

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSEPH TRAUGOTT,)
Employee,)
Claimant,) FINAL DECISION AND ORDER ON
RECONSIDERATION
v.)
ARCTEC ALASKA,) AWCB Case No. 201309316
Self-Insured Employer,) AWCB Decision No.17-0113
Defendants.)
) Filed with AWCB Fairbanks, Alaska
) on September 22, 2017
)

ARCTEC Alaska's September 11, 2017 petition for reconsideration of *Joseph Traugott v. ARCTEC Alaska*, AWCB Decision No. 17-0103 (August 29, 2017) (*Traugott IV*) was heard on the written record on September 21, 2017 in Fairbanks, Alaska. This hearing date was selected on September 19, 2017 on the board's own motion. Attorney Eric Croft represented Joseph Traugott (Employee). Attorney Robert Bredesen represented ARCTEC Alaska (Employer). The record closed at the hearing's conclusion on September 21, 2017.

ISSUES

Employer contends *Traugott IV* should be amended to address two matters: Employer's unopposed petition for a Social Security offset, and resolution of a difference in Employee's weekly compensation rate as calculated by the parties.

Under the law, the time in which the board may address a petition for reconsideration expires before an opposing party's answer to the petition is due. Consequently, Employee had not yet

responded to Employer's petition at the time of the hearing. Both matters, however, are procedural, and were unopposed by Employee at hearing.

1. ***Should Traugott IV be modified to include a determination of Employee's weekly compensation rate, and, if so, what is that rate?***
2. ***Should Traugott IV be modified to include a determination of Employer's entitlement to a Social Security offset, and, if so, what is the amount of the offset?***

FINDINGS OF FACT

All findings in *Traugott IV* are incorporated herein. The following facts are reiterated from *Traugott IV*, or are established by a preponderance of the evidence:

1. Employee's claims were heard initially heard on February 18, 2016, but during deliberations the panel concluded it lacked sufficient understanding of the medical records to properly weigh the medical testimony. As a result, *Traugott I* ordered a second independent medical evaluation (SIME). (*Traugott IV*).
2. The issues for the February 18, 2016 hearing were set at the January 8, 2016 prehearing. The prehearing conference summary states Employee's claims would be heard on February 18, 2016. It does not identify specific issues. (Prehearing Conference Summary, January 8, 2016). While Employee's July 16, 2015 and November 10, 2015 claims seek temporary total disability (TTD) benefits, neither request a compensation rate adjustment. (Claims, July 16, 2015 and November 10, 2015; Observation). Neither party raised the issue of a Social Security offset or compensation rate at the February 18, 2016 hearing (Hearing Briefs, February 16, 2016).
3. The SIME ordered by *Traugott I* was performed on January 5, 2017. (SIME Report, January 5, 2017). A prehearing was held on March 8, 2017 to schedule the continuation of the hearing, but the issues for hearing were not changed. (Prehearing Conference Summary, March 8, 2017).
4. On June 8, 2017, Employer filed a petition for a Social Security offset. Employer's petition includes a copy of the Social Security award letter finding Employee was entitled to Social Security disability beginning in January 2014. The petition does not show how the reduction to Employee's workers' compensation benefits would be computed. (Petition, June 8, 2017).

5. On June 20, 2017 Employee's attorney sent an email to Employer's attorney and the Board regarding the issues for the July 6, 2017 hearing. Employee's attorney stated one of the issues was:

TTD Compensation rate and SSD offset. The parties agree that an SSD offset is appropriate from the date of SS award at the original rate. The parties are not raising timeliness challenges, that Mr. Traugott waited too long to file for SSD or that the insurance company waited too long to raise the offset issue. The parties expect to present a stipulated compensation rate with SSD offset to the Board at hearing. (Employee Email, June 20, 2017).

6. In its brief for the July 6, 2017 hearing, Employer asserted Employee's gross weekly earnings were \$1,531.23, and his weekly compensation rate for TTD was either \$998.30 or \$998.45, but "the parties appear to have agreed." (Employer's Hearing Brief, July 3, 2017).
7. The Division's Rate Table for 2013 shows a weekly benefit of \$998.30 for an injured worker who is married with two dependents and a gross weekly wage of \$1,531.00. The Division's online benefit calculator shows the weekly benefit for an employee who is married with two dependents with a gross weekly wage of \$1,531.23 is \$998.45. (Observation).
8. Employee's claims were heard on July 6, 2017, with closing arguments on July 24, 2017. (Record). At the inception of the hearing, the designated chair asked the parties to clarify what issues remained to be decided. Employer's attorney stated that if there was an award of benefits, the parties needed the compensation rate set, both pre- and post- Social Security disability offset. Employee's attorney stated they had stipulated to it post-offset, and were within fifteen cents pre-offset. (Hearing Transcript, July 6, 2017).
9. At closing arguments on July 24, 2017, Employer's attorney stated "[T]here's also as listed in my brief a Social Security disability offset issue, as well, and I believe we've agreed on, on those numbers." "We'll pay the extra fifteen cents per week. There's no need for a ruling on that." (Hearing Transcript, July 6, 2017).
10. *Traugott IV*, which was issued on August 29, 2017, held Employee's work for Employer was the substantial cause of his osteomyelitis, entitling him to medical treatment and disability benefits. It did not address either Employee's compensation rate or the Social Security offset. (*Traugott IV*).
11. Despite the fact that 8 AAC 45.225(b)(5) indicates an employer cannot take a Social Security offset until there has been a board order granting the reduction, parties occasionally stipulate to both the employer's entitlement to the offset and the amount. (Observation, Experience).

12. On September 11, 2017, Employer filed a petition for reconsideration of *Traugott IV*. Employer asked that the decision be revised to include a memorialization of the parties' stipulation regarding Employee's compensation rate and to address Employer's petition for a Social Security offset.

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

(3) this chapter may not be construed by the courts in favor of a party;

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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).

In *Smith v. University of Alaska, Fairbanks*, 172, P.3d 782, 791 (Alaska 2007) the court stated:

The compensation process is not a game of "say the magic word," in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey, and for this purpose there are more realistic approaches than a mere appeal to the dictionary. (*quoting* 8 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 130.06[2][e] (2006)).

AS 23.30.130. Modification of awards.

(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215,

whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

(b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

AS 44.62.540. Reconsideration.

(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.

AS 23.30.110. Procedure on claims.

(a) . . . the board may hear and determine all questions in respect to the claim.

In *Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270 (Alaska 1999), the Supreme Court held the board “need only make findings with respect to issues that are both material and contested.” “There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff’s cause of action or the defendant’s defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.” *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951); *see also, Blumenstein v. Phillips Ins. Center, Inc.*, 490 P.2d 1213, 1223 (Alaska 1971).

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.

8 AAC 45.050. Pleadings

....

(f) Stipulations.

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts.

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.

(4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

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.

ANALYSIS

1. Should Traugott IV be modified to include a determination of Employee's weekly compensation rate, and, if so, what is that rate?

There appears to be no dispute on this issue. In its July 3, 2017 hearing brief, Employer noted Employee's compensation rate was either \$998.30 or \$998.45, a fifteen cent difference. At the July 7, 2017 hearing, Employee's attorney stated they had stipulated to the compensation rate post-Social Security offset, but were still fifteen cents apart pre-offset. At the closing arguments on July 24, 2017, Employer agreed to pay the extra fifteen cents. By the parties' agreement, Employee's TTD compensation rate is \$998.45 per week, and *Traugott IV* will be modified to include an order to that effect.

2. Should Traugott IV be modified to include a determination of Employer's entitlement to a Social Security offset, and, if so, what is the amount of the offset?

In his June 20, 2017 email, Employee's attorney agreed a Social Security disability offset was appropriate from the date of the award. Employer's entitlement to a Social Security disability offset is not in dispute, and *Traugott IV* will be modified to include an order stating Employer is

entitled to a Social Security offset since January 2014, the date he became eligible for the disability benefits. While the parties appear to agree on the amount of the offset, and thus the amount of Employee's reduced weekly compensation rate, that figure was not include in Employer's June 8, 2017 petition and is not in the board's file. Absent that information, *Traugott IV* will not be amended to include a finding as to the amount of the Social Security offset. If the parties are indeed in agreement on the amount of the offset, a stipulation requesting the board confirm that amount will quickly resolve the matter.

CONCLUSIONS OF LAW

1. *Traugott IV* will be modified to include a determination that Employee's weekly compensation rate is \$998.45.
2. *Traugott IV* will be modified to include a determination that Employer is entitlement to a Social Security offset, but *Traugott IV* will not be modified to state the amount of the offset.

ORDER

1. *Traugott IV* is modified to include an additional order stating: Employee's weekly compensation rate is \$998.45.
2. *Traugott IV* is modified to include an additional order stating: Employer is entitled to a Social Security disability offset beginning January 2014.
3. In all other respects, *Traugott IV* remains as issued.

Dated in Fairbanks, Alaska on September 22, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Jacob Howdeshell, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JOSEPH TRAUGOTT, employee / claimant; v. ARCTEC ALASKA, self-insured employer / defendant; Case No. 201309316; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 22, 2017.

_____/s/
Ronald C. Heselton, Office Assistant II