Alaska Workers' Compensation Appeals Commission

Charles E. Martin,
Appellant,

vs.

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

Final Decision and Order
Decision No. 070 February 13, 2008

AWCAC Appeal No. 07-016
AWCB Dec. Nos. 07-0079 & 07-0111
AWCB Case Nos. 199908379 & 200226229

Appeal from Alaska Workers' Compensation Board Decision No. 07-0079, issued on April 9, 2007, by the southcentral panel at Anchorage, Rosemary Foster, Designated Chair, Dave Kester, Member for Industry, Patricia Vollendorf, Member for Labor, and Alaska Workers' Compensation Board Decision No. 07-0111, issued on reconsideration May 4, 2007, at Anchorage, Rosemary Foster, Designated Chair, Patricia Vollendorf, Member for Labor, and Dave Kester, Member for Industry.

Appearances: Charles Martin, pro se, appellant. Richard Wagg, Russell, Wagg, Budzinski, and Gabbert, for appellees, Nabors Alaska Drilling, Inc., and Northern Adjusters, Inc.

Commissioners: John Giuchici, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Charles Martin suffered a low back injury in his employment as a toolpusher in 1999. In July 2002, he made a motorcycle trip from Alaska to southern California, where he was injured when a car struck him as he was stopped at a traffic light. Martin claimed that the injuries he suffered to his neck and knees in that traffic accident were covered by the Alaska Workers' Compensation Act because (1) he was on his way to an appointment for treatment of his back injury when the traffic accident occurred and (2) he would not have made the trip to California, and thus been in the accident, but for his 1999 work injury. The board denied his claim and Martin appeals. We agree that the

board essentially applied the correct legal analysis to the claim for coverage of the 2002 traffic accident and we conclude the error in the board's analysis is harmless. We affirm the board's decision. Nabors Alaska Drilling, Inc., (Nabors), petitioned the board for enforcement of a lien for the treatment it provided to Martin after the traffic accident from the settlement Martin received from the traffic accident under AS 23.30.015. Because we concluded Martin's injuries in the 2002 traffic accident were not caused by his 1999 work injury, we also conclude the board may not direct reimbursement from the third party settlement for those injuries under AS 23.30.015, although we agree that the employer is subrogated to the extent of amounts paid by the employer as medical expenses related to determining whether Martin's work injury had been aggravated by the traffic accident and for treatment of aggravation of the 1999 work injury caused by the 2002 traffic accident. Because application of the correct legal principles does not require a remand to the board for further findings of fact, we modify the board's order.

Factual background.

We do not make findings of fact when reviewing the record below. In this case, many of the significant facts are not disputed; rather, the parties dispute the legal effect of events they agree occurred.

Martin injured his lower back in May 1999 while working for Nabors. His left leg was numb, and he had severe low back pain. He was seen by Thomas Vasileff, M.D., shortly afterwards. A Magnetic Resonance Imaging (MRI) scan revealed a herniated disc at the L4-5 level, spinal stenosis, and left lateral recess narrowing. Dr. Vasileff scheduled and performed a left L4-5 discectomy.

After the surgery, Martin continued to have low back pain. He also developed right leg pain. Dr. Vasileff ordered another MRI scan which showed a possible fragment to the left at the L4-5. In 2000, a second MRI scan showed desiccation and narrowing of the L4-5 disc and protrusion of the L4-5 disc to the left, but otherwise a normal L3-4 disc. Martin was referred to Dr. Peterson for another opinion regarding surgery.

Dr. Peterson felt surgery could be performed, but did not advise it without further study.[1] Dr. Vasileff did not recommend further surgery by himself.[2] However, at Dr. Peterson's referral, Martin sent his records to Jens Chapman, MD, at the University of Washington for his opinion.[3] Dr. Chapman did not recommend surgery until Martin lost weight, quit tobacco, and was not taking muscle relaxants and narcotics.[4] Dr. Vasileff and Dr. Peterson referred Martin to Dr. Levine, who did more studies.[5] At some point, Martin asked for a referral to the Mayo Clinic.[6] Martin developed a problematic relationship with Dr. Vasileff and Dr. Levine, and transferred his care to Dr. Chisholm, thus changing his attending physician in February 2002.[7]

In 2002, Dr. Chisholm referred Martin to Dr. Chandler for evaluation and consideration of nerve ablation to address his persistent pain.[8] Dr. Chandler saw Martin in June 2002 and reported that Martin was a candidate for a discectomy and probable fusion.[9] Dr. Chisholm saw Martin again on August 6, 2002.[10] Between seeing Dr. Chandler in June and Dr. Chisholm in August, Martin drove his 2002 Harley Davidson Sportster[11] motorcycle to California.[12] He told his physicians he was "taking a

---

1 Peterson Depo. 22:19-24, 26:17-25.

2 Vasileff Depo. 18:25 - 19:25.

3 R. 0775, Martin Depo. (2002) 97:21-98:4.

4 R. 0949.

5 R. 0730.

6 R. 0727.

7 Martin Depo. (2002) 93:3-95:25, 96:4-14, 104:17-20, R. 2397, 2399. Dr. Chisholm ultimately decided he did not wish to treat Martin either. R. 1485-86.

8 R. 0841.

9 R. 0835-37.

10 R. 1119.

11 Martin identified it as a 2002 Sportster in his first deposition, Martin Depo. (2002) 110:6, as a Harley-Davidson 1200 Sportster in a 2004 deposition, R. 0266.

12 Martin testified he left on his trip on July 10 and returned by airplane three days after the July 27, 2002 accident. Martin Depo. (2002) 105:10, 111:8-11. However, Dr. Chisholm reported seeing him on June 13, 2002, R. 0834.

trip to see his family."[13] He traveled alone, without another driver accompanying him in another vehicle.[14] He planned to see if he could find a physician who could do other forms of surgery.[15] In addition, he planned to see a physician in Oregon, in an appointment arranged by his attorney, Mr. Curry.[16] He testified to the board:

> Dr. Chisholm gave me a three-month supply of meds, pain meds. Dr. Chandler had ordered an ortho-track traction belt that I could strap on and pump up to take the weight off my body. And I went looking for a doctor. I think he said at one time to find a golden scalpel to fix my back. I was not receiving any help from the doctors here in Alaska. They were actually doing more damage than good. The documentation will prove that.
>
> While in California, I had seen two doctors a day a part and was on my way to my sister's house to continue up to Oregon to see the specialist that Mr. Curry had setup the appointment for me and I was rear-ended. . . . I chose to go by motorcycle for that trip [because] the employer had told me they would help me get to a doctor, a specialist, somebody to fix my back, and they didn't. . . . And at the time, money was tight. It was more comfortable for me to ride that motorcycle than sit stiff in a truck.[17] It's easier to pull off the highway if I have to stop. . . . I felt like I would be able to see more doctors – I'd have more freedom if I had a means of transportation.[18]

On July 25, 2002, Martin saw Curtis Spenser, M.D., who recommended decompression and fusion at the L4-5, preceded by a discogram to "see whether he

---

[13] Martin Depo. (2002) 108:8-9.

[14] Martin Depo. (2002) 99:12-23.

[15] Martin Depo. (2002) 104:15-16, 106:24-25.

[16] Hrg Tr. 25:18-20; 26:18-20. Mr. Curry did not represent Martin in his workers' compensation case. Hrg Tr. 30:10-13.

[17] Martin's testimony about the comfort of his motorcycle is contradicted by his Petition for Reconsideration to the board, in which he said, "I made it as far as Utah abusing my meds, my brother had to come and get me from Aztec, New Mexico as I could not go any farther due to back and leg pain. I rested there a week and went on to California." Martin, Petition for Reconsideration, 6 (April 18, 2007). In his deposition, he says it took him "over a week" to get to California. Martin Depo. (2002) 105:23.

[18] Hrg Tr. 25:9 – 26:17.

would be able to withstand a free floating fusion."[19] He saw William Dillon, M.D., on July 26, 2002, who deferred treatment recommendations pending review of diagnostic tests.[20] He would not give Martin a recommendation until a myelogram and contrast enhanced CT scan was obtained to rule out the possibility of arachnoiditis.[21]

The next day, July 27, 2002, while stopped at a light on Whittier Boulevard in Whittier, California, Martin was struck by a car sometime after 5:00 p.m.[22] He was taken to the emergency room at Presbyterian Intercommunity Hospital in Whittier. Steven Chin, M.D., evaluated him there, and a number of X-rays and a CT scan of the cervical spine were taken.[23] He was discharged early on July 28, 2002.[24]

On Martin's return to Alaska, he saw Dr. Chisholm on August 6, 2002, who referred him for another MRI scan.[25] The scan was interpreted by Dr. Chisholm as showing changes from the previous scan in April 2002.[26] Dr. Chandler, who saw Martin on September 6, noted that Martin's back condition was worse, and referred him to Dr. Peterson for surgery.[27] On October 22, 2002, Dr. Peterson, at Martin's request, referred him to Dr. Delamarter in Santa Monica, California,[28] for evaluation of experimental disc replacement surgery.[29] Martin filed a claim,[30] and, after a second

---

[19] R. 1252.

[20] R. 1250-1251.

[21] R. 1251.

[22] Appellant's Exc. 71-76. Only page 5 of this report (Exc. 75) is contained in the record that was before the board, R. 0650.

[23] R. 1108-10.

[24] R. 1115.

[25] R. 1119-20.

[26] R. 1121.

[27] R. 1312-13.

[28] Martin testified Dr. Delamarter's name "was brought up" to him while he was in California. Hrg Tr. 25:5-6.

[29] R. 1381-82. Dr. Delamarter recommended the disc replacement surgery in June 2003. R. 0021.

[30] R. 0059-60.

independent medical examination,[31] the board heard his claim for medical benefits and transportation to have an evaluation by Dr. Delamarter as agreed in a pre-hearing conference on February 19, 2003.[32] The board denied the claim in an interlocutory decision May 2003.[33] Later that year, Martin went to California and had the surgery done.[34] Ultimately, Nabors reimbursed those expenses.[35]

Martin filed a complaint in California against the woman who struck him.[36] In addition to aggravation of his back injury, he claimed his neck was injured and his knee was injured.[37] He was represented in that action and obtained a $100,000 settlement.[38] Nabors approved the settlement and notified Martin it had a lien on the settlement.[39] The settlement has not been disbursed.

The proceedings before the board.

Martin filed a petition to release the settlement proceeds and determine that Nabors had no lien on the settlement.[40] The parties agreed that the board should hear Martin's petition and Nabors's defense that, although the 2002 traffic accident was not in the course of employment, Nabors was entitled to a lien on the settlement for expenses it was required to pay as a result of aggravation of the work-related back injury.[41]

---

31 R. 2415-16, 2436-40, 2450-71.

32 R. 2562.

33 *Charles E. Martin v. Nabors Alaska Drilling, Inc.*, (*Martin I*) Alaska Workers' Comp. Bd. Dec. No. 03-0101 (May 6, 2003) (W. Walters, Chair).

34 R. 1598-1600. Surgery was performed August 26, 2003. *Id.*

35 Hrg Tr. 33:5-6.

36 R. 0259, Martin Depo. (2003) 22:23-25.

37 Martin Depo. (2003) 23:23-25:2.

38 R. 0306.

39 R. 0307-08, 0454.

40 R. 0623.

41 R. 2695-96.

At hearing, the board had some difficulty defining the issues presented by the parties, as reflected in this exchange between the hearing officer and the parties at the beginning of the hearing:

> MS. FOSTER: So basically the issues that we're talking about here today, I'm looking at Mr. Wagg's brief, whether there's a valid lien and is the Employer responsible for medical costs associated with your back injury. Is that a fair statement of what you think the issue is?
>
> MR. MARTIN: Except for the last part. The back has been accepted. The history was whether I was in the scope or course of employment while trying to find a physician, a back specialist, to fix my back when that motor vehicle accident happened.
>
> MS. FOSTER: Okay. All right. Then. . . .
>
> MR. WAGG: And if I could just clarify. I agree the back condition is an accepted condition. There was a cervical injury as the result of the motorcycle accident, which is not an accepted condition. And that was one of the questions that was raised at the hearing today is the cervical, but not the back. The back is accepted.
>
> MS. FOSTER: Okay. So looking at the issues then, it's the (indiscernible) under 015?
>
> MR. WAGG: Correct.
>
> MS. FOSTER: And then also whether you're – whether the employer is responsible for medical costs related to the back injury?
>
> MR. WAGG: Related to the cervical condition.
>
> MS. FOSTER: So are you saying you've already paid for or accepted the medicals cost for the back injury?
>
> MR. WAGG: That's correct.
>
> MR. MARTIN: Correct.
>
> MS. FOSTER: Okay. But just the neck?
>
> MR. WAGG: Right.[42]

At the hearing, Nabors argued that the trip to California was not employer provided or required travel, and that he was not referred to a specialist in California at

[42] Hrg Tr. 8:11-9:15.

the time Martin went to California, nor would there have been any need at the time to go outside for care.[43] Therefore, the travel was not within the course and scope of employment, but simply a personal trip. Nabors argued that the consequences of the trip – the injuries sustained in the traffic accident – are not work-related; therefore, the neck injury was not the employer's responsibility.[44] On the other hand, because the traffic accident aggravated the low back injury, causing Nabors to incur more medical bills than would otherwise had the traffic accident not occurred, Nabors was entitled to a lien on the recovery for the additional amount.[45]

Martin argued that the 2002 traffic accident was within the course of his employment for two reasons. First, he argued that his employer promised to provide him the best care available.[46] The care in Alaska was not helping him, so he was required to go outside, by motorcycle, because the employer failed to assist him in finding the best care that could be had, the "state of the art surgery."[47] Second, he argued that he was traveling in California to obtain care but for his injury at Nabors; therefore, the injuries in the 2002 traffic accident were caused by his employment.[48] As to the lien, Martin took the position that if the accident was covered by workers' compensation, then the employer was entitled to a lien, but not unless the employer accepted the injuries and paid benefits.[49] He also argued that until he was fully compensated for his injuries, the employer was not entitled to a lien.[50]

---

43 R. 0676-77.

44 R. 0677.

45 R. 0674-75.

46 Hrg Tr. 38:21-23, 50:4-9. He based his argument on an e-mail from Belinda Wilson, R. 0770.

47 Hrg Tr. 50:4-9.

48 R. 0628.

49 Hrg Tr. 14:25-15:14, 50:16-20.

50 R. 0661.

The board's decision.

The board's decision reflects the difficulty it had identifying the issues before it. First, the board found that the employer was entitled to a lien on the third party recovery.[51] Then, the board found "employee's trip to California was undertaken strictly on his own volition."[52] The board found that Martin was not acting under the direction of the employer, or pursuant to a referral for treatment.[53] The board concluded the traffic accident was not within the course and scope of employment.[54] Third, without referring to the traffic accident being outside the course of employment, the board applied the presumption to the analysis to the neck injury sustained in the accident.[55] It began with the premise that the employee's testimony, and Dr. Chin's report, raised the presumption that the neck injury was covered.[56] Then the board found that Dr. Laycoe's examination eliminated the possibility that any neck injury had not resolved. The board concluded that this evidence rebutted the presumption.[57] Finally, the board determined that the employee failed to provide any additional proof [presumably beyond Dr. Chin's report] that he had a neck injury.[58] Since the neck injury was "resolved," the board concluded that the employee had not proven a compensable claim.[59]

The board ordered that the employer was entitled to claim a lien against the third party settlement as a result of medical treatment provided by the employer as a

---

[51] *Charles E. Martin v. Nabors Alaska Drilling, Inc.*, (*Martin II*), Alaska Workers' Comp. Bd. Dec. No. 07-0079, 6 (April 6, 2007) (R. Foster, Chair).

[52] *Id.* at 7.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 7-8.

[56] *Id.* at 9.

[57] *Id.* at 9.

[58] *Martin II* at 9.

[59] *Martin II* at 9-10.

result of the traffic accident.[60] The board also ordered that the employer is responsible for medical benefits for the back injury "which arose in the course and scope" of Martin's employment, but that the employer "is not responsible for medical costs associated with the employee's neck as it is not a compensable condition pursuant to AS 23.30.095."[61]

Martin sought reconsideration.[62] The board rejected the request for reconsideration, on the basis that Martin's petition sought to reargue his position before the board and introduce new issues and evidence not before the board in the March 2007 hearing. Because he did not present "new evidence or argument in connection with the issues addressed at the March 7, 2007, hearing," the board denied the petition.[63] This appeal followed.

Standard of review.

When reviewing appeals from board decisions, the commission may not disturb credibility determinations by the workers' compensation board of witnesses who appear before it.[64] A board finding as to the weight to be assigned medical testimony and reports is conclusive, even if the evidence is susceptible to contrary conclusions.[65] If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings.[66] Because the commission makes its decision based on the record before the board, the briefs filed on appeal, and oral argument to the commission,[67] no new evidence may be presented to the commission.

---

60 *Id.* at 10.

61 *Id.*

62 R. 2926.

63 *Charles E. Martin v. Nabors Alaska Drilling, Inc.*, (*Martin III*), Alaska Workers' Comp. Bd. Dec. No. 07-0111, 5 (May 4, 2007) (R. Foster, Chair).

64 AS 23.30.128(b). The board made no explicit credibility determinations regarding the witness who appeared before them in this case.

65 AS 23.30.122.

66 AS 23.30.128(b).

67 AS 23.30.128(a).

Whether the evidence the board relied on is "substantial evidence," and whether the board applied the proper legal analysis to the facts, are matters of law to which we are required to apply our independent judgment, subject to the Alaska Supreme Court's decisions and the Alaska State Legislature's statutes.[68]

Discussion.

We see the primary issue that was presented to the board for decision as, "Did Martin's traffic accident on July 27, 2002, arise out of and in the course of employment?" The answer to this question determines the answer to the other questions presented by Martin's appeal. We begin our discussion by examining the theory of coverage advanced by Martin.

1. Alaska law does not espouse pure positional risk liability.

Martin's claim that the 2002 traffic accident arose out of his employment depends on application of pure positional risk theory. The concept of "pure positional risk" is that if the employment put the person in the position where he was injured, then the employer is liable for the injuries because the person would not have otherwise been injured, regardless of the time and circumstance of the injury, or whether the risk originated with the employment. Thus, pure positional risk dictates that if a worker is struck by lightning as he drives to work, the employer is liable, because the employment relationship put him in the position to be struck. If a worker is at a store buying clothes she will wear at work, and she falls on the escalator, the employer is liable for her injury, because the need to buy clothes put her in position on the escalator. Pure positional risk requires the employer to assume liability for every risk engendered by the employment relationship, whether or not the employer has control of the risk or the risk is a part of the employment duties. In its simplest terms, if the employment relationship starts the chain of events that leads to injury, the employer is liable.

Martin claims that his work put him in position to be struck by a car because he was injured at work, the employer-provided treatment for that injury was not improving

[68] AS 23.30.128(b).

his condition, he went to California to look for a better physician, and he was struck by a car there. If the employment had not started the chain of events leading to his accident, he argues, he would not have been injured in 2002. Martin's argument is based on pure positional risk theory because it recognizes no limits on the time, manner, or circumstances of the risk leading to employer liability and disregards objective reasonableness.

Alaska law does not recognize pure positional risk as the basis for liability for workers' compensation. When Martin was injured in 2002, the Alaska State Legislature required compensation to be paid "in respect of disability or death of an employee"[69] and medical benefits to be paid "which the nature of the injury requires."[70] "Disability" was defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury;"[71] and "injury" meant "accidental injury or death arising out of and in the course of employment."[72] "Arising out of and in the course of employment," the legislature said in AS 23.395(2),

> includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities[.]

The legislature excluded personal activities away from employer-provided facilities from those risks that might arise out of the employment relationship, such as the risks attendant on shopping for clothing to wear at work.[73] It also required that the injury "arise out of *and in the course of* employment." Thus, employment relationship must

---

69 AS 23.30.010 (2002).

70 AS 23.30.095(a).

71 AS 23.30.395(10) (2002).

72 AS 23.30.395(17).

73 On the other hand, if the employer directed the employee to leave the work-site, go to a uniform shop, and purchase a new uniform, an injury arising from and in the course of performing the employer-directed activity would be covered.

place the person in the position to be injured (that injury *arise out of employment*) and the injury must occur within the time, place and circumstances of the employment (in the course of employment).

The Alaska Supreme Court instructs us that these concepts are "merged" in a single concept of work connection,[74] but that does not mean that the Court has abandoned all time, place, and manner restrictions and adopted pure positional risk as the test of work connection. The Supreme Court also recognizes limits on whether injuries arise out of the employment, such as the "going and coming rule," which says that injuries that occur while the employee is going to and from work generally are not compensable, notwithstanding certain exceptions.[75] Thus, the person struck by lightning on his way to begin his regular work on the employer's premises is not covered by workers' compensation in Alaska. Not every trip engendered by the employment relationship will result in workers' compensation coverage.[76]

Injuries that occur in the course of traveling to and from a physician's office to receive treatment for a work-related injury are covered by the workers' compensation act for two reasons recognized by the Alaska Supreme Court. First, because the employee is required to submit to reasonable medical treatment as a condition of receiving compensation and the workers' compensation act is a part of the contract of hire, the employee's travel to the medical treatment is not personal travel, but an activity performed at the direction of the employer.[77] Second, the court analogized

---

[74] *Anderson v. Employers Liab. Assurance Corp.*, 498 P.2d 288, 290 n.5 (Alaska 1972) (remote site recreation), quoting *Northern Corp. v. Saari,* 409 P.2d 845, 846 (Alaska 1966) ("if the accidental injury or death is connected with any of the incidents of one's employment then the injury or death would both arise out of and be in the course of such employment.").

[75] *RCA Serv. Co. v. Liggett*, 394 P.2d 675 (Alaska 1964); *Seville v. Holland Am. Line Westours*, 977 P.2d 103 (Alaska 1999).

[76] *See Malone v. Lake & Peninsula Borough Sch. Dist.*, 977 P.2d 733 (Alaska 1999).

[77] *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145, 1148-49 (Alaska 1989).

medical travel to a "special errand" under the "special errand rule."[78] Either way, travel to obtain medical care is not viewed as compensable solely on the basis of pure positional risk engendered to the employment relationship.

The Alaska Supreme Court, in a very early case, delineated a rule we believe is relevant here:

> [I]t is both possible and desirable to locate a median between disallowing compensation and compensating all injuries which, by any thread of causation, may be connected with an earlier compensable injury. The test we adopt is this: if the earlier compensable injury is a substantial factor contributing to the later [personal] injury, then the later injury is compensable.[79]

The Alaska Supreme Court has defined "a substantial factor" as follows: the employment (or employment injury) is a substantial factor in bringing about the injury if, but for the employment (or employment injury), the injury would not have occurred, *and*, reasonable minds would regard the employment (or employment injury) as a cause and assign responsibility to it.[80] With this test, we return again to the recognition that pure positional risk (purely a "but for" thread of causation) is not the law in Alaska.

2. The board's finding that Martin's trip to California was not in the course of employment is supported by substantial evidence.

Martin argues that his trip to California was solely occasioned by his need to obtain another physician who would give him the surgical care he needed. He does not dispute that he saw family members while he was there; he testified that he stayed a week with his brother in Aztec, New Mexico, stayed with his son in Whittier, California, and that he was on his way to his sister's house in La Habra (a town to the southeast of Whittier) when his motorcycle was struck. Whether, as employer argued below, the trip was occasioned by his desire to visit family, or a dual purpose trip, was not an issue the

---

78 *Id.* at 1149.

79 *Cook v. Alaska Workmen's Comp. Bd.,* 476 P.2d 29, 35 (Alaska 1970).

80 *Wells v. Swalling Const. Co., Inc.*, 944 P.2d 34, 38 (Alaska 1997), citing *Fairbanks N. Star Borough v. Rogers & Babler*, 747 P.2d 528, 532 (Alaska 1987).

board fully addressed in its findings.[81] However, we are able to trace the board's reasoning because the board made findings of fact that would exclude Martin's journey from coverage under *Kodiak Oilfield Haulers.* In its decision, the board said

> The board has reviewed the evidence and argument offered by the parties and finds that the employee's trip to California was undertaken strictly on his own volition. The board finds that the employee was not acting under the direction of the employer or pursuant to referral for treatment and his motorcycle accident was not within the course and scope of his employment as defined by the Alaska Workers' Compensation Act.[82]

In these few sentences, the board addresses both underlying principles on which liability for injury in the course of travel to medical treatment recognized in *Kodiak Oilfield Haulers*: the "special errand rule" and activity performed at the direction of the employer.

---

[81] Martin did not argue that the employer failed to overcome the presumption of compensability, which, in its discussion of the neck injury, the board found had been raised. Martin's testimony regarding his subjective belief that he needed to go to California by motorcycle to find a physician is not sufficient to raise the presumption that the traffic accident is work-related; when it occurred, he was not returning from a physician's office, nor going to one. He was going to his sister's house from his son's house. R. 0266, 0268. To raise the presumption of compensability, the employee must produce *some* evidence of causal connection between the employment and the injury. *Burgess Constr. Co. v. Smallwood,* 623 P.2d 312, 316 (Alaska 1981). In many cases, that is easily done because the injury occurs on the employer's premises, during work hours. The traffic accident injury occurred years after Martin's employment relationship with Nabors was severed. It did not occur in the course of treatment or retraining provided by the employer. Only Martin's personal belief that riding a motorcycle to California was his best option to obtain better treatment connects the injury to the employment. When injured, he was not going to or returning from treatment – he was traveling from where he had been staying with his son in Whittier, California, R. 0266, on his way to visit his sister in La Habra, California. R. 0268. We would agree that the presumption had been overcome by the evidence that the trip to California was undertaken without referral by his physicians or direction by the employer. Because there is substantial evidence to rebut the presumption, the board's error in not applying the presumption analysis correctly is harmless error. *Kodiak Oilfield Haulers,* 777 P.2d at 1151.

[82] *Martin II* at 7.

Martin concedes that Nabors did not *direct* him to go to California on his motorcycle. There is no evidence the adjuster directed him to make the trip. Martin did not tell the adjuster or Nabors human resources officer that he intended to make the trip and ask for permission to do so.[83] In fact, Martin's witness repeatedly testified that the employer had *not* arranged or sanctioned the trip,[84] an omission that Martin seemed to view as a breach of an employer promise to him.[85] Martin had no referral from his attending physician to a physician in California when he made the trip.[86] He got the two Californian doctors' names "off the internet."[87] There is ample evidence in the record as a whole to support the board's finding that the trip was not "at the direction of the employer" within the meaning of *Kodiak Oilfield Haulers*, that is, pursuant to reasonable treatment orders of his attending physician or the consultants to whom he was referred by his attending physician.

The Supreme Court also characterized a journey to and from the authorized medical provider as analogous to a "special errand," that is, an off-premises journey that ordinarily would be excluded as part of the going and coming rule.[88] The analogy to the "special errand rule" is no more helpful to Martin. The special errand rule states that

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual coming and going rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazzard, [sic] or urgency of making it in

---

[83] Appellant's Br. 6-7, Hrg Tr. 38:24 - 39:2, Martin Depo. (2002) 108:6-9.

[84] Hrg Tr. 38:24 - 39:2, 39:19-22, 40:8-10.

[85] Hrg Tr. 13:20-21, 35:24-36:6.

[86] Martin testified he told his physicians that he was going to visit family. Martin Depo. (2002) 108:6-9.

[87] Martin Depo. (2002) 104:2-4.

[88] *Kodiak Oilfield Haulers,* 777 P.2d at 1149.

> the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.[89]

Martin was not on a journey to an authorized medical provider. His trip to California was not within the medical benefits provided by AS 23.30.095(a), which include "transportation charges to *the nearest point where adequate medical facilities are available.*"[90] In *Kodiak Oilfield Haulers,* the Supreme Court approved the board's application of a time limit on medical travel as well: "as soon as reasonably possible."[91] Thus, while the special errand rule, by analogy, may bring a journey to medical care into the course of employment, there are limits on how far, and how long, that errand may last. More importantly, however, in this case is the board's finding that Martin's journey itself was not undertaken at the request of the employer.

In *Johnson v. Fairbanks Clinic*, the court said "The foremost consideration in support of our conclusion that the trip was part of a special errand is the strong inference that Dr. Johnson undertook the trip *only at the implied request of his employer*."[92] This implied request, based on the need to see his patient before scheduled surgery, was the "particular circumstance" that impelled Dr. Johnson to undertake the greater hazards of the weekend journey from his cabin than his usual commute from his home. In Martin's case, the board found Martin acted purely of his own volition in making the trip to California, a finding that excludes the possibility of an implied request by the employer. In reviewing the evidence before the board, including

---

89 *Johnson v. Fairbanks Clinic*, 647 P.2d 592, (Alaska 1982), quoting 1 A. Larson, The Law of Workmen's Compensation § 16.10, at 4-123 (1978) (footnotes deleted).

90 AS 23.30.395(26). Martin did not address why adequate care was not available in other large cities, such as Seattle, Salt Lake, Portland, San Francisco, or Denver; all closer than the approximately 3700 miles Martin rode his motorcycle.

91 777 P.2d at 1149-50.

92 647 P.2d at 592, 595. (Emphasis added).

Martin's own testimony, we cannot say that the board lacked substantial evidence to support its findings.[93]

We conclude that the board properly applied the legal principals applicable to the question whether Martin's journey arose out of and in the course of employment. The board's written findings, while brief, are sufficient to allow us to determine that the board did consider whether or not a "special errand rule" analogy, or "employer directed activity" brought the off-premises journey within the course of employment obligations under AS 23.30.095(a). We conclude the board did not err in deciding that the motorcycle journey to California, and traffic accident during that journey, was not in the course of employment.

3. Injuries to Martin's neck resulting from the motorcycle accident are not work-related.

Having determined that the traffic accident did not occur in the course of employment, the board examined Martin's claim for treatment and compensation for injuries to his neck resulting from the traffic accident as though the accident had occurred in the course of employment, using the usual three-part presumption analysis. It found that the employee's testimony and Dr. Chin's report was sufficient to raise the presumption that the injury was covered.[94] It then analyzed the medical evidence in isolation, without considering the impact of its prior finding that the traffic accident itself did not occur in the course of employment. It did not discuss whether the

[93] The board did not make findings concerning the factors listed in *Kodiak Oilfield Haulers,* 777 P.2d at 1149. In a closer case, the absence of such findings would compel us to remand to the board for further findings. In this case, however, the *only* evidence of work relationship is Martin's testimony regarding his subjective belief that his actions were a reasonable response to dissatisfaction with his medical treatment, so that the journey was "medical related travel."

[94] The employee's testimony and Dr. Chin's report are sufficient to establish a causal link between the injury and the traffic accident; however, they are not sufficient to raise the presumption that the traffic accident arose out of and in the course of employment, for reasons we explained above.

evidence that the traffic accident did not occur in the course of employment overcame the presumption of compensability.[95]

We do not understand why the board analyzed the claim in this manner. The board's confusion at the outset of the hearing regarding the issues for hearing may have led it to view the claim for treatment of the neck symptoms in isolation from the 2002 traffic accident. The board may have thought that Martin's claim was for accident-increased symptoms of an earlier work injury. We conclude that the board's mistake was harmless error, because the board's finding that the 2002 traffic accident did not occur in the course of employment excludes all injuries resulting from the traffic accident from coverage by workers' compensation act. Therefore, the employer is not liable for medical treatment of the neck injury or compensation for disability caused by the neck injury that occurred in the 2002 traffic accident.

4. The employer is entitled to reimbursement from settlement against a third party for an injury aggravating a work-related injury insofar as the employer made payments as the direct consequence of the aggravating injury.

AS 23.30.015(g) establishes a right of the employer to recover compensation and paid to the employee from a settlement obtained from a third party responsible for the "disability or death" for which compensation is payable.[96] The Supreme Court has recognized, that AS 23.30.015 entitles the employer to claim reimbursement from the

---

[95] One way of overcoming the presumption of compensability is through medical evidence, as when a physician testifies that the injury or disability probably was not caused by an accident that the parties agree occurred in the course of employment. An example of this is when a physician testifies that a particular injury probably was not caused by lifting a tire. The parties agree the employee, an auto mechanic, lifted the tire at work; the medical opinions disagree whether the tire lifting incident caused the injury. Another way, to overcome the presumption is to produce evidence that the accident (lifting a tire, in our example) did not arise out of and in the course of employment, as when the employer shows that the tire belonged to the employee's personal vehicle, and she lifted it while changing it along the roadside because it had gone flat on the way to work.

[96] AS 23.30.015(a) expressly provides that an employee need not elect whether to receive compensation or to recover damages from the third person.

proceeds generated in a third party settlement,[97] even if enforcement of that right may leave the employee with nothing from the settlement.[98] The question here is whether a settlement from a personal injury, occurring after the work injury that established the employer's liability, may be the basis of an employer claim for reimbursement.

In *Forrest v. Safeway Stores, Inc.*,[99] the Supreme Court answered this question in the affirmative, holding that the employer is entitled to reimbursement from a settlement established by an employee's suit against a third party tortfeasor who aggravates a pre-existing work-related injury, up to the extent of the employer's exposure. In that case, Forrest sued a physician who treated him for a work-related injury. According to Forrest, the treatment made his injury worse. When he dismissed his action against the physician without his employer's knowledge, the employer sought to limit its liability under AS 23.30.015(h). The Supreme Court held that because the employer remained liable for compensation so long as the work-related injury was a substantial factor in the employee's disability, the employer was not entitled to a complete forfeiture of all compensation under AS 23.30.015(h). However, the employer was entitled to receive only a partial forfeiture, limited to the extent of the liability for compensation and benefits attributable to the aggravation.

In this case, Nabors does not contest continuing liability for the employee's back injury. It seeks reimbursement of compensation and medical expenses, subject to reduction for a pro rata share of the attorney fee, attributable to aggravation of the back injury by the traffic accident. If the Alaska Supreme Court is willing to allow an employer to enforce AS 23.30.015 so as to result in a *forfeiture* of future benefits attributable to a third party's negligent aggravation of a pre-existing work-related injury, we think AS 23.30.015 is enforceable to the same extent to permit reimbursement from a settlement with a negligent third party in similar circumstances. Where the employer voluntarily pays for care or diagnostic testing required as a direct

---

97 *Alaska Nat'l Ins. Co. v. Jones*, 993 P.2d 424 (Alaska 1999).

98 *McCarter v. Alaska Nat'l Ins. Co.*, 883 P.2d 986 (Alaska 1994).

99 830 P.2d 778 (Alaska 1992).

consequence of the aggravation of a work related injury caused by a third party's negligence, it is unfair to disallow the employer the opportunity to share in the recovery only because the third-party aggravation is not, as in *Forrest*, the result of treatment for the work-related injury.[100]

However, we agree that the Supreme Court would not be willing to extend the employer's right of reimbursement beyond those paid expenses or compensation directly attributable to the traffic accident and its aggravation of the pre-existing work injury.[101] Thus, if the employer would have been liable for future temporary total disability compensation absent the aggravation, the employer would not have a right of reimbursement, notwithstanding that the compensation was paid after the aggravation.[102] If, however, the employer paid emergency room expenses that are directly attributable to the aggravation of the pre-existing injury by the traffic accident, which would not have been incurred otherwise, then the employer has a right to recover those payments from the third party settlement.

---

[100] AS 23.30.015(a) refers only to a third person's liability for damages "on account of a disability . . . for which compensation is payable." It is not limited to damages "on account of *the injury* for which compensation is payable." We recognize the distinction noted by the Supreme Court in *Forrest* between the usual third party action, in which the wrong-doer caused the original injury, and those in which the wrong-doer aggravates the original injury through malpractice. The employer is liable for disability resulting from malpractice in treatment of a work-related injury; this is a significant difference from the current case because the traffic accident did not arise out of treatment for the injury. However, Martin sought damages in part "on account of a disability" for which, Martin argues, compensation continues to be payable. Thus, while the board found that the traffic accident did not arise out of and occur in the course of employment, to the extent that Nabors paid medical care or compensation for which the third party is liable, Nabors ought to be able to recover it from the third party.

[101] We note that the employer does not argue that the aggravation was so great that the employment is no longer a substantial factor in bringing about the disability.

[102] No argument was presented in the hearing that the employer's liability for disability compensation related to the acknowledged work-related back injury was increased by the traffic accident.

The board determined that the traffic accident did not occur in the course of employment, so the employer is not liable under the workers' compensation act for future medical care or compensation attributable the traffic accident. Therefore, the employer is not entitled to recover amounts under AS 23.30.015(e)(1)(D). The employer's right to reimbursement extends only to the cost of benefits actually furnished by the employer as a direct consequence of the traffic accident, less a pro rata share of attorney fees, to the extent of the liability of the third party.

The board's order states the employer has a right to "claim a lien under AS 23.30.015" "as a result of medical treatment provided the employee as a result of a motorcycle-auto accident in California." The right to claim a lien is not only "as a result of" medical treatment; it is "to the extent of" medical treatment provided to the employee as a result of the accident. In light of the restriction imposed by the Supreme Court in *Forrest*, we exercise our authority to modify[103] the board's order to reflect the extent of the employer's right of reimbursement for past paid medical care under AS 23.30.015.

Conclusion.

We have determined that the board's findings of fact, while brief, are supported by substantial evidence in light of the whole record. They show that the board did consider whether the medical travel was compensable under *Kodiak Oilfield Haulers*. Moreover, while the board's decision reflects some confusion regarding the analysis applicable to the claim for injury resulting from the traffic accident, the error is harmless in view of the evidence supporting the board's findings that the traffic accident did not occur in the course of employment. We therefore AFFIRM the board's decision denying the claim for medical treatment of injuries resulting from the 2002 traffic accident. In light of our discussion above, we MODIFY the board's order to substitute "to the extent

[103] AS 23.30.128(d).

of medical treatment" for "as a result of medical treatment" in paragraph 1 of the board's order.

Date: *13 Feb. 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission AFFIRMED the board's decision that Charles Martin's injuries due to a traffic accident on July 27, 2002, were not compensable (covered by workers' compensation). The appeals commission MODIFIED the board's order allowing the employer to receive from Mr. Martin's third party settlement reimbursement of any medical care or compensation that it has paid as a result of the traffic accident, less a pro rata share of attorney fees. The appeals commission's decision ends all administrative proceedings in this part of Mr. Martin's workers' compensation case; it does not affect his other claims and petitions. It 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 Certification box below.

Proceedings to appeal this decision must be instituted 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 the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. To see the date this decision is mailed, look at the clerk's Certificate of Distribution in the box below.

A request for commission reconsideration must be filed within 30 days of the date of mailing of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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).

If you wish to appeal this decision 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 appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Alaska Workers' Compensation Appeals Commission's Final Decision No. 070 in the appeal of Charles E. Martin vs. Nabors Alaska Drilling, Inc., and Northern Adjusters; AWCAC Appeal No. 07-016; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this _13th_ day of _February_, 20_08_.

____*Signed*_____
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision and Order in AWCAC Appeal No. 07-016 was mailed on *2/13/08* to Charles E. Martin(certified) & R. Wagg at their addresses of record and faxed to Wagg, Director WCD, & AWCB Appeals Clerk.

Signed *2/13/08*
L. Beard, Appeals Commission Clerk Date