ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

DONALD J. BILEDDO, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201321773
NABORS INDUSTRIES, LTD., Self-Insured Employer, Defendant.	)	AWCB Decision No. 18-0087 Filed with AWCB Fairbanks, Alaska on August 29, 2018

Nabors Industries' (Employer) January 30, 2018 petition seeking Second Injury Fund (Fund) reimbursement was heard in Fairbanks, Alaska on June 7, 2018, a date selected on April 11, 2018. Attorney Richard Wagg appeared and represented Employer. Fund Administrator, Velma Thomas, appeared telephonically and represented the Fund. There were no witnesses. The record closed at the hearing's conclusion on June 7, 2018.

ISSUE

Employer contends the Fund has admitted it has met all the statutory criteria for reimbursement, save for the "combined effects" requirement. It contends Employee previously suffered a heart attack and stroke, which are conclusively presumed to be permanent physical impairments, and further contends Employee incurred additional permanent physical impairments resulting from his work related back injury. Employer relies on an affidavit from one of Employee's physicians to establish the combined effects requirement and contends reimbursement should be ordered.

The Fund contends Employer has not demonstrated the combined effects requirement has been met and requests Employer's petition be denied.

Should Fund reimbursement be ordered?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On September 22, 2005, Employee was taken off work by his physician for left hip pain, which was caused by either avascular necrosis or arthritis. (John Joosse, M.D. Statement, September 22, 2005).

2) In November 2010, Employee suffered a heart attack while working for Employer at Prudhoe Bay, Alaska. He underwent cardiac stent placement, a procedure that then caused a cerebral vascular accident. The left hemispheric stroke left Employee with speech impediments, including mispronouncing words, stuttering, and difficulty finding words. Even though he has participated in speech therapy, Employee continues to suffer from speech impediments, which are worse when he is stressed, excited or tired. Because of his speech impediments, Employee resigned his former position as a supervisor since he did not like haggling on the phone, one of the duties of his job as a supervisor. (Discharge Summary, November 18, 2018; Employee's affidavit, September 13, 2017; Bruce McCormick, M.D., report, May 15, 2017).

3) Employer did not file a workers' compensation injury report for Employee's heart attack. (Record; observations).

4) On July 19, 2013, Employee, who was working as a mechanic, injured his lower back while he was working in an awkward position under the cab of a skid steer replacing a wiring harness. (First Report of Injury, September 13, 2013).

5) An August 2, 2013, a magnetic resonance imaging (MRI) study showed a left neural foraminal herniation at L5-S1. (MRI report, August 2, 2013).

6) On August 26, 2013, Employer attempted to notice the Fund of a possible claim for reimbursement citing Employee's September 22, 2005 work release, but the Fund was unable to identify a claim for Employee that matched the date of injury. (Employer's Notice, August 26, 2013; Fund letter, September 3, 2013). On September 24, 2013, Employer sent another notice to

the Fund, which the Fund acknowledged. (Employer's Notice, September 24, 2013; Fund letter, September 27, 2013).

7) On August 27, 2013, Employee underwent an L5-S1 microdiscectomy and was later given a 10 percent whole person permanent partial impairment (PPI) rating. (Operative report, August 27, 2013; Richard Cobden, M.D., chart notes, February 17, 2014).

8) On April 18, 2014, Employee was found eligible for reemployment benefits and he began training as an electronic drafter. (Reemployment Benefits Administrator (RBA) letter, April 18, 2014; Progress Report, October 4, 2014).

9) On November 2, 2015, Employee slipped and fell on carpeted stairs at his home and "landed hard on his butt." He was able to get up with some difficulty, but the next day he noted increased pain over the area of his incision. Employee was also experiencing intermittent pain down his right posterior thigh. (Alena Anderson, M.D., chart notes, December 7, 2015; R. David Bauer, M.D., report, February 19, 2016). A lumbar MRI showed a diffuse disc bulge, an annular tear, and posterior vacuum disc phenomenon at L5-S1, and a central disc protrusion at L4-L5. After consultation with his surgeon, Employee elected to undergo further lumbar spine surgery. (Anderson chart notes, January 7, 2016).

10) On February 1, 2016, Employee's reemployment plan was suspended at his request because of his November 2, 2015 slip and fall injury. (Reemployment Benefits Progress Report, December 9, 2015; RBA letter, February 1, 2016).

11) On February 19, 2016, Dr. Bauer evaluated Employee on Employer's behalf and diagnosed lumbar radiculopathy, which he did not think was related to the July 19, 2013 work injury. Dr. Bauer concluded, "If not for the slip and fall in his home . . . [Employee] would not require surgery at the current time." (Bauer report, February 19, 2016).

12) On March 2, 2016, Employer controverted all benefits based on Dr. Bauer's February 19, 2016 report. (Controversion Notice, March 2, 2016).

13) On March 8, 2016, Employee underwent a revision L5-S1 microdiscectomy and L4-L5 decompression surgery. (Operative report, March 8, 2016).

14) On April 4, 2016, Employee thought he had improved significantly since surgery, but he was experiencing discomfort in the *sitting position*. (Ken Lemos, M.D., chart notes, April 4, 2016).

15) On May 9, 2016, Employee though he was doing "okay," since his surgery, but he was still experiencing some intermittent discomfort and could not *sit for long*. If Employee used an ice pack, he could extend his *sitting time* to about a half an hour. (Anderson chart notes, May 9, 2016).

16) On June 4, 2016, Employee thought he was improving day-by-day, but *sitting* was still problematic since he could only sit for 20 minutes at a time. Because of his *sitting limitation*, Employee's physician excused him from jury duty. (Marshall chart notes, June 4, 2016).

17) On September 26, 2016, Employee was still experiencing *sitting intolerance* and sitting longer than 30-45 minutes was problematic. (Lemos addendum, September 26, 2016).

18) In August 2016, two of Employee's doctors expressed their disagreement with Dr. Bauer's conclusion that Employee's need for his March 8, 2016 surgery was not substantially caused by the July 19, 2013 work injury. They also opined the July 19, 2013 work injury was the substantial cause of Employee's current disability. (Anderson response, undated; Jensen response, undated).

19) On October 24, 2016, Employee's surgeon thought Employee had reached medical stability and instructed him to return on an as needed basis. However, Employee was still experiencing significant residual mechanical low back pain that *limited his sitting* to a maximum of 30 minutes. Because of his *limited ability to sit*, Employee's surgeon did not think Employee could even perform light duty work. (Paul Jensen, M.D., chart notes, October 24, 2016). Further vocational rehabilitation was also thought inappropriate. (Cobden chart notes, November 7, 2016).

20) On November 7, 2016, Employee was still experiencing *difficulty sitting* for more than a short period. He was given a 12 percent whole person PPI rating for his lumbar spine. (Cobden report, November 7, 2016).

21) On January 31, 2017, Employee underwent a functional capacities evaluation. Although his longest single duration *sitting demonstration* was 48 minutes, the evaluator noticed Employee began shifting in his chair after 27 minutes. The evaluation's conclusion was Employee was not currently able to work an eight-hour workday. (Keira Baird, D.P.T., report, January 31, 2017).

22) On March 2, 2017, Employee's physician reviewed the results of the physical capacities evaluation and thought Employee's "disability is of such a nature that he should apply for Social Security disability now." (Cobden report, March 2, 2017).

23) On May 15, 2017, Bruce McCormack, M.D., performed a secondary independent medical evaluation (SIME). Upon physical examination, Dr. McCormack noted the following: "[Employee] has a slight speech anomaly when he gets tired. He has some difficulty with Methodist/Episcopal, but is otherwise fluent." Dr. McCormack thought the causes of Employee's disability and need for medical treatment were the July 19, 2013 work injury, pre-existing degenerative changes and the November 2, 2015 fall at home. Of these, Dr. McCormack identified the July 19, 2013 work injury as "the substantial cause." He explained: "The substantial cause has always been the work injury on 11/2/15 [sic]. The fall down the flight of stairs injured a disc already compromised disc [sic]. It was compromised by the industrial 7/19/13 injury." In Dr. McCormack's opinion, the work injury combined with Employee's pre-existing degenerative changes to cause his disability and need for medical treatment. He also thought Employee's disability was of a continuing nature and the work related worsening of his pre-existing condition was permanent. Although Employee was planning to apply for Social Security disability, Dr. McCormack thought Employee could perform light and sedentary work. (McCormack report, May 15, 2017).

24) On November 27, 2017, one of Employee's physicians averred he had evaluated Employee several times, was aware of Employee's cerebral vascular accident, and had read Employee's affidavit documenting his continuing speech problems. The doctor also set forth the following opinion:

> It is my opinion that [Employee's] low back injury . . . has combined with the continuing permanent impairment resulting from his cerebral vascular accident, so as to create a disability substantially greater than that which would have resulted from the low back injury alone.

(Cobden affidavit, November 27, 2017).

25) On January 30, 2018, Employer petitioned to join the Fund and claimed reimbursement. It attached documents, such as Employee's discharge summary from the hospital following his heart attack, and a Family and Medical Leave Act physician's certification, to demonstrate it had knowledge of a qualifying permanent physical impairment. (Employer's Petition, January 30, 2018).

26) On February 12, 2018, the Fund answered Employer's January 30, 2018 petition. It denied Employer had established the "combined effects" requirement for reimbursement, but admitted

all other statutory requirements for reimbursement had been met. (Fund's Answer, February 12, 2018).

27) On March 22, 2018, Employee and Employer filed a compromise and release (C&R) agreement settling their disputes. It states, "The employee asserts that his injury, coupled with continuing symptoms from his previous stroke, has rendered him permanently and totally disabled from employment. He additionally asserts that his limitations prevent him from completing his retraining program." Meanwhile, Employer contended, "[E]mployee's current condition, need for repeat surgery and related disability, is not substantially caused by the 07/19/13 work injury. The employer contends that the employee could be retrained or returned to work in some capacity." (C&R, March 22, 2018).

PRINCIPLES OF LAW

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.205. Injury combined with preexisting impairment.

(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

. . . .

(d) The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the director was not notified at least three weeks before the award or adjudication that the fund might be subject to liability for the injury or death.

. . . .

> (f) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a "permanent physical impairment" unless
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> (1) it is one of the following conditions:
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> (C) cardiac disease,
> (D) arthritis,
> . . . .
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> (K) cerebral vascular accident,
> . . . .

In enacting the statute, the legislature decided an employer should not be liable for, or pay premiums for, certain pre-existing disabilities. *Employers Commercial Union Ins. Group v. Christ*, 513 P.2d 1090; 1093 (Alaska 1973). In interpreting the statute's specific schedule of conditions, "the issue is not whether the pre-existing condition is an obstacle or likely to become a handicap to the particular job, but rather whether it is a hindrance to or limits employability in general." *Id*. (citing *DeDominic v. Joseph Schlitz Brewing Company*, 30 A.D.2d 578, 289 N.Y.S.2d 689; 691 (New York 1968)). Thus, when an employee has one of the enumerated conditions, there is a permanent physical impairment as a matter of law. *Id*. at 1094.

In *Kennecott Greens Creek Mining Co. v. Clark*, AWCAC Decision No. 080 (June 9, 2008) at 13, the Alaska Workers' Compensation Appeals Commission explained the presumption that an employee's claim is compensable in AS 23.30.120(a)(1) does not apply to an employer's request for reimbursement from the Secondary Injury Fund. *Clark* also set forth the requirements for reimbursement:

> In order to decide that the Fund is liable for reimbursement to an employer, AS 23.30.205(a) requires that the following facts be established: (1) the employee had "a permanent physical impairment" within the meaning of [the statute]; (2) the employee incurred "a subsequent disability by injury arising out of and in the course of the employment;" and (3), the employer's liability for compensation for disability is substantially greater

> (a) "by reason of the combined effects of the preexisting impairment and subsequent injury" or,
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> (b) "by reason of the aggravation of the preexisting impairment" than the liability that would have resulted from the subsequent injury alone.

Id. at 13-15. It next explained how to analyze the statute's "combined effects" or "aggravation" criteria:

> In order to make the findings required by (3) above, the board must establish the value of the employer's liability for compensation for disability from the subsequent injury alone and the value of the liability for compensation for disability from the "combined effects" of the injury and preexisting impairment or "aggravation" of the preexisting impairment. Once both values are established, the board may compare them and determine if the employer's liability is "substantially greater" than would result from the second (or subsequent) injury alone. It is not enough that the liability be simply greater, it must be *substantially* greater.

Id. at 15 (emphasis in original). The employer has the burden to produce evidence sufficient to demonstrate the relative values of its liability for disability compensation, and the substantiality of any greater liability; and must persuade the board, by a preponderance of the evidence, either the "combined effects," or "aggravation" requirement has been met. *Id*. at 16.

"Substantial" is defined as, material. (Merriam-Webster Dictionary 490 (New ed. 2005). "Material" means, of such a nature that knowledge of the item would affect a person's decision-making. (Black's Law Dictionary, 1066 (Ninth ed. 2009).

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

In *Hewing v. Alaska Workmen's Compensation Bd.*, 512 P.2d 896; 900 (Alaska 1973), the Alaska Supreme Court explained different types of compensation theories:

> Serious conceptual differences exist between the 'whole man' and 'earning capacity' theories of disability. Under the whole man theory, the primary criteria governing disability awards are physiological and psychiatric. This theory challenges the concept, basic to Alaska's workmen's compensation law, that unscheduled partial disability awards should be made for economic loss, not for physical injury as such.

The concept of disability compensation in Alaska rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264; 266 (Alaska 1974).

> **8 AAC 45.186. Second Injury Fund**
> . . . .
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> (c) For the purposes of AS 23.30.205, it is conclusively presumed that the conditions listed in AS 23.30.205(f)(1) constitute a hindrance to employment or an obstacle to obtaining employment or reemployment.
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> (d) Notice under AS 23.30.205(d) . . . must be sent to the administrator of the second injury fund.
> . . . .

ANALYSIS

Should Fund reimbursement be ordered?

In order to find the Fund liable for reimbursement to Employer, AS 23.30.205(a) requires that the following facts be established: (1) Employee had "a permanent physical impairment" within the meaning of the statute; (2) Employee incurred "a subsequent disability by injury arising out of and in the course of the employment;" and (3), Employer's liability for compensation for disability that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury. *Clark.* Here, the Fund's February 12, 2018, answer removes the first two criteria from contention, leaving only the third. Employer now has the burden of establishing, by a preponderance of the evidence, the "combined effects" requirement has also been met. *Id.*

This showing requires a calculation of the value of the employer's liability for disability compensation from the subsequent injury alone, and a calculation of the value of liability for compensation for disability from the combined effects of both the injury *and* the pre-existing impairment. *Id*. Once both values are established, they may then be compared, and a determination made, whether Employer's liability is substantially greater than that which would have resulted from the second injury alone. *Id*. Employer submits no such calculations and neither does it point to different time-periods of disability from which calculations could be undertaken. Instead, it relies on an affidavit from one of Employee's doctors, who opines:

> It is my opinion that [Employee's] low back injury . . . has combined with the continuing permanent impairment resulting from his cerebral vascular accident, so as to create a *disability* substantially greater than that which would have resulted from the low back injury alone.

(Emphasis added). However, the statute requires that Employer's *liability* for disability compensation be substantially greater, not that Employee be more "disabled." Disability is a term of art in workers' compensation, AS 23.30.395(16), and there are serious conceptual differences between "disability," *i.e.* an incapacity because of an injury to earn wages, and physical impairment, *Hewing*; *Vetter*. Here, Employee's doctor understandably conflates the two.

The statute's purpose is for employers to not be liable for certain pre-existing physical impairments that can increase disability compensation owed an employee. *Christ*. Employer has offered no evidence that its liability was increased, let alone substantially increased, because of the combined effects of Employee's pre-existing permanent physical impairment and the work injury. To the contrary, considerable evidence indicates what prolonged Employee's disability in this case was not his stroke-induced speech impediment, but rather his sitting limitation following the second back surgery. Since Employer has failed to meet its burden, its petition will be denied.

CONCLUSIONS OF LAW

Fund reimbursement should not be ordered.

ORDER

Employer's January 30, 2018 petition seeking Fund reimbursement is denied.

Dated in Fairbanks, Alaska on August 29, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Jacob Howdeshell, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of DONALD J. BILEDDO, employee / claimant; v. NABORS INDUSTRIES. LTD., self-insured employer / defendant; Case No. 201321773; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 29, 2018.

/s/
Ronald C. Heselton, Office Assistant II