

Alaska Workers' Compensation Appeals Commission

Charles E. Martin,
Appellant,

vs.

Nabors Alaska Drilling, Inc. and
Northern Adjusters, Inc.,
Appellees.

Final Decision

Decision No. 139 October 5, 2010

AWCAC Appeal No. 09-029
AWCB Decision No. 09-0171
AWCB Case Nos. 199928740,
199928711, 199908379, 199714944,
and 199506229

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0171, issued at Anchorage on November 18, 2009, by southcentral panel members Janel L. Wright, Chair, Patricia A. Vollendorf, Member for Labor, Robert C. Weel, Member for Industry.

Appearances: Charles E. Martin, self-represented appellant; Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Nabors Alaska Drilling, Inc. and Northern Adjusters, Inc.

Commission proceedings: Appeal filed December 18, 2009; briefing completed June 3, 2010; oral argument presented July 15, 2010.

Commissioners: David Richards, Stephen T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The employee, appellant, Charles E. Martin (Martin), in pursuit of his claims against his employer, appellee, Nabors Alaska Drilling, Inc. (Nabors), previously appealed a board decision¹ to the commission, which issued a decision.² In this

¹ See *Charles E. Martin v. Nabors Alaska Drilling, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 07-0079 (Apr. 9, 2007) (*Martin I*). The board's order in *Charles E. Martin v. Nabors Alaska Drilling, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 07-0111 (May 4, 2007), Order on Reconsideration of Bd. Dec. No. 07-0079, is not relevant to this appeal. Martin's petition for reconsideration was denied and dismissed.

proceeding, Martin appeals another board decision,³ in which the board concluded that Nabors had paid Martin all the benefits to which he was entitled. The commission concurs with the board's reasoning and affirms its decision in *Martin III*,⁴ for the reasons stated below.

2. Factual background and proceedings.

In providing a background for this decision, the commission borrows from the board's thorough summary of the underlying facts.⁵ Martin began working in the oil fields at age 21.⁶ He started working for Nabors in 1981 and, with the exception of a period of time between 1991 and 1995, was employed by Nabors in a number of jobs, including driller and tool pusher.⁷ As a driller, Martin was responsible for all drilling operations on a rig, requiring him to perform tasks such as pulling levers, moving dials, pulling pipe out of the hole as deep as 20,000 feet for up to 12 hours per day, and operating blowout equipment.⁸ On May 10, 1999, Martin injured his back while working as a driller for Nabors.⁹

a. Martin's medical treatment history.

Martin treated with orthopedic surgeon Thomas Vasileff, M.D., who ordered a magnetic resonance imaging (MRI) study, which showed a herniated disc at L4-L5, and recommended surgery.¹⁰ Dr. Vasileff performed a left-sided L4-L5 discectomy on

² See *Martin v. Nabors Alaska Drilling, Inc., et al.*, Alaska Workers' Comp. App. Comm'n Dec. No. 070 (Feb. 13, 2008)(*Martin I*).

³ See *Charles E. Martin v. Nabors Alaska Drilling, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 09-0171 (Nov. 18, 2009)(*Martin III*).

⁴ Bd. Dec. No. 09-0171.

⁵ See *Martin III*, Bd. Dec. No. 09-0171 at 2-19.

⁶ Cover Letter for employee's H'rg Br. for March 28, 2006, board hearing.

⁷ *Id.*; Sept. 5, 2002, Dep. of Charles E. Martin 40-45.

⁸ Sept. 5, 2002, Dep. of Charles E. Martin 39-43.

⁹ R. 0001; see *Martin III*, Bd. Dec. No. 09-0171 at 3.

¹⁰ R. 0700-701.

July 1, 1999.¹¹ Following the surgery, Martin's pain persisted, prompting Dr. Vasileff to refer him to Harold Cable, M.D. Dr. Cable performed a discogram on January 19, 2000, which revealed structural problems in the L4-L5 nucleus and a defect in the annulus.¹² Dr. Vasileff also referred Martin to Davis Peterson, M.D., who recommended an interbody fusion, and to Larry Levine, M.D., who performed an electromyogram (EMG) and found abnormal nerve conduction.¹³ Over the first half of 2000, Martin's condition improved somewhat, leading Dr. Vasileff to release him for light duty work as of July 18, 2000.¹⁴ Two days later, Martin returned to work for Nabors doing paperwork to help the tool pushers and attending safety meetings.¹⁵

On July 27, 2000, Dr. Cable administered a lumbar steroid injection to Martin.¹⁶ On November 9, 2000, Dr. Vasileff found Martin to be medically stable and recommended that he receive a permanent partial impairment (PPI) rating.¹⁷ During another visit on November 21, 2000, Martin complained to Dr. Vasileff of continuing back and left leg pain.¹⁸ Dr. Vasileff recommended additional epidural steroid injections, with the first being scheduled for November 30th.¹⁹ In late November 2000, while back at work, Martin was called on to supervise the move of a drilling rig from Prudhoe Bay to Milne Point.²⁰ During this operation, while sitting in a pickup truck, he experienced pain in his back and legs.²¹ Martin saw Dr. Vasileff on November 29th.²² A

¹¹ R. 0702-703.

¹² R. 0996-97.

¹³ R. 0729, 0732.

¹⁴ R. 0746, 0969.

¹⁵ Sept. 5, 2002, Dep. Charles E. Martin 51-52.

¹⁶ R. 0747, 0967.

¹⁷ R. 0966.

¹⁸ R. 0748.

¹⁹ R. 0749.

²⁰ Sept. 5, 2002, Dep. Charles E. Martin 51-52.

²¹ Sept. 5, 2002, Dep. Charles E. Martin 52.

MRI performed that same day showed a recurrent herniation at L4-L5 and facet arthropathy at L5-S1.²³ Dr. Vasileff again took Martin off work.²⁴ Martin did not work for Nabors after November 27, 2000.²⁵

On seeing Dr. Peterson again on December 21, 2000, Martin reported that, although the epidural steroid injections temporarily improved his symptoms, the symptoms recurred.²⁶ Dr. Peterson thought Martin might be a candidate for fusion surgery and referred him to Jens Chapman, M.D., for a second opinion.²⁷ As of May 2, 2001, Dr. Chapman believed that Martin was not a candidate for fusion surgery until he lost weight, stopped smoking, and was weaned off narcotic pain medication.²⁸

Thereafter, Dr. Vasileff referred Martin to Rehabilitation Medicine Associates.²⁹ On June 12, 2001, Robert Fu, M.D., evaluated him for a PPI rating.³⁰ As part of the evaluation, Martin completed a medical history indicating that approximately 20 years earlier he was diagnosed with bilateral carpal tunnel syndrome (CTS) and tendinitis.³¹ Even though Martin continued to have symptoms, surgery had not been provided, nor was any other type of treatment.³² Dr. Fu noted that the epidural steroid injections had enabled Martin to return to work in July of 2000; however, his condition had worsened again.³³ With respect to his back injury, Martin was assessed a 13% whole person PPI rating based on the *AMA Guides to the Evaluation of Permanent Impairment*, 5th

²² R. 0750.

²³ R. 0960.

²⁴ R. 0750-51, 0753.

²⁵ R. 0750-51.

²⁶ R. 0754.

²⁷ R. 0755.

²⁸ R. 0949.

²⁹ R. 0947-48.

³⁰ R. 0928-34.

³¹ R. 0929.

³² R. 0929.

³³ R. 0929.

Edition.³⁴ Dr. Fu also noted: 1) Martin's CTS and tendinitis were pre-existing and not related to his back injury;³⁵ and 2) Martin had a slight hearing loss on the left side and did not require a hearing aid.³⁶

On August 1, 2001, Dr. Vasileff found that Martin was suffering from chronic pain and depression.³⁷ He received another epidural steroid injection on September 18, 2001.³⁸

Martin's hearing was evaluated on October 16, 2001.³⁹ The evaluation showed bilateral, moderate-to-severe, high frequency, sensorineural hearing impairment.⁴⁰ The evaluator attributed the hearing loss to Martin's work with Nabors and concluded that it would improve with a hearing aid.⁴¹ On January 5, 2002, Martin completed a report of injury with respect to the hearing loss.⁴² He indicated that May 15, 1999, was the date of last exposure to injury which he attributed to "years of exposure to loud environment at work (extra loud environment on drilling rig)."⁴³

On February 4, 2002, Martin saw Denise M. Hawks, M.D., Ph.D., a psychiatrist, for an evaluation. He reported to Dr. Hawks that he reaggavated his back injury in September and October 2000 and had been unable to work since that time.⁴⁴

³⁴ R. 0933.
³⁵ R. 0933.
³⁶ R. 0931.
³⁷ R. 0926.
³⁸ R. 0905.
³⁹ R. 0893.
⁴⁰ R. 0893.
⁴¹ R. 0893.
⁴² R. 3526.
⁴³ R. 3526.
⁴⁴ R. 1253-59, 1253.

At the request of Nabors, James Robinson, M.D., a psychiatrist and psychologist, and Bryan Laycoe, M.D., an orthopedic surgeon, performed an employer's medical examination (EME) of Martin on February 15, 2002.⁴⁵ They recommended that Martin be evaluated in a pain clinic, recommended against surgery, and agreed with Dr. Fu's 13% lumbar PPI rating.⁴⁶

On March 8, 2002, Donald Endres, M.D., evaluated Martin for hearing loss and concluded that his work for Nabors was a substantial factor in causing it, even though a pre-employment physical had revealed some high frequency hearing loss.⁴⁷ Dr. Endres assessed a 17% whole person PPI rating for bilateral hearing loss.⁴⁸

Another lumbar MRI was performed on April 9, 2002, which showed a progression to extrusion and increased disc disease at L4-L5, resulting in moderate to severe central canal stenosis.⁴⁹ Leon Chandler, Jr., M.D., evaluated Martin for back pain on June 7, 2002, and recommended surgery to include a diskectomy and probable fusion at L4-L5.⁵⁰ On July 25, 2002, Martin was seen by Curtis Spencer, III, M.D., who diagnosed recurrent disc herniation with significant neurologic bowel and bladder compromise and ongoing radiculitis. Dr. Spencer recommended back surgery in the form of decompression and fusion.⁵¹ William Dillin, M.D., saw Martin for his back pain on July 26, 2002, and did not recommend further surgery without new diagnostic tests being performed.⁵² While in California purportedly seeking more medical and surgical

⁴⁵ R. 0845-60.

⁴⁶ R. 0858-60.

⁴⁷ R. 0814-15.

⁴⁸ R. 0815.

⁴⁹ R. 0839-40.

⁵⁰ R. 0775-76.

⁵¹ R. 0777.

⁵² R. 1250.

opinions for his back, Martin was in a motor vehicle accident on July 27, 2002.⁵³ Emergency room physician Steven Chin, M.D., diagnosed acute cervical and lumbar spine strain, acute right hand weakness with probable neurapraxia, and acute low back strain with radicular pain.⁵⁴

On his return to Alaska, Martin had another lumbar MRI performed on August 8, 2002.⁵⁵ When compared to the April 2002 MRI, it revealed, among other things, increased disc disease at L4-L5 and new disc protrusion at L2-L3.⁵⁶ On September 6, 2002, Dr. Chandler again referred Martin to Dr. Peterson to evaluate whether surgical intervention was warranted for the herniated disc at L4-L5 and fusion at L4-L5 and L5-S1.⁵⁷ The same day, in a letter to David Chisholm, M.D., Dr. Chandler stated his belief that Martin needed surgery at the L4-L5 level and that fusion should be considered at the L4-L5 and L5-S1 levels.⁵⁸ Dr. Peterson referred Martin to Rick Delamarter, M.D., for evaluation for experimental artificial disc replacement surgery.⁵⁹ Dr. Laycoe performed another EME and reported on November 2, 2002, that, while fusion and discectomy surgery might be appropriate, disc replacement surgery was not.⁶⁰

On November 21, 2002, a second independent medical examination (SIME) was performed by John McDermott, M.D. He reported that further surgeries were ill-advised, Martin was medically stable, could not return to work at that time, had a 13% whole person PPI rating, and that his pain behavior did not correlate with the

⁵³ R. 1340-42.

⁵⁴ R. 1342. Whether the injuries Martin suffered in this accident were compensable, because they might have related to obtaining medical care for his work-related injury, was the subject of his appeal to the commission in *Martin II*. The commission concluded they were not. *See Martin II*, App. Comm'n Dec. No. 070 at 18-19.

⁵⁵ R. 1239-41.

⁵⁶ R. 1240.

⁵⁷ R. 0784.

⁵⁸ R. 0785.

⁵⁹ R. 0782.

⁶⁰ R. 1361-62, 1364.

mechanical instability in his back.⁶¹ On April 30, 2003, Martin saw Dr. Chisholm, who recommended that he participate in the Virginia Mason pain clinic program, but Martin declined to do so. Dr. Chisholm discontinued treating Martin and expressed his opinion that there was a strong component of secondary gain to Martin's pain behavior.⁶² Dr. Delamarter evaluated Martin on June 4, 2003, and, as surgical options, recommended either an antero-posterior spinal fusion at L4-L5 or disc replacement surgery at L4-L5.⁶³

Martin had cervical⁶⁴ and lumbar spine MRIs on June 25, 2003.⁶⁵ Dr. Delamarter performed disc replacement surgery on August 26, 2003.⁶⁶ After a follow-up on September 8, 2003, he reported that Martin was doing well, with minimal symptoms, and no use of Oxycontin.⁶⁷ On October 27, 2003, Dr. Delamarter noted that Martin was doing much better, with some residual leg and back symptoms with activity. He

⁶¹ R. 1469-73.

⁶² R. 1485-86.

⁶³ R. 1492-94, 1493.

⁶⁴ Medical Records, Vol. 2 of 3, 000570-571; *see Martin III*, Bd. Dec. No. 09-0171 at 11-12. The cervical spine MRI showed a severe left-sided foraminal encroachment at C6-C7 secondary to encroachment by disc disease and osteophytic spurring, prominent disc protrusion with left paracentral, posterolateral osteophytic spurring at the C6-C7 level, and a minimal disc bulge at C5-C6. Medical Records, Vol. 2 of 3, 000571.

⁶⁵ Medical Records, Vol. 2 of 3, 000572-574; *see Martin III*, Bd. Dec. No. 09-0171 at 11-12. The lumbar MRI showed interval surgical removal of the previous disc extrusion at L4-L5 with minimal residual granulation tissue in the left lateral recess area in and around the left L5 nerve root; increased bone bruise left lateral-posterolateral aspect of the endplate areas at L4-L5 and new bone bruise right lateral-anterolateral aspect of the endplates at this level with a significant increase in the marrow changes over the previous MRI; minimal, residual annular material at the L4-L5 level without compromise of the central canal or neural foramen; mild to moderate right and mild left neural foraminal narrowing secondary to bony encroachment from ossific ridging in the posterolateral aspects of the endplates at L4-L5; and moderate facet hypertrophy. Medical Records, Vol. 2 of 3, 000573.

⁶⁶ R. 1650-52.

⁶⁷ R. 1602.

ordered physical therapy.⁶⁸ Martin started physical therapy on November 17, 2003, but over the ensuing months complained of pain in his right shoulder and neck.⁶⁹

In January 2004, Martin saw Dr. Chandler, complaining of pain in his neck, arms, and low back. On March 9, 2004, Dr. Chandler indicated that Martin's lumbar condition was medically stable and there was nothing medically preventing him from participating in a retraining program.⁷⁰ Dr. Chandler administered an epidural steroid injection at C6-C7 on March 31, 2004.⁷¹

During a KEY Functional Assessment on April 19, 2004, physical therapist Jean McCarthy, who did the assessment, noted that Martin appeared pale, sweated profusely, and had labored breathing. She thought the assessment may have been performed prematurely.⁷² On April 22, 2004, in connection with a lawsuit arising out of the motor vehicle accident in California, Steward Shanfield, M.D., examined Martin and concluded he was suffering from cervical spine degenerative disc disease.⁷³

On April 28, 2004, Martin followed up with Dr. Delamarter, who believed Martin may have overexerted himself in physical therapy and recommended that he walk rather than undertake more physical therapy. Dr. Delamarter noted a herniation at C6-C7 and recommended fusion or disc replacement at that level.⁷⁴

Joella Beard, M.D., performed a PPI rating on June 17, 2004. She gave Martin a 23% rating for his lumbar condition, which was discounted for the previous 13% rating, yielding an additional 10% whole person PPI rating.⁷⁵ In September 2004, Martin

⁶⁸ R. 1607.

⁶⁹ R. 1611-12; *see Martin III*, Bd. Dec. No. 09-0171 at 12.

⁷⁰ R. 1786-89.

⁷¹ R. 1797.

⁷² R. 1816, 1817-24.

⁷³ R. 1883-88.

⁷⁴ R. 1845.

⁷⁵ R. 1894-1907, 1907.

complained of low back pain or spasms to two other health care providers.⁷⁶

Richard Cuneo, M.D., conducted an EME on December 6-7, 2004. It was his opinion that Martin's lumbar condition was the result of cumulative trauma over the course of his employment with Nabors and that he was medically stable as to this condition as of August 26, 2004, one year after his second back surgery. Dr. Cuneo concurred with Dr. Beard's 23% PPI rating for the low back and concluded that Martin's cervical condition and bilateral CTS were not work-related. He thought that Martin was capable of sedentary work, considering only the lumbar condition.⁷⁷

EMG testing was performed on December 7, 2004, which showed bilateral CTS of moderate severity.⁷⁸ The following day, December 8, 2004, David Bradford, M.D., noted a cystic lesion on Martin's left hip, which he believed may have been responsible for Martin's left leg pain.⁷⁹

In a letter dated February 7, 2005, Dr. Chandler expressed his opinion that Martin's CTS was work-related.⁸⁰ On June 9, 2005, Dr. Delamarter concluded that Martin would not be able to participate in vocational rehabilitation or employment on an eight-hour-a-day basis.⁸¹

At the request of Nabors, on July 12, 2005, Martin was seen again by Dr. Endres to evaluate his hearing loss. Dr. Endres reported: 1) prior to his employment with Nabors, Martin had suffered a hearing loss that accounted for 11% of the 17% whole person PPI rating that Dr. Endres had previously provided; 2) Martin's recreational activities were partly responsible for his hearing loss; and 3) the hearing loss would not prevent Martin from working if he used hearing aids.⁸²

⁷⁶ Medical Records, Vo1. 3 of 3, 000826; R. 1934.

⁷⁷ R. 1957-90.

⁷⁸ R. 1947-48.

⁷⁹ R. 1952-53.

⁸⁰ R. 2130-31.

⁸¹ R. 2148.

⁸² R. 2165-68.

On August 23, 2005, Martin saw Christopher Wilson, M.D., for another SIME. Dr. Wilson diagnosed Martin with bilateral radial tunnel syndrome (RTS) and CTS. It was Dr. Wilson's opinion that these conditions were the result of cumulative work-related trauma and that the onset of symptoms occurred in the early to mid-1980s. According to Dr. Wilson, Martin was not medically stable and should have combined CTS/RTS releases performed bilaterally, but not simultaneously.⁸³ In light of this evidence, Dr. Cuneo reconsidered his earlier opinion that Martin's CTS was not work-related and concluded that it was.⁸⁴ Martin underwent surgery on his left upper extremity on July 26, 2006, and on his right upper extremity on July 24, 2007.⁸⁵ Dr. Beard assigned a 13% whole person PPI rating for the left and 3% for the right for a combined PPI rating for the upper extremities of 16%.⁸⁶

At this juncture of the board's decision in *Martin III*, it pointed out for the second time that there was no mention in any of Martin's medical records of him having reported that, while he was working light duty for Nabors in 2000, a specific incident aggravated his low back injury. Specifically, there is no reference to Martin having reported that he injured his back while assisting an electrician with a generator in late November 2000.⁸⁷ In his deposition on September 5, 2002, Martin provided an explanation for leaving his job with Nabors. He testified that he was receiving epidural injections when home from work. When he was requested to return to help move the rig from Prudhoe Bay to Milne Point, while sitting in a pick-up truck, the epidural injections wore off and the pain came back worse than before.⁸⁸ At hearing on June 24, 2008, Martin testified that he injured his back while trying to help an electrician disassemble a generator, when he bent over the generator to help remove

⁸³ R. 2191-92.

⁸⁴ R. 2361.

⁸⁵ R. 3188.

⁸⁶ See Charles E. Martin's Hr'g Binder for June 24 and 26, 2008, attachments for 2007, July 24, 2007, PPI Report, Dr. Beard.

⁸⁷ See *Martin III*, Bd. Dec. No. 09-0171 at 7 and 17.

the cover.⁸⁹

b. Vocational rehabilitation.

Vocational rehabilitation efforts on behalf of Martin are described by the board in *Martin III*.⁹⁰ Briefly, the Rehabilitation Benefits Administrator (RBA) found him eligible for vocational rehabilitation on February 28, 2002.⁹¹ A retraining plan developed by specialist Lulie Williams was rejected by the parties on August 7, 2003.⁹² On October 10, 2007, Lulie Williams notified the RBA that she could not devise a plan.⁹³ On June 20, 2008, specialist Robert Sullivan concluded that Martin could not be successfully retrained due to his physical limitations, narcotic medication usage, and remunerative wage issues.⁹⁴ At a hearing on June 24, 2008, on behalf of Nabors, specialist Elisa Hitchcock initially testified that a plan could have been implemented for Martin based on her review of materials available prior to the hearing.⁹⁵ However, when apprised of Sullivan's opinion, she ultimately concurred that Martin could not be retrained.⁹⁶

c. Compensation payment history.

Due to the complexity of Martin's claims and the uncertainty surrounding the appropriate characterization of some of his compensation payments, the board ordered an audit of the payments. The audit was performed by Maria-Elena Walsh, a former

⁸⁸ See Charles E. Martin Dep. 52:10-22.

⁸⁹ See Hr'g Tr. 37:17-18, 38:3-12.

⁹⁰ See *Martin III*, Bd. Dec. No. 09-0171 at 17-18.

⁹¹ R. 2766-67.

⁹² R. 2859.

⁹³ R. 3360.

⁹⁴ R. 3367-70.

⁹⁵ See Hr'g Tr. 51:12-58:25.

⁹⁶ See June 24, 2008, Hr'g Tr. 59:18-66:7.

workers' compensation officer.⁹⁷ Utilizing the audit and other sources, the board found that Martin received compensation payments as follows:

- TTD from May 13, 1999, through June 11, 2001 [back injury];
- PPI biweekly from June 12, 2001, through December 3, 2001 (initial 13% PPI rating = \$17,550.00) [back injury];
- AS 23.30.041(k) stipend from December 4, 2001, through August 25, 2003 [back injury];
- PPI in a lump sum on April 9, 2002 [hearing loss];
- TTD from August 26, 2003, through March 8, 2004 [back injury];
- PPI biweekly from March 9, 2004, through July 21, 2004 (additional 10% PPI rating = \$13,500.00) [back injury];
- AS 23.30.041(k) stipend from July 22, 2004, through August 3, 2006 [back injury];
- TTD from January 25, 2005, through July 23, 2007 [CTS/RTS]; and
- PPI biweekly from July 24, 2007, through February 24, 2008 [CTS/RTS].⁹⁸

d. The board hearings.

Hearings were held on Martin's claims on June 24, 2008, and August 7, 2008. Issuance of a decision by the board was delayed for logistical reasons until November 18, 2009.⁹⁹ The following issues were addressed by the board at the hearings and in the decision in *Martin III*:

- 1) For purposes of calculating Martin's compensation rate under AS 23.30.220 and his PPI benefits under AS 23.30.190, what are the dates of injury with respect to his back, CTS/RTS, and hearing loss?
- 2) For purposes of AS 23.30.180, on what date did Martin become permanently and totally disabled (PTD)?¹⁰⁰

In terms of these issues, the board summarized the parties' respective positions.

⁹⁷ See Binder *Martin's Audit*; see *Martin III*, Bd. Dec. No. 09-0171 at 22-23.

⁹⁸ See *Martin III*, Bd. Dec. No. 09-0171 at 19 and 36-37.

⁹⁹ See *id.* at 1-2.

Martin maintained that he suffered a new back injury on November 27, 2000, and that date should be used to calculate his TTD and PPI payments relative to his back. Similarly, he argued that his TTD and PPI payments with respect to his hearing loss and CTS/RTS should be calculated from the date he was rated for them.¹⁰¹ Nabors contended that Martin did not suffer a new back injury in November 2000 and that his back injury, hearing loss, and CTS/RTS benefits should all be calculated using an injury date no later than May 1999, the last time Martin worked as a driller. According to Nabors, Martin was appropriately paid AS 23.30.041(k) stipend benefits, not PTD benefits, while going through the reemployment process.¹⁰²

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.¹⁰³ The board's findings regarding the credibility of the testimony of a witness are binding on the commission; we exercise our independent judgment when reviewing questions of law and procedure.¹⁰⁴

4. Discussion.

Although the history of Martin's claims is complex, the analysis of the legal issues is straightforward. As the ensuing discussion reveals, once the dates of injury for Martin's back, hearing loss, and CTS/RTS, and the date he became PTD, are determined, the TTD, PPI, and PTD/.041(k) stipend benefits to which he is entitled can be specified.

a. There is substantial evidence to support the board's conclusion that Martin did not suffer a second injury to his back in November 2000.

At the center of the dispute between the parties over benefits for Martin's back is

¹⁰⁰ See *id.* at 2.

¹⁰¹ See *id.* at 20.

¹⁰² See *id.* at 21.

¹⁰³ Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. See, e.g., *Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

¹⁰⁴ See AS 23.30.128(b).

whether he suffered a new back injury on November 27, 2000. Martin would be entitled to more TTD and PPI benefits than he was paid, were he able to show that he had a second back injury.

On the TTD benefits issue, AS 23.30.220(a) states: "Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury." See also *Thompson v. United Parcel Service*, 975 P.2d 684, 688 (Alaska 1999). Certain sections of the Alaska Workers' Compensation Act (Act), AS 23.30.001 – AS 23.30.395, that are relevant to the issues presented in this appeal were amended in 2000. The version of AS 23.30.175(a) that was in effect prior to July 1, 2000, provided that "[t]he weekly rate of compensation for disability or death may not exceed \$700[.]" As amended, subsection .175(a),¹⁰⁵ together with subsection .175(d),¹⁰⁶ provided a formula for calculating the maximum weekly rate of compensation for injuries occurring on or after July 1, 2000. The formula yielded a higher maximum weekly rate of compensation of \$762.¹⁰⁷ Martin's income was such that, for any injury he suffered before July 1, 2000, he would be entitled to TTD benefits at the maximum weekly rate of \$700. Nabors paid him TTD benefits based on this rate. For any injury he incurred on or after July 1, 2000, Martin would be entitled to TTD benefits at the new, higher maximum weekly rate of compensation of \$762.

Second, AS 23.30.190(a), the subsection of the Act that addresses compensation for PPI, was also amended in 2000 to increase the whole person amount by which the employee's permanent impairment rating is multiplied from \$135,000 to \$177,000.¹⁰⁸

¹⁰⁵ AS 23.30.175(a) reads in relevant part: "The weekly rate of compensation for disability or death may not exceed the maximum compensation rate[.] . . . In this subsection, 'maximum compensation rate' means 120 percent of the average weekly wage, calculated under (d) of this section, applicable on the date of injury of the employee."

¹⁰⁶ AS 23.30.175(d) supplies the formula for determining the average weekly wage.

¹⁰⁷ June 24, 2008, Hr'g Tr. at 18:5-10.

¹⁰⁸ As amended in 2000, AS 23.30.190(a) provides in pertinent part: "In case

Similar to the foregoing TTD benefits analysis, for the back injury Martin suffered before July 1, 2000, namely the back injury of May 15, 1999, he would be entitled to PPI benefits multiplied by \$135,000. If he had suffered a second back injury on November 27, 2000, as he maintains, Martin would be entitled to PPI benefits for that injury multiplied by the amended whole person amount of \$177,000. Martin's PPI ratings total 23% for his back, initially 13% and later an additional 10%. If the subsequent rating could be attributed to a second back injury and multiplied by \$177,000, Martin would be entitled to receive a higher amount in PPI benefits for his back than he was paid by Nabors, which paid him PPI benefits for both ratings multiplied by \$135,000.¹⁰⁹

As an initial matter, the board found that Martin did not provide Nabors with notice that he suffered a back injury on November 27, 2000, until he testified in that regard at the hearing on June 24, 2008.¹¹⁰ Whether there was substantial evidence to support this finding by the board is of no significance; the board proceeded with its legal analysis as though it excused Martin's delay in giving notice.¹¹¹ The board concluded that the presumption of compensability would not apply to any back injury he suffered on November 27, 2000.¹¹² Martin would bear the burden of proving a

of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person."

¹⁰⁹ Martin did not argue, nor would it have done any good for him to argue, that the 2000 amendment to AS 23.30.190(a) was intended to have retroactive effect, that is, apply to injuries occurring before July 1, 2000. The Alaska Supreme Court "presume[s] that statutes only have prospective effect 'unless a contrary legislative intent appears by express terms or necessary implication.'" *Thompson* at 688 (footnote omitted). We can discern no such express or implied legislative intent in connection with the amendment to subsection .190(a).

¹¹⁰ See *Martin III*, Bd. Dec. No. 09-0171 at 23.

¹¹¹ See *id.*

¹¹² See *id.* and AS 23.30.120(a), which states: "In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed . . . that (1) the claim comes within the provisions of this chapter[.]" Based on the wording of this subsection of the statute, the Alaska Supreme Court has held that the presumption of compensability is applicable to any claim for compensation under the Act. See, e.g.,

second injury to his back.¹¹³ In our independent judgment, we conclude that the board correctly applied AS 23.30.120(a) and (b) in declining to utilize the normal presumption of compensability analysis,¹¹⁴ and required Martin to meet this burden. Furthermore, the board did not find Martin's testimony at the June 24, 2008, hearing credible in terms of having suffered a second back injury while helping an electrician remove a generator cover.¹¹⁵ We are bound by this finding, *see* AS 23.20128(b), which is amply supported by the record.¹¹⁶ Finally, in our view, these same factual findings by the

Municipality of Anchorage v. Carter, 818 P.2d 661, 665 (Alaska 1991).

¹¹³ *See Martin III*, Bd. Dec. No. 09-0171 at 23 and n.123, quoting AS 23.30.120(b): "If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section."

¹¹⁴ The presumption of compensability analysis requires a three-step process. In the first step, generally, AS 23.30.120(a)(1) creates the presumption of a compensable disability once the employee has produced some evidence that the claim arose out of or in the course of employment, that is, presented evidence of a preliminary link between employment and injury. In the second step, to rebut the presumption, the employer must produce substantial evidence that either (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 the employment was a factor in the disability. If the employer produces substantial evidence rebutting the presumption, in the third step, the presumption drops out and the employee must prove all elements of the claim by a preponderance of the evidence. *See, e.g., Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991)

¹¹⁵ *See Martin III*, Bd. Dec. No. 09-0171 at 24.

¹¹⁶ The board stated:

Based on Dr. Vasileff's November 2000 medical reports and the employee's deposition, we find the employee was sent home from work in November of 2000 because the epidural injections he received for pain, *sequelae* of his May 10, 1999 injury, wore off. . . . The Board does not find the employee credible. The employee testified at hearing he injured his back when removing a cover from a generator on November 27, 2000. We find this testimony is not consistent with either the medical records or the employee's own testimony provided during his September 5, 2002 deposition. We would have expected the employee in his 2002 deposition or in his medical records to mention the November 27, 2000 incident assisting the electrician [to] repair the generator, but he did not. We find he first mentioned this specific event in his hearing testimony on June 24, 2008. *Martin III*,

board are substantial evidence supporting the board's conclusion that Martin did not suffer a second back injury in November 2000.

Substantial evidence demonstrates that 1) Martin injured his back in May 1999; and 2) he did not suffer another back injury in November 2000. Nabors paid Martin TTD benefits attributable to his back injury at the maximum weekly rate of \$700 applicable to injuries occurring before July 1, 2000. Martin is not entitled to compensation at the higher rate that came into effect for injuries on or after that date. Nabors paid Martin PPI benefits for both of his back ratings multiplied by \$135,000, the amount applicable to injuries occurring before July 1, 2000. We conclude that those payments were appropriate, under the circumstances.

b. There is substantial evidence to support the board's conclusions that Martin's hearing loss and CTS/RTS were cumulative injuries that occurred no later than May 1999.

The parties' dispute over the payment of benefits for Martin's hearing loss and CTS/RTS injuries has some similarity to their dispute over the payment of benefits for his back. Nabors paid Martin PPI benefits for his hearing loss and paid TTD and PPI benefits for his CTS/RTS commensurate with the benefit levels applicable to injuries occurring before July 1, 2000. Martin seeks payment of these benefits at the higher levels provided for in the 2000 amendments to AS 23.30.175(a) and (d) and AS 23.30.190(a).

In terms of Martin's claim for hearing loss, the board made findings of fact to include the following: Martin began work for Nabors in 1981 with a pre-existing hearing impairment. His hearing loss was not noted again until June 12, 2001, by Dr. Fu. An evaluation on October 16, 2001, revealed a bilateral, moderate-to-severe hearing impairment that was attributed to Martin's employment with Nabors. In a report of injury dated January 5, 2002, Martin identified May 15, 1999, as the last day of exposure to loud noise on a drilling rig. Two months later, on March 8, 2002, Martin received a 17% PPI rating from Dr. Endres for his hearing loss. The board found that

the last day of work activity that brought about Martin's hearing loss was May 15, 1999, because his job duties during his brief stint of employment with Nabors between July and November 2000 was in a light duty capacity doing paperwork and monitoring safety procedures.¹¹⁷

The board made findings of fact relative to Martin's CTS/RTS as well. During his June 2001 examination of Martin, Dr. Fu noted a 20-year history of CTS. Dr. Wilson, one of the SIME physicians, examined Martin on August 25, 2005, and diagnosed his condition as CTS/RTS caused by cumulative trauma related to employment. In a report of injury dated October 11, 2005, Martin identified the date of this injury as May 13, 1999. The board found that Martin's light duty employment with Nabors in 2000 did not include work activities that he had previously performed as a driller, such as pulling levers, moving dials, and pulling pipe, activities which could contribute to his CTS/RTS.¹¹⁸

Against this factual backdrop, the board drew legal conclusions which applied a principle that can be traced to the commission's decision in *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069 (Feb. 7, 2008)(*Barron*). In *Barron*, we were called on to decide the date of injury where the employee had not suffered injury in any specific incident. Rather, the argument was made that cumulative trauma over the course of employment caused the injury. The commission's reasoning was as follows:

Barron's new theory of injury is that the hard physical labor over the whole period of employment, rather than any single event, caused the disablement and need for medical care. . . . The theory of such claims is that a repeated micro-trauma in the employment caused the gradual onset of injury, rather than any specific accident. It is a theory incompatible with a claim of specific injury bringing about the disability. The problem with such claims is the practical difficulty of fixing a date for the "accidental injury." AS 23.30.395(24). Although the Alaska Supreme Court has not expressly disavowed the concept that "accidental injury" must be traceable to some definite time and place of

¹¹⁷ See *Martin III*, Bd. Dec. No. 09-0171 at 26-27.

¹¹⁸ See *id.* at 27-28.

origin, it has long held that "working conditions" may be a legal cause of a disability, and thus give rise to a claim for compensation. *See Burgess Constr. Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981); *Fox v. Alascom, Inc.*, 718 P.2d 977 (Alaska 1986). In our view, date of injury of such claims is the last day the employee engaged in the work activity that he or she alleges brought about the "cumulative" injury. *Treaster v. Dillon Cos., Inc.*, 987 P.2d 325 (Kansas 1999). *Martin III*, Bd. Dec. No. 09-0171 at 25-26 quoting *Barron* at 23, n.99.

Consistent with this analysis, the board concluded that Martin's hearing loss and CTS/RTS were cumulative injuries brought about by his work activity as a driller. In the exercise of our independent judgment, we agree with the board that the cumulative injury concept, as articulated in *Barron*, is an appropriate means of determining Martin's dates of injury for his hearing loss and CTS/RTS. The last day that Martin worked as a driller was May 15, 1999, a few days after he injured his back. Thereafter, his employment with Nabors in 2000 did not involve work activity that would contribute to either of these conditions. Accordingly, the commission concludes that there is substantial evidence, already discussed in this section, supporting the board's findings that the dates of injury for Martin's hearing loss and CTS/RTS were in May 1999.

Nabors paid benefits to Martin for his hearing loss and CTS/RTS in amounts applicable to injuries occurring prior to July 1, 2000. Those benefits were paid in the appropriate amounts. Martin is not entitled to more compensation in these respects.

c. There is substantial evidence to support the board's conclusion that Martin was PTD as of October 2007.

The date Martin was PTD has a bearing on the issue whether he was paid the appropriate benefits in the appropriate amount. Once Martin's biweekly PPI benefits for his initial back rating were exhausted, as of December 3, 2001, Nabors paid him .041(k) stipend benefits from December 4, 2001, through August 25, 2003.¹¹⁹ In August 2003, the parties rejected the reemployment plan developed by rehabilitation specialist Lulie Williams.¹²⁰ On August 26, 2003, the date of Martin's second back surgery, Nabors

¹¹⁹ *See id.* at 18 and 36.

¹²⁰ *See id.* at 17.

resumed paying Martin TTD benefits.¹²¹ TTD benefits were paid through March 8, 2004. On March 9, 2004, Dr. Chandler issued his opinion that Martin was medically stable and capable of participating in a reemployment program.¹²² As of that date, Nabors began paying Martin biweekly PPI benefits in order to exhaust the benefits owed him on the additional 10% PPI rating for his back.¹²³ When those benefits were exhausted, as of July 22, 2004, Nabors again paid Martin .041(k) stipend benefits, and continued to do so through August 3, 2006.¹²⁴ Soon after the June 24, 2008, hearing commenced, Nabors stipulated that Martin was PTD, based solely on his May 1999 back injury.¹²⁵ Nabors also conceded that Martin had been PTD since at least February 25, 2008,¹²⁶ as Nabors had been paying him PTD benefits from that date forward.¹²⁷ Otherwise, there was no consensus as to when Martin was PTD.¹²⁸

Because the parties stipulated that Martin was PTD, the board did not apply the presumption analysis under AS 23.30.120 to that issue.¹²⁹ However, the board did apply the presumption analysis to the issue of the date Martin was PTD. It found that Martin raised the presumption on the basis of Dr. Delamarter's June 9, 2005, opinion that Martin would not be able to participate in vocational rehabilitation or employment

¹²¹ See *id.* at 37.

¹²² See *id.* at 13.

¹²³ See *id.* at 18.

¹²⁴ See *id.* Martin was paid TTD, PPI, or .041(k) benefits from the date of his back injury, May 13, 1999, through August 3, 2006. He was also paid PPI in a lump sum for his hearing loss on April 9, 2002. The TTD and PPI benefits he was paid between January 25, 2005, and February 24, 2008, related to his CTS/RTS. See *id.* at 18-19. As of February 25, 2008, Nabors began paying him PTD benefits. See *id.* at 31, 32. Thus, Martin was paid TTD, PPI, or .041(k) benefits, without interruption, from May 13, 1999, through February 24, 2008. See *id.* at 18-19.

¹²⁵ June 24, 2008, Hr'g Tr. 15:2-4; see *Martin III*, Bd. Dec. No. 09-0171 at 30.

¹²⁶ See *Martin III*, Bd. Dec. No. 09-0171 at 31.

¹²⁷ June 24, 2008, Hr'g Tr. 16:10-15; see *Martin III*, Bd. Dec. No. 09-0171 at 31.

¹²⁸ See *Martin III*, Bd. Dec. No. 09-0171 at 31.

¹²⁹ See *id.*

for eight hours a day.¹³⁰ However, later in its opinion, the board noted that on March 9, 2004, Dr. Chandler had concluded that Martin could participate in a rehabilitation program.¹³¹ The board also found that Nabors had rebutted the presumption with substantial evidence, that being the opinion of Lulie Williams. It was not until October 15, 2007, that Lulie Williams acknowledged she was unable to devise a rehabilitation plan meeting Martin's remunerative wage.¹³² The board concluded that Martin could be considered PTD as of that date because he was "both physically unable to work and vocationally un-employable[.]"¹³³ In other words, the board found that Martin had not met his burden under the third step of the presumption of compensability analysis;¹³⁴ he had failed to prove by a preponderance of the evidence that he was PTD while Nabors was paying him .041(k) stipend benefits between July 22, 2004, and August 3, 2006.¹³⁵

The question we face is whether there is substantial evidence supporting the board's conclusion, while mindful that as a matter of law, the receipt of PTD benefits and participation in a reemployment plan, are not necessarily mutually exclusive. *See Meek v. Unocal Corp.*, 914 P.2d 1276, 1280 (Alaska 1996). We find that substantial evidence does exist. Prior to October 15, 2007, only Dr. Delamarter provided an opinion that Martin could not work or participate in a reemployment plan for eight hours a day. On the other hand, Dr. Chandler expressed his opinion, on March 9, 2004, that Martin could participate in the rehabilitation process. In his January 18, 2005, report, Dr. Cuneo thought Martin could perform sedentary work. It was not until October 15, 2007, when rehabilitation specialist Lulie Williams reported to the RBA that she could

¹³⁰ *See id.*

¹³¹ *See id.* at 36.

¹³² *See id.* at 32.

¹³³ *Id.* at 32.

¹³⁴ *See* n.114, *supra*.

¹³⁵ There is no basis for Martin to argue that he should have received PTD benefits when Nabors first paid him .041(k) stipend benefits, from December 4, 2001, and August 25, 2003. There was no medical evidence that he might have been PTD until Dr. Delamarter provided an opinion along those lines on June 9, 2005.

not devise a reemployment plan for Martin, that there was sufficient evidence for Martin to prove he was PTD.

5. Conclusion.

There is substantial evidence supporting the board's conclusions that: 1) Martin suffered a back injury on May 10, 1999, and did not injure his back on November 27, 2000; 2) Martin's hearing loss and CTS/RTS were cumulative injuries attributable to his work activity before May 15, 1999; and 3) Martin was PTD as of October 15, 2007. Nabors paid Martin's benefits accordingly. We therefore AFFIRM the board's decision and order in all respects.

Date: 5 October 2010

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David Richards, Appeals Commissioner

Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision 09-0171. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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
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RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days after this decision was distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical and grammatical errors, and a citation correction at footnote 134, this is a full and correct copy of the Final Decision No. 139 issued in the matter of *Martin v. Nabors Drilling, Inc.*, AWCAC Appeal No. 09-029, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 5, 2010.

Date: October 12, 2010



Signed

B. Ward, Appeals Commission Clerk