ALASKA WORKERS' COMPENSATION BOARD

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

GABRIEL W. THOMPSON, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201320804
RYAN AIR SERVICES, INC., Employer,	)	AWCB Decision No. 14-126
and	)	Filed with AWCB Fairbanks, Alaska on September 8, 2014.
INS. CO. OF THE STATE OF PENNSYLVANIA, Insurer, Defendants.	)	

Gabriel Thompson's (Employee's) November 25, 2013 claim seeking a compensation rate adjustment, interest and attorney's fees and costs was heard in Fairbanks, Alaska on July 31, 2014, a date selected on April, 22, 2014. Attorney Robert Rehbock appeared and represented Employee, who also appeared telephonically and testified on his own behalf. Attorney Krista Schwarting appeared and represented Ryan Air Services, Inc. (Employer). Starr Shanley, Ryan Air Service's Human Resources Director, appeared telephonically and testified on Employer's behalf. The record closed at the hearing's conclusion on July 31, 2014.

ISSUES

At the time of injury, Employee contends he had just progressed from being a student and working part-time, low-paying, flight instructor jobs to ongoing, full time employment as a commercial pilot. He contends Employer used a historical wage formula to calculate his compensation rate, which was improper under *Gilmore v. Alaska Workers' Compensation Board.*, 882 P.2d 922

(Alaska 1994) because he had not worked in the same occupation for the past two calendar years. Employee contends his "minimal" historical earnings do not reflect his future earning capacity so they should not be used. Instead, he, contends his compensation rate should be calculated according to "usual wage" under AS 23.30.220(a)(5), which was $42.50 per flight hour with a $190.00 minimum guaranteed per flight day; or alternatively, based on his actual earnings as a commercial pilot.

Employer acknowledges Employee's historical wages were not consistent and therefore contends Employee's compensation rate is properly based on the highest of two previous years' income. It also points out Employee was in an orientation period with Employer and contends basing Employee's compensation rate on either his earnings as a commercial pilot, or on the earnings of other permanent, full-time employees, is too speculative since there was no guarantee Employee would have completed orientation or continued to work for Employer. It opposes any adjustment to Employee's compensation rate and contends awarding Employee a higher compensation rate would look like a "windfall."

1) Is Employee entitled to a compensation rate adjustment?

Employee seeks interest on adjusted compensation.

Employer contends, since Employee's compensation should not be adjusted, interest is not due on adjusted compensation.

2) Is Employee entitled to interest on compensation?

Employee seeks attorney's fees and costs.

Employer contends, since Employee's compensation should not be adjusted, neither would he be entitled to an awards of attorney's fees and costs.

3) Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

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

1) On July 26, 2013, while working for Employer as a pilot, Employee injured his left shoulder loading a heavy box into an aircraft. (Compensation Report, August 19, 2013; Thompson dep. at 30).

2) On July 27, 2013, Employee sought treatment for his shoulder and a magnetic resonance imaging (MRI) study showed a superior labral tear extending into the superior aspect of the anterior and posterior glenoid labrum. (MRI report July 27, 2014).

3) Employer accepted the compensability of Employee's injury and began paying temporary total disability at the minimum rate. (Compensation Report, August 19, 2013).

4) Employee provided wage history information to the adjuster, which showed he earned $6,948.59 working for two employers in 2012: ATP (Airline Transport Professionals) and Triad Air (dba Piedmont Flight Training), and $6,092.00 working for Amerigas in 2011. (Employer's Hearing Brief, Ex. 2-3).

5) Employee's average weekly wage in 2012 was $133.63 ($6,948.59/52 weeks). His average weekly wage in 2011 was $117.15 ($6,092.00/52 weeks). (Observations).

6) At the time of Employee's injury, the minimum compensation rate was $244 per week. (Alaska Workers' Compensation Division Bulletin 12-06, December 26, 2012).

7) About two weeks after the injury, Employee returned to North Carolina, where he was domiciled, to recover from the work injury in the comfort of his own home and in the company of his wife. (Thompson dep. at 34).

8) Employer continued to pay Employee the minimum compensation rate and applied a cost of living adjustment (COLA). (Compensation Report, July 25, 2014).

9) On August 19, 2013, Employee filed a claim seeking a compensation rate adjustment. (Claim, August 14, 2013).

10) On September 5, 2013, Employee underwent left shoulder arthroscopic surgery with a Bankart repair in North Carolina. (Operative Report, September 5, 2013).

11) On September 16, 2013, Employer filed its answer to Employee's August 14, 2013 claim, contending its compensation calculations were correct. (Employer's Answer, September 13, 2013).

12) On November 14, 2013, Employee's attorney filed his entry of appearance. (Employee's Entry of Appearance, November 12, 2014).

13) On November 29, 2013, Employee's attorney amended Employee's claim to include interest and attorney's fees and costs. (Claim, November 25, 2013).

14) On December 23, 2013, Employer filed its answer to Employee's November 25, 2013 claim, contending its compensation calculations were correct. (Employer's Answer, December 19, 2013).

15) On February 10, 2014, Employer took Employee's deposition, who testified as follows: Employee worked for Amerigas between September of 2010 and February of 2011 as a seasonal propane delivery driver, where he earned about $20 per hour. Prior to working for Amerigas, he had worked as a long haul truck driver for US Express, Warner Express and CSRT, where he was paid various rates by the mile. Employee moved from Idaho to North Carolina because his wife got a job there and that was the location of the flight school he wanted to attend. He began flight school in September of 2011, and completed flight school in April of 2012. Following flight school, Employee worked about 20 hours per week between May of 2012 and July of 2012 as a flight instructor for ATP, where he earned about $20 per hour. Next, between August 2012 and February 2013, he worked about six hours per week at $14.50 per hour as a flight instructor for Piedmont Flight Training (Triad Air). On April 26, 2013, Employer hired Employee as a pilot to fly freight in a CASA transport category aircraft on a full time basis. His starting wage was $42.50 per hour or $190 per day, whichever was greater. Employee's schedule was two weeks on, and two weeks off, with no minimum number of guaranteed hours. He would commute between Alaska and North Carolina with FedEx because he had "jump seat benefits," which means he can fly with FedEx free of charge. Employee was specifically looking for an employer in Alaska because he grew up here and always wanted to fly here. He initially applied to several employers in Alaska, but none were available, so he began work as a flight instructor to build his time. Employee did not have a written employment contract with Employer. When asked if he had expectations of ongoing employment with Employer, Employee answered: "Yes, it was a full time permanent job." He also expected his wages to increase to $49.50 per hour after a years' time, when he began flying Employer's Cessna. When Employee first started with Employer, he attended ground school for about three weeks and then began flying after he passed his check ride. Employee was based out of Bethel and Kotzebue and flew to about 40 rural villages. There were no set routes, the flights were dispatched to the pilots on duty as they were needed. Employee worked as a co-pilot and was responsible for loading the cargo while the pilot did the paperwork. The cargo varied. It could be a 500 pound outboard motor or a box weighing a couple of ounces.

Employee was injured in Nome when he was loading "really lightweight" boxes into the aircraft. He was stacking boxes when he tried to lift one that weighed 30 or 40 pounds. Since he did not expect the box to weigh that much, as it was the same size and color as the others he had been stacking, it jerked his hand and shoulder because he did not anticipate how heavy the box was going to be. The day of the injury was Employee's last day of work. Employer does not have light duty work available for Employee. When asked for the basis of his claim for a compensation rate adjustment, Employee stated: "Based on what I was making as a pilot and averaging what I made while I was with [Employer]." Employee clarified, his claim was not based on what he thought he would be making after a year's time, but stated: "I'm just basing it on what I actually made." (Thompson dep., February 10, 2014).

16) Administrative notice is taken that working as a flight instructor is a common method to "build hours," *i.e.* gain the requisite flying experience to secure a job as a commercial airline pilot. (Experience, unique or peculiar facts of the case, and inferences drawn from the above).

17) On February 11, 2014, Amat Sahasrabudhe, M.D., performed an Employer's medical evaluation (EME). Employee reported ongoing left shoulder pain and reported he has "good days and bad days." Overall, Employee reported a 50 percent improvement in his shoulder pain after the surgery. Dr. Sahasrabudhe opined the July 26, 2013 work injury was the substantial cause of Employee's need for medical treatment and further opined Employee was not yet medically stable. Based on discrepancies between MRI reports, which indicated Employee had a superior labral tear from anterior to posterior (SLAP tear), and the operative report, which stated Employee had a Bankart repair, as opposed to a SLAP repair; as well as findings from his own physical examination, Dr. Sahasrabudhe expressed a concern Employee might still have an unrepaired SLAP tear. He suggested a repeat MRI. (Sahasrabudhe report, February 11, 2014).

18) On July 10, 2014 Dr. Sahasrabudhe issued an addendum EME report. After reviewing a June 3, 2014 MRI, Dr. Sahasrabudhe opined Employee did not have a tear of the superior labrum, but rather concluded Employee's ongoing pain complaints were the result of osteochondral defects in the glenoid, for which there was no recommended orthopedic treatment. He stated Employee was medically stable as of the date of his report and assessed a two percent whole person permanent partial impairment (PPI) rating. (Sahasrabudhe report, July 10, 2014).

19) Employer converted Employee's compensation to bi-weekly PPI at the minimum rate. (Compensation Report, July 25, 2014).

20) On July 25, 2014, Employee filed an affidavit of attorney's fees and costs, which stated he had incurred attorney's fees in an amount of $7,766.75 and costs in an amount of $10.89, for a total of $7,777.64. The affidavit states Employee's attorney bills his time at $425.00 per hour and his senior paralegal is billed at $175.00 per hour. The affidavit is not itemized and does not set forth dates on which work was performed, descriptions of what specific activity was undertaken on Employee's behalf, or how much time was spent performing a particular activity. (Employee's Affidavit of Fees and Costs, July 23, 2014).

21) Employee did not file an itemized affidavit for paralegal services. (Record; observations).

22) On July 31, 2014, Starr Shanley testified as follows at hearing: She is employed as Employer's Human Resources (HR) Director. Her duties as HR Director include tracking pilots' progress through Employer's ground school and orientation periods. Employer's orientation period is 120 days and it monitors how pilots fly from their stations and how they adjust to Bush Alaska. Prospective pilots first attend Employer's ground school; then, they must pass a check ride. Employer has a "very rigorous" orientation program because it has a reputation for being extremely safety conscious. Employer's trainer pilots make sure Employer's pilots are flying safely and are competent. During ground school, which lasts from one to two weeks, pilots are paid a $400 per week stipend; next, they are paid at half pay while they continue their training. After pilots pass their check rides, they are hired and receive full pay. A pilot's pay depends on the type of aircraft flown and whether the pilot is working as pilot in command or second in command of the aircraft. Employer's CASA 212 aircraft requires a crew of two; its Cessna 207 aircraft requires just one pilot. A pilot's pay also varies based on length of service. Pilots do not get a pay raise when they complete the 120 day orientation period. Pilots get raises when they become "dual qualified" (passed check rides for both the CASA and the Cessna) and after they have worked for a year. Employer does not have written employment contracts with its pilots. Not all pilots are qualified to fly the Cessna after a year. A pilot's flying skills are important in determining what qualifies a pilot for pilot in command. Employee completed ground school and was in Employer's orientation period. He had not completed the 120 day period at the time of his injury. Employee began orientation on April of 2013, and would have finished in August of 2013. Employee went to full pay after passing his check ride. Employee had no guarantee he would be hired at the conclusion of Employer's orientation period. There were six pilots in Employee's ground school class, one of which had Cessna experience. All six pilots were hired, and two are still with

Employer. One pilot has since qualified to fly the Cessna. Employer has had "some problem" retaining out-of-state employees, who have problems with commuting to Alaska and the working conditions in Alaska. The chief pilot and the director of operations make Employer's hiring determinations. On cross-examination, Ms. Shanley testified as follows: Employee resigned on May 19, 2014 and was not terminated by Employer. Employee was being paid $42.50, the rate of pay during orientation. Employee had been hired as a pilot. The $190 rate is the "weather rate." Weather pay is offered so there is no pressure for the pilots to fly in bad weather. Ms. Shanley does not do payroll and does not understand the "mechanics" of Employee's payroll calculations. During questioning by panel members, Ms. Shanley was asked if pilots are considered "employees" during orientation. She thought that was "an interesting question." She explained employees are on the payroll during orientation, and they get holidays and workers' compensation coverage, but not other benefits such as health insurance, 401(k), etc. Ms. Shanley also stated pilots are hired after their check rides and their orientation period begins. (Shanley).

23) Ms. Shanley was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

24) Employee testified as follows at hearing: He moved from Idaho to North Carolina to attend flight school. He finished flight school in April 2012 and worked as a flight instructor in Jacksonville, Florida, then at Piedmont as a flight instructor during 2012 and 2013. Working as a flight instructor is like an apprenticeship to build time to be commercial pilot. He went to work for Employer because it was his first commercial pilot job offer. Prior to 2011, Employee was a student and a truck driver. He attended Employer's ground school for three weeks, then passed his 207 check ride on March 25, 2013 and began receiving half pay. Next, he passed his CASA check ride on May 9, 2013, and began receiving full pay of $42.50 per hour. Employee still wants to be a commercial pilot and is looking for work. He worked for Employer because the first job as a commercial pilot is the most difficult to get and Employer hired him. Employee did not receive any indication Employer was considering terminating his employment. The reason he resigned from Employer was because it did not have any light duty work for him. Employer's pay scale is comparable to other Alaska employers. On cross-examination, Employee testified as follows: He moved to North Carolina because his wife had just finished nursing school and she applied for jobs in cities where flight schools were located. He had had no commercial pilot job offers prior to Employer's. Employee began looking for a commercial pilot job in April of 2012 and Employer

extended him its job offer in February of 2013. He did not have an employment guarantee from, or a written employment contract, with Employer. On re-direct, Employee testified his shoulder injury is the only reason he did not continue working as a pilot. During questioning by panel members, Employee testified Employer never discussed a 120 day period with him. He also explained he grew up in Alaska. (Employee).

25) Employee was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

26) During the weeks after passing his check ride on May 9, 2013, Employee's monthly flight block time summary shows he operated the CASA aircraft as second in command as follows: 32.1 hours between May 10, 2013 and May 15, 2013; 39.8 hours between May 16, 2013 and May 21, 2013; 26.3 hours between June 24, 2013 and June 29, 2013; 23.5 hours between July 1, 2013 and July 6, 2013 and 23.4 hours between July 22, 2013 and July 25, 2013. (Pilot Monthly Flight Block Time Summary, April 16, 2013 to July 25, 2013).

27) Employee's block time summary does not include a flight time entry on his injury date. (*Id.*; observations).

28) During the weeks from May 10, 2013 until Employee's date of injury, he flew an average of 29.02 hours per week. (*Id.*).

29) Employee's earnings statement for the period July 15, 2013 through July 31, 2013 shows he earned $1,993.25 based on flight time at $42.50 per hour, while the daily, "weather" rate for that period would have been $1,710. Employee's year-to-date gross wages were $6,962.56. (Employee's earning statement, July 15, 2013 to July 31, 2013).

30) Employee specifically contends his compensation rate should be calculated according to "usual wage" under AS 23.30.220(a)(5), which is $42.50 per flight hour with a $190 minimum guaranteed per flight day; or alternatively, calculated according to the former AS 23.30.220(a)(4)(A), utilizing his actual, weekly earnings for his last 13 weeks of employment. He contends, because the regulation at 8 AAC 45.220(a)(4) still references the former statutory subsection at §220(a)(4)(A), it may still be applied. (Employee's Hearing Brief, July 28, 2014).

31) Employee attached an exhibit to his hearing brief setting forth his calculations for amounts he contends he is owed in increased TTD if AS 23.30.220(a)(5) and the former AS 22.30.220(a)(4)(A) were applied. His amounts are $9,316.27, and $9,268.17, respectively. (*Id.*).

32) On July 30, 2014, Employee filed an affidavit of attorney's fees and costs, which stated he had incurred attorney's fees in an amount of $8,804.25 and costs in an amount of $10.89, for a total of $8,815.14. The affidavit states Employee's attorney bills his time at $425 per hour and his senior paralegal is billed at $175 per hour. The affidavit is not itemized and does not set forth dates on which work was performed, descriptions of what specific activity was undertaken on Employee's behalf, or how much time was spent performing a particular activity. (Employee's Supplemental Affidavit of Fees and Costs, July 28, 2014)

33) On August 4, 2014, Employee further supplemented his attorney's fees and costs, claiming an additional $1,787.50 in attorney's fees and $432.07 in costs, for a grand total of $11,034.71 in fees and costs when combined with his previous affidavits. The affidavit is not itemized and does not set forth dates on which work was performed, descriptions of what specific activity was undertaken on Employee's behalf, or how much time was spent performing a particular activity. (Employee's Supplemental Affidavit of Fees and Costs, August 4, 2014).

34) Employee did not file an itemized affidavit for paralegal services. (Record; observations).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, 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 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
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> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

The Alaska Supreme Court, in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney's fees awarded by the board should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, to ensure adequate representation. However, fully compensatory does not mean an attorney automatically receives full, actual fees. *Williams v. Abood*, 53 P.3d 134; 147 (Alaska 2002). In *Bignell*, the Court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on the merits of a claim. *Id.* at 973. The board was instructed to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney's fees for the successful prosecution of a claim. *Id.* at 973, 975.

In *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009), the AWCAC stated "AS 23.30.145(a) establishes a minimum fee, but not a maximum fee." A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the

board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.*

The Alaska Supreme Court does not disapprove of determining a reasonable fee award by comparing the value of benefits sought to the value of benefits awarded. *Fireman's Fund Ins. Co. v. Bouse*, 932 P.2d 222; 243 (Alaska 1997). Similarly, the Court also does not disapprove of determining a reasonable fee by taking into account the number of issues litigated; the complexity of those issues; and the resulting benefit to the employee. *Williams* at 147. However, determining a reasonable fee by comparing the value of benefits awarded to the value of services performed is suspect. *Lewis-Walunga* at 5.

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
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> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . .
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> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.
> . . .

The courts have consistently instructed the board to award interest for the time-value of money, as a matter of course. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1191 (Alaska 1993). For injuries which occurred on or after July 1, 2000, AS 23.30.155(p) and 8 AAC 45.142 require payment of interest at a statutory rate, as provided at AS 09.30.070(a), from the date on which each installment of compensation is due.

> **AS 23.30.175. Rates of compensation.** (a) The weekly rate of compensation for disability or death may not exceed the maximum compensation rate, may not be less than 22 percent of the maximum compensation rate, and initially may not be less than $110. However, if the board determines that the employee's spendable weekly wages are less than $110 a week as computed under AS 23.30.220, or less

than 22 percent of the maximum compensation rate a week in the case of an employee who has furnished documentary proof of the employee's wages, it shall issue an order adjusting the weekly rate of compensation to a rate equal to the employee's spendable weekly wages. If the employer can verify that the employee's spendable weekly wages are less than 22 percent of the maximum compensation rate, the employer may adjust the weekly rate of compensation to a rate equal to the employee's spendable weekly wages without an order of the board. If the employee's spendable weekly wages are greater than 22 percent of the maximum compensation rate, but 80 percent of the employee's spendable weekly wages is less than 22 percent of the maximum compensation rate, the employee's weekly rate of compensation shall be 22 percent of the maximum compensation rate. Prior payments made in excess of the adjusted rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation. In this subsection, "maximum compensation rate" means 120 percent of the average weekly wage, calculated under (d) of this section, applicable on the date of injury of the employee.

(b) The following rules apply to benefits payable to recipients not residing in the state at the time compensation benefits are payable:

> (1) the weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215 by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state . . . .

AS 23.30.220. Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

> (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;
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> (2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;
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> (3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;
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> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all

occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

(5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees;

(6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;

(7) when the employee is working under concurrent contracts with two or more employers, the employee's earnings from all employers is considered as if earned from the employer liable for compensation;

(8) if an employee when injured is a minor, an apprentice, or a trainee in a formalized training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee; if the minor, apprentice, or trainee would have likely continued that training program, then the compensation shall be the average weekly wage at the time of injury rather than that based on the individual's prior earnings;

(9) if the employee is injured while performing duties as a volunteer ambulance attendant, volunteer police officer, or volunteer firefighter, then, notwithstanding (1) - (6) of this subsection, the gross weekly earnings for calculating compensation shall be the minimum gross weekly earnings paid a full-time ambulance attendant, police officer, or firefighter employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance attendants, police officers, or firefighters, at a reasonable figure previously set by the political subdivision to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week;

(10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1) - (7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this

> paragraph may not exceed the employee's gross weekly earnings at the time of injury. . . .

In *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922; 929 (Alaska 1994) (superseded by statute as stated in *Dougan v. Aurora Elec., Inc.*, 50 P.3d 789; 797), a former version of the statute was held unconstitutional as applied because it created large differences in compensation between similarly situated injured workers, bore no relationship to the goal of accurately calculating an injured employee's lost wages for the purposes of determining his or her compensation and was unfair to workers whose past history does not accurately reflect their future earning capacity. An amended version of the statute corrected those problems by providing a variety of formulas for differing employment situations. *Dougan* at 797. The Alaska Supreme Court later stated: "[T]he first question under *Gilmore* is not whether an award calculated according to [the statute] is 'fair.' Rather, it is whether a worker's past employment history is an accurate predictor of losses due to the injury." *Thompson v. United Parcel Service*, 975 P.2d 684; 688 (Alaska 1999).

A primary purpose of workers' compensation is to accurately predict what a worker's wages would have been but for the injury. *Thompson* at 689; *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166 (Alaska 2002) (citing *Thompson*). The statutory formulas based on historical earnings must be applied when past earnings are an accurate predictor of future wage loss due to an injury. *Id.* A party must show substantial evidence past wages are inaccurate predictors of future earning capacity in order to deviate from the statutory formula based on historical earnings. *Id.* at 688. The statutory formula that should be applied is the one that best fits an employee's circumstances. *Wasser & Winters Co., Inc., v. Linke*, AWCAC Decision No. 09-033 (September 7, 2010).

An injured worker's intentions at the time of injury regarding future employment are relevant to determining the reliability of the employee's past work history as a predictor of future lost income. *Justice v. RMH Aero Logging, Inc.*, 42 P.3d 549; 558 (Alaska 2002). Even though there were interruptions in the employee's work history, substantial evidence supported the conclusion the employee was not a temporary employee when the interruptions in employment were consistent with the nature of the work and the employee had a reasonable expectation of working

year around on an ongoing basis. *Flowline of Alaska v. Brennan*, 129 P.3d 881; 882 (Alaska 2006).

When applying a former statute requiring consideration of "an employee's work and work history" in determining the employee's lost earnings, the focus is on the particular employee rather than a hypothetical employee similarly circumstanced. *Wrangell Forest Products v. Anderson*, 786 P.2d 916; 918 (Alaska 1990). When applying a former statute requiring consideration of the "nature of the employee's work and work history," it was proper for the board to consider the employee's two most recent earning years prior to the injury were the two lowest earning years in the employee's ten year work history and to find the employee's earning pattern was changing, indicating increased earning potential. *Circle de Lumber Co. v. Humphrey*, 130 P.3d 941; 947 (Alaska 2006). Consideration of an employee's future employment prospects in light of prior employment can be a reliable method for predicting future wage loss. *Id*. at 948. A variety of factors in aggregate, such as turning down another job and demonstrating a more consistent work pattern can support a finding of improving earnings potential at a time of injury. *Id*. at 949. The period of time between when an employee is hired and when the employee actually begins work should not be counted when calculating wage loss under an alternative method. *Id*.

The former version of the statute, amended in 2005, read:

> **AS 23.30.220. Determination of spendable weekly wage.** (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> . . .
>
> (4) if at the time of injury the
>
> (A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 calendar weeks within the 52 weeks immediately preceding the injury.

(B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1) – (3) of this subsection and (A) of this paragraph, the employee's weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13. . . .

. . .

AS 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties.

8 AAC 45.180. Costs and attorney's fees.

. . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

. . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and

that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

. . .

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

(A) is employed by an attorney licensed in this or another state;

(B) performed the work under the supervision of a licensed attorney;

(C) performed work that is not clerical in nature;

(D) files an affidavit itemizing the services performed and the time spent in performing each service; and

(E) does not duplicate work for which an attorney's fee was awarded. . . .

. . .

8 AAC 45.195. Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

8 AAC 45.220. Gross weekly earnings. (a) After calculating the gross weekly earnings less the payroll tax deductions under AS 23.30.220, the result will be rounded to the nearest dollar.

(b) The calculation of an employee's gross weekly earnings set out in (c) of this section applies to each of the following periodic payments:

(1) "weekly amount" under AS 23.30.220(a)(1);

(2) "monthly earnings" under AS 23.30.220(a)(2);

(3) "yearly earnings" under AS 23.30.220(a)(3);

(4) "earnings" under AS 23.30.220(a)(4)(A);

(5) "amount that the employee would have earned" under AS 23.30.220(a)(4)(B);

(6) "usual wage" under AS 23.30.220(a)(5);

(7) "total wages" under AS 23.30.220(a)(6); or

(8) "earnings" under AS 23.30.220(a)(7).

(c) In calculating an employee's gross weekly earnings, each of the terms set out in (b) of this section means periodic payments made by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer. . . .

ANALYSIS

1) Is Employee entitled to a compensation rate adjustment?

Employee contends his historical earnings do not reflect his future earning capacity and he seeks a compensation rate increase based on either his usual wage, or his actual earnings at the time of injury. Employer opposes a compensation rate adjustment on the basis Employee was in an orientation period. It contends basing Employee's compensation rate on his pay at the time of injury would be inappropriate because it presumes continued employment with Employer which, it contends, is too speculative.

Under the former statute, a party was required to show substantial evidence an employee's past wages were an inaccurate predictor of future earning capacity in order to deviate from a statutory formula based on historical earnings. *Thompson*. Under the current statute, the statutory formula that should be applied is the one that best fits Employee's circumstances. *Linke*. In this case, Employee earned $6,092 working as a seasonal propane delivery driver in 2011; and $6,948.59 working as a flight instructor in 2012. Employee's calculated average weekly wage using either of these two years yields approximately one half of the minimum statutory compensation rate. AS 23.30.220(a)(4); AS 23.30.175(a); Bulletin 12-06, December 26, 2012.

Employee was hired by Employer on April 26, 2013 and, at the time of his injury, was working as a commercial airline pilot earning $42.50 per hour. Employee's earnings statement shows he had earned $6,962.56 through July 31, 2013. It is noted this year-to-date total also likely includes the modest stipend Employee was paid while attending Employer's ground school, as well as the half-wages he was paid until he passed Employer's check ride. Yet, even still, during the short period of time between April 26, 2013 and July 31, 2013, Employee had already earned

as much as he had during either of his two previous years' employment. Clearly, at the time of Employee's injury, Employee's earning potential had significantly improved and that earning potential bore no resemblance whatsoever to his historical earnings. *Humphrey*.

Contrary to Employer's contention that calculating Employee's compensation based on a usual wage or his actual earnings would be too speculative, an overwhelming amount of unrefuted evidence indicates Employee would have continued in his new, hard-earned, career as a pilot. First, he relocated from Idaho to North Carolina to attend the flight school of his choice. His wife, who had just earned her degree in nursing, also specifically applied for jobs in locals that had flight schools so Employee could further his career. Then, Employee completed his flight training in April of 2012, and began looking for work as a commercial airline pilot. In the meantime, he was only working six hours per week as a flight instructor at one flight school, and then 20 hours per week at another, where he was being paid either $14.50 or $20.00 per hour to gain flight experience necessary to be hired as a commercial airline pilot.

Employee credibly testified it is tough to break into the business of flying aircraft for a living and the first job in the field is the hardest to get. Yet, Employee succeeded and finally landed his first job as a pilot – with Employer. He commuted between North Carolina and Alaska, where he grew up, to work his first job as a commercial pilot because he always wanted to fly in Alaska. His flights while commuting between North Carolina and Alaska cost him nothing since he had jump seat benefits with FedEx. He passed Employer's ground school and its check ride, and went to full pay working as a pilot. When asked at his deposition if he had expectations of ongoing employment with Employer, Employee answered: "Yes, it was a full time permanent job." Ms. Shanley's testimony supports Employee's understanding of his employment status notwithstanding Employer's "orientation" period. There are no adverse reports on Employee's performance as a pilot or any indication he was going to be terminated. Employee had reasonable expectations his employment with Employer would continue. *Brennan*. His new career was the product of a tremendous investment of time, effort and family commitment. All available evidence suggests Employee would have continued to work as a pilot had he not been injured. Employee's intentions at the time of injury are also relevant to this inquiry. *Justice*.

The only reason Employee did not continue work as a pilot was the work injury. Furthermore, he continues to seek employment as a commercial airline pilot to this day.

The primary purpose of disability benefits is to accurately compensate an injured worker for future wage loss resulting from an injury. *Thompson*; *Bauder*. Here, Employee has produced substantial evidence his compensation should not be based on his historical earnings as a seasonal propane delivery driver or a flight instructor. *Thompson*. Rather, evidence indicates the most accurate measure of Employee's lost earning potential is his actual income working as a commercial airline pilot for Employer. *Linke*.

Employee suggests his compensation be calculated according to either AS 23.30.220(a)(5); or, alternatively, according to the former AS 23.30.220(a)(4)(A). As for utilizing the calculation set forth in the latter, this decision will decline to award compensation based on a superseded statute notwithstanding the regulation's continuing reference to it. However, this decision agrees §220(a)(5) best fits Employee's circumstances. As discussed above, Employee's wages were hardly "fixed" over the previous two year period.

The "usual wage for similar services" can be readily and accurately ascertained. Employee's flight block time summary shows he operated the CASA aircraft as second in command as follows: 32.1 hours between May 10, 2013 and May 15, 2013; 39.8 hours between May 16, 2013 and May 21, 2013; 26.3 hours between June 24, 2013 and June 29, 2013; 23.5 hours between July 1, 2013 and July 6, 2013 and 23.4 hours between July 22, 2013 and July 25, 2013. Thus, Employee's total time over these five weeks was 145.1 hours, which averages 29 hours per week (145.1 hours / 5 weeks). Consequently, the most reliable calculation of Employee's loss of earning potential is $1,233.35 per week (29 hours per week x $42.50 per hour). This amount shall be used as his gross weekly earnings (GWE) for purposes of re-calculating Employee's compensation. Of course, this amount will be further subject to payroll tax deductions under AS 23.30.220(a) and the COLA adjustment set forth at AS 23.30.175(b).

2) Is Employee entitled to interest on compensation?

The law provides for an award of interest to compensate for the time value of money. AS 23.30.155(p). Based on the principle of law set forth above, Employee is entitled to interest on compensation awarded. *Id.*

3) Is Employee entitled to attorney's fees and costs?

Employer resisted adjusting Employee's compensation by litigating the adjustment, contending Employee's compensation had been properly calculated. Employee retained counsel, who successfully obtained a valuable benefit for him - a compensation rate adjustment. Thus, Employee is entitled to reasonable attorney's fee and costs under AS 23.30.145(b).

In making attorney's fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on the employee's behalf, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails. *Bignell.*

Unfortunately, Employee's affidavits prevent necessary consideration of these issues. The regulation requires itemized affidavits. 8 AAC 45.180(d)(1). Here, Employee merely presents a bill with a grand total in affidavit form. His bill also happens to state claimed hourly rates. Employee's affidavits do not set forth dates on which work was performed, descriptions of what specific activity was undertaken on Employee's behalf, or how much time was spent performing a particular activity. Neither did Employee file the requisite affidavit for paralegal costs providing necessary details for an award of those costs under 8 AAC 45.180(f)(14).

Although the regulation alternatively provides for an award of minimum statutory fees under AS 23.30.145(a), under these circumstances, it is thought such as award would not be fully compensatory and further the policy objectives of ensuring the continuing availability of competent counsel to represent injured workers. Therefore, in order to best ascertain the rights of the parties, AS 23.30.135, and to prevent manifest injustice, 8 AAC 45.195, the issue of Employee's attorney's fees and costs will be held in abeyance and Employee will be instructed to file itemized affidavits

in accordance with the regulations within 10 days is this decision and order. Alternatively, a stipulation of reasonable fees would be welcomed from the parties.

CONCLUSIONS OF LAW

1) Employee is entitled to have his compensation adjusted based on gross weekly earnings of $1,233.35 per week.

2) Employee is entitled to interest on compensation awarded.

3) Employee is entitled to an award of reasonable attorney's fees and costs.

ORDERS

1) Employer shall re-calculate Employee's past and continuing compensation as set forth above.

2) Employer shall pay Employee compensation in arears, along with interest on the re-calculated compensation, within 14 days of this decision and order.

3) Employee is ordered to file affidavits for attorney's fees and costs in accordance with 8 AAC 45.180 within 10 days of this decision and order. Alternatively, a stipulation of reasonable fees would be welcomed from the parties.

Dated in Fairbanks, Alaska on September 8, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Sarah Lefebvre, Member

/s/
Rick Traini, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission. If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 GABRIEL W. THOMPSON, employee / claimant; v. RYAN AIR SERVICES, INC., employer; INS. CO. OF THE STATE OF PENNSYLVANIA, insurer / defendants; Case No. 201320804; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on September 8, 2014.

/s/______________________________

Darren R. Lawson, Office Assistant II