

Alaska Workers' Compensation Appeals Commission

Alaska Asphalt Services, LLC and The Ohio
Casualty Insurance Company,
Appellants,

vs.

Sabrina M. Martino,
Appellee.

Final Decision

Decision No. 304 June 22, 2023

AWCAC Appeal No. 22-009
AWCB Decision No. 22-0046
AWCB Case No. 202007450

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 22-0046, issued at Anchorage, Alaska, on June 29, 2022, by southcentral panel members William Soule, Chair, Bronson Frye, Member for Labor, and Michael Dennis, Member for Industry.

Appearances: Stacey C. Stone, Holmes Weddle & Barcott, PC, for appellants, Alaska Asphalt Services, LLC and The Ohio Casualty Insurance Company; Robert J. Bredesen, Hillside Law Office, LLC, for appellee, Sabrina M. Martino.

Commission proceedings: Petition for review filed July 14, 2022, with motion for stay; order granting motion to convert petition for review to appeal issued August 2, 2022; order granting motion for stay issued August 17, 2022; briefing completed March 16, 2023; oral argument was not requested by either party.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Sabrina M. Martino was injured on June 30, 2020, while operating a compactor for her employer, Alaska Asphalt Services, LLC, insured by The Ohio Casualty Insurance Company (Alaska Asphalt). There have been two interlocutory decisions issued in

Ms. Martino's claim;¹ however, only *Martino II* was appealed to the Alaska Workers' Compensation Appeals Commission (Commission).

Ms. Martino timely filed a petition for review of *Martino II* with the Commission, and on August 2, 2022, the Commission granted Ms. Martino's motion to convert the petition for review to an appeal as "the issue is . . . finite and can be reviewed by the Commission without impacting the Board's authority to decide other matters that may arise in this case. The issue is one that might certainly arise in other cases and so the Commission has an obligation to provide its guidance."²

2. *Factual background and proceedings.*³

On June 30, 2020, Ms. Martino was running a compactor at work for Alaska Asphalt when it fell to a lower elevation; she pulled up on it and felt shoulder pain.⁴ Alaska Asphalt accepted the injury as work-related and paid Ms. Martino temporary total disability (TTD) benefits from July 3, 2020, through March 27, 2021.⁵ In considering when Ms. Martino might have been eligible for a reemployment evaluation, the Board noted that 90 days from July 3, 2020, is October 1, 2020.⁶

On February 16, 2021, orthopedic surgeon Trevor R. Born, M.D., saw Ms. Martino at a Veterans' Administration (VA) facility for her left shoulder. He diagnosed left shoulder impingement and a possible "SLAP" tear, scapular dyskinesia, and possible thoracic outlet syndrome (TOS). Dr. Born recommended (1) physical therapy for Ms. Martino's rotator

¹ *Martino v. Alaska Asphalt Servs., LLC*, Alaska Workers' Comp. Bd. Dec. No. 22-0029 (Apr. 29, 2022)(*Martino I*), in which the Board granted Ms. Martino's petition for a Second Independent Medical Evaluation; and *Martino v. Alaska Asphalt Servs., LLC*, Alaska Workers' Comp. Bd. Dec. No. 22-0046 (June 29, 2022)(*Martino II*), in which the Board granted Ms. Martino's requests for stipend benefits, interest, and a penalty.

² Order on Motion to Convert Petition for Review to an Appeal (Aug. 2, 2022).

³ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁴ R. 0001, 0332-33.

⁵ R. 0791-92.

⁶ *Martino II* at 3, No. 2.

cuff; (2) medication and possible intra-articular injections; (3) a chest computer tomography; and (4) limiting her ability to return to work in respect to her left shoulder.⁷

On the same day, Ms. Martino sent an email to the Division of Workers' Compensation (Division), although she did not copy it to Alaska Asphalt or its representative, questioning her right to retraining. She stated:

On 6/30/20 I was injured on the job. I would like to see if I may be eligible for vocational assistance and re-employment training. I am not sure that I will be able to return to the same line of work. I ran heavy equipment and did labor work. I have done physical therapy, then received injections and am going to again start physical therapy and possibly will need surgery in the near future. I am afraid that line of work may not be attainable any more [sic].

. . . .

Thank you for your time in reading this and please let me know what I may need to do qualify for any assistance.⁸

The following day, the Division's Reemployment Benefits Section's technician sent Ms. Martino and her workers' compensation insurer a letter advising her "of [her] rights to reemployment benefits." The letter cited AS 23.30.041 subsections regarding her inability to work for 45, 60, and 90 consecutive days and told Ms. Martino what documentation she needed to file. Notably, the letter advised Ms. Martino if she had been totally disabled from her normal job for 90 consecutive days or more, she could submit an attached form and the Reemployment Benefits Administrator (RBA) would order an eligibility evaluation upon verification of the 90-day time loss. She was to copy paperwork submitted to the RBA to Alaska Asphalt and its adjuster.⁹

On February 26, 2021, Ms. Martino emailed the RBA's office, but again did not copy the email to Alaska Asphalt or its representatives:

I am writing this letter in reference to ACB 20207450. . . . On 6-30-2020 I was injured on the job and have been seeking treatment and receiving workers compensation since. I fear my body might bot [sic] be able to handle the type of work I have been accustomed to for the last 2 decades

⁷ R. 0884.

⁸ R. 0787.

⁹ R. 2920-21.

(construction). I would like to see if I could initiate consideration for reemployment training. Thank you for your time and consideration. Please contact me to let me know your determination. . . .

Ms. Martino provided her telephone number and email address and said she was “in limbo on residence” and had two mailing addresses in different states. She was in Florida when she sent this email to the RBA’s office. Attached to her email was a photograph of a January 28, 2021, check for TTD benefits from Alaska Asphalt from January 17, 2021, through January 30, 2021, and a photograph of a December 31, 2020, letter from the Division to her confirming TTD benefits Alaska Asphalt paid her from July 3, 2020, through December 19, 2020.¹⁰ The Board determined that Ms. Martino sent these documents to the RBA’s office to demonstrate through her TTD benefit payment history that her work injury had totally disabled her for at least 90 consecutive days.¹¹

The technician, on February 26, 2021, emailed Ms. Martino, but did not copy Alaska Asphalt. Attached to the email was the technician’s February 17, 2021, letter. In the email, the technician stated:

I just left you a voicemail to call me back regarding your request for reemployment benefits. There is a process to go through for you to request an evaluation to see if you are eligible. To date we’ve not received any 90 day Employer notification that there was consecutive 90 days of time loss where you were totally unable to do the job of employment. I would like to talk with you to explain it more. Also, if you have the name of your adjuster with the insurance company, I will need that. I sent you paperwork regarding your rights and the request form to fill out, that was sent on 2/17/21 to your Hawaii address. Looking forward to hearing from you. . . .¹²

The same day, Ms. Martino called the technician who explained the reemployment benefits process. Ms. Martino stated her work injury totally disabled her for over 180 days and she requested an eligibility evaluation.¹³

¹⁰ R. 2924-26.

¹¹ *Martino II* at 4, No. 6.

¹² R. 2922.

¹³ *Martino II* at 4, No. 8.

On March 1, 2021, the technician sent a letter to Alaska Asphalt's insurer stating Ms. Martino reported it had been over 90 days since her work injury and cited to applicable sections from AS 23.30.041. The letter also stated:

Based on the information in our files, we do not have a clear indication if the employee has been off work for 90 consecutive days. Also, we do not have any medical reports from the doctor addressing the employee's ability to return to work. . . .

The letter asked the insurer to confirm Ms. Martino had been off work for 90 consecutive days because of her work injury, and asked for a doctor's opinion addressing whether Ms. Martino might be permanently precluded from returning to the job she had on the injury date. The letter stated the RBA's office could not refer Ms. Martino for an eligibility evaluation until it received a response and a physician's report and requested both within 14 days. Attached to the letter was a "Workers' Compensation Reemployment Verification for 90 Consecutive Days of Timeloss" form asking the person completing it to check "Yes" or "No" if Ms. Martino had been off work "for 90 consecutive days due to the date of injury," June 30, 2020.¹⁴ Also on March 1, 2021, Ms. Martino sent the adjuster and technician an email in which she mentioned her conversation with the technician and asked the adjuster if she had sent the 90-day notice form.¹⁵

The next day, March 2, 2021, Ms. Martino emailed the technician and the adjuster (1) a February 16, 2021, VA medical note restricting Ms. Martino's duties with her left upper extremity to five pounds lifting overhead and no repetitive overhead, left upper extremity use; and (2) a multi-page March 2, 2021, report from Dr. Born outlining his evaluation and his "work projection note limiting her with certain activities with regards to left upper shoulder."¹⁶

On March 4, 2021, orthopedic surgeon Wilbert B. Pino, M.D., performed an employer's medical evaluation (EME) and opined the work injury was "the causative factor and the substantial cause for the employee's reported disability. . . ." Ms. Martino (1) had

¹⁴ R. 2931-34.

¹⁵ R. 2927.

¹⁶ R. 2935-40.

a work-caused “musculoskeletal sprain/strain of the left upper extremity” from using a “Jumping Jack” compactor while at work for Alaska Asphalt; (2) needed no formal physical therapy or other medical care besides an independent exercise program; (3) had reached medical stability effective January 6, 2021; and (4) could return to “heavy” time-of-injury work including heavy equipment operator.¹⁷ He apparently was not asked if Ms. Martino would have any permanent partial impairment (PPI) from the injury as he did not opine whether she would have any PPI.

On March 8, 2021, Ms. Martino emailed the adjuster:

Hello? I did receive a check for the second half of February today. The checks for the 1st half of January AND 1st half of February has still not arrived. I also received the reemployment verification form but although it has the box checked for yes 90 consecutive days the date written is 2/22/21 . . . please clarify.¹⁸

On the same day, adjuster Sharona A. Hlavinka emailed Ms. Martino and the technician stating, “The 90th day is 02/22. You have to be off 90 days to qualify for voc.”¹⁹ On March 11, 2021, the technician emailed the adjuster and stated Ms. Martino “was in receipt of the 90 day verification but I have not received it from you as of yet. I’ve attached again.”²⁰

On March 15, 2021, the RBA’s office received the 90-day verification form signed by Jacqueline R. Schulze and dated March 12, 2021, with the “Yes” box checked indicating Ms. Martino had been off work since July 6, 2020, because of the work injury. The form included a footnote referencing AS 23.30.041(c), which stated in relevant part:

If the employee is totally unable to return to the employee’s employment at the time of the injury for **90 consecutive days** as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .²¹

¹⁷ R. 0869-75.

¹⁸ R. 2941.

¹⁹ R. 2941.

²⁰ R. 2942.

²¹ R. 2943. (Emphasis in original.)

The same day, the technician asked Ms. Martino for her location so the technician could find a specialist to perform the eligibility evaluation. The Board noted the technician did not copy this to Alaska Asphalt or its adjuster.²² Ms. Martino responded on the same day and stated she was in Tampa Bay, Florida, receiving medical care at the VA clinic, and was planning to move back to Hawaii for care the following month. The Board noted Ms. Martino did not copy these emails to Alaska Asphalt or its adjuster.²³

On March 25, 2021, Alaska Asphalt denied TTD benefits not supported by medical evidence, not related to the work injury, after the date of medical stability, January 6, 2021, and a penalty. The Board held that Alaska Asphalt did not controvert “all benefits” or reemployment benefits. Alaska Asphalt based its denials on Dr. Pino’s March 4, 2021, opinion stating Ms. Martino could return to her normal work.²⁴

On March 30, 2021, the technician told Ms. Martino to advise when she returned to Hawaii so the technician could refer her for an eligibility evaluation. The Board found that neither the technician nor Ms. Martino copied the exchange of emails to Alaska Asphalt or its adjuster.²⁵

On April 7, 2021, Ms. Martino told the technician she was in Hawaii, provided her mailing address, and said she wanted to proceed with the evaluation. The same day, the technician told Ms. Martino she was waiting for a Hawaii reemployment specialist to return her call. The Board noted these emails were not sent to Alaska Asphalt or its adjuster.²⁶

On April 20, 2021, the technician emailed Ms. Martino, attorney Stacey C. Stone, and the adjuster, and stated she had verification from Alaska Asphalt that Ms. Martino had missed 90 consecutive days because of the work injury, and the technician had

²² R. 2945.

²³ R. 2944-45.

²⁴ R. 0031-32.

²⁵ R. 2951.

²⁶ R. 2950-51.

located a specialist to perform the eligibility evaluation. The email also asked Ms. Martino to provide her 10-year work history and her physician's name for the specialist.²⁷

On April 26, 2021, the technician sent Ms. Martino, Ms. Stone, the rehabilitation specialist, and the insurer a letter stating she had received documentation that Ms. Martino had missed 90 consecutive workdays because of her work injury, she had moved to Hawaii, and "compensability of [her] claim does not appear to be in dispute." The letter assigned rehabilitation specialist Lanelle S. Yamane to the case and identified materials the adjuster needed to send to Ms. Yamane within 10 days. The technician also explained the purpose for the evaluation, the parties' rights, and provided time limits under Alaska law for performing the eligibility evaluation.²⁸

The same day, Alaska Asphalt denied TTD benefits not supported by medical evidence, not related to the work injury, and after medical stability; it also denied reemployment benefits and a penalty. The Board found that Alaska Asphalt did not controvert "all benefits." Alaska Asphalt based its reemployment denial on Dr. Pino's March 4, 2021, opinion stating Ms. Martino could return to her normal work and, "Hence, reemployment benefits are not warranted."²⁹

The technician reviewed Alaska Asphalt's April 26, 2021, Amended Controversion Notice and in the event "comments" section said "eval moves forward."³⁰ The same day the technician received Ms. Martino's formal request for an eligibility evaluation based on her allegation she had been totally unable to return to her work at the time of her injury for 90 consecutive days or more, beginning June 30, 2020.³¹ The technician also emailed the adjuster to clarify Ms. Yamane's phone number and address and advised the material sent to the specialist must be copied to Ms. Martino and the RBA's office.³² Ms. Stone's

²⁷ R. 2957.

²⁸ R. 2961-63.

²⁹ R. 0044-45.

³⁰ *Martino II* at 8, No. 25.

³¹ R. 2966.

³² R. 2964-65.

office, on the same day, emailed Ms. Yamane, identified itself as counsel for Alaska Asphalt and its carrier, and attached documents “to assist with the eligibility evaluation process.”³³

On May 8, 2021, Ms. Yamane faxed a questionnaire to Alaska Asphalt’s managing member seeking information about Ms. Martino’s work at the time of her injury. She also asked if Alaska Asphalt could offer Ms. Martino alternative employment.³⁴ On May 13, 2021, Ms. Yamane summarized a conversation she had with Alaska Asphalt’s managing member including alternative employment. She provided Alaska Asphalt a form to complete to ensure any available work was a legally valid employment offer.³⁵ On May 19, 2021, Ms. Yamane emailed Alaska Asphalt’s managing member a second request regarding alternative employment.³⁶

On June 24, 2021, orthopedist Mark O. Hansen, M.D., removed Ms. Martino from work for six weeks.³⁷ He reviewed Ms. Martino’s left-shoulder MRI which showed supraspinatus and infraspinatus tendinosis, but no tears. Dr. Hansen gave a left shoulder subacromial corticosteroid injection and diagnosed left rotator cuff tendinitis and possible TOS. Depending upon the injection results, he recommended additional physical therapy for neck and upper back stretching and strengthening and a cervical MRI to rule out left-sided nerve impingement.³⁸

On July 14, 2021, Alaska Asphalt’s managing member completed an employment form offering Ms. Martino a job on the “prep & paving crew” beginning May 12, 2021, at \$28.32 per hour in Anchorage, Alaska.³⁹

³³ R. 2971-72.

³⁴ R. 2976-77.

³⁵ R. 2979.

³⁶ R. 2983.

³⁷ R. 1026.

³⁸ R. 1022-25.

³⁹ R. 3064-67.

On August 6, 2021, Dr. Hansen predicted Ms. Martino would have permanent physical capacities to perform the physical demands of several jobs she held in the 10-year period prior to her work injury.⁴⁰

On August 27, 2021, Alaska Asphalt denied TTD benefits not supported by medical evidence, not related to the work injury, and after medical stability; it also denied PPI benefits, interest, and attorney fees and costs. The Board found that Alaska Asphalt did not controvert “all benefits.” Alaska Asphalt based these denials on Dr. Pino’s March 4, 2021, opinion stating Ms. Martino could return to her normal work and had a zero percent PPI rating, on its contention that all benefits were paid timely, and no attorney provided any services resulting in Ms. Martino receiving a benefit.⁴¹

Alaska Asphalt’s first three controversion notices contained a typographical error for Dr. Pino’s medical stability date in the “Reason-Specific Benefits Controverted” block. They said he opined medical stability occurred on January 26, 2021, whereas elsewhere on the notice his proffered date, January 6, 2021, was accurately stated.⁴²

On August 30, 2021, after difficulty identifying Ms. Martino’s attending physician and finding a physician willing to respond to her questionnaires, Ms. Yamane recommended Ms. Martino was ineligible for vocational retraining benefits. She based this on Dr. Hansen’s prediction Ms. Martino would have the permanent physical capacities to perform the physical demands of jobs she held in the 10 years prior to her injury, which exist in the Alaska labor market.⁴³

On September 13, 2021, the RBA’s designee notified the parties that Ms. Martino was not eligible for reemployment benefits based on Ms. Yamane’s recommendations and because Ms. Martino’s physician predicted she would have the permanent physical capacities to perform the physical demands of jobs she held in her 10-year work history, including Bartender and Informal Waiter/Waitress. Since these jobs exist in the labor

⁴⁰ R. 1150-54.

⁴¹ R. 0037-38.

⁴² *Martino II* at 9, No. 36.

⁴³ R. 3081-107.

market, Ms. Martino was not eligible for retraining benefits. The designee also advised Ms. Martino she had 10 days from September 1, 2021, to appeal the determination. The designee served this letter, which had the wrong date (September 1, 2021) on the first page, on all parties, including an attorney who was either representing or advising Ms. Martino at the time.⁴⁴

The Board found that Alaska Asphalt eventually paid Ms. Yamane's evaluation services in full.⁴⁵ The Board also found that the agency file for Ms. Martino did not show either a petition or other pleading appealing from the RBA's September 13, 2021, decision finding her not eligible for reemployment benefits.⁴⁶

On October 29, 2021, William F. Beringer, D.O., charted Ms. Martino with left-sided neck pain for one and one-half years with left arm pain, tingling, and weakness. He diagnosed cervical radiculopathy, spondylosis, and disc disorder and referred Ms. Martino to pain management for an epidural steroid injection and possibly an artificial disc.⁴⁷

In her hearing brief, and at hearing on May 18, 2022, Ms. Martino's primary contention was that she and Alaska Asphalt "stipulated" she was disabled from her work for at least 90 consecutive days because of her work injury. She bases this "stipulation" on Ms. Schulze's March 12, 2021, 90-day form verifying Ms. Martino had been disabled because of her work injury for 90 consecutive days beginning July 6, 2020. Ms. Martino contends this "stipulation" is binding on Alaska Asphalt and pursuant to Alaska Supreme Court (Court) precedent, Alaska Asphalt could not unilaterally terminate "stipend" benefits without obtaining Board permission to do so. She further contends there are limited bases on which Alaska Asphalt could controvert her benefits which would stop the reemployment eligibility evaluation process from moving forward, and Alaska Asphalt had not relied on those. Consequently, she claimed entitlement to "stipend" benefits for the

⁴⁴ R. 3108-09.

⁴⁵ R. 3112-14.

⁴⁶ *Martino II* at 10, No. 40.

⁴⁷ R. 1040-42.

time she was in the process, regardless of the ultimate finding that she was not eligible, and requested interest and a penalty on the stipend that should have been paid.⁴⁸

The record remained open after the hearing so Alaska Asphalt could file a supplemental hearing brief. In its June 1, 2022, brief, Alaska Asphalt contended it had no notice on February 16, 2021, that “reemployment benefits were being actively sought.” It conceded that on March 15, 2021, Alaska Asphalt’s managing member confirmed Ms. Martino had been off work since July 6, 2020. However, it contended on March 25, 2021, it controverted “all benefits” not supported by medical evidence or after the date of medical stability, based on Dr. Pino’s EME report stating Ms. Martino could return to her “time-of-injury” job. Alaska Asphalt pointed to Ms. Martino’s April 26, 2021, formal written request for an eligibility evaluation on a Board form, and its same-dated amended controversion expressly denying Ms. Martino’s right to reemployment benefits based on Dr. Pino’s opinions. It conceded if an injured worker has been unable to return to work for 90 days or more, the law states an eligibility evaluation “shall be ordered” unless the Alaska Asphalt controverted “on certain grounds.”

Alaska Asphalt contended it “controverted and made clear” its position that Ms. Martino could return to work before it had notice she was requesting reemployment benefits and before the technician made a referral for an eligibility evaluation. It contended:

While the March 25th controversion did not explicitly use the word “reemployment,” at the time the controversion was filed Employer had no notice that Employee had sent an email seeking information about the reemployment process, and despite the timeline set in AS 23.30.041, neither a Board administrator, nor the employee herself, had sought to begin the reemployment process as of January 6, 2021 and did not provide notice to employer in the February email.

Alaska Asphalt contended its March 25, 2021, notice was a “controversion-in-fact” and its April 26, 2021, amended controversion should have stopped the eligibility evaluation

⁴⁸ R. 0773-804.

process, but “a referral was made despite the fact that a controversion in fact was in the record before the reemployment process began.”⁴⁹

The Board found that Alaska Asphalt did not controvert on any grounds listed in 8 AAC 45.510(b) or 8 AAC 45.522(a), and never controverted on grounds that Ms. Martino unreasonably failed to cooperate with the reemployment process.⁵⁰

Alaska Asphalt further contended its controversions “required the RBA to refer the matter for a prehearing pursuant to 8 AAC 45.510(b).” It contended if the RBA made an error “either in delay to begin the reemployment process or miscounting of timelines within what Employee argues is the reemployment process, the employer cannot by law be held responsible.” Finally, Alaska Asphalt contended the fact that Ms. Martino was ultimately found not eligible, and she did not appeal that decision, demonstrated its position was correct. It cited to Board decisions and contended “stipend” benefits are not automatic and to award them without a hearing deprives it of property without due process. Alaska Asphalt contended Ms. Martino’s position “would require the employer to pay stipend benefits even though all parties know or should know the employee will not be eligible for retraining benefits.” It contended a simultaneous controversion preceding a referral requires the RBA “to immediately retract its determination” for an eligibility evaluation. It requested an order denying Ms. Martino’s request for “stipend” and associated ancillary benefits.⁵¹

The Board noted that the RBA prescribes Form 07-6169 for use by employers to notify the RBA that an injured worker has been totally unable to return to the at-injury employment for 90 consecutive days because of the work injury. Many injured workers are not aware of the reporting intricacies in the reemployment benefit process. The Board further found the RBA has no capacity to monitor every case to know when an injured worker has been totally disabled for 45, 60, or 90 days because of their work

⁴⁹ R. 0809-16.

⁵⁰ R. 0031-32, 0044-45, 0037-38, 0040-41; *Martino II* at 11, No. 45.

⁵¹ R. 0809-16.

injury.⁵² Alaska Asphalt did not notify the RBA in October 2020 that Ms. Martino had been off work for more than 90 days as required by statute. The Board awarded Ms. Martino AS 23.30.041(k) stipend benefits for the time she was in the reemployment process.

3. *Standard of review.*

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.⁵³ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁵⁴ "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁵⁵ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁵⁶ The Board's conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.⁵⁷

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.⁵⁸ Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.⁵⁹

⁵² *Martino II* at 12, No. 47; R. 2943.

⁵³ AS 23.30.128(b).

⁵⁴ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁵⁵ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

⁵⁶ AS 23.30.122.

⁵⁷ AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013).

⁵⁸ AS 23.30.128(b).

⁵⁹ *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

4. Discussion.

On June 30, 2020, Ms. Martino was running a compactor at work for Alaska Asphalt when she was injured.⁶⁰ Alaska Asphalt accepted the injury as work-related and paid Ms. Martino TTD benefits from July 3, 2020, through March 27, 2021.⁶¹ In considering when Ms. Martino might have been eligible for a reemployment evaluation, the Board noted that 90 days from July 3, 2020, is October 1, 2020.⁶²

Ms. Martino first inquired about her entitlement to reemployment benefits on February 16, 2021, several months after Alaska Asphalt should have notified the RBA that it had paid TTD for more than 90 days. Ms. Martino was assigned to a rehabilitation specialist on March 15, 2021. Alaska Asphalt filed controversions on March 25, 2021, April 26, 2021, and August 27, 2021, but the Board found that none of these controversions contained the required regulatory language which would have stopped the evaluation process.

The Board awarded Ms. Martino AS 23.30.041(k) (.041(k)) stipend benefits for the period she was involved in the reemployment evaluation process, and the Board found that Alaska Asphalt did not file controversions which were sufficient to stop the eligibility evaluation process. Alaska Asphalt now contends the Board erred when it awarded Ms. Martino .041(k) stipend benefits.

a. Notification to RBA when employee is off work for more than 90 days.

Ms. Martino first inquired about entitlement to a reemployment evaluation on February 26, 2021. Alaska Asphalt did not notify the RBA of the fact that Ms. Martino had been out of work for more than 90 days due to her work injury until it was contacted by the RBA technician, and then did not provide the necessary confirmation until March 15, 2021. Alaska Asphalt contends Ms. Martino was not fully in the rehabilitation process until the formal request for an evaluation on April 26, 2021.

⁶⁰ R. 0001, 0332-33.

⁶¹ R. 0791-92.

⁶² *Martino II* at 3, No. 2.

AS 23.30.041(c) states:

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. **If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted.** If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.⁶³

This section mandates that the RBA order an eligibility evaluation whenever an employee has been out of work for more than 90 days due to the work injury. The RBA only knows an employee has been out of work for more than 90 days when an employer provides that information. As the Board noted, "the only way the RBA knows if an injured worker has passed the 90-day mark is if someone tells her. The RBA currently has no way to monitor all cases to determine when an injured worker has been disabled for 45, 60 or 90 days."⁶⁴

However, the employer always knows how long an injured worker has been out of work since it is paying TTD. Thus, the employer is in a position to ensure an injured worker is ripe for beginning the eligibility evaluation process for reemployment benefits.

⁶³ AS 23.30.041(c) (emphasis added).

⁶⁴ *Martino II* at 20.

Furthermore, pursuant to Board regulation, the employer is required to “notify the administrator, in writing, on the 91st day” that the injured worker has been “totally unable to return to the employee’s employment at the time of injury. . . .”⁶⁵ It is mandatory for the RBA to order an eligibility evaluation once the employee has been off work for 90 days, but it is the employer who has the information that the employee has been off work more than 90 days and the employer has a regulatory obligation to notify the RBA. It is up to the employer to notify the RBA that an employee has been off work due to a work injury for 90 days. Unless and until the employer complies with its regulatory duty and informs the RBA that an injured worker has been off work for 90 days, there is no mechanism for the RBA to know when to order an eligibility evaluation. Alaska Asphalt had full control over when the reemployment process should have begun for Ms. Martino, and it cannot shift the burden to Ms. Martino for the failure to start the process when she had been off work for 90 days in October 2020.

The referral for an eligibility evaluation should have been made in October 2020 when Ms. Martino had been off work due to her work injury for 90 days. However, Alaska Asphalt did not notify the RBA of this fact in October 2020. Had Alaska Asphalt complied with its regulatory duty and timely notified the RBA, Ms. Martino more likely than not would have been through the eligibility evaluation process by the time Alaska Asphalt controverted further TTD on March 25, 2021. That is, from October 1, 2020, to March 27, 2021, it is slightly more than five months. The rehabilitation specialist was appointed by the RBA on April 20, 2021, and her report recommending that Ms. Martino be found not eligible for reemployment benefits was issued on August 30, 2021. This is slightly more than four months. Thus, if Alaska Asphalt had notified the RBA timely that Ms. Martino was off work for more than 90 days, she would have been through the process by the time she reached medical stability according to Dr. Pino, the EME physician.

Alaska Asphalt contends that Ms. Martino was not fully involved in the reemployment process until she formally requested an eligibility evaluation on April 26, 2021. Alaska Asphalt relies on *Carter v. B & B Construction, Inc.*, wherein the Court

⁶⁵ 8 AAC 45.507(b).

(Court) held that an employee is entitled to .041(k) benefits while participating in the reemployment process.⁶⁶ The Court went on to state that an employee is entitled to .041(k) benefits when there is a gap between PPI and the commencement of reemployment benefits, and the employee is in “active pursuit of reemployment benefits.”⁶⁷ The Commission, in *Vandenberg v. State of Alaska*, held that the only requirement for .041(k) benefits is that the employee be “in the vigorous pursuit of reemployment benefits.”⁶⁸

However, Alaska Asphalt ignores its duty to notify the RBA of the employee’s inability to return to her work at the time of injury after 90 days, and it further ignores that Ms. Martino initiated the process for an eligibility evaluation with her inquiry on February 16, 2021. The RBA put Alaska Asphalt on notice on February 17, 2021, that the 90-day requirement for an eligibility evaluation had long passed. Alaska Asphalt already knew Ms. Martino was eligible for an eligibility evaluation since it was still paying TTD well past the 90-day mark in October 2020. Alaska Asphalt cannot shift its burden to Ms. Martino. Moreover, Ms. Martino herself was fully involved in seeking an eligibility evaluation starting February 16, 2021.

The substantial evidence in the record supports the Board’s finding that Ms. Martino was “vigorously” pursuing her reemployment benefits from at least February 16, 2021. Alaska Asphalt did not dispute that an injury occurred within the course and scope of Ms. Martino’s employment, nor that she had been unable to return to her work at the time of injury for more than 90 days. The first controversion filed by Alaska Asphalt was on March 25, 2021, long after Ms. Martino’s right to an eligibility evaluation arose, and more than a month after she began her inquiry into her reemployment rights. The record supports the Board.

⁶⁶ *Carter v. B & B Constr., Inc.*, 199 P.3d 1150, 1159-1160 (Alaska 2008).

⁶⁷ *Id.*

⁶⁸ *Vandenberg v. State of Alaska*, Alaska Workers’ Comp. App. Comm’n Dec. No. 240, 10 (Sept. 14, 2017).

b. Is Ms. Martino entitled to AS 23.30.041(k) stipend benefits while being evaluated for eligibility for reemployment benefits?

Alaska Asphalt contends that the Board erred in two ways when it awarded Ms. Martino .041(k) stipend benefits. First, Alaska Asphalt asserts the Board should have applied the presumption of compensability to the question of whether Ms. Martino was entitled to .041(k) stipend benefits. Secondly, Alaska Asphalt contends that the Board misinterpreted AS.23.30.041(k) when it awarded stipend benefits even though Ms. Martino has not had a PPI rating nor presented any evidence of PPI benefits due and owing to her.

First, whether Ms. Martino is entitled to .041(k) stipend benefits prior to being awarded a PPI rating is a legal question because interpretation of the statute is involved. Resolving a legal issue does not require the Board to analyze the presumption of compensability. There are no factual disputes in the request for a reemployment evaluation. Ms. Martino was injured within the course and scope of her employment and more than 90 days had passed without her being able to return to her work at the time of injury.⁶⁹ The issue before the Board and the Commission is whether an employer is obligated to pay .041(k) stipend benefits while an employee is in the eligibility evaluation process, once the employee has reached medical stability, but prior to a PPI evaluation. This is a legal question because it involves interpretation of the Alaska Workers' Compensation Act (Act). The presumption analysis applies to questions of fact and does not apply where there are no factual disputes, as here.⁷⁰

Important to this question is the confusion Alaska Asphalt makes between the statutorily mandated evaluation for eligibility for reemployment benefits and the entitlement to reemployment benefits. Alaska Asphalt correctly notes that a requirement for retraining (reemployment benefits) does require either a PPI rating or a prediction of permanent impairment resulting from the work injury.⁷¹ The question before the Board

⁶⁹ *Martino II* at 19-23.

⁷⁰ *See, e.g., Rockney v. Boslough Constr. Co.*, 115 P.3d 1240, 1243-1244 (Alaska 2005) (*Rockney*).

⁷¹ AS 23.30.041(e).

was Ms. Martino's entitlement to .041(k) benefits while undergoing the mandatory eligibility evaluation once she had reached medical stability, but before she had been evaluated for PPI. The eligibility evaluation is mandatory after an employee is off work for 90 days.

Ms. Martino, by statute, was entitled to the eligibility evaluation because she had been off work for more than 90 days due to the work injury. Alaska Asphalt does not dispute this fact, nor could it, since it confirmed in March 2021 that she indeed had been off work for more than 90 days. This step in the reemployment process does not require either a PPI rating or a prediction of permanent impairment. Further, Alaska Asphalt could have addressed this issue with its EME in March 2021, but chose not to do so. Alaska Asphalt avoided getting an answer to this question by failing to ask Dr. Pino (the EME physician) if Ms. Martino was expected to have a permanent impairment as a result of the work injury. In the experience of the Commission, this is a fairly standard question to ask of the EME physician.

Rather, Alaska Asphalt wants to put the entire onus on Ms. Martino to get a PPI evaluation prior to undergoing the statutorily mandated eligibility evaluation, while at the same time denying her the benefits to do so. There is no statutory requirement for a PPI rating prior to being referred for an eligibility evaluation for reemployment benefits. AS 23.30.041(k) provides for the payment of benefits while an injured worker is in the reemployment process. The statute states:

Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's

temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

The legal question is whether the language of this statute is sufficient to provide .041(k) stipend benefits during the eligibility evaluation process, prior to any PPI rating. Such a question does not fall under the presumption of compensability analysis, nor should it. If, as the Court stated in *Rockney*, the presumption analysis does not apply to evaluations of reemployment plans, it likewise should not apply to the statutorily required eligibility evaluation.⁷² To hold otherwise is in direct contravention of the statutory requirement that the Act be interpreted to ensure “the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .”⁷³

The Board is affirmed in its finding that the presumption analysis did not apply to the legal question raised by Alaska Asphalt regarding whether .041(k) stipend benefits should be paid to an employee in the eligibility evaluation process prior to a PPI rating.

c. Did Alaska Asphalt properly controvert entitlement to an eligibility evaluation?

Alaska Asphalt acknowledged that if an injured worker has been unable to return to work for 90 days or more, the law states an eligibility evaluation “shall be ordered” unless Alaska Asphalt controverted “on certain grounds.” Although it did not use the precise language required by the regulation, Alaska Asphalt contended it “controverted

⁷² *Rockney*, 115 P.3d at 1243-1244.

⁷³ AS 23.30.001(1).

and made clear” its position that Ms. Martino could return to work before it had notice she was requesting reemployment benefits and before the technician made a referral for an eligibility evaluation. It further asserted that

While the March 25th controversion did not explicitly use the word “reemployment,” at the time the controversion was filed Employer had no notice that Employee had sent an email seeking information about the reemployment process, and despite the timeline set in AS 23.30.041, neither a Board administrator, nor the employee herself, had sought to begin the reemployment process as of January 6, 2021 and did not provide notice to employer in the February email.

Alaska Asphalt also claimed its April 26, 2021, amended controversion should have stopped the eligibility evaluation process, but “a referral was made despite the fact that a controversion in fact was in the record before the reemployment process began.”⁷⁴

Alaska Asphalt contended it properly controverted benefits to Ms. Martino and these controversions should have alerted the RBA to stop the eligibility evaluation process, even though it did not controvert “all benefits” nor use the specific language in 8 AAC 45.510.

On the other hand, Ms. Martino asserts Alaska Asphalt failed in its statutory duty to advise the RBA of her need for an eligibility evaluation due to her receiving TTD benefits for more than 90 days, pursuant to 8 AAC 45.507. Ms. Martino states that Alaska Asphalt then compounded its failure by filing controversions which did not meet the statutory and regulatory mandates.

The regulation at 8 AAC 45.510 states:

(a) For injuries occurring on or after November 7, 2005, if the employee has been totally unable to return to the employee's employment at time of injury for at least 60 consecutive days, but less than 90 consecutive days, as a result of the injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The requesting party must file with the administrator and serve all other parties with (1) a written request for the evaluation; (2) a physician's prediction the injury may permanently preclude the employee from returning to the employee's job at the time of the injury; and (3) documentation the employee has been totally unable to return to the employee's employment at the time of the injury for at least

⁷⁴ R. 0809-816.

60 consecutive days, but less than 90 consecutive days, as a result of the injury.

(b) The administrator shall consider a written request for an eligibility evaluation for reemployment benefits, unless the employer controverts on grounds the employee's injury did not arise out of and in the course of employment, on grounds the employee's total inability to return to the employee's employment at the time of injury is not a result of the injury, or on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, or 23.30.250. If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference regarding the controversion no later than 30 days after the board receives the matter. If a claim is filed and if requested by the employee, the board will conduct a hearing no later than 90 days after the prehearing conference in accordance with 8 AAC 45.060(e) and 8 AAC 45.0070(b)(3), limited to the grounds set out in this subsection.⁷⁵

The regulation at 8 AAC 45.522 further provides:

(a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, **the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022, 23.30.100, 23.30.105, and 23.30.250, or 8 AAC 45.510(b).** If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b).

(b) If a controversion notice has not been filed under (a) of this section, the administrator shall, no later than five working days after notice received under 8 AAC 45.507(b), send a letter to the parties identifying the name and address of the rehabilitation specialist selected in accordance with AS 23.30.041(c) to evaluate the employee. . . .

These regulations, when read together, state explicitly the grounds upon which an eligibility evaluation may be denied or terminated. Precise grounds are stated.

⁷⁵ 8 AAC 45.510.

5. *Conclusion and order.*

The Board's Decision is AFFIRMED.

Date: 22 June 2023 Alaska Workers' Compensation Appeals Commission



Signed

James N. Rhodes, Appeals Commissioner

Signed

Amy M. Steele, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 304 issued in the matter of *Alaska Asphalt Services, LLC and The Ohio Casualty Insurance Company v. Sabrina M. Martino*, AWCAC Appeal No. 22-009, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 22, 2023.

Date: June 26, 2023



Signed

 K. Morrison, Appeals Commission Clerk