would be glad to review the results of such a study, if it is performed, and reconsider my answer to this and other questions as appropriate, based on the results of those studies."<sup>86</sup> "Based on the currently available data regarding the neurologic aspects of Mr. Roberge's case, no additional treatment would be viewed as required within the context of the 5/14/14 employment injury."<sup>87</sup> "In the unlikely event that the results of neurophysiologic studies demonstrate findings suggesting problems with sensation in the left hand are related to the effects of the 5/14/14 employment injury, then treatment directed toward this component of the his symptom complex may limit or reduce permanent impairment in Mr. Roberge's case."<sup>88</sup> "Although currently it is medically probable Mr. Roberge's left hand sensory symptoms are not related to the 5/14/14 employment injury, this impression is derived from an incomplete data base. If an EMG and nerve conduction study is done (and ideally this should be done in both upper extremities), I will be glad to review the results of that study and further address the questions raised in your consultation request."<sup>89</sup>

These numerous references to the need for an EMG and a nerve conduction study are a strong indication that the SIME has not been completed and a final report has not been provided by Dr. Direnfeld. Therefore, the Commission finds that Dr. Direnfeld's September 28, 2016, report is not final, and the tolling of the time limitation in .110(c) has not ceased. In fact, the report has never been completed and so the time for filing the ARH has not run. Until a final SIME report is received, the tolling of the statute of limitations in .110(c) remains in place. The time for filing the ARH is still tolled until the SIME report is completed and finalized. Therefore, the time limitation for filing an ARH

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<sup>85</sup> Exc. 135.

<sup>86</sup> Exc. 137.

<sup>87</sup> Exc. 137.

<sup>88</sup> Exc. 139.

<sup>89</sup> Exc. 141.

did not expire.<sup>90</sup> The ARH on filed on August 27, 2018, was timely, since the SIME is not yet completed.

There has been delay and obstruction by both parties. ASRC controverted all medical treatment and refused to pay for the EMG/Nerve Conduction Study recommended by the EME and the treating doctor. Eventually ASRC agreed to pay for the study if done by someone other than the treating doctor or his referral. ASRC finally agreed on a place for Mr. Roberge to get the study done. However, for some reason Mr. Roberge did not get the testing done prior to the SIME. The SIME physician has consistently recommended the same testing saying he is not able to reach a conclusion about the sensory problems in the ulnar distribution. ASRC then withdrew its agreement to pay for the testing. When Mr. Roberge sent the result of the scalene block injection to Dr. Direnfeld, he replied he still needed the EMG/Nerve Conduction Study to reach a conclusion regarding the diagnosis of thoracic outlet syndrome and any relation to the work injury. It is not clear the testing has ever been done. Dr. Direnfeld has not yet issued a final report. Until Dr. Direnfeld issues a final report, the time limitation in .110(c) for filing an ARH has not run. The ARH filed by Mr. Roberge was timely and he is entitled to a hearing on the merits.

#### *5. Conclusion.*

The Commission AFFIRMS the finding of the Board that the tolling of the time limitation in AS 23.30.110(c) began on February 11, 2016, when the parties stipulated to the SIME at the prehearing conference, and that agreement was memorialized in the prehearing conference summary. The time for filing an ARH has not yet run under AS 23.30.110(c) because the SIME report by Dr. Direnfeld has not yet been completed,

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<sup>90</sup> It is disconcerting that an experienced attorney such as Mr. Croft was lax in getting the EMG/Nerve Conduction Study done (i.e. after approval by ASRC and before the SIME examination).

since the requested testing has not yet been performed. Mr. Roberge's ARH was timely filed. The matter is REMANDED to the Board for a hearing on the merits.

Date: 24 September 2019 Alaska Workers' Compensation Appeals Commission



*Signed*

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Michael J. Notar, Appeals Commissioner

*Signed*

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Amy M. Steele, Appeals Commissioner

*Signed*

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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. 269, issued in the matter of *Richard Roberge vs. ASRC Construction Holding Company and Arctic Slope Regional Corporation*, AWCAC Appeal No. 19-001, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 24, 2019.

Date: September 27, 2019



*Signed*

K. Morrison, Appeals Commission Clerk