

**Case:** *Charles E. Martin vs. Nabors Alaska Drilling, Inc. and Northern Adjusters, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 139 (October 5, 2010)

**Facts:** Charles Martin (Martin) hurt his low back in his employment as a driller in May 1999. Martin contended that he suffered a new back injury on November 27, 2000, and that date should be used to calculate his temporary total disability (TTD) and permanent partial impairment (PPI) payments relative to his back. Similarly, he argued that his TTD and PPI payments with respect to his hearing loss, carpal tunnel syndrome (CTS), and radial tunnel syndrome (RTS) should be calculated from the date he was rated for them. Nabors Alaska Drilling, Inc. (Nabors) contended that Martin did not suffer a new back injury in November 2000 and that his 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. The board concluded that Martin did not suffer a second back injury in 2000 and that May 1999 was the injury date for the hearing loss and CTS/RTS injuries.

Nabors argued that Martin was appropriately paid AS 23.30.041(k) stipend benefits, not permanent total disability (PTD) benefits, while going through the reemployment process. The board agreed, concluding that Martin was not permanently and totally disabled until October 15, 2007, when Lulie Williams acknowledged she was unable to devise a rehabilitation plan meeting Martin's remunerative wage, thus rendering him vocationally unemployable.

**Applicable law:** 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." The weekly maximum for injuries suffered before July 1, 2000, was \$700, and after that date, \$762. Also for injuries after July 1, 2000, AS 23.30.190(a) increased the whole person amount by which the employee's permanent impairment rating is multiplied from \$135,000 to \$177,000.

AS 23.20128(b) provides that credibility determinations by the board are binding on the commission.

"In our view, date of injury of claims [that allege repeated micro-trauma in the employment caused the gradual onset of injury] is the last day the employee engaged in the work activity that he or she alleges brought about the 'cumulative' injury." *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069, 23 n.99 (February 7, 2008).

**Issues:** Does substantial evidence support that Martin did not suffer a second injury to his back in November 2000? Does substantial evidence support that Martin's hearing loss and CTS/RTS injuries were cumulative ones attributable to his work before May 15, 1999? Does substantial evidence support that Martin was permanently and totally disabled as of October 15, 2007?

**Holding/analysis:** A second injury would mean that Martin was owed more TTD and PPI benefits due to statutory changes. The commission agreed with the board that Martin bore the burden of proving the second injury (the compensability presumption

did not apply since Martin delayed giving notice and this delay was excused per AS 23.30.120(b)). The commission concluded substantial evidence supported that Martin did not satisfy this burden. The board did not find Martin's testimony regarding the second back injury credible, a finding that is binding on the commission.

Martin sought payments for his hearing loss and CTS/RTS commensurate with the benefit levels applicable to injuries occurring after July 1, 2000. But the commission concluded the "cumulative injury" concept applied to establish the date of injury and that substantial evidence supported an injury date of no later than May 15, 1999, the last day Martin worked as a driller. Martin engaged in light duty employment with Nabors in 2000 that 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. The work activities in 2000 also did not expose him to loud noises that could contribute to the hearing loss.

Similarly, the date Martin was PTD determined whether he was paid the appropriate benefits in the appropriate amount. The commission concluded that substantial evidence supported that October 15, 2007, was the date that Martin was PTD, although the commission noted 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)." Dec. No. 139 at 22.

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

**Note:** Dec. No. 070 (February 13, 2008) concerned an appeal of an earlier board decision that concluded a traffic accident was not work-related, and that granted the employer a lien on third-party recovery.