ALASKA WORKERS' COMPENSATION BOARD

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

ELIZABETH ODOM, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201517330
HOPE COMMUNITY RESOURCES, INC., Employer,	)	AWCB Decision No. 17-0126
and	)	Filed with AWCB Anchorage, Alaska on November 2, 2017
BERKSHIRE HATHAWAY HOMESTATE INSURANCE CO., Insurer, Defendants.	)	

Hope Community Resources, Inc.'s June 2, 2017 petition for a social security offset and overpayment recoupment was heard on September 27, 2017, in Anchorage, Alaska, a date selected on August 4, 2017. Attorney Eric Croft and law clerk James Croft appeared and represented Elizabeth Odom (Employee). Attorney Adam Sadoski appeared and represented Hope Community Resources, Inc. and Berkshire Hathaway Homestate Insurance Co. (Employer). Employee testified as a witness. The record was held open for further evidence and briefing, and closed on October 9, 2017.

ISSUES

As a preliminary issue, Employee requested continuance of the hearing, arguing that she had recently claimed a compensation rate adjustment which, if granted, would affect the calculations made in any Social Security offset order.

Employer argued it was ready to address compensation rate as a part of the Social Security offset issue, and the compensation rate could either be heard with the scheduled hearing issues or addressed in a later decision.

An oral order denied continuance, and the hearing proceeded on the scheduled issues.

1. **Was the oral order denying continuance correct?**

Employer contends it is entitled to a Social Security offset because Employee is receiving Social Security Disability (SSD) payments. Employee does not oppose a Social Security offset, but disputes the amount.

2. **Is Employer entitled to a Social Security Offset?**

Employer further contends that the lump sum payment Employee received for past SSD created a large overpayment on Employer's part, which justifies reducing Employer's future payments by 100% in order to recoup the overpayment.

Employee contends her compensation should not be reduced by 100% to recoup overpayment, since her compensation rate required adjustment. Employee concedes Employer is entitled to withhold 20% to recoup overpayment, but argues there is insufficient cause to allow 100% withholding, since Employee has need for the full payments, and Employer will have adequate opportunity to recover any overpayments from future benefit payments.

3. **Is Employer entitled to withhold more than 20% of payments?**

FINDINGS OF FACT

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

1) Employee began working for Employer in February 2014, as an Individual Service Provider for disabled clients. Before starting work for Employer, Employee had not been employed for approximately four years. (Employee Hearing Testimony).

2) On November 2, 2015, Employee tripped on a sidewalk while working, and reported injury to her right shoulder and knee. Employer has not filed any controversions in this case. (Report of Injury, November 5, 2015; Record).
3) Employee began receiving temporary total disability (TTD) shortly after the injury. Employer calculated Employee's compensation rate at $269.17 per week, from her 2014 gross earnings of $19,839.84. (Havard Email, January 25, 2017; Adjuster Notes Entry, November 13, 2015; Compensation Reports, November 13, 2015 – May 5, 2017).
4) Between approximately December 25, 2014 and the November 2, 2015 work injury, Employee earned $27,610.96 in gross wages, $26,769.84 of which was earned in 2015. In the six months preceding the work injury (183 days, from May 3 to November 2), Employee earned $15,972.14, or $610.96 per week. This gross weekly wage results in a compensation rate of $399.69. (Employee Paystubs, December 25, 2014 – November 2, 2015; Division of Workers' Compensation Benefit Calculator, http://labor.alaska.gov/wc/benefitcalculator.htm).
5) On December 7, 2015, Employee contacted an adjuster for Employer, requesting assistance with her compensation rate. The adjuster advised Employee that it appeared her rate was correctly calculated, but agreed to obtain and assess her 2015 wages. The adjuster agreed only to obtain the information, not to change Employee's TTD rate. (Berkshire Hathaway Homestate Companies Notes, December 7, 2015).
6) On April 25, 2017, the Social Security Administration informed Employee she became disabled for SSD purposes on November 2, 2015, and her entitlement to SSD benefits began on May 1, 2016 since Employee had been "disabled for five full calendar months in a row." Employee was informed she would receive $14,242.00, representing SSD payments accrued between May 2016 and March 2017, and $1,298.00 per month following the lump sum payment. (Social Security Administration Letter, April 25, 2017).
7) The record is not clear on the amount of time Employee has been disabled since the work injury. Employer filed records showing payment of TTD for dates from December 15, 2015 to December 18, 2016, with an unpaid period and a period of partial disability payment in mid-2016. Employer's compensation reports indicate TTD paid at the rate of $267.17, and do not cover the full period after the work injury. Compensation reports show temporary partial disability (TPD) was paid for approximately six weeks in early 2016. The amounts

reported in Employer's annual reports do not match up to the number of weeks of reported TTD. (Employer Payment Record, filed as Exhibit 2 of Hearing Brief, September 20, 2017; Compensation Reports, November 13, 2015 – May 5, 2017).

8) Employee lives on a modest budget, with her sole income currently derived from SSD and workers' compensation benefits. She has approximately $900 - $1000 in monthly expenses, not including food. (Employee Hearing Testimony).
9) The hearing date was set on August 4, 2017. (Prehearing Conference Summary, August 4, 2017).
10) On September 18, 2017, Employee filed a claim for a compensation rate adjustment, penalties, interest, and attorney fees and costs. (Claim, September 18, 2017).

PRINCIPLES OF LAW

> **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 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.
> . . . .

A decision may be based not only on direct testimony and other tangible evidence, but also on "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). "Substantial evidence" to support findings of Workers' Compensation Board is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007 (Alaska 2009). Within the administrative adjudication system for workers' compensation claims, the Appeals Commission's decisions have the force of legal precedent, unless reversed or modified by the Alaska Supreme Court. *Municipality of Anchorage v. Faust*, AWCAC Decision No. 078 (May 22, 2008).

The Alaska Supreme Court has recognized the Board may be required to apply equitable or common law principles in a specific case, and has explicitly held the Board has authority to invoke equitable principles to prevent an employer from asserting statutory rights. *Wausau*

Insurance Companies v. Van Biene, 847 P.2d 584, 588 (Alaska 1993). An implied waiver arises where the course of conduct pursued evidences an intention to waive a right, or is inconsistent with any other intention than a waiver, or where neglect to insist upon the right results in prejudice to another party. *Id.* To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver. *Id.* (citing *Milne v. Anderson*, 576 P.2d 109 (Alaska 1978). The elements of estoppel are: assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Id.* (citing *Jamison v. Consolidated Utilities*, 576 P.2d 97, 102 (Alaska 1978).

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

> **Sec. 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:
> . . . .
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> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations

> during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
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> (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees;
> . . . .
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> (10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1) - (7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury.
> . . . .

In *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994), the Court found a prior version of AS 23.30.220 unconstitutional on equal protection grounds, noting that the purpose of the Act's indemnity benefit provisions was to "formulate a fair approximation of a claimant's probable future earning capacity" during periods of disability. *Id.* at 927 (citing *Johnson v. RCA-OMS*, 681 P.2d 905 (Alaska 1984). The decision was largely based on the fact that wage determinations under the Act at the time based compensation rates only on the average wage earned during the two calendar years prior to the work injury, without regard for whether the result would accurately reflect lost future earnings. *Gilmore* at 928. *Gilmore* was superseded by amendment of the statute in 1995. *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006).

In *Dougan v. Aurora Electric Inc.*, 50 P.3d 789 (Alaska 2002), the Court noted that the then-current version of AS 23.30.220 accounted for the reasoning of *Gilmore*, and provided "a variety of formulas for differing employment situations." *Id.* at 797. In 2002, AS 23.30.220(a)(4) contained paragraphs (A) and (B), which calculated weekly earnings from the most favorable average of 13 consecutive weeks within the 52 immediately before the injury, or, if the employee had been employed under 13 weeks prior to injury, by determining the amount the employee would have earned if they had been employed for 13 weeks. *Flowline* noted that the tests from *Gilmore* could not be applied to newer statutes, but acknowledged *Gilmore*'s finding that a fair

approximation of future earning capacity lost in disability remained the essential component of the Act's compromise: "the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation." (quoting *Gilmore* at 927). *Flowline* found that this principle continued to "provide the context for interpreting the Workers' Compensation Act."

In *Straight v. Johnston Construction and Roofing, LLC*, AWCAC Decision No. 231 (November 22, 2016), the employee made $41.45 per hour at the time of the injury, reporting his weekly wage as $2,108.80, but had taken off significant portions of the two years prior to injury to build his house. Under AS 23.30.220(a)(4), his compensation rate was calculated at $255.00 per week, far less than the $1,159.00 compensation rate that would result from his earnings at the time of injury. The Board declined to adjust Mr. Straight's rate, finding that the Act's calculation provision referring to "general fairness" had been removed in the 1988 amendment, and the current statute did not give the Board discretion to avoid a calculation's harsh result. On appeal, the Commission reviewed the history of AS 23.30.220 (adopted in its current form in 2005), noting numerous Alaska Supreme Court statements indicating that a basic principle of workers' compensation is fairly approximating a claimant's future earning capacity lost due to the injury. *Id*. at 7-10. While acknowledging the opaque legislative intent of the current statute, the Commission held that "in some circumstances an injured worker's earnings 'for [the] purpose of calculating compensation' may not be readily ascertainable" under the standard sections of AS 23.30.220. The Commission, looking to AS 23.30.220(a)(5), the fairness interpretation requirement in AS 23.30.001, and the Supreme Court's jurisprudence on rate calculations, remanded to the Board for further consideration of whether the calculation under AS 23.30.220(a)(4) accurately predicted the Employee's lost future earning capacity.

> **AS 23.30.225. Social Security and Pension or Profit Sharing Plan Offsets.**
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> (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.

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.

A Social Security offset may be retroactive to the start of Social Security eligibility, depending on the unique facts of the case. *Langston v. Municipality of Anchorage*, AWCB Decision No. 01-0161 (August 22, 2001); *Heggenberger v. Fred Meyer, Inc.*, AWCB Decision No. 03-0087 (April 18, 2003); *Burch v. Alaska Fresh Seafoods, Inc.*, AWCB Decision No. 08-0243 (December 11, 2008).

> **8 AAC 45.074. Continuances and cancellations.**
> . . . .
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> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
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> (1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;
(C) a party, a representative of a party, or a material witness becomes ill or dies;
(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
(E) the hearing was set under 8 AAC 45.160(d);
(F) a second independent medical evaluation is required under AS 23.30.095(k);
(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
(I) the parties have agreed to and scheduled mediation;
(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

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 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. Was the oral order denying continuance correct?

Employee requested continuance in order to more fully address her compensation rate prior to any decision on Employer's petition for offset and withholding. Employee filed a claim for compensation rate adjustment on September 18, 2017, nine days prior to hearing and approximately seven weeks after the hearing was scheduled.

Continuances are disfavored, and are not routinely granted. 8 AAC 45.074(b). Hearing continuance may only be granted on the basis of good cause, defined by regulation. *Id*. Employee did not cite good cause here under 8 AAC 45.074(b)(1), and none is applicable to these circumstances. While Employee points to complications that may arise if compensation rate is not fully addressed before the offset, compensation rate is a necessary part of the offset analysis, as discussed below. Employee had ample opportunity to raise the issue in time to set it for the September 27, 2017 hearing. The oral order denying continuance was correct.

2. Is Employer entitled to a Social Security Offset?

Employer argues it is entitled to a social security offset under AS 23.30.225(b). Employee has previously agreed that the offset is applicable, but in briefing the hearing dispute raised two arguments against the offset or the amount of offset.

Employee first argues that Employer should be estopped from asserting overpayment and offset, due to an adjuster's December 2015 agreement to look at her 2015 wages compared to 2014, though the adjuster's notes state only information gathering was agreed to, not a change to the compensation rate. The elements of estoppel are assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Van Biene*. If a position may be found in the adjuster's statement, it was a mere intent to review the information, and Employee still lacks reasonable reliance and resulting prejudice related to the offset and overpayment issues. Employer did not represent that it would decline to pursue its rights on either of these arguments. This action by Employer does not meet the standard for application of equitable estoppel principles. *Id.*

Employee also argues that the offset requested by Employer was incorrectly calculated, and requests adjustment of the compensation rate before application of the offset. This argument is based on Employee's earnings in the part of 2015 preceding her injury. If applied, Employee's analysis would result in a higher compensation rate than Employer has paid using the 2014 wages. While Employee has separately claimed a compensation rate adjustment, this decision has found above that it is not necessary to set a final compensation rate immediately. Compensation rate is, however, a necessary factor in calculating a social security offset. AS 23.30.225(b); *Stanley*. This decision will address the compensation rate on the record before it in order to determine the offset amount, and any future changes to the compensation rate may be incorporated at a later date. AS 23.30.135.

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]

Stanley. Employee disputes Employer's calculation of GWE under AS 23.30.220(a)(4), which she argues is unrepresentative of her actual earnings at the time of her injury, and her earning capacity lost due to the work injury. Employee contends the difference is significant and unfair, and does not comport with the principles behind the Act and its compensatory benefits.

Employee began working for Employer in late February 2014, and did not work in 2013. As a result, the only measurable wage under AS 23.30.220(a)(4) is a single partial year work history after multiple years of absence from the labor market. An employee's absence from the labor market might result in lower initial earnings due to lack of work history with an employer, lack of seniority, and other factors, and this appears to be born out in Employee's case. In the roughly ten months she worked in 2015, Employee earned significantly more than she did in the roughly ten months she worked in 2014. The Commission's *Straight* decision involved strikingly similar facts, and is binding precedent. Accordingly, Employee's GWE calculated

based on her 2014 earnings is not a fair representation of the future earnings lost due to the work injury, and a case-specific assessment is required. *Straight*.

In assessing lost future earnings, the best evidence of Employee's current earnings are paystubs filed by Employer, which show earnings for approximately ten months preceding the date of injury. In order to avoid periods when Employee remained relative new in the workforce, calculation of GWE will be based on the six months prior to injury. These earnings amount to $610.96 per week. This amount is a fair representation of the future earnings Employee lost due to the work injury. *Straight*. The large difference from the original rate of $396.80 confirms the need for case-specific assessment. *Id*.

This amended GWE is applied to the offset calculation as follows:

A. Determine employee's Gross Weekly Earnings (GWE) ($610.96)
B. From GWE, determine Weekly Compensation Rate for worker's compensation (Weekly WC Rate) ($399.69, from the Division's Rate Calculator)
C. Calculate employee's Weekly Social Security benefit by multiplying monthly payment x 12 and ÷ 52 (Weekly SS Benefit) ($298.39)
D. Add Weekly WC Rate + Weekly SS Benefit [B + C] ($698.08)
E. Calculate 80% of GWE [80% of A] ($488.77)
F. Calculate Social Security Offset [D – E] ($209.31)

Since the new compensation rate is $399.69, the compensation rate after application of the offset is $190.38. In order to apply the Act's provisions in a "quick, efficient, fair, and predictable" manner, and in light of the clear evidence relating to Employee's compensation rate and SSD benefits, both the compensation rate and Social Security offset will be applied retroactively. AS 23.30.001(1); *Burch*. The new compensation rate will be applied as of the date Employee began receiving disability benefits in this case, and the Social Security offset will be applied as of the date Employee became entitled to SSD benefits. Employer's withholding to recoup overpayment will be addressed in light of this amended compensation rate.

3. Is Employer entitled to withhold more than 20% of payments?

Employer argues that 100% withholding of payments to recoup overpayment is reasonable in light of its estimated overpayment and time to recoup without such an order, as well as Employee's acceptance of a lump sum SSD check for past benefits without compensating

Employer for overpayment. Employer's arguments are based on the $269.17 compensation rate, and require recalculation based on this decision's determinations.

After applying Employee's calculated compensation rate retroactively, it is necessary to calculate the accrued underpayment. The parties did not present argument or evidence on the amount of time Employee was disabled, and the record is unclear and contradictory. Employer claims overpayment from May 2016, but filed a payment record showing a 4-month gap in from April 2016 to late August 2016. Employee claims underpayment from the date of injury to May 2016, but compensation reports and Employer's payment records indicate periods of TPD and no disability in early 2016. A finding on the specific amounts of accrued underpayment and overpayment is not ripe for decision at this time. For the purpose of the withholding analysis, this decision presumes Employee has received TTD since the date of injury.

From the November 2, 2015 injury to the May 1, 2016 start of SSD benefits, 25 weeks and 6 days elapsed. Applying the difference in compensation rates ($130.52), an underpayment of $3,374.87 accrued in that time. The amount due to Employee after application of the offset is $190.38 per week. Overpayment during the periods for which Employee received SSD benefits is therefore $78.79 per week, from Employer's paid rate of $269.17. Since Employee's SSD benefits began May 1, 2016, the overpayment accrued by the date of the September 27, 2017 hearing (73 weeks and 3 days) was $5,785.44. Employer's total overpayment, accounting for the prior underpayment, is $2,410.56. At 20% withholding, it would take 64 weeks, or nearly 1.25 years to recoup the full overpayment, compared to 26 weeks (6 months) at 50% withholding and 13 weeks (3 months) at 100%. Because this decision applies an amended compensation rate, concerns of hardship resulting from a greater withholding rate are lessened, as are concerns about the time it will take to recoup overpayments. In order to hasten resolution of the overpayment and avoid hardship to Employee, Employer will be allowed to withhold 50% of future payments until the overpayment is recouped, including amounts accrued following the September 27, 2017 hearing.

CONCLUSIONS OF LAW

1. The oral order denying continuance was correct.
2. Employer is entitled to a Social Security Offset.
3. Employer is entitled to reduce payments by more than 20%.

ORDER

1. The oral order denying continuance is affirmed.
2. Employee's compensation rate is set to $399.69, retroactive to November 2, 2015.
3. Employer is entitled to take a $209.31 Social Security offset, retroactive to May 1, 2016.
4. Employer may withhold 50% of future weekly disability benefits until previous overpayments resulting from the Social Security offset are fully recouped.

Dated in Anchorage, Alaska on November 1, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Henry Tashjian, Designated Chair

/s/
Patricia Vollendorf, Member

/s/
Amy Steele, 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 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 ELIZABETH ODOM, employee / claimant; v. HOPE COMMUNITY RESOURCES, INC., employer; BERKSHIRE HATHAWAY HOMESTATE INSURANCE C, insurer / defendants; Case No. 201517330; 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 November 2, 2017.

/s/
Elizabeth Pleitez, Office Assistant