Case: *Charles E. Martin vs. Nabors Alaska Drilling, Inc. and Northern Adjusters, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 070 (February 13, 2008)

Facts: Martin hurt his low back in his employment as a toolpusher in 1999. In 2002, he travelled by motorcycle from Alaska to California to consult with doctors regarding his back condition and to visit family. He was injured when a car struck him as he was stopped at a traffic light. Martin hurt his back, neck and knees in that traffic accident. The employer paid for medical expenses for the back injury but sought enforcement of a lien on a later settlement agreement reached between Martin and the car's driver because the accident aggravated Martin's preexisting work-related back injury. Martin argued that his neck injury was covered by the workers' comp 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 Martin's claim. The board concluded that the traffic accident was not within the course of Martin's employment because "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[.]" Dec. No. 070 at 15. However, the board denied Martin's claim for the neck injury not on the basis of a lack of a work connection, but rather because of a lack of proof that he suffered a neck injury. In addition, the board decided that the employer was entitled to a lien on the third-party recovery under AS 23.30.015. The employer sought reimbursement of compensation and medical expenses attributable to aggravation of the back injury by the traffic accident. Martin appealed.

Applicable law: Compensation must be paid "in respect of disability or death of an employee," AS 23.30.010 (2002), and medical benefits are to be paid "which the nature of the injury . . . requires," AS 23.30.095(a). "[D]isability" is "incapacity because of injury to earn the wages which the employee was receiving at the time of injury[,]" AS 23.30.395(10) (2002), and "injury" means "accidental injury or death arising out of and in the course of employment," AS 23.30.395(17). AS 23.30.395(2) states that "arising out of and in the course of employment":

> 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[.]

Under *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145, 1148-49 (Alaska 1989), injuries that occur in the course of traveling to and from a physician's office to receive treatment for a work-related injury are compensable. This is for two reasons: (1) 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. (2) Medical travel is like a "special errand" under the "special errand rule." 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 the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself. *Johnson v. Fairbanks Clinic*, 647 P.2d 592, 594 (Alaska 1982) (citation omitted).

AS 23.30.015(g) establishes a right of the employer to recover compensation paid to the employee from a settlement obtained from a third party responsible for the "disability or death" for which compensation is payable. AS 23.30.015 entitles the employer to claim reimbursement from the proceeds generated in a third party settlement, *Alaska Nat'l Ins. Co. v. Jones*, 993 P.2d 424 (Alaska 1999), even if enforcement of that right may leave the employee with nothing from the settlement, *McCarter v. Alaska Nat'l Ins. Co.*, 883 P.2d 986 (Alaska 1994). An 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. *Forrest v. Safeway Stores, Inc.*, 830 P.2d 778 (Alaska 1992).

Issues: Were the cervical injuries suffered in the 2002 motor vehicle accident work-related? Was employer entitled to a lien for medical expenses paid for Martin's back from the traffic accident settlement agreement?

Holding/analysis: The commission rejected Martin's argument about the compensability of the traffic accident injuries as one based on pure positional risk. Pure positional risk holds an employer liable if the employment starts the chain of events that leads to injury. But Alaska law requires an injury to "[arise] out of and in the course of employment," as defined in AS 23.30.395(2). Moreover, employment must be a substantial factor in bringing about the injury. This occurs when "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." Dec. No. 070 at 14, citing *Wells v. Swalling Const. Co., Inc.*, 944 P.2d 34, 38 (Alaska 1997).

The commission concluded that substantial evidence supported that the traffic accident was not work-related because it was not "at the direction of the employer" under the *Kodiak Oilfield Haulers* rule. Martin conceded that the employer did not direct him to go to California by motorcycle or arrange or sanction the trip, and his Alaskan attending physician did not refer him to the Californian doctors. In addition, when Martin was injured in the accident, he was traveling from his son's home to his sister's, rather than going to or returning from treatment. The commission also concluded that substantial evidence supported that the "special errands" rule did not apply. The commission

noted there are limits on "how far, and how long" a journey to medical care within the course of employment may last. Moreover, even under the special errands rule, travelling to receive medical care must be done at the direction of the employer. The commission noted that in a closer case it would need to remand to the board to make findings concerning the factors listed in *Kodiak Oilfield Haulers*. "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.'" Dec. No. 070 at 18 n.93.

The commission concluded that the board's failure to apply the presumption of compensability to whether the traffic accident was compensable was harmless error since there was substantial evidence to rebut the presumption. Similarly, the board's presumption analysis of whether a neck injury occurred without considering whether that injury was work-related was harmless error since the board otherwise decided the traffic accident was not work-related.

On the lien, the commission modified the board's order to give the employer the right to claim a lien under AS 23.30.015 "to the extent of" medical treatment provided to the employee as a result of the traffic accident. However, the commission limited the employer's right of reimbursement to the already paid expenses or compensation directly attributable to the traffic accident and its aggravation of the pre-existing work injury. (The commission noted that the employer did not argue that the aggravation was so great that the employment is no longer a substantial factor in bringing about Martin's disability.) Moreover, because the board determined that the traffic accident did not occur in the course of employment, the employer would not be liable for future medical care or compensation attributable the traffic accident.

Note: This case was appealed to the Alaska Supreme Court, but the appeal was dismissed on August 15, 2008.

Note: Dec. No. 139 (October 5, 2010) concerned an appeal of another board decision between these two parties. The board concluded that Nabors had paid Martin all the benefits to which he was entitled and the commission affirmed.