

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DANNY SMITH, )  
)  
Employee, ) FINAL DECISION AND ORDER  
Respondent, )  
) AWCB Case No. 201605509  
v. )  
) AWCB Decision No. 17-0030  
MARK CARTER CONTRACTING INC., )  
) Filed with AWCB Anchorage, Alaska  
Employer, ) on March 20, 2017  
)  
and )  
)  
ALASKA NATIONAL INSURANCE, )  
)  
Insurer, )  
Petitioner. )

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Mark Carter Contracting, Inc. (Employer) and Alaska National Insurance Company's November 29, 2016 petition for an order allowing Employer to take a social security offset was heard in Anchorage, Alaska on March 15, 2017, a date selected January 10, 2017. Danielle Fidler appeared and represented Danny Smith (Employee). Ms. Fidler is Employee's guardian. Attorney Nora Barlow appeared and represented Employer. There were no witnesses. The record closed at the hearing's conclusion on March 15, 2017.

## ISSUE

Employer contends it is entitled to a Social Security offset. Employee does not object to the Social Security Offset.

### 1) Is Employer entitled to a Social Security offset?

Employer contends it overpaid Employee following October 2016, when Employee was found entitled to and received Social Security disability benefits. Employer requests an order permitting it to reduce Employee's future benefits by 20 percent until Employer recoups its overpayment.

Employee did not object to Employer's recovery of its overpayment. However, Employee wants to know the amount he will receive with reductions in his compensation for a Social Security offset and an additional 20 percent to reimburse Employer for its overpayment.

**2) Is Employer entitled to withhold 20 percent of Employee's future compensation to reimburse Employer for permanent total disability benefit overpayments?**

FINDINGS OF FACT

- 1) On April 6, 2016, while working for Employer, a tree fell on Employee. The tree hit him from behind, pinned him on top of a stump, and knocked Employee's hard-hat off, injuring his head. A cervical vertebra fractured, Employee's ribs broke, and his lung punctured. (First Report of Occupational Injury, April 11, 2017.)
- 2) On April 7, 2016, Employer started paying Employee temporary total disability (TTD) benefits. Employee's compensation rate was \$568.80 based upon gross weekly earnings of \$896.00 and his status as single with one dependent. (Initial Payment Report, April 20, 2016.)
- 3) On April 28, 2016, Employer adjusted Employee's compensation rate effective April 6, 2016, to \$607.10 per week. Employee's status is single with one dependent. His reported gross weekly earnings remained \$896.00. (Change in Benefit Amount Report, April 28, 2016.)
- 4) On June 8, 2016, Employee's benefit type changed from TTD to permanent total disability (PTD) benefits. (Change in Benefit Type Report, June 8, 2016.)
- 5) On August 6, 2016, the Social Security Administration (SSA) provided Employee notice he was entitled to monthly disability benefits of \$1,548.00 beginning October 2016. The SSA found Employee's disability began on April 6, 2016, his injury date while working for Employer. (SSA Notice of Award, August 6, 2016.)
- 6) On November 29, 2016, Employer petitioned for a Social Security offset under AS 23.30.225(b) and requested permission to recoup overpayment of benefits since October

2016, by reducing Employee's future PTD benefits by 20 percent until it recoups the overpayment. Employer filed the SSA's August 6, 2016 "Notice of Award." Employer computed the Social Security offset reduction:

|  |            |
|--|------------|
| a. Employee's gross weekly at the time of injury                 | \$ 896.00  |
| b. Social Security monthly benefit                               | \$1,548.00 |
| c. Weekly Social Security benefit (\$1,548 x 12 months/52 weeks) | \$ 357.23  |
| d. Weekly Workers' Compensation PTD benefits                     | \$ 607.10  |
| e. Weekly WC and SS benefit                                      | \$ 964.33  |
| f. Maximum combined WC and SS benefit - 80% of \$896.00          | \$ 716.80  |
| g. Social Security offset [e - f]                                | \$ 247.53  |

(Petition, November 29, 2016; Memorandum in Support of Petition for Social Security Offset, November 29, 2016.)

7) On January 10, 2017, Employer filed a hearing request for its November 29, 2016 petition for a Social Security offset. (Affidavit of Readiness for Hearing, January 10, 2017.)

#### PRINCIPLES OF LAW

##### **AS 23.30.155. Payment of compensation.**

....

(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. . . .

AS 23.30.155(j) permits withholding up to 20 percent of future compensation installments and can be invoked at an employer's discretion. *Davenport v. K&L Distributors, Inc.*, AWCB Decision No. 92-0180 (July 22, 1992).

##### **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. . . .

*Stanley v. Wright-Harbor*, AWCB Decision No. 82-0039 (February 19, 1982) *aff'd* 3 AN-82-2170 Civil (Alaska Super. Ct. May 19, 1983), established guidelines for calculating an employer's Social Security offset under AS 23.30.225(b) and held an offset must be based upon an employee's initial Social Security entitlement. Social Security offsets are calculated as follows:

- A. Determine employee's Gross Weekly Earnings (GWE)
- B. From GWE, determine Weekly Compensation Rate for worker's compensation (Weekly WC Rate)
- C. Calculate employee's Weekly Social Security benefit by multiplying monthly payment x 12 and ÷ 52 (Weekly SS Benefit)
- D. Add Weekly WC Rate + Weekly SS Benefit [B + C]
- E. Calculate 80% of GWE [80% of A]
- F. Calculate Social Security Offset [D – E]

*Id.*

**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 Administrations 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 dependant'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.

In *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150 (Alaska 1994), the Supreme Court held "average weekly wages" as a benefit cap under AS 23.30.225(b) is synonymous with 'gross weekly earnings' under AS 23.30.220, insofar as both terms represent a measure of historical earning capacity." *Id.* at 156.

#### ANALYSIS

##### **1) Is Employer entitled to a Social Security offset?**

An employer seeking a Social Security offset to reduce an employee's weekly compensation must first obtain an order before it is entitled to offset its compensation liability against an employee's Social Security disability benefit entitlement. 8 AAC 45.225(b). Employer has complied with the required procedures for its Social Security offset request. *Id.* Employer obtained a copy of the SSA's Notice of Award showing Employee receives monthly Social Security disability benefits of \$1,548.00 and his initial entitlement was October 2016. 8 AAC 45.225(b)(1)(A) and (C). The award notice states Employee is receiving Social Security disability benefits for his disability that started on April 6, 2016, the day of Employee's work injury. 8 AAC 45.225(b)(1)(B). Employee is single and has no dependents. 8 AAC 45.225(b)(1)(D). Employer correctly calculated the \$247.53 Social Security offset using Employee's initial monthly entitlement and showed how the reduction was calculated. 8 AAC 45.225(b)(2) and (3). Employer filed its affidavit of readiness for hearing on January 10, 2017. 8 AAC 24.225(4).

Employer has met 8 AAC 45.225(b)'s criteria to reduce Employee's weekly compensation under AS 23.30.225(b). Employee does not object to Employer's Social Security offset. Employer is

entitled to take a weekly \$247.53 Social Security offset both prospectively and retroactively to October 1, 2016, the date Employee's entitlement began. Employee's compensation rate reduced by the Social Security offset is \$359.57.

**2) Is Employer entitled to withhold 20 percent of Employee's future compensation to reimburse Employer for permanent total disability benefit overpayments?**

Without an order, an employer can withhold up to 20 percent of future compensation payments if it has made an overpayment. AS 23.30.155(j). If an employer wishes to withhold more than 20 percent, an order is required.

Employee's entitlement to Social Security disability benefits started on October 1, 2016, and he continues to receive them. Since October 1, 2016, Employee has received PTD and Social Security disability benefits. From October 1, 2016 to March 20, 2017, a 28-week period, Employer has been overpaying Employee \$247.53 per week, the amount of its Social Security offset. Employee has received an overpayment totaling \$6,930.84 ( $\$247.53 \times 28 \text{ weeks} = \$6,930.84$ ).

Employer has not requested to withhold more than 20 percent of Employee's future unpaid compensation payments. Therefore, an order is not necessary for Employer to exercise its entitlement to withhold 20 percent of each unpaid compensation installment. AS 23.30.155(j). Employee's weekly compensation rate with the Social Security offset is \$359.57 ( $\$607.10 - \$247.53 = \$359.57$ ). Employer is entitled to withhold 20 percent of \$359.57 each week until Employer has recouped its \$6,930.84 overpayment. The amount Employer is entitled to withhold is \$71.94 ( $\$359.57 \times .20 = \$71.94$ ). On a biweekly basis, the amount withheld will be \$143.88.

Employee is advised his compensation rate with both Social Security offset and Employer's 20 percent reimbursement on a weekly basis is \$287.63. On a biweekly basis, Employee will receive \$575.26 in PTD benefits. Once Employer has recouped its overpayment, Employee's weekly PTD compensation rate will return to \$359.57 and he will receive \$719.14 on a biweekly basis.

CONCLUSIONS OF LAW

- 1) Employer is entitled to a Social Security offset.
- 2) Employer is entitled to withhold 20 percent of Employee's future compensation to reimburse Employer for permanent total disability benefit overpayments.

ORDER

- 1) Employer is entitled to take a \$247.53 offset retroactively to October 1, 2016.
- 2) Employer has made a \$6,930.84 overpayment and is entitled to reimbursement.
- 3) Employer may withhold no more than 20 percent of Employee's future compensation payments due Employee.

Dated in Anchorage, Alaska on March 20, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/  
Janel Wright, Designated Chair

/s/  
Donna Phillips, 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 DANNY SMITH, employee / respondent; v. MARK CARTER CONTRACTING, INC., employer; ALASKA NATIONAL INSURANCE CO., insurer / petitioners; Case No. 201605509; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March 20, 2017.

/s/

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Nenita Farmer, Office Assistant 1