ALASKA WORKERS' COMPENSATION BOARD

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

PAMELA J. DARROW (fka CREEKMORE), Employee, Claimant,	)	FINAL DECISION AND ORDER
	)	AWCB Case No(s). 199616590
v.	)	AWCB Decision No. 14-0133
ALASKA AIRLINES, INC., Employer,	)	Filed with AWCB Fairbanks, Alaska on October 3, 2014
and	)	
ALASKA AIRLINES, INC., Insurer, Defendants.	)	

Pamela Darrow's (Employee) January 15, 2014 amended claim was heard on August 14, 2014 in Fairbanks, Alaska. This hearing date was selected on May 29, 2014. Attorney John Franich appeared and represented Employee. Attorney Richard Wagg appeared and represented Alaska Airlines (Employer). There were no witnesses. Because the docket ran past the close of business on the day of hearing, the panel was unable to undertake immediate deliberations and the record was held open until the panel could next deliberate. The record closed when the board next met on September 4, 2014.

ISSUES

As a preliminary matter before hearing, both parties informed the chair of their intent to seek appellate review of this decision regardless how the issues are decided. In a prior compromise and release (C&R) agreement, the parties stipulated Employee's average weekly wage (AWW) at the time of injury was $688.98 per week and her adjusted average weekly wage (AAWW) under

AS 23.220(a)(10) is $1,390.00 per week. However, they disagree on how to calculate the social security offset at AS 23.30.225(b).

Employee urges this decision to adopt the calculation method employed in *Miller v. Municipality of Anchorage*, AWCB Decision No. 13-0099 (August 20, 2013), which utilizes Employee's AAWW in the formula. Employee's proposed calculation results in negative social security offset for Employer and a compensation rate that is higher than Employee's AWW at the time of injury. Employee concedes Employer cannot be ordered to pay more that Employee's gross weekly earnings (GWE) at the time of injury, so her compensation rate would remain at her AWW of $668.98 per week. Employee contends she "has to live with" the cap on her maximum compensation rate just as Employer "has to live with" the adjustment to her AWW.

Employer cites the express language at AS 23.30.225(b), which states Employee's combined benefits cannot be more than 80 percent of her AWW at the time of injury. Employer emphasizes "at the time of injury," and contends this decision cannot ignore the clear language of the statute. It contends Employee's maximum compensation rate was set at the time of injury and is not affected by future adjustments to her gross weekly earnings. Arguing on behalf of its interpretation of the statute, Employer cites *Shirley v. Underwater Constructors*, 884 P.2d 150 (Alaska 1994), which it contends demonstrates the Legislature intended to make benefits more affordable to employers and to reduce employer-paid benefits under a state scheme where federal assistance was available to disabled workers. Employer also cites *Louie v. BP Exploration (Alaska) Inc.*, 327 P.3d 204 (Alaska 2014), which it contends illustrates the Alaska Supreme Court felt obliged to enforce the statutory limit on compensation in that case notwithstanding the "devastating effect" on the injured worker, and contends the results should be the same here. Employer contends the proper amount to use in the calculation is Employee's AWW at the time of injury and urges the adoption of its calculation method.

1) What is the correct amount of a Social Security offset under AS 23.30.225(b)?

Employee contends, under AS 44.62.030, the regulation at 8 AAC 45.134 is unenforceable as written because it conflicts with the express language of the statute at AS 23.30.180. She specifically contends 8 AAC 45.134 impermissibly extends the statute at §180, which provides for

reducing permanent total disability (PTD) payments by amounts of permanent partial disability (PPD) payments previously made, by also allowing reductions for permanent partial impairment (PPI) payments. Employee contends the former PPD benefit under AS 23.30.190 bears no relation to the current PPI benefit under the current version of the statute because the former benefit was a disability benefit, which compensated an injured worker for the loss of future earning capacity, and the current benefit is an impairment benefit, which compensates an injured worker for the loss of a body part or function. In support of her argument, Employee contends, since §190 was amended in 1988, workers who have not lost any earning capacity are entitled to compensation for PPI, and a minimum wage worker receives the same dollar amount for a given PPI rating as a highly paid construction worker or white collar professional. She contends, when the Legislature amended §190 in 1988, it intentionally did not also amend the language under §180 because it only intended to afford employers the ability to receive credit for past payments compensating for a loss of earning capacity against future payments for loss of earning capacity. Employee contends this statutory interpretation is correct because it represents an "apples to apples" comparison, whereas, "PPI payments are more like oranges," since they bear no relationship whatsoever to earning capacity, but rather are intended as compensation for the loss of a body part or function. Therefore, Employee contends her PTD payments should not be offset by amounts of PPI previously paid notwithstanding the language of the regulation at 8 AAC 45.134.

Employer contends, just as the Legislature failed to make terms like "average weekly wages" and "gross weekly wages" consistent in the Act, its failure to specifically modify the language in §180 to mirror the PPI benefit language in §190, does not indicate its intent to grant Employee a "double payment" for disability arising from the same injury. It contends the regulation at 8 AAC 45.134(c) provides for the recoupment it seeks and contends this decision should follow the regulation. Employer cites *Lowe's HIW v. Anderson*, AWCAC Decision No. 130 (March 17, 2010), which it contends appears to be binding precedent on the issue, as well as previous Board practice under other decisions such as *Keifer v. International Steel Erectors,* AWCB Decision No. 04-0283 (December 1, 2004) and *Pietro v. Unocal*, AWCB Decision No. 13-0156 (December 3, 2013) in support of its position for application of an offset.

2) Under AS 23.30.180(a), may Employer reduce Employee's PTD benefits by amounts of PPI previously paid?

Employee alternatively contends, if Employer is entitled to reduce her PTD benefits by amounts of PPI previously paid, the statutorily prescribed inflation adjustment should be calculated from the "date of adjustment," as opposed to from the time of payments. It is believed, when Employee requested a calculation from "date of adjustment," she meant from the stipulated PTD date of October 8, 2012.

Employer did not address the inflation adjustment issue, either in its brief, or at hearing. Therefore, its position is unknown. However, it is presumed Employer opposes Employee's proposed date.

3) ***In the event Employer is entitled to recover amounts of PPI previously paid, how should those amounts be adjusted for inflation?***

Employee contends she has been undercompensated at a rate of $245.75 per week, which results in a total underpayment of $23,697.32 through the date of hearing. Since Employer has paid $40,500.00 in PPI, Employee contends Employer can recover its PPI payments in 2 ½ years at the statutory rate so there is no need to order withholding at a higher rate.

Employer contends it will take "years" to recover the PPI amount at a rate of 20 percent, and it will take "many more years" to recover overpayments resulting from application of the social security offset. Therefore, it requests a 50 percent weekly offset so it might eventually recover all credits due.

4) ***Should Employer be permitted to withhold greater than 20 percent under AS 23.30.155(j)?***

Employee contends she has been undercompensated and requests interest on additional compensation awarded.

Employer denies Employee has been undercompensated and contends she has been overcompensated instead. Therefore, it denies any interest is due.

5) ***Is Employee entitled to interest on compensation awarded?***

Employee contends she has been undercompensated and seeks an award of minimum statutory attorney's fees based on additional compensation awarded.

Employer contends, since Employee has been overcompensated rather than undercompensated, she is not entitled to an award of attorney's fees and costs.

6) 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 January 25, 1996, Employee was hired by Employer as a security officer. (C&R Agreement, May 2, 2014).

2) On May 21, 1996, Employee began working for the State of Alaska as an accounting clerk concurrent with her employment with Employer. (*Id.*).

3) On August 1, 1996, Employee moved to a new job with the State of Alaska as a personnel assistant. (*Id.*).

4) On August 6, 1996, while working for Employer, Employee injured her right knee when she was tripped by another employee. (*Id.*).

5) Employee's injury resulted in multiple surgeries, including five failed knee replacements and recurrent infections and revisions. Ultimately, Employee required resection of all components and underwent a hip-to-ankle, "long nail" fusion. (*Id.*).

6) On October 19, 2012, the Social Security Administration found Employee became disabled on December 10, 2010 and awarded Employee $1,559 per month in Social Security Disability Insurance (SSDI) benefits. (Award Letter, October 19, 2012).

7) Employee's SSDI benefits are the equivalent of $359.77 per week ($1,550 per month x 12 months / 52 weeks per year). (Observations).

8) On January 9, 2013, Employee filed a claim seeking PTD from December 10, 2012 and continuing, compensation rate adjustment and re-characterization of payments to PTD and attorney's fees and costs. (Employee's Claim, January 8, 2013).

9) On January 24, 2013, Employer filed an answer to Employee's January 8, 2013 claim, denying all benefits claimed and asserting various affirmative defenses. (Employer's Answer, January 21, 2013).

10) On April 12, 2013, Employer filed an amended answer to Employee's January 8, 2013 claim, admitting Employee is PTD, but denying it owed PTD benefits for the claimed period, denying a compensation rate adjustment pending requested discovery and asserting a possible social security offset. (Employer's Amended Answer, April 10, 2013).

11) On June 20, 2013, Employer filed a second amended answer to Employee's January 8, 2013 claim, admitting a PPI adjustment was due. (Employer's Amended Answer, June 17, 2013).

12) On November 1, 2013, Employer filed a third amended answer to Employee's January 8, 2013 claim admitting PTD benefits from March 30, 2013, but denying a compensation rate increase was due. Instead, it alleged continuing overpayments had occurred. (Employer's Answer, October 20, 2013).

13) On November 6, 2013, Employer field a petition seeking a social security offset. (Employer's Petition, November 4, 2013).

14) On January 15, 2014, Employee filed an amended claim seeking an unspecified period of TTD from August 6, 1996; PTD from December 10, 2010 and continuing, penalty, interest, attorney's fees and costs and alleging a controversion-in-fact in relation to Employee's wage rate calculation. (Claim, January 15, 2014).

15) On January 29, 2014, Employer filed an answer to Employee's amended claim, admitting a compensation rate adjustments on TTD and PTD benefits may be due Employee based on newly received documentation. (Employer's Answer, January 27, 2014).

16) On February 18, 2014, Employer filed a controversion a second amended answer to Employee's January 15, 2014 claim, admitting a TTD compensation rate adjustment may be due Employee based on newly received documentation from Employee's attorney, and admitting a PTD compensation rate adjustment may be due Employee, but denying the PTD rate should be adjusted to $700. (Employer's Amended Answer, February 14, 2014).

17) On March 17, 2014, Employer filed an amended controversion and a third amended answer to Employee's January 15, 2014 claim, admitting TTD, TPD and PTD adjustments are due Employee, but denying Employee's compensation rate should be $668.98 per week. In its

amended answer, Employer also requested a greater than 20 percent offset against PTD benefits to recoup previously paid PPI benefits. (Employer's Amended Answer, March 13, 2014).

18) On March 21, 2014, the parties participated in mediation, which resolved some outstanding issues in the case and left others for hearing. (C&R, May 2, 2014).

19) On May 2, 2014, the parties filed a partial C&R agreement that states the following: Employee became PTD October 8, 2012 and Employee's TTD rate was $423.23 based on gross weekly earnings of $668.98 as single with two dependents. The parties further agreed Employee had been paid compensation as set forth in an attached March 14, 2014 compensation report. The report shows a lump sum PPI payment of $9,450 on February 10, 1998; an "advance" PPI payment of $3,105 on August 26, 2003; an advance PPI payment of $1,000 on May 6, 2005; and a lump sum PPI payment of $26,945 on July 15, 2005. Under the agreement, future medical benefits remained open. (*Id.*).

20) The United States Department of Labor, Bureau of Labor Statistics' online CPI inflation calculator provides the following annually adjusted figures for the present day value of Employee's PPI payments: $13,790 for the February 10, 1998 payment of $9,450; $4,014 for the August 26, 2003 payment of $3,105; and $34,034 for the May 6, 2005 and July 15, 2005 payments of $27,945, rounded to the nearest whole dollar amount. (www.bls.gov/data/inflation_calculator.htm, accessed on September 30, 2014).

21) On May 2, 2014, the parties filed a stipulation to attorney's fees related to the partial C&R agreement. It provided that Employee's attorney would be paid statutory minimum fees under AS 23.30.145(a) for specific, enumerated benefits paid to Employee through the date the C&R agreement was approved, and for continuing fees based on 10 percent of Employee's future PTD benefits. (Stipulation, May 7, 2014).

22) Employee proposes the following calculation for the social security offset be adopted from *Miller*:

A. Average Weekly Wage at the Time of Injury	$668.98
B. Adjusted Average Weekly Wage under AS 23.30.220(a)(10)	$1,390.00
C. Weekly Compensation Rate from Tables	$700.00
D. Weekly SSDI Benefit	$357.92[1]
E. PTD plus SSDI (C + D)	$1,057.92

[1] Employee does not explain how she arrived at the weekly equivalent of her monthly SSDI award.

F. 80% of Adjusted AWW (B x .8)	$1,112.00
G. Offset (E - F)	-$54.08
H. PTD Rate (C - G)	$754.08

Employee contends: "This computation results in a negative offset and a higher PTD rate – one that is above the maximum rate under the 1996 rate table. Since the Employer cannot be ordered to pay more than the employee's GWE at the time of injury, her compensation rate would remain at $668.98 and the Employer would not be entitled to an offset for SSDI payments." (Employee's Hearing Brief, August 8, 2014).

23) Employer contends the social security offset should be calculated as follows: Employee is receiving $1,559 per month in SSDI, which equates to $359.77 per week. It contends AS 23.30.225(b) sets a maximum weekly combined social security and workers' compensation benefits at 80 percent of her AWW at the time of injury. In this case, 80 percent of Employee's AWW at the time of injury is $535.18 ($688.98[2] x .8 = $535.18). Applying the offset at §225(b), Employee would then be entitled to $359.77 in social security benefits, and $175.41 per week in PTD benefits. Employer contends, since it has been paying PTD at $423.23 per week, an overpayment of $247.92 per week has been accruing. (Employer's Hearting Brief, August 8, 2014).

24) Employer presumably intended to use the stipulated AWW of $668.98 in its calculation instead of $688.98. (Observations, unique or peculiar facts of the case, and inferences drawn from the above).

25) At a May 29, 2014 prehearing conference, the parties agreed to set specific issues for hearing on August 24, 2014, including social security offset, PPI adjustment and compensation rate adjustment. (Prehearing Conference Summary, May 29, 2014).

26) Employer agrees Employee's AAWW under AS 23.30.220(a)(10) is $1,390 per week. (Employer's Hearing Brief, August 8, 2014).

27) The Alaska Workers' Compensation Board's 1996 Weekly Compensation Rate Tables established a maximum compensation rate of $700 per week. (1996 Rate Tables).

[2] This amount is presumably a typo since $688.98 x .8 = $551.18, not $535.18.

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 . . . .

The meaning of a statutory provision is determined by the language of a particular provision construed in light of the purpose of the whole instrument. *Wien Air Alaska v. Arant*, 592 P.2d 352; 356 (Alaska 1979).

> It is an established principle of statutory construction that all sections of an act are to be construed together so that all have meaning and no section conflicts with another. Further, where one section deals with a subject in general terms and another-deals with a part of the same subject in a more detailed way, the two should be harmonized, if possible; but if there is a conflict, the specific section will control over the general.

In the Matter of Hurchinson's Estate, 577 P.2d 1074; 1075 (Alaska 1978). A "harmonious whole" must be a single instrument. *Shirley v. Underwater Construction, Inc.*, 884 P.2d 150; 155 (Alaska 1994).

> **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. . . .
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> (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.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are also considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975.

When an employee files a claim to recover controverted benefits, subsequent payments, though voluntary, are the equivalent of a board award, and attorney's fees may be awarded where the efforts of counsel were instrumental in inducing the payments. *Childs v. Copper Valley Elect. Ass'n.*, 860 P.2d 1184; 1190 (Alaska 1993).

The statute at AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. *Lewis-Walunga v. Municipality of Anchorage,* AWCAC Decision No. 123 (December 28, 2009) at 5. 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.*

> **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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> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.
> . . . .
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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 statute in effect at the time of Employee's injury stated:

> **AS 23.30.175. Rates of compensation.** (a) The weekly rate of compensation for disability or death may not exceed $700 and initially may not be less than $110
> . . . .

In *Louie v. BP Exploration (Alaska), Inc.*, 327 P.3d 204 (Alaska 2014), the Alaska Supreme Court found the legislature intended to create an "absolute maximum" compensation rate under the statute in order to "provide for a fixed maximum compensation rate which can be predicted." *Id*. at 209. Discussing the statutory cap on compensation in Louie's case, the Court observed:

> Louie had the extreme misfortune both to suffer a devastating injury and to suffer it shortly before an amendment to the statute would have increased the benefit amount available to him. We do not discount the devastating effect of Louie's injury on his family and his income: $700 a week is a cheeseparing amount that inadequately compensates him for his lost income. Under the $700 statutory cap, Louie can receive an amount that is equal to a little more than 30% of what his income was in 2000 and approximately 12% of what Smith testified Louie would be earning now if he had not been disabled. *Id*.

Nevertheless, the Court concluded $700 per month was the maximum amount to which Louie was entitled. *Id*.

> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. . . .

Prior to its 1988 amendment, the former version of the statute stated:

> **AS 23.30.180 Permanent Total Disability.** (a) In the case of total disability adjudged to be permanent 80 per cent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . .

Although the current version of the statute continues to state PTD benefits may be reduced by the amount of PPD benefits previously paid, parties in other cases have stipulated the statute also affords a reduction for PPI benefits previously paid. *Miller v. Municipality of Anchorage*, AWCB Decision No. 13-0099 at 3 (August 20, 2013) (*aff'd on other grounds*, AWCAC Decision No. 197 (July 1, 2014)); *Barnett v. Lee's Custom Designs*, AWCB Decision No. 99-0146 at 7 (July 8, 1999). Other cases have acknowledged an employer's right to reduce PTD payments to recover previously paid amounts of PPI in dicta. *Keifer v. International Steel Erectors*, AWCB Decision No. 04-0283 (December 1, 2004); *Pietro v. Unocal*, AWCB Decision No. 13-0156 (December 3, 2013).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person . . . . The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations. . . .

Under the current version of §190, the calculation of a permanent partial impairment is based on the whole person and is arrived at under the American Medical Association Guides to the

Evaluation of Permanent Impairment. This represents a marked departure from the former version of the statute, which calculated permanent partial disability based on a schedule of values for arms, fingers and legs. *Sumner v. Eagle's Nest Hotel*, 894 P.2d 628; 631 (Alaska 1995); *Lowe's HIW, Inc. v. Anderson*, AWCAC Decision No. 130 at 10-11 (March 17, 2010).

Prior to its 1988 amendment, the former version of the statute stated:

> **AS 23.30.190. Compensation for permanent partial disability**. (a) In the case of disability partial in character but permanent in quality the compensation is 80 percent of the injured employee's spendable weekly wages in addition to compensation for temporary total disability or temporary partial disability . . . . and shall be paid as follows:
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> (1) arm lost, 280 weeks of compensation, not to exceed $43,680;
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> (2) leg lost, 248 weeks of compensation, not to exceed $40,320;
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> (3) hand lost . . . .
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> (4) foot lost . . . .
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> (5) eye lost . . . .
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> (6) thumb lost . . . .
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> (7) first finger lost . . . .
> . . . .
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> (17) compensation for permanent total loss of use of a member is the same as for loss of the member;
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> (18) compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member;
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> (19) in addition to other allowable compensation, the board shall award proper and equitable compensation up to $10,000 for
> . . . .
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> (B) partial or total loss or loss of use of a part or function of the body not otherwise provided for under this subsection;
> . . . .
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> (21) in a case in which there is a loss of, or loss of use of more than one member or parts of more than one member set out in (1) – (18) of this section, not amounting to permanent total disability, the award of compensation is for

> the loss of, or loss of use of, each member or part of the member, which awards shall run consecutively . . . .

The concept of disability compensation 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) (cited with approval in *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978)).

Formerly, there were four basic types of disability compensation payable under the Alaska Workers' Compensation Act: (1) temporary total disability, (2) temporary partial disability, (3) permanent total disability and (4) permanent partial disability. *Hood v. Workmen's Compensation Bd.*, 574 P.2d 811; 814 (Alaska 1978).

Under the former version of the statute, a claimant was not entitled to simultaneously recover both permanent total and permanent partial disability benefits. *Wagner v. Stuckagain Heights*, 926 P.2d 456; 459 (Alaska 1996). Where possible, the Alaska Workers' Compensation Act should be interpreted as one consistent structure intended to further its overall purpose and should award compensation for one type of disability in light of compensation for others, particularly where both are for the same accident. *Id.*

The former version of the statute was amended by the original Senate Bill 322, which was revised by the House CS for CS SB 322 (Judiciary) and adopted in 34 ch 79 SLA 1988. The legislative history of the House CS for CS SB 322 shows the following:

At a meeting of the House Judiciary Committee on April 6, 1988, Bob Anders, Co-chair of the labor side of the Labor Management Task Force, testified before the committee. He discussed the pros and cons of the bill.

> Mr. Anders explained another area of change was in PPD payments. They are presently capped at $60,000 and labor felt that amount was extremely low. They moved to a *"whole man"* figure of $240,000. *The present grant system treats injuries unfairly, as it gives a person who makes $700 per week a larger amount than one who makes $400 per week, even though they have the same injury.*

(House Judiciary Committee Minutes, April 6, 1988) (emphasis added).

At an April 11, 1988 meeting of the House Judiciary Committee, Paul Roller, the Director of the Division of Insurance, spoke.

> Chairman Sund asked for the history of Mr. Roller's experience with the *whole person theory* as a major change in the system. Mr. Roller said it was his understanding the U.S. Longshoremen-Harborworkers coverage has something similar. They came up with a fairly arbitrary figure of what the *whole person* was worth, which became $240,000. Each part of the body is figured as a percentage of the overall body then, a percentage of impairment is figured in. *The problem with that system is that in some instances different parts of the body are worth different amounts to people depending on their occupation, which isn't taken into account under the whole person theory.*
>
> Chairman Sund noted that *the current system is based on loss of earning capacity.* He asked if any other states use the *whole person* concept. Mr. Roller replied that a couple other states do it, but they are hybrid systems. There is no other state with exactly the same type of system as that being proposed.

(House Judiciary Committee Minutes, April 11, 1988) (emphasis added).

At a House Judiciary Committee meeting on April 12, 1988, Kevin Daugherty, an attorney for the Alaska State District Counsel of Laborers, addressed the committee. He discussed the background of the joint Labor-Management Task Force that worked extensively in revising the Workers' Compensation Act.

> Mr. Daugherty pointed out there were four types of injuries. The major one they addressed was PPD, and within that are scheduled and unscheduled disabilities. The scheduled disabilities have particular monetary ceilings on the amount an injured worker can receive, depending on the extent of the injury, which varies by body part. The task force would like to employ a system referred to as a *whole person theory*, feeling it is a more humane approach to an injured worker. *Regardless of the worker's income*, their injury should be treated equally. They hope to provide a greater benefit to the more severe injuries with this approach. They also hoped to reduce litigation by being more definitive.

(House Judiciary Committee Minutes, April 12, 1988) (emphasis added).

On April 13, 1988, at a House Judiciary Committee meeting, Jackie McClintock, Director of the Division of Workers' Compensation, commented on some statements made yesterday by Mr. Roller of the Division of Insurance.

> She addressed a statement by Mr. Roller that the proposed amendment for some disabilities, such as loss of an arm, *does not take into* consideration the person's

> type of work or *the future loss of earning capacity*. She noted that present law does not do that either, except for unscheduled PPD. She explained the difference in compensation between current law and the proposed change, *adding that the loss of future earning capacity is still not taken under consideration*. Other states use some combination of the whole person concept for compensating unscheduled PPD, and it is not a totally new concept for Alaska. Prior to the Supreme Court ruling in the Hewing case a percentage factor was used all the time for unscheduled PPD and was affirmed in various cases.

(House Judiciary Committee Minutes, April 13, 1988) (emphasis added).

At a meeting of the House Judiciary Committee on April 14, 1988, Director McClintock explained that injuries will be *in the schedule* if they are ratable in the AMA guides.

(House Judiciary Committee Minutes, April 14, 1988) (emphasis added).

On April 15, 1988, at a meeting of the House Judiciary Committee, Chancy Croft, Attorney at Law, stated:

> He had a role in creating original workers' compensation laws when he was a legislator, and was now involved with the proposed changes. He noted *there was a substantial difference between disability and impairment* and discussed the difference between the levels of disability. *SB 322 completely does away with economic disability.*

(House Judiciary Committee Minutes, April 15, 1988) (emphasis added).

At a House Finance Committee Meeting on April 29, 1988, Representative Wallis asked what the rationale was for adopting the method of determining compensation *based on percent of disability, rather than on loss of earnings.*

> Representative Sund explained that it is a major change dealing with unscheduled injuries, which are the major injuries to the head, back, and neck. He said that *the rest of the injuries are scheduled* in an attempt to put more certainty into the system, and to decrease the amount of litigation.
>
> Ms. McClintock, then the Director of the Division of Workers' Compensation, responded to Representative Wallis' question. She said that *the intent was to take away the predictions of future loss of earnings.*

(House Finance Committee Minutes, April 28, 1988) (emphasis added).

The Sectional Analysis of House CS for CS for SB 322 (Labor and Commerce), prepared by House Judiciary Committee, states:

> Section 33. PERMANENT PARTIAL DISABILITY (PPD)
> Page 26, Line 11
>
> This section repeals prior law and reenacts a *totally new concept* in permanent partial disabilities. All payments for permanent partial impairment will be based on a *whole person concept* in accordance with the American Medical Guides to Evaluation of Permanent Impairment Compensation. Under the Guides the impairment of any body part is computed as to how it affects total body functioning. Compensation is computed by multiplying the employee's actual degree of impairment by the appropriate adjustment factor by the maximum compensation rate of $240,000, but no permanent partial impairment payment may be less than $250. The section also provides that an impairment rating be reduced by a pre-existing permanent impairment; however, the prior rating will not negate a finding of permanent total disability.
>
> Current law provides maximum schedules for fourteen various body parts, ranging from $2,800 to $59,000, plus a maximum unscheduled benefit of $60,000 based on loss of earning capacity for back and neck injuries. This section represents a redistribution of benefits to those workers who have more significant injuries and disabilities from those with lesser impairments.
>
> Note: This section does not work in practice as the Labor-Management Task Force intended. PPD payments at the lower impairments are considerably lower than under present law. See the payment chart in the backup file under "Task Force."

(Sectional Analysis of House CS for CS for SB 322 (Labor and Commerce)) (emphasis added).

> **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:
>
> . . . .
>
> (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. . . .

A primary purpose of workers' compensation is to accurately predict what a worker's wages would have been but for the injury. *Thompson v. United Parcel Service*, 975 P.2d 684; 689 (Alaska 1999); *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166 (Alaska 2002) (citing *Thompson*). The object of AS 23.30.220 is to arrive at a fair approximation of an employee's probable future earning capacity during a period of disability. *Deuser v. State of Alaska*, 697 P.2d 647; 649 (Alaska 1985). 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.* However, AS 23.30.220(a)(10) permits the Board to vary the method used to calculate the spendable weekly wage of an employee who is permanently and totally disabled when calculation under other subsections "does not fairly reflect the employee's earnings during the period of disability." *Louie* at 207. 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).

> **AS 23.30.225. Social security and pension or profit sharing plan offsets.**
> . . . .
>
> (b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury. . . .

Under both federal and state statutes, an injured employee's disability entitlements from all sources cannot exceed 80 percent of the employee's pre-injury earnings. 42 USC §424(a); AS 23.30.225(b). However, although the two statutes involve the same general subject matter, they are not in *para materia* and will not be construed together. *Underwater Construction* at 155.

The formula for calculating the social security offset at §225(b) was first applied in *Milner v. Hull Cutting Co.*, AWCB Decision No. 88-0277 (October 26, 1988). Since its development, the

offset calculation has been consistently applied by the board. *E.g. Harp v. Arco Alaska, Inc.*, AWCB Case No. 8715387 (August 17, 1994); *Cornelison v. Rappe,* AWCB Decision No. 01-0008 (January 11, 2001; *Heggenberger v. Fred Meyer, Inc.*, AWCB Decision No. 02-0244 (November 2, 2002); *Laframboise v. Weldin Contruction, Inc.*, AWCB Decision No. 08-0139 (July 29, 2008); *Baker v. Alaska Industrial Coating*, AWCB Decision No. 08-0186 (October 15, 2008); *Burch v. Alaska Fresh Seafoods, Inc.*, AWCB Decision No. 08-0211 (November 12, 2008).

The phrase "average weekly wages" in §225(b) has the same meaning as "gross weekly earnings" in §220. *Underwater Construction*. When an employee's average weekly wages (AWW) are adjusted under AS 23.30.220(a)(10), the resulting adjusted average weekly wages (AAWW) become the "average weekly wages at the time of injury" under § 225(b). *Miller v. Municipality of Anchorage*, AWCB Decision No. 13-0099 (August 20, 2013) (*aff'd on other grounds*, AWCAC Decision No. 197 (July 1, 2014)).

> **AS 23.30.395. Definitions.**
> . . . .
>
> (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
> . . . .
>
> **AS 44.62.020. Authority to adopt, administer, or enforce regulations**. Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.
>
> **AS 44.62.030. Consistency between regulation and statute.** If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.
>
> **AS 44.62.300. Judicial review of validity.** An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid

(1) for a substantial failure to comply with AS 44.62.010 - 44.62.320;

. . . .

8 AAC 45.134. Modification and offset of compensation: reimbursement.

. . . .

(b) In accordance with AS 23.30.155(j), the employer may reduce permanent total disability benefits to recover permanent partial disability benefits previously paid by the employer for the same injury.

(c) For purposes of (b) of this section and AS 23.30.180, permanent partial disability benefits includes permanent partial impairment benefits paid under AS 23.30.190.

8 AAC 45.225. Social security and pension or profit sharing plan offsets.

. . . .

(b) An employer may reduce an employee's weekly compensation under AS 23.30.225(b) by

(1) getting a copy of the Social Security Administration's award showing the

(A) employee is being paid disability benefits;

(B) disability for which the benefits are paid;

(C) amount, month, and year of the employee's initial entitlement; and

(D) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee or beneficiary's initial entitlement, excluding any cost-of-living adjustments;

(3) completing, filing with the board, and serving upon the employee a petition requesting a board determination that the Social Security Administration is paying benefits as a result of the on-the-job injury; the petition must show how the reduction will be computed and be filed together with a copy of the Social Security Administration's award letter;

(4) filing an affidavit of readiness for hearing in accordance with 8 AAC 45.070(b); and

(5) after a hearing and an order by the board granting the reduction, completing a Compensation Report form showing the reduction, filing a copy with the board, and serving it upon the employee.

. . . .

The procedure for employer's to apply for application of the social security offset at AS 23.30.225 was first developed in *Stanley v. Wright-Harbor*, AWCB Decision No. 82-0039 (February 19, 1982); *aff'd*, 3-AN 82-2170 Civil (Alaska Superior Ct. May 19, 1983). That decision found application of AS 23.30.225(b) does not lower a claimant's entitlement to benefits any more than if the statute did not exist. "The dollar amount of the benefits is merely redistributed between Social Security and the workers' compensation carrier." *Id*. at 3.

ANALYSIS

1) What is the correct amount of a Social Security offset under AS 23.30.225(b)?

So far as it is known, *Miller* was the first decision to address the issue of whether an employee's adjusted average weekly wages under AS 23.30.220(a)(10) should become the "average weekly wages at the time of injury" under AS 23.30.225(b). Here, Employee urges this panel to adopt the conclusion reached in *Miller* and utilize the full stipulated amount of her adjusted average weekly wages while calculating Employer's entitlement to a social security offset. Employer strongly disagrees and contends this decision cannot ignore the express terms of the statute that limits Employee to 80 percent of her average weekly wages "at the time of injury." It emphasizes "at the time of injury," and cites *Underwater Construction* and *Louie* as support for its position.

First, Employer contends *Underwater Construction* supports its statutory interpretation because, in that decision, the Court found, by enacting §225(b), the Legislature intended to make benefits more affordable to employers and to reduce employer-paid benefits under a state scheme where federal assistance was available to disabled workers. Employer accurately quotes *Underwater Construction*. However, that decision concerned an analysis of what effect, if any, a similar federal statute had on the interpretation of the Alaska statute at §225(b). As part of its analysis, the Court considered the Legislature's broad public policy objectives in enacting that statute. *Underwater Construction* did not address the specific mechanics of applying §225(b). On the other hand, Employee points out *Miller* did address the specific mechanics of the statute's application and, in so doing, stated:

> The crux of the issue is whether a gross weekly wage adjusted under AS 23.30.220(a)(10) becomes the "average weekly wage at the time of injury" under AS 23.30.225(b). It must. In *Underwater Construction*, the Supreme Court held "gross weekly earnings" used in AS 23.30.220 has the same meaning as "average weekly earnings" in AS 23.30.225(b). While the court did not specifically say "average weekly wages at the time of injury," the term "average weekly wages" only appears as part of "average weekly wages at the time of injury" in AS 23.30.225(b). The Supreme Court cannot have meant it in any other context.

Miller at 27. However, in this case, the "crux of the issue" is different than in *Miller*. Nevertheless, as a starting point for this analysis, the rationale in *Miller* is persuasive and it is accepted in the case that Employee's average weekly wages adjusted under §220(a)(10) should become her "average weekly wages at the time of injury" under §225(b). Meanwhile, Employer's point is also acknowledged. By enacting §225(b), the Legislature did intend to make benefits more affordable to employers and to reduce employer-paid benefits under a state scheme where federal assistance was available to disabled workers. *Underwater Construction*.

In this case, the crux of the issue actually is a statutory "at the time of injury" limitation, as Employer points out. Employer emphasizes "at the time of injury" language in §225(b) and cites *Louie* as support for its position. However, similar to *Underwater Construction* above, *Louie* did not address the application of the social security offset at AS 23.30.225(b), but rather the statutory cap on compensation at AS 23.30.175(a). The relevant statutory limitation here involves both the limitation at §220(a)(10), as well as one at §225(b). Since *Louie* does set forth a two-step process for determining an injured worker's compensation under §§220 and 175, it does provide critical guidance here.

First, *Louie* explains:

> Alaska Statute 23.30.220(a)(10) permits the Board to vary the method used to calculate the spendable weekly wage of an employee who is permanently and totally disabled when calculation under other subsections "does not fairly reflect the employee's earnings during the period of disability." In such cases, the statute permits the Board to consider a number of factors, *but it limits the "compensation calculated under this paragraph" to "the employee's gross weekly earnings at the time of injury."*

Id. at 207 (emphasis added). It next explains the interplay between §220, under which an injured worker's compensation is initially determined and may later be adjusted; and §175, which is an absolute maximum cap on an employee's compensation:

> [I]n our view, these sections do not conflict because they concern two distinct steps in benefit calculation. Alaska Statute 23.30.220 governs the first step of a two-step process—determining the employee's spendable weekly wage. Variation in calculating spendable weekly wage is needed because the formula may produce lower benefit amounts than are warranted in certain circumstances. *Capping the amount of compensation under the alternative formula at the amount of actual gross earnings removes any incentive to be found disabled rather than return to work.* Step two of the two-step process is to apply the maximum or minimum set out in AS 23.30.175. Unless the statutory maximum in effect in January 2000 does not apply to Louie's claim, his compensation is capped at $700 a week at the second step, no matter how his wage is calculated in the first step; this amount will never exceed his gross weekly earnings at the time of his injury.

Id. at 208 (emphasis added). Incidentally, here Employee is subject to the same $700 cap under §175 in effect at the time of her injury as Louie but, unlike Louie, that cap does not come into play in her case.

Employee proposes the following calculation, which has been modified to account for her original miscalculation of the weekly SSDI benefit amount:

A. Average Weekly Wage at the Time of Injury	$668.98
B. Adjusted Average Weekly Wage under AS 23.30.220(a)(10)	$1,390.00
C. Weekly Compensation Rate from Tables	$700.00
D. Weekly SSDI Benefit	$359.77[3]
E. PTD plus SSDI (C + D)	$1,059.77
F. 80% of Adjusted AWW (B x .8)	$1,112.00
G. Offset (E - F)	-$52.23
H. PTD Rate (C - G)	$752.23

However, even if the holding in *Miller* is adopted here, as it has been, the results are still not those Employee hopes.

Following *Louie* and applying *Miller*, yields the following results:

A. Average Weekly Wage at the Time of Injury	$668.98

[3] Corrected amount

B. Adjusted Average Weekly Wage under AS 23.30.220(a)(10)	$668.98
C. Weekly Compensation Rate	$668.98
D. Weekly SSDI Benefit	$359.77
E. PTD plus SSDI (C + D)	$1,028.75
F. 80% of Adjusted AWW (B x .8)	$535.18
G. Offset (E - F)	$493.57
H. PTD Rate (C - G)	$175.41

The first step under *Louie's* two-step process is to determine Employee's adjusted weekly wages under §220(a)(10). In this case, the parties have stipulated it is $1,390 per week. However, *Louie* reminds us §220(a)(10) limits this amount to the employee's gross weekly earnings "at the time of injury," which the parties agree was $668.98. It is believed this is where Employee miscalculates. Next, as *Louie* instructs, the second step is to apply the maximum cap at §175 which, at the time of Employee's injury, was $700 per week. Here, Employee is safely below that cap, so her compensation rate remains at $668.98 per week. Incidentally, Employee's previous compensation rate was $423.23; so she does realize the benefits of the adjustment provision at §220(a)(10). Then, Employer's social security offset must then be calculated under §225(b) and, as Employer points out, this calculation is also limited to Employee's earnings "at the time of injury." Although Employee would like to use the stipulated adjusted average weekly wage of $1,390 at this point, she cannot. As set forth above, §220(a)(10) limited the stipulated adjustment to her gross weekly earnings at the time of injury and that same limitation appears again at §225(b). The correct amount to use at this step is $668.98, not $1,390, as Employee contends. Therefore, as Employer contends, Employee is entitled to receive $359.77 per week in SSDI benefits, and $175.41 in PTD compensation. *Louie*; AS 23.30.225(b).

In this case, even though Employer arrives at the correct result, it technically does so in reliance on the wrong basis. The salient factor in Employee's case is not, either initially or exclusively, the "at the time of injury" limitation at §225(b), as Employer contends; nor is it utilizing Employee's adjusted average weekly wage versus her weekly wage at the time of injury while calculating the offset under §225(b), as Employee contends; but rather it is the initial "at the time of injury" limitation under §220(a)(10) encountered at the first step of *Louie's* two-step process, and which is only later reinforced again at §225(b).

2) Under AS 23.30.180(a), may Employer reduce Employee's PTD benefits by amounts of PPI previously paid?

Although the general issue presented has been summarily decided at least once before by another district panel in *Keifer*, here Employee presents a novel argument in support of her position on the issue, which she contends creates an issue of first impression. So far as it is known, Employee is correct. No other decisional authority could be found that decided the issue presented as Employee frames it here.

Employee contends the former PPD benefit under AS 23.30.190 bears no relation to the current PPI benefit under the current version of the statute because the former benefit was a disability benefit, which compensated an injured worker for the loss of future earning capacity, and the current benefit is an impairment benefit, which compensates an injured worker for the loss of a body part or function. She contends, when the Legislature amended §190 in 1988, it intentionally did not also amend the language under AS 23.30.180 that allows an employer to reduce PTD benefits by amounts of PPD benefits previously paid, because it only intended to afford employers to ability to receive credit for past payments compensating for a loss of earning capacity against future payments compensating for loss of earning capacity. Employer, on the other hand, essentially contends the "permanent partial disability" language at §180 is simply a statutory remnant following the 1988 re-write of §190, and attributes that language's continued appearance at §180 to legislative oversight in failing to amend it along with §190.

Under the current version of §190, the calculation of a permanent partial impairment is based on the whole person and is arrived at under the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment (Guides)*. This represents a marked departure from the former version of the statute, which calculated permanent partial disability based on a schedule of values for arms, fingers and legs and where compensation was paid out for a certain number of weeks at eighty percent of wages. *Sumner*; *Lowe's*. Historically, in Alaska workers' compensation law, disability compensation has been for the loss of an employee's earning capacity rather than for a medical impairment as such. *Vetter*; *Hewing*. Additionally, the definition of "disability" is codified at AS 23.30.395. It has also been held, under former statutes, that there were four basic types of disability compensation: (1) temporary total

disability, (2) temporary partial disability, (3) permanent total disability and (4) permanent partial disability. *Hood*.

Here, Employee's contention is based on the premise that PPI payments are an "impairment benefit" rather than disability compensation based on a loss of earning capacity. The Alaska Supreme Court touched on the issue presented here in *Hewing*:

> 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 Board's inadequate consideration, under AS 23.30.210(a) of the availability of work which appellant could perform may indicate that its 'whole man' terminology reflects an improper emphasis upon physical injury.

In their treatise, Professor Larson and Larson provide an expanded explanation of the issue:

> At the outset of the analysis of this controversy, it is important to define with some precision the 'schools of thought' that are the protagonists in this struggle . . . . For purposes of the present controversy . . . it is more useful to use a two-way division, turning on whether the essence of what is being compensated for is medical or economic. Under his division . . . [there are] the 'earning impairment theory,' in contrast to the 'physical impairment theory.' A pure wage loss statute would do no more than compare actual post-injury and pre-injury earnings, and pay the appropriate compensation . . . . It would, of course, have no 'schedule' at all. . . . But, no such 'pure' statute exists in America today. . . . The important question now becomes: how many such concessions can a basically 'wage loss' or 'earning capacity' statute make, and still be entitled to be identified as an 'earnings-impairment' statute?

Arthur Larson & Lex K. Larson, *The Law of Workmen's Compensation* § 80.05[2], at 80-16 to 80-18 (2008). They suggest evaluating the following criteria to answer the above question: 1) whether or not there are adjustments of the pre-injury and post-injury earnings to make the compensation more realistic, and 2) limited applications of the schedule principle. *Id*.

As the Alaska Supreme Court and the Appeals Commission have both observed, under the former §190, compensation was provided for a certain number of weeks at 80 percent of *wages*. *Sumner* at 631; *Lowe's* at fn 35. Even though total dollar amounts of compensation payable and

the terms of payments were based on a schedule of injuries, the amount of each compensation payment, which were paid over time instead of in a lump sum, was tied to an individual's earning capacity. Thus, under Larson's criteria, PPD payments under the former §190 could still be fairly classified as an "earning impairment" benefit. *Hood*.

However, as mentioned above, the PPI benefit currently at §190 is based on the AMA *Guides*, and is a determined by a percentage of impairment to a particular body part, system or function, which is then converted to a percentage of impairment to a whole person. The PPI benefit is next arrived at by multiplying the percentage of impairment to the whole person by a hypothetical $177,000 whole person dollar amount. Although PPI did represent a significant departure from the former PPD benefit in some respects, as the former Director of the Division of Workers' Compensation, Ms. McClintock, pointed to the House Judiciary Committee, the AMA *Guides* essentially are a schedule of ratable injuries, just as the former §190 was; and this decision agrees with her characterization. The *Guides* merely changed the schedule under which the dollar amounts of the benefit are determined.

Under a section of their treatise discussing the impossibility of rationally rating a disability when the tie with earning capacity is severed, Prof. Larson and Larson wrote:

> The schedule approach presupposes that there is an abstract and uniform measure of 'disability' that is valid and fair for all persons, apart from their activities or occupations. What, for example, does "loss of use" of three fingers mean? Loss of use for what purpose? For typesetting or for unskilled labor?

Id. at 80-37. As Employee correctly contends, under the current §190, workers who have not lost any earning capacity at all may be entitled to compensation for PPI, and a minimum wage worker receives the same dollar amount for a given PPI rating as a highly paid construction worker or white collar professional.

Larson identifies another hallmark of a physical impairment benefit. While describing the gradual historical erosion of the wage loss principle, they explained:

> Whereupon all this [historical developments] is superimposed the practice of lump-summing, all resemblance to a wage loss system is lost. If a worker is given $20,000 for some internal organ damage that has no conceivable effect, actual or presumptive, on earning capacity, it is no longer possible to pretend that this is still

> somehow only an exploitation of the wage-loss principle aided by the conclusive presumption of eventual wage loss.
>
> In normal compensation theory, since benefits are designed to forestall destitution by supplying regular periodic income, lump-summing is strongly discouraged. . . .

Id. at 80-28. As previously mentioned, PPI is generally payable in lump sums, as it was in Employee's case. Interestingly enough, in *Sumner*, the Alaska Supreme Court also seemed to recognize PPI as a lump sum impairment benefit when it contrasted PPI to other forms of compensation paid under §155 at 14 day intervals:

> An examination of workers' compensation law prior to the 1988 amendments provides one perspective on this issue. Section 190, providing for permanent partial disability payments, was markedly different than the present version. Depending on the injury, compensation was provided for a certain number of weeks at eighty percent of wages. Former AS 23.30.190(a)(1) (amended 1988) . . . . Therefore, PPD payments were made in installments, and the fourteen day period with the seven day penalty period applied. (citation omitted) (case under former statutory scheme noting that PPD payments in biweekly installments are the norm). *Therefore, there is a historical basis for applying the section 155 time periods to the current act. Quite possibly the legislature simplified section 190 without considering the payment ramifications, or whether section 155 still applies to PPI payments.*

Sumner at 631 (emphasis added). Employee cites *Sumner* as support for her position. It seems to do just that.

The challenge Employee presents here is, relevant Alaska Supreme Court decisional authority, such as *Vetter*, *Hewing* and *Hood*, all predate the 1988 legislative amendment to §190. However, an examination of the legislative history does reveal a very clear legislative intent in this regard. For examples, when Representative Wallis asked, at a House Finance Committee meeting on April 29, 1988, what the rationale was for adopting the method of determining compensation based on percent of disability rather than on loss of earnings, Representative Sund explained that it was a major change dealing with unscheduled injuries, and said the rest of the injuries are scheduled in an attempt to put more certainty into the system, and to decrease the amount of litigation. Director McClintock also added the intent was to take away the predictions of future loss of earnings.

Kevin Daugherty, an attorney for the Alaska State District Counsel of Laborers who participated on the Joint Labor-Management Task Force that worked on the revisions, explained the task force wanted to employ a system referred to as a whole person theory, since it thought that was a more humane approach to an injured worker. He explicitly stated, regardless of the worker's income, their injuries should be treated equally, and an intended benefit of the amendment was to reduce the amount of litigation by creating a more definitive, *i.e.* scheduled, benefit. Finally, Chancy Croft, who participated in creating the original workers' compensation statutes when he was a legislator, and who is a long-time workers compensation practitioner, definitively explained to the House Judiciary on April 15, 1988, "SB 322 completely does away with economic disability." Additionally, the legislative history is replete with references to changing the benefit to one based on the "whole man" or "whole person" theory for permanent partial compensation.

Incidentally, Employer cites the following from *Lowe's* and contends it appears to be binding precedent here: "There will be occasions, as AS 23.30.180(a) recognizes, when PPI is paid and the employee is subsequently found to be permanently, totally disabled. In such cases, the permanent total disability benefits must be reduced by the amount of the permanent partial disability (or PPI) award, adjusted for inflation." *Lowe's* at 12. However, the issue being decided at that portion of the Commission's analysis was whether an order to pay PPI concurrently with TTD was improper. A decidedly different issue is presented here. Therefore, it is thought Employer's cited quotation is dicta rather than a holding, which would create binding precedent on the issue presented in this decision. Like the legislative history of the 1988 amendment to §190, it is interesting to note *Lowe's* repeated use of physical impairment terminology, *i.e.* "whole employee," *id*. at 10, "whole person," *id*. at 11, and "whole man," *id*. at 11, fn 35, throughout its analysis.

Similarly, this decision is also mindful of *Wagner*, where the Alaska Supreme Court wrote:

> Interpreting the four types of workers' compensation as a consistent whole with a common objective favors the conclusion that simultaneous payment of PTD and PPD benefits should be avoided as redundant and to prevent overcompensation. In a similar vein, Professors Larson and Larson explain that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that,

> at a given moment in time, a person can be no more than totally disabled. The practical reason is that if he is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award, it may be more profitable for him to be disabled than to be well-a situation which compensation law always studiously avoids in order to prevent inducement to malingering. (citing Larson). The Board relied on this argument to rule in Stuckagain's favor. We also find it persuasive.

Wagner at 459. However, *Wagner* decided whether an employee could receive concurrent PPD and PTD payments for the same injury. Again, as with *Lowe's*, the issue presented here is different. Here, Employee is not seeking simultaneous payment of permanent partial and permanent total disability benefits. Her PPI payments began, and ended, a decade ago. Neither has she, nor will she, receive more than the maximum permanent total disability compensation. Employee will be compensated for her loss of earning potential as a result of her permanent total disability from October 8, 2012 continuing.

When one takes into account Larson's criteria: that an employee's earnings play no role in determining the amount of the PPI benefit, PPI's complete reliance on the schedule principle to determine the amount of the benefit, and the practice of "lump-summing" PPI, save for when an employee is in the reemployment process, PPI has all the characteristics a physical impairment benefit. The legislative history of the statute indicates this was no coincidence. It not only shows the Legislature was well informed at the time it was contemplating amending §190, but also shows the Legislature very conscientiously and deliberately decided to dramatically change the nature of the permanent partial benefit by completely removing any connection to a loss in earning capacity as a basis for the benefit. It appears the Legislature did not simply forget to amend the "permanent partial disability" language at §180 when it amended the benefit at §190; instead, it is thought the Legislature deliberately chose not to.

As Employee contends, under the former §180, it was logical for the Legislature to afford employers an ability to receive credit for past payments compensating for permanent loss of earning capacity against future payments for permanent loss of earning capacity, which she contends, is an "apples to apples" comparison. This would be the "double payment" to which Employer refers. However, since PPI is a physical impairment benefit, rather than an earnings impairment benefit, it truly is the "orange" Employee contends it to be. Therefore, on these bases,

it is not thought Employer should be entitled to reduce Employee's PTD by amounts of PPI previously paid. Nevertheless, ultimately, as Employer points out, 8 AAC 45.134(c) equates PPI with PPD for purposes of recoupment under §180 and it contends the regulation should be applied.

Employee, on the other hand, contends the regulation is unenforceable under AS 44.62.030 since it conflicts with the express terms of the statute upon which it is based. Regardless of this panel's thoughts on the merits of Employee's argument, jurisdiction over her issue here clearly rests with the court system and not with this tribunal. AS 44.62.300. In the meantime, since it is unknown on what authority an administrative body can refuse to apply its own regulation on what is clearly a substantive issue, it must be applied. Therefore, this decision will reluctantly order a reduction in PTD benefits by the amount of PPI previously paid. AS 23.30.180(a); 8 AAC 45.134(c).

3) How should amounts of previously paid PPI be adjusted for inflation?

When an injured worker becomes permanently and totally disabled, the Act requires any previously paid PPD benefits be adjusted for inflation when an employer seeks to recoup them. AS 23.30.180(a). Neither party opposes utilizing the consumer price index (CPI) as the basis for adjusting previously paid PPI for inflation, so it will employed here for that purpose. Although Employee urges calculation of the adjustment from some point in time other than when PPI was actually paid, this decision will decline to do so since she was able to enjoy the time value of those dollars from their dates of payment.

The parties agree Employer paid Employee PPI as follows: a lump sum PPI payment of $9,450 on February 10, 1998; an "advance" PPI payment of $3,105 on August 26, 2003; an advance PPI payment of $1,000 on May 6, 2005; and a lump sum PPI payment of $26,945 on July 15, 2005. The United States Department of Labor, Bureau of Labor Statistics' online CPI inflation calculator provides the following annually adjusted figures for the present day value of Employee's PPI payments: $13,790 for the February 10, 1998 payment of $9,450; $4,014 for the August 26, 2003 payment of $3,105; and $34,034 for the May 6, 2005 and July 15, 2005 payments of $27,945, rounded to the nearest whole dollar amount. Therefore, Employer will be afforded a $51,838 credit for PPI previously paid.

4) Should Employer be permitted to withhold greater than 20 percent under AS 23.30.155(j)?

The Act affords employers an opportunity to recover overpayments by withholding up to 20 percent from future compensation instalments. AS 23.30.155(j). Should an employer wish to withhold at a rate greater than 20 percent, it must first seek, and obtain, board approval. *Id.* Here, Employer seeks to withhold 50 percent from Employee's future PTD benefits, contending it will take "many years" to recoup its credits.

On one hand, given the above results of this decision, Employer's point is well taken. It may well take many years for Employer to recoup its credits, especially if it prevails on the parties' planned appeals. On the other hand, the parties only presented oral argument on the legal issues at hearing. There were no fact witnesses. Consequently, it is unknown what effects withholding compensation at a rate greater than 20 percent would have on Employee's ability to support herself. Consequently, the record is presently insufficient to fairly weigh the parties' competing interests in this regard. AS 23.30.001. Therefore, this decision will decline to order withholding at a rate greater than the statutory rate at this point in time. *Id.*

5) Is Employee entitled to interest on compensation awarded?

The law provides for an award of interest to compensate for the time value of money. AS 23.30.155(p). For the reasons set forth above, since Employee will not be awarded additional compensation, neither is she entitled to interest on compensation awarded.

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

The law provides for an award of attorney's fees upon successful prosecution of a claim. AS 23.30.145. In this case, Employee specifically seeks minimum statutory fees under §145(a). Since Employer controverted Employee's claim, Employee would otherwise be eligible for a fee award under this subsection. *Harnish.* However, for the reasons set forth above, Employee's attorney was unsuccessful in his efforts to secure additional compensation on his client's behalf and attorney's fees will not be awarded.

CONCLUSIONS OF LAW

1) The correct amount of Employer's social security offset is $493.57 per week.

2) Employer may reduce Employee's PTD benefits by amounts of PPI previously paid.

3) Amounts of previously paid PPI should be adjusted for inflation according to the Consumer Price Index and calculated from the dates of payment.

4) Employer should not be permitted to withhold greater than 20 percent under at this point in time.

5) Employee is not entitled to interest.

6) Employee is not entitled to attorney's fees.

ORDER

Employee's January 15, 2014 claim is denied.

Dated in Fairbanks, Alaska on October 3, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Robert Vollmer, Designated Chair

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Lake Williams, 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, PAMELA J. DARROW (fka CREEKMORE), employee / claimant; v. ALASKA AIRLINES, INC., self-insured employer / defendant; Case No. 199616590; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on October 3, 2014.

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Vera James, Office Assistant