ALASKA WORKERS' COMPENSATION BOARD

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

ANDY JAMES, Employee, Claimant, v. NORTHERN CONSTRUCTION, Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201500569 AWCB Decision No. 17-0044 Filed with AWCB Anchorage, Alaska on April 20, 2017

Andy James' (Employee) January 27, 2017 petition was heard on March 21, 2017 in Anchorage, Alaska, a date selected on February 7, 2017. Attorney Eric Croft appeared and represented Employee. Attorney Adam Sadoski appeared and represented Northern Construction and its insurer (Employer). There were no witnesses. The record closed on March 21, 2017.

ISSUES

Employee contends Employer improperly adjusted his weekly compensation rate when he relocated to Salmon, Idaho. He contends Employer used a lower cost of living adjustment (COLA) ratio for a community farther away from his home than the nearest community on the division's COLA listings. He seeks an order restoring the correct rates for two separate periods and awarding past underpaid disability benefits, plus interest.

Employer contends it used the correct COLA for reducing Employee's compensation rate. It contends it used road miles to determine the distance to the nearest COLA adjusted city on the division's COLA list. Employer contends as there was no underpayment, no past disability benefits or interest are due. It seeks an order dismissing Employee's petition.

1) What are Employee's proper COLA compensation rates?

Employee contends he gave Employer all the information necessary for it to calculate the COLA ratio properly, but Employer failed to readjust Employee's weekly compensation rate. He requests an unspecified penalty on unspecified benefits.

Employer did not directly address Employee's penalty claim. This decision presumes Employer opposes the penalty request.

2) Is Employee entitled to a penalty?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On December 31, 2014, Employee got hurt on the job while working for Employer. (Report of Occupational Injury or Illness, January 1, 2015).

2) The parties agree Employee's earnings resulted in his Alaska weekly compensation rate being the maximum, $1,143 per week. (Andy James' Brief on Petition to Restore Appropriate Compensation Under the Act, March 10, 2017, at 2; Employer's Hearing Brief in Opposition to Employee's Petition to Restore Compensation Rate, March 10, 2017, at 2).

3) Employee left Alaska and moved to Salmon, Idaho on January 5, 2015. Employer continued to pay Employee disability at $1,173 per week for over two years. (Parties hearing statements).

4) Employer never controverted Employee's right to the maximum Alaska compensation rate. (ICERS database, accessed April 19, 2017).

5) Effective January 1, 2017, Employer adjusted Employee's weekly compensation rate using the COLA ratio for Idaho Falls, Idaho. Using this 62.77 ratio, Employer reduced Employee's weekly disability rate from $1,143 to $717.46 and claimed a $41,364.07 overpayment. Further, Employer began recovering the alleged overpayment by purportedly withholding 20 percent ($143.49) from

Employee's ongoing bi-weekly disability checks. Thus, combining the ongoing COLA and retroactive overpayment reductions, Employer professedly reduced Employee's weekly compensation rate from $1,143 to $573.97 per week. (Employer's Hearing Brief in Opposition to Employee's Petition to Restore Compensation Rate, March 10, 2017, at 3; observations).

6) On January 18, 2017, Employer notified Employee for the first time about this weekly compensation rate COLA adjustment and alleged overpayment. (Letter, January 18, 2017; Employer's Hearing Brief in Opposition to Employee's Petition to Restore Compensation Rate, March 10, 2017, letter at Exhibit 2).

7) On January 19, 2017, Croft set forth Employee's position and evidence on the COLA adjustment and asked Employer to reconsider its position. (Letter, January 19, 2017).

8) Assuming Employee's relevant gross weekly wage was $1,995.96, and he is married with three children, his spendable weekly wage is $1,639.38 and his weekly disability rate would be the maximum $1,143. (Division's online Benefit Calculator, computed April 19, 2017).

9) Employer reported two $207.75 overpayment recoveries in this case, one on January 12, 2017 and one on February 1, 2017. (ICERS Recovery Segment, accessed April 19, 2017).

10) On January 27, 2017, Employee filed and served a petition for an order restoring Employee's compensation rate. He contends Employer improperly used the COLA ratio from Idaho Falls to lower his weekly compensation rate. Employee contends Employer should have used the COLA ratio from Bozeman, Montana. Additionally, Employee contends Employer used the wrong methodology. He contends Employer should have multiplied the proper COLA ratio times his spendable weekly wages calculated, according to his methodology, under AS 23.30.185. He concludes, had Employer done so, Employee's rate would have remained at his $1,143 per week maximum. (Petition to Restore Appropriate Compensation Under the Act, January 27, 2017).

11) Employer contends it used the proper COLA ratio from the nearest listed community and properly took the appropriate 20 percent offset. (Employer's Hearing Brief in Opposition to Employee's Petition to Restore Compensation Rate, March 10, 2017).

12) The parties agree the "line of sight" distance between Salmon and Bozeman is less than the "line of sight" distance between Salmon and Idaho Falls. They also agree the driving distance between Salmon and Bozeman is more than the driving distance between Salmon and Idaho Falls. (Parties' hearing statements).

13) The parties agree 8 AAC 45.138's reference to "nearest" refers to "distance" between two locations. Employee contends this creates a "bright line" rule defining "pure distance" in straight-line mileage from one point to another. He contends injecting driving distances defeats efficiency and clarity while "pure distance" is easily verifiable. Employer contends 8 AAC 45.138 refers to "practical distance," which takes into account geography, which may interfere with "line of sight" travel between two points. Employer suggests the regulation requires examining what other economic similarities "connects two cities" to determine the "closest" COLA ratio. In this regard, Employer contends Idaho Falls "more represents" Salmon's economy then does Bozeman. (*Id.*).

14) Effective January 1, 2014 through December 31, 2016, Idaho Falls' COLA ratio is 64.77. Bozeman's COLA ratio is 76.31. (Bulletin 14-01, January 5, 2015).

15) Effective January 1, 2017 through December 31, 2019, Idaho Falls' COLA ratio is 62.77. Bozeman's COLA ratio is 77.47. (Bulletin 16-05, November 29, 2016).

16) Actual weekly compensation rates for disability benefits cannot be determined through resort to the Act alone. The Act is used to determine an injured worker's gross weekly earnings and that figure is compared to the division's published Rate Tables, or since approximately 2015, the division's online Benefit Calculator. The Rate Tables and online calculator are devices that calculate weekly compensation rates based on predetermined spendable weekly wages (net wages after tax deductions) built into the tables or calculator for a given gross weekly earning, taking into account dependents. (Experience; judgment; observations).

17) Other Act provisions relating to compensation rates set minimum or maximum rates and adjust rates according to a recipient's residence or other factors. (*Id.*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> > (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 board may base its decision on not only 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).

In *Wilson v. Erickson*, 477 P.2d 998, 1001 (Alaska 1970), the Alaska Supreme Court noted, "the whole purpose of the workmen's compensation informal procedures is to get away from cumbersome procedures and reach a correct decision by the shortest and quickest possible route consistent with due process."

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .
>
> (h) The department shall adopt rules for all panels . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
>
> **AS 23.30.155(j). Payment of compensation**. . . .
> . . . .
>
> (e) if any installment of compensation payable without an award is not paid within seven days after becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. . . .
> . . . .
>
> (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. . . .
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

In *Phillips v. Nabors Alaska Drilling, Inc*., 740 P.2d 457 (Alaska 1987), an oil field worker provided earnings information to his workers' compensation adjuster to justify a compensation rate increase. The employer used a different statutory sub-section to calculate the rate, requiring the injured worker to file a claim. The hearing resulted in the higher rate, for which the employee had previously provided adequate evidence. The board also awarded a penalty. On appeal, *Phillips* decided, to impose a penalty, the court must find the statute required an employer to pay a higher benefit. The statute in question did not do so. Further, *Phillips* held the applicable statute

authorized the board, not the employer, to make certain findings. *Phillips* held it was unfair to impose a penalty under these circumstances and reversed the board's penalty award.

In *Harp v. ARCO Alaska, Inc*., 831 P.2d 352, 358 (Alaska 1992), the Alaska Supreme Court said in reference to a penalty:

> A controversion notice must be filed in good faith to protect an employer from imposition of a penalty. In *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37 (Alaska 1974), this court wrote:
>
> > In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed.

AS 23.30.175. Rates of compensation. . . .
. . . .

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

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

(5) application of (1)-(4) of this subsection may not result in raising a recipient's weekly compensation rate to an amount that exceeds the weekly compensation rate that the recipient would have received if the recipient had been residing in the state.

(c) The department shall provide by regulation for the determination and comparison of living costs for this state and the other areas in which recipients reside and for the redetermination and comparison of these costs every three years.

In *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264 (Alaska 1984), the Alaska Supreme Court addressed a class-action suit against a workers' compensation insurance company. The claimants alleged AS 23.30.175's weekly compensation rate reduction was unconstitutional because it violated an injured worker's right to travel interstate and denied equal protection to similarly situated injured workers. *Brown* addressed this statute before the division had an independent

company provide regular COLA comparisons, and stated, "[W]e cannot say that a worker has an inherent right to benefits set in disregard of his her economic environment." *Id*. at 271.

In *Ranney v. Whitewater Engineering*, 122 P.3d 214 (Alaska 2005), an unmarried woman sought death benefits when her fiancé died in a work accident. The claimant argued the court should ignore the distinction between married and unmarried "wives." The court noted the Act's "broader purpose is to provide a system of compensation that is 'quick, efficient, fair and predictable' and is not unreasonably expensive for employers." *Id*. at 220. *Ranney* said the legislature could have adopted a system requiring the board to scrutinize each relationship on an individual basis to determine whether death benefits were awardable. Instead, *Ranney* found the legislature declined to require "increased precision" through "an *ad hoc* decision in all cases" because it would be too "administratively costly." The legislature instead "engaged in . . . traditional . . . line drawing." *Id*. at 221. In *Ranney*, the legislature drew the line at "marriage." *Ranney* concluded:

> As with all line drawing, particularly were social welfare legislation is involved, the practical point where the line is drawn may seem arbitrary, and there may be 'close cases at the margins' (citation omitted). But this does not mean that line drawing is impermissible. This kind of line drawing -- which involves balancing the benefits of greater precision against its costs in determining how the workers' compensation system can best provide support for workers and their families -- is within the legislature's competence. *Id*.

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. . . .

> **8 AAC 45.138. Cost-of-living adjustment**. . . .
>
> (b) At the board's direction, the commissioner will contract, in accordance with AS 36.30, with an organization to perform the cost-of-living surveys. . . .
> . . . .
>
> (d) If the cost-of-living adjustment under AS 23.30.175 and this section results in a compensation rate that exceeds the maximum weekly rate provided in AS 23.30.175, the recipient's compensation rate must be reduced to the maximum weekly rate in effect under AS 23.30.175 at the time of injury.

> (e) If the recipient does not reside in this state but resides in the United States, the cost-of-living ratio must be determined by using the ratio of the published cost of living for the area nearest where the recipient resides and the cost of living for this state. If the recipient resides an equal distance between two areas for which cost-of-living surveys have been published, the ratio that results in the highest compensation rate must be used. . . .

ANALYSIS

1) What are Employee's proper COLA compensation rates?

The legislature's mandate for interpreting the Act is to ensure its application results in "quick, efficient, fair, and predictable delivery of indemnity" benefits to injured workers "at a reasonable cost" to employers. AS 23.30.010(1); *Wilson*. While litigation is necessary in some cases to ensure fairness, in general litigation is not quick, efficient or predictable. It is often expensive. Therefore, an optimal approach to resolving workers' compensation disputes is to have summary and simple processes and procedures. AS 23.30.005(h); *Wilson*. Interpreting the Act and regulations to draw "bright line" rules in so far as possible furthers the legislature's intent. *Ranney*.

If an injured worker leaves Alaska and relocates "Outside," his weekly compensation rate is subject to a possible COLA. AS 23.30.175(b). His weekly rate may increase or decrease, but it can never increase above the Alaska maximum rate. AS 23.30.175(b)(5); 8 AAC 45.138(d). The parties agree Employee, while in Alaska, was entitled to the maximum weekly $1,143 rate. Then he moved to Salmon in January 2015, less than a week following his work injury. Employer, who paid him bi-weekly disability checks for over two years, knew he relocated. *Rogers & Babler*. Nevertheless, not until January 2017, did Employer select a COLA location it determined was nearest to Salmon in "practical distance." Employer contends "practical distance" takes into account geographical boundaries and similar community economic standards. "Practical distance" is essentially driving distance between two points combined with economic "closeness." Employee on the other hand contends the Act and regulations refer to distance in "line of sight" miles, similar to "as the crow flies."

The legislature gave the Alaska Department of Labor & Workforce Development an assignment to promulgate regulations determining and comparing the cost of living for Alaska with other areas in

the United States where workers' compensation recipients who leave Alaska may reside. AS 23.30.175(c). In conformance with this directive, the division publishes a chart every three years prepared by an agency that determines costs-of-living in various locales. 8 AAC 45.138(b). If an injured worker receiving disability benefits leaves Alaska and moves to a city or town listed on the COLA chart, there is usually no dispute and the employer adjusts his weekly compensation rate up or down accordingly. *Rogers & Babler*. When the injured worker moves to an unlisted city or town, 8 AAC 45.138(e) requires the employer to use the published COLA ratio "for the area nearest where the recipient resides." If the recipient resides "an equal distance" between two areas on the published COLA survey, the employer must use the ratio resulting in the highest rate. *Id*. Neither the Act nor the regulation define "nearest" or "distance." *Rogers & Babler.*

Salmon is a small town not on the COLA chart. Both parties agree Bozeman is closer to Salmon than is Idaho Falls by "line of sight." Employer's suggested "practical distance" calculation is not a term used in the Act or regulations. Using "practical distance" as the COLA measuring stick inserts vague economic variables into the calculation and injects delay, inefficiency and unpredictability into what should be a simple and summary process and procedure to deliver indemnity benefits to injured workers at a reasonable cost to employers. AS 23.30.001(1); AS 23.30.005(h); *Wilson*. Employer's reliance on *Brown* is inapplicable, as *Brown* addressed this statute from a constitutional perspective, which is not an issue here.

By contrast, Employee's "bright line" direct, "pure distance" or "line of sight" interpretation better follows the legislature's intent and makes calculating distances between two points more efficient, and more predictable. Employee's interpretation is more consistent with getting "away from cumbersome procedures" and reaching "a correct decision by the shortest and quickest possible route consistent with due process." *Wilson*. His interpretation will also result in less litigation and thus less cost to employers. AS 23.30.001(1). Furthermore, the Alaska Supreme Court in *Ranney* suggested factfinders should not have to decide cumbersome, administratively costly *ad hoc* issues. Using Employer's "practical distance" opens up hearings to myriad "practical" and "distance" issues. Therefore, as Bozeman is nearest in direct, "line of sight" distance from Salmon than is Idaho Falls, Employer erred when it selected Idaho Falls as the proper COLA ratio. This decision will direct Employer to use Bozeman's 76.31 COLA ratio for Employee's disability benefits from

January 5, 2015 through December 31, 2016, and its 77.47 COLA ratio thereafter, subject to future revisions as the COLA ratios may change.

Notwithstanding Employer's ratio errors, Employee contends his weekly compensation rate should remain significantly higher notwithstanding the COLA. He contends AS 23.30.175(b)(1) requires Employer to multiply his "weekly rate of compensation" calculated "under . . . 23.30.185" times the applicable COLA ratio to derive the appropriate compensation rate while Employee lives in Salmon. Since AS 23.30.185 references an injured worker's "spendable weekly wage," Employee reasons AS 23.30.175(b)(1) requires Employer to multiple Bozeman's 76.31 or 77.47 COLA rates times Employee's "spendable weekly wage" rather than times his weekly compensation rate. Using Employee's method and assuming his spendable weekly wage is $1,639.38, his weekly COLA rates would be $1,251.01 and $1,270.02, respectively, and both would remain at the maximum $1,143 ($1,639.38 x 76.31 = $1,251.01 = $1,143 maximum under §175(b)(3); $1,639.38 x 77.47 = $1,270.02 = $1,143 maximum under §175(b)(3)).

Employee's novel approach overlooks the requirement in AS 23.30.185 that says "80 percent" of Employee's spendable weekly wage is the weekly temporary disability amount to which Employee is entitled. In other words, 80 percent of Employee's spendable weekly wage is his weekly compensation rate, subject to the maximum limit. Therefore, one derives the applicable COLA compensation rate by multiplying the original Alaska compensation rate times the COLA ratio. AS 23.30.185 gives the basic "calculation" for Employee's weekly compensation rate, but neither it nor any other Act provision or regulation provides the spendable weekly wage figure, or the 80 percent calculation. A party derives those figures currently by using the division's online Benefit Calculator. In prior years, published Rate Tables provided these numbers. *Rogers & Babler*. Therefore, though it used the wrong ratios, Employer's methodology is correct. Employee's compensation rates with COLA for Salmon are $872.22 from January 5, 2015 through December 31, 2016 (80 percent of his spendable weekly wages reduced to the maximum $1,143 x 76.31 = $872.22).and $885.48 from January 1, 2017 and continuing (80 percent of his spendable weekly wages reduced to the maximum $1,143 x 77.47 = $885.48). Employee is entitled to these rates.

As Employee raised no equitable issues against Employer's recently requested overpayment and its right to recover it, Employer has an overpayment and may reduce Employee's applicable weekly rates by 20 percent to recover its overpayment. AS 23.30.155(j). This decision will direct Employer to recalculate its overpayment in accordance with this decision. Employer's calculations and the division's Payment Recovery database do not correlate. Thus, it is unclear how much Employer has recovered to date. To the extent Employer has recovered more than 20 percent based on the weekly compensation rates established in this decision it shall pay Employee the difference, plus interest. AS 23.30.155(p). However, there remains an overpayment. Therefore, from any over-recovery Employer shall pay Employee, Employer may withhold 20 percent and may withhold 20 percent from any interest owed Employee on its over-recovery. AS 23.30.155(j).

2) Is Employee entitled to a penalty?

Employee requested an unspecified penalty on unspecified benefits. His evidence and argument on this issue were inadequate. *Rogers & Babler*. AS 23.30.155(e) is the only statute potentially applicable to his penalty claim. It provides for a penalty on benefits payable "without an award" that are not paid when due. In some instances, a penalty under this subsection is awardable if an employer has no basis in law or fact upon which to controvert an injured worker's benefits, but controverts them anyway. *Harp*. Employer never controverted Employee's right to the maximum weekly compensation rate. Rather, Employer eventually decided to apply AS 23.30.175 and take its mandated COLA from Employee's past and ongoing disability payments. Though Employer used the wrong city and COLA ratios, Employee failed to explain on what grounds this should result in an awardable penalty. On these facts and arguments, this decision will not grant Employee's penalty claim. *Phillips*.

CONCLUSIONS OF LAW

1) Employee's proper COLA compensation rates are $872.22 and $885.48.
2) Employee is not entitled to a penalty.

ORDER

1) Employee's January 27, 2017 petition is granted in part and denied in part.
2) The COLA ratios for Bozeman, Montana shall be applied to Employee's weekly disability benefits so long as he resides in Salmon, Idaho, in accordance with this decision.
3) Employer shall recalculate Employee's disability benefits retroactively applying the Bozeman COLA ratios in accordance with this decision.
4) Employee's request for a weekly compensation rate based on multiplying his spendable weekly wages by the applicable COLA ratios is denied.
5) To the extent Employer has recovered more than 20 percent of its overpayment based on the rates established in this decision it shall pay Employee the difference, plus interest.
6) As there remains an overpayment, Employer may withhold 20 percent from any over-recovery Employer shall pay Employee under Order (5), above, and may also withhold 20 percent from any interest owed Employee on any over-recovery.

Dated in Anchorage, Alaska on April 20, 2017.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Patricia Vollendorf, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from the date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of Andy James, employee / claimant v. Northern Construction, employer; Liberty Northwest Insurance Corporation, insurer / defendants; Case No. 201500569; 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 April 20, 2017.

_____/s/_____
Nenita Farmer, Office Assistant