ALASKA WORKERS' COMPENSATION BOARD

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

CODY R. RHODE, Employee, Claimant, v. ANCHORAGE PLUMBING & HEATING, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201418303 AWCB Decision No. 15-0117 Filed with AWCB Anchorage, Alaska On September 17, 2015

Cody Rhode's (Employee) March 25, 2015 claim was heard on August 13, 2015 in Anchorage, Alaska, a date selected on April 29, 2015. Attorney Keenan Powell appeared and represented Employee, who appeared and testified. Attorney Rebecca Holdiman-Miller appeared and represented Anchorage Plumbing & Heating and its insurer (Employer). As preliminary matters, it was noted Employer's brief and witness list had not been timely received. The brief and witness list were located and Employee had no objection to the panel considering them. The designated chair disclosed he had been Employer's customer in the past and given its co-owner and manager free legal advice upwards of 20 years ago. The designated chair assured the parties he could be fair and impartial. No party had any objection to the designated chair's participation in the hearing. Witnesses included Jerry Brawn and Allison Green, both of whom testified on Employer's behalf. The record closed at the hearing's conclusion on August 13, 2015.

ISSUES

Employee contends Employee's attending physician's office contacted Employer's adjuster to obtain surgery preauthorization on several occasions but never received a call back until the third try. On that occasion, Employee contends the adjuster told the provider there was no "hip" claim. Hip surgery was not preauthorized. Instead, the insurer scheduled an employer's medical evaluation (EME), which Employee contends was a "stall tactic." He seeks penalties and a finding Employer made an unfair or frivolous controversion.

Employer contends its adjuster took no action that could be construed as a controversion-in-fact and nothing she did delayed Employee's surgery. It contends the adjuster preauthorized surgery on December 9, 2014, but the medical provider declined to go forward with the procedure until the EME was resolved. Further, the adjuster was aware of only a back injury, and Employer contends Employee subsequently changed his reported injury to include his hip. Employer contends it took only five or six days for the adjuster to obtain and review additional medical records concerning Employee's hip, after which the adjuster swiftly preauthorized medical care for the injured hip. It contends Employee's medical provider Orthopedic Physicians of Alaska (OPA) was responsible for delaying the surgery. Therefore, Employer contends Employee is entitled to no penalties and no finding Employer made an unfair or frivolous controversion.

1) Should Employer be assessed penalties or should a finding be made that it frivolously or unfairly controverted compensation due Employee?

Employee contends he had just commenced on his plumbing career when he was injured at work. He contends the adjuster based his compensation rate on his previous work as a lot porter at a car dealership, at which he earned a much lower pay rate. Employee contends he was in a Charter College program to learn plumbing and therefore his temporary total disability (TTD) rate should be adjusted upwards to reflect a higher lost earning capacity.

Employer contends Employee's compensation rate was fairly and accurately calculated based upon the compensation statute formula. It contends Employee's situation does not qualify for any deviation from the standard, statutory scheme. Employer contends Employee's job when injured did not require any training or certification and he found a new job only because he was

terminated from his previous position. It contends Employee cannot demonstrate he would have continued to work at a higher wage rate during the continuance of his temporary disability as evidenced by his retraining request, and his refusal to continue working for Employer with accommodations. Employer contends Employee is not entitled to a rate adjustment.

2) Is Employee entitled to a compensation rate adjustment?

FINDINGS OF FACT

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

1) Employee worked at Cal Worthington Ford making $11 an hour until April 2014 when he was fired because he wrecked a vehicle. Thereafter, Employee tried to get into Charter College, got in and eventually began attending classes. Charter College classes began approximately three months before he began working for Employer. At Charter, Employee learned basic plumbing and heating as well as ventilation. In August or September 2014, Employee began working for Employer making $15 per hour as a plumber's helper. His duties included running back and forth between the job and the plumbing van, heavy lifting, pulling parts and stocking the plumbing van for the days' work. The hourly wage difference between the two jobs was significant to Employee. Employee wanted to begin a career in plumbing. He was pursuing an "HVAC" certification at Charter College. Employee testified he told Jerry Brawn the day he was hired that he wanted to become a journeyman plumber. The job with Employer required no training and Employee had none when he began working there. Employee found out about the job through friend who was also attending Charter College. Jerry did not tell Employee his plans for keeping Employee on nor did he discuss what it would take for Employee to remain working or to be fired. Employee was aware Employer had a program for apprentices at a school called AVTEC, if a plumber's helper worked out after three or four months. Receiving the AVTEC certificate, however, would not result in Employee being a licensed plumber. (Employee).

2) On October 24, 2014, Employee hurt himself when moving a large, industrial boiler. Employee says he told his attending physicians it was his "hip," but his doctors kept putting down on his reports that it was his "back." Finally, one physician manipulated his hip and discovered he had a hip, not a back injury. (*Id.*).

3) Employee's injury report lists a "lower back area" and a "strain or tear." (First Report of Injury, October 24, 2014).

4) On December 9, 2014, Laurie Vickery at OPA called adjuster Allison Green to obtain Employee's claim status. Green told Vickery she had received all hip medical records and an EME was scheduled for January 16, 2015. Vickery stated, "August in our office notified patient that we cannot move forward with surgery until IME has been completed and a determination made." (Green; Vickery letter, January 13, 2015).

5) On December 9, 2014, Green also told Vickery at OPA it could go forward with right hip surgery, which was preauthorized. (Green).

6) Following his work injury, Employer honored Employee's work restrictions but Employee could not continue working as each time he reported to work his hip symptoms were aggravated. Employee could not rest, lie down or ice his hip while at work even doing light duty. He turned down Employer's continued accommodations because he did not want to make his hip situation worse prior to surgery. (Employee).

7) Employee did not request reemployment benefits and has no idea how the process began. He is participating in the process because he believes it is the right thing to do, not because he specifically requested reemployment benefits. "The lady" told him he had to participate since he was disabled for more than 90 days. He would, however, accept retraining if it would advance him further. Employee said HVAC work is 40 to 50 percent of Employer's work. (*Id*.).

8) Employee wanted surgery in December 2014, but did not receive it at that time because he was told "it was put on hold." OPA's "scheduler" told Employee the surgery was put on hold because the insurance company had not yet approved it. He was not aware he could have filed a claim in December asking for a board order directing the surgery to proceed. (*Id*.).

9) On January 16, 2015, Employee attended an EME, but surgery was still not scheduled right away. Employee has no idea why it was not scheduled immediately after the EME. (*Id*.).

10) Employee said after OPA told him his surgery was put "on hold," first his mother and later he contacted the adjuster to find out why surgery was delayed. He took all hip medical records immediately to the adjuster showing his hip was injured. He was not aware the adjuster told OPA on or about December 9, 2014, OPA was authorized to proceed with the hip surgery. Employee does not recall being released to light duty work in June 2015. Employee intended to go back to work for Employer. (*Id*.).

11) On February 13, 2015, Employee underwent his first hip surgery. (*Id*.).

12) Employee changed physicians because he felt OPA was not taking him seriously and he still had symptoms post-surgery. (*Id*.).

13) On March 25, 2015, Employee , through counsel filed a claim seeking a compensation rate adjustment, penalties, a finding Employer frivolously or unfairly controverted Employee's right to benefits, and related attorney's fees, costs and interest. (Workers' Compensation Claim, March 25, 2015).

14) On April 20, 2015, Employer filed its answer and denied Employee's claims in their entirety. (Answer to Employee's Workers' Compensation Claim, April 17, 2015).

15) On April 20, 2015, Employer filed a notice denying Employee's claim for a compensation rate adjustment, penalty, interest, a finding Employer made an unfair or frivolous controversion and attorney fees and costs. (Controversion Notice, April 17, 2015).

16) Employer never filed a formal controversion notice stating it denied Employee's right to his initial, right hip surgery. (Observations).

17) On June 30, 2015, Employer controverted TTD benefits as of June 8, 2015, based on Employer's offer of light duty work accommodating Employee's physical restrictions. (Controversion Notice, June 29, 2015).

18) On August 31, 2015, Employee had his second hip surgery. (*Id*.).

19) On September 14, 2015, Employer controverted medical benefits after May 13, 2015, and temporary total and temporary partial disability benefits based on a September 7, 2015 EME report from Charles Craven, M.D. Dr. Craven said Employee was medically stable from his work injury by May 13, 2015, and any further surgical intervention to include revision arthroscopy or total hip arthroplasty were substantially caused by Employee's preexisting femoral acetabular impingement and not his October 24, 2014 work injury with Employer. (Controversion Notice, September 14, 2015).

20) At hearing on August 13, 2015, Jerry Brawn testified he is Employer's manager and part owner. He also handles advertising for new hires. Plumber helper jobs do not require prior experience, though it is a plus. Brawn hired Employee on July 29, 2014. Brawn did not hire Employee because he was in the Charter College HVAC program, as Employer does very little ventilation or refrigeration. Brawn does not recall a discussion with Employee specifically saying he wanted to be a plumber, though Brawn conceded everybody he hires tells him they

want to be a plumber. Employee was on probation when he was hurt at work. The probation would have continued to October 29, 2014, had Employee not been injured. If a plumber's helper is a "go-getter," and is working out well, Employer usually moves them to the apprenticeship program. Employee's probationary period was not over yet, so Brawn had not yet made a final determination about his future. However, based on feedback from the plumbers, brawn determined Employee was "not very motivated" and did a lot of "standing around." Therefore, Brawn concluded he probably would not have kept Employee on or put him in the apprenticeship program at AVTEC. After 90 days, an employee would ordinarily receive a one dollar per hour raise. If Employee was put in the apprenticeship program, he would be paid according to a regular pay scale. Brawn arranged the lighter duty positions for Employee after his injury. Brawn understood Employee could stand and sit no more than 30 minutes at a time. Brawn "worked hard" to accommodate Employee's restrictions, and during the time Employer provided light duty work, Employee only worked four hours. Brawn arranged for Employee to do inventory work at his same hourly pay rate. (Brawn).

21) Brawn's testimony was credible. (Experience, judgment and inferences drawn from the above).

22) At hearing on August 13, 2015, Allison Green testified she is an adjuster at Liberty Mutual Insurance Company. She adjusted Employee's claim in December 2014. Employee's work injury with Employer was first reported as a back injury. Green first learned of a "hip" injury when OPA called her on December 4, 2014, for surgical authorization. Green recalled a teleconference with "Laurie" at OPA's office recommending a hip arthroscopy. Green advised the provider that the claim was open and accepted "for a back injury." Green also recalled later the same day Employee's mother called her to say Employee had a hip injury, not a back problem. Green told Employee's mother Green had not received any records regarding a hip injury. Employee's mother said she would ask her son to contact providers and send over chart notes. An EME appointment was also scheduled on December 4, 2014. Green explained she sends an EME request through a computer database and the company arranging the EME always provides her with the "first available" EME date. Green scheduled the EME because she first learned on December 4, 2014, that the body part had changed from back to hip. As a licensed adjuster, Green has rules she must follow. She has a duty to Employer and to her insurance company to thoroughly investigate claims. Therefore, when the injured body part changed,

Green felt it necessary to schedule an EME. Green subsequently received records demonstrating Employee had a right hip injury. She called Employee's provider's office on December 9, 2014, after she received hip records, to discuss the matter. Green told Employee's provider at OPA that "they can proceed with surgery." According to Green, OPA asked a "standard question," which was, "was an EME scheduled?" Green was aware of a then-recent board decision suggesting preauthorization was necessary. Her knowledge of this board decision was why she preauthorized right hip surgery on December 9, 2014. On February 11, 2015, OPA asked Green to write a confirming preauthorization letter, which she wrote on February 11, 2015. Green conceded that on February 11, 2015, when she talked to OPA, she was very frustrated and probably was a little rude because she had already authorized the surgery months earlier but OPA declined to perform it because Green told them, in response to OPA's question, that an EME had been scheduled. In Green's view, had OPA performed surgery when Green had authorized it, Employee would have recovered more quickly. She had no resistance to Employee having right hip surgery as of December 4, 2014. Green continued to pay Employee time loss benefits. She did not want the surgery to be delayed because she was paying him TTD. Green testified it was common practice for providers to ask her in Alaska claims whether there was an EME scheduled. According to Green's contemporaneous adjuster's note, the treating physician elected to postpone surgery until the EME took place. Green was going to be proactive and follow-up on the EME if the report had not been received within two weeks. Had Employee gone forward with immediate right hip surgery in December 2014, Green would have paid for it. She never controverted the surgery, never denied it and expressly told OPA it was authorized. She never told OPA she had Employee under surveillance nor did she tell OPA she was going to get an addendum report from the EME physician after he reviewed surveillance video. OPA advised Green it would not perform surgery until OPA had reviewed the EME report. Green cannot direct medical care. (Green).

23) Green did not recall the exact date she sent questions to the EME physician, though the questions are normally sent about two weeks in advance. Green conceded she asked EME questions nine and 10, involving the reasonableness and necessity of future treatment, because they are "standard questions" requesting the physician's opinions. Even if the EME physician had stated the proposed surgery was not reasonable and necessary, Green said she would not have denied Employee's surgery because she had already preauthorized it. It is not a common

practice for Green to send a letter to the medical provider preauthorizing surgery. Most medical providers accept an oral authorization to provide medical treatment. Green needed a medical opinion about the right hip compensability issue because she is not a doctor. The OPA physician's opinion "was not good enough" because there was some degeneration in the right hip, which Green thought the attending physician did not address thoroughly. Green knows she is entitled under Alaska law to an EME. When Green authorized surgery on December 4, 2014, she had no medical evidence supporting any denial. Two months later, in February 2015, OPA requested a letter authorizing treatment in writing, and Green provided it the same day OPA requested it. In Green's experience, when medical providers called her in Alaska cases, the providers would ask (1) if the claim is "open and billable"; (2) is an EME scheduled; and (3) will they authorize treatment? Some medical providers delay providing medical treatment if they hear from the adjuster that there is a pending EME. Some medical providers also would tell Green whether or not they were going to delay surgery based upon the EME. Green asked OPA in this case to send her something in writing in the event OPA decided to not proceed with surgery given the pending EME. OPA never did. (*Id*.).

24) Is undisputed Employee's TTD compensation rate was calculated under AS 23.30.220(a)(4).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the

> nature of injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . .
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> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute. (*Id*.; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his injury and the employment by adducing "some evidence" showing his claim arose out of his employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239 (Alaska 1987). For injuries occurring after the November 7, 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
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> (1) that the right of the employee to compensation is controverted;
> (2) the name of the employee;
> (3) the name of the employer;
> (4) the date of the alleged injury or death; and
> (5) the type of compensation and all grounds upon which the right to compensation is controverted.
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> . . . .
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> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.
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> (e) If any installment of compensation payable without an award is not paid within seven days after it 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. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
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> . . . .

> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125. . . .

Employers must either pay or controvert benefits without an award but may controvert any time after payments are made. AS 23.30.155(a). A controversion notice must, however, be filed and it must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "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." *Id.* at 358.

The employer must possess sufficient evidence in support of the controversion that, if the employee does not introduce evidence in opposition to the controversion, the board would find the employee not entitled to benefits. *Id.* The controversion and the evidence on which it is based must be examined in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion. *State of Alaska v. Ford*, AWCAC Decision No. 133 at 21 (April 9, 2010). When an employer has insufficient evidence an employee's disability is not work-related, the controversion was in bad faith, invalid and a penalty is imposed. *Harp* at 359.

The Alaska Supreme Court has broadly interpreted "controversion" when reviewing attorney's fee awards. In *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978) the court said:

> To require that a formal notice of controversion be filed as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose that we are able to perceive. It would be a pure and simple elevation of form over substance because the nature of the hearing, the pre-hearing discovery proceedings, and the work required of the claimant's attorney are all unaffected by the existence or not of a formal notice of controversion when there is a controversion in fact.

Cases like *Alaska Interstate* gave rise to the "controversion-in-fact" concept. Board decisions have long held "for purposes of a referral to the Division of Insurance under AS 23.30.155(o), 'controversions' need not be formal or written controversions." *Tweden v. UPS*, AWCB Decision No. 03-0153 (July 3, 2003).

The spendable weekly wage statute in effect in 1982, which was the basis for considerable compensation rate litigation and resultant decisional law, stated:

> **AS 23.30.220. Determination of average weekly wage**. Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows;
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> 1) Repealed by §11 Ch 75 SLA 1977.
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> 2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;
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> 3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board;
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> 4) if an employee is a minor or an apprentice, or a trainee, as determined by the board, when injured, and under normal conditions his wages would increase during the period of disability, this fact shall be considered in computing his average weekly wage;
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> 5) if the employee is injured while performing his duties as a volunteer ambulance attendant, policeman or fireman, the wage for calculating compensation shall be the minimum wage paid a full-time ambulance attendant, policeman or fireman in the political subdivision when the injury occurred, or if the subdivision has no full-time ambulance attendants, policemen, or firemen employed, at a reasonable wage figure previously set by the subdivision to make this determination and in no case may the wage for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week.

In *Johnson RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Alaska Supreme Court construed the 1982 statute, but did not decide the case on constitutional grounds. In *Johnson* the facts were:

> Johnson's salary for the final year of his military service, 1979, was $20,166.12. He asserted that his salary for the approximately 40 weeks that he worked for RCA-OMS was some $42,000.00, most of it earned after his injury. The Board, using subsection (2) of AS 23.30.220, determined Johnson's average weekly wage according to his military rather than civilian salary. So computed, his average weekly wage was $387.81, resulting in benefits of $258.54 per week. By contrast, if subsection (3) had been used, his average weekly wage would

> apparently have been approximately $1,000.00 with benefits two-thirds of that. (*Id*. at 906).

Johnson construed the statute and held the board was required to use an alternate sub-section of §220 in cases like Johnson's. Though it did not decide the case on constitutional grounds, *Johnson* also held for the first time:

> The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid. Normally the formula in subsection (2) will yield a fair approximation of this figure. However, sometimes it will not, and in those cases subsection (3) of the statute is to be used. (*Id*. at 907).

Since *Johnson*, the court has often repeated this objective, which it derived from Professor Larson's workers' compensation treatise in which he said:

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis. (*Id*. at 907; citing 2 A. Larson, *The Law of Workmen's Compensation* §60.11(d), at 10-564 (1983) (footnote omitted)).

AS 23.30.220 was amended in 1983 (effective January 1, 1984) to read in pertinent part:

> (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> > (1) The gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
> >
> > (2) If the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history. . . .

The converse situation from *Johnson*'s facts occurred a year later when the Alaska Supreme Court decided *State v. Gronroos*, 697 P.2d 1047 (Alaska 1985). The facts were:

> Mr. Gronroos retired in 1977 from his position as a community relations officer with the United States Park Service. His salary upon retirement was approximately $42,000.
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> Mr. Gronroos . . . found employment with the State of Alaska Department of Transportation and Public Facilities (State) as a field materials technician. The job was classified as a permanent seasonal position and Mr. Gronroos expected it to last about six months each year. The salary was approximately $2,000 per month. Mr. Gronroos contended that he would have preferred full-time work, but found that the seasonal job was ideal for his circumstances. The job supplemented his retirement income, yet permitted him vacation time in Hawaii.
>
> Mr. Gronroos was working for the State of Alaska on September 5, 1980 when he jarred his back while on the job. He filed a claim for temporary total disability benefits with the Board. The Board ordered the state to pay Mr. Gronroos compensation based upon the method of calculation contained in AS 23.30.220(2). (*Id*. at 104).

The employer appealed and the court again construed the statute and said the express "fairness" requirement built into former §220 applied both ways and required an opposite result from *Johnson* when the facts were opposite. In other words, the law also provided for a TTD rate reduction when the facts so indicated. Thereafter things were relatively quiet for a time in respect to rate adjustment cases.

Section 220 was amended again in 1988 to take into account employees who were "absent from the labor market" for a time; this generated additional litigation. The seminal case resulting from this §220 iteration is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* struck down §220 for the first time on constitutional, equal protection grounds. The facts were:

> Gilmore started work for Klukwan on June 12, 1989 and was earning average spendable weekly wages of approximately $850. However, for the calendar years 1987 and 1988 he worked for a total of only thirty-nine weeks. He claims that for twenty-two of the thirty-nine weeks he was in vocational training programs learning to be a motorcycle mechanic. He contends that he should have been considered 'absent from the labor market' within the meaning of section .220(a)(2) for these twenty-two weeks. If he is correct, he would be entitled to an

> alternative wage computation, for he would have been 'absent from the labor market' for at least eighteen months during the two years in question. (*Id*. at 924-925).

The board rejected Gilmore's claim and he appealed on statutory construction grounds. The Alaska Supreme Court on its own motion asked for further briefing on whether §220 in effect at the time of Gilmore's injury could pass constitutional muster. Subsequently, the court ruled it could not and struck down §220 as applied to Gilmore's case. The law in effect at the time of Gilmore's injury said in pertinent part:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
>
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury;
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> (3) if an employee when injured is a minor, an apprentice, or a trainee in a formal training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee. . . .

The court asked the parties to consider two hypothetical examples in their additional briefing:

> Example A: Two workers work side-by-side for eleven and one half months in 1992, ending December 15th, as well as for the last seven months of 1991, beginning June 1st. During this period each worker performs the same work and earns the same wage. Worker # 1, however, did not work the first five months of 1991 or at all in 1990 because he was injured. Worker # 2, on the other hand, worked all of both 1991 and 1990. On December 15, 1992, both workers suffered the same injury in an on-the-job accident. Under AS 23.30.220(a)(2) the wage base for worker #1 will be only 7/24 of that of worker #2.
>
> Example B: Same facts as Example A except that there is a third worker doing the same work at the same wage who suffers the same injury on December 15,

> 1992. Worker #3, however, did not work during the first seven months of 1991 or at all in 1990 because he was injured. Worker #3 would be entitled to an alternative calculation under AS 23.30.220(a) and may be eligible for compensation benefits based on his current wage which would approximate the wage base of worker #2 and be nearly 3.4 times higher than that of worker #1 (who worked two months longer than worker #3 during 1991). (*Id*. at 925-26).

Based upon these facts and hypothetical situations, *Gilmore* set forth the standard for reviewing the constitutionality of §220:

> Article I, section 1 of the Alaska Constitution provides in part that 'all persons are equal and entitled to equal rights, opportunities, and protection under the law.' This clause may be more protective of individual rights than the federal equal protection clause. (Citation omitted). As our examples illustrate, the current statutory scheme clearly classifies injured employees based on differences in their prior work history. These classifications will often result in substantially different disability benefits for similarly situated employees. The question therefore is whether this unequal treatment is permissible under the Alaska Constitution. (*Id*. at 926).

Gilmore applied the "sliding scale" test to the court's equal protection challenge, which involves a three-step analysis:

> First, it must be determined at the outset what weight should be afforded the . . . interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. . . . Depending on the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation.
>
> Second, an examination must be undertaken of the purposes served by the challenged statute. Depending on the level of review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest.
>
> Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. . . . At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated. (*Id*. at 926; citing *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269-270 (Alaska 1984)).

The court ruled in step one an "interest in workers' compensation benefits is, however, similar to an interest in unemployment compensation benefits or other economic interests. We have consistently held that such economic interests are only 'entitled to review at the low end of the scale.'" *Gilmore* at 927; citing *Sonneman v. Knight*, 790 P.2d 702, 705 (Alaska 1990).

As for step two, the court held the legislature's intent could be gleaned from the session laws which said, "It is the intent of the legislature that AS 23.30 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 AS 23.30." (*Id*.). This legislative intent has been codified into AS 23.30.001. *Gilmore* found these goals were "legitimate purposes" but also found, reflecting back on the *Johnson* decision:

> The overall purpose of AS 23.30.220(a) and the other sections of the Act used to calculate an injured worker's indemnity benefits is 'to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid' (footnote omitted). *Johnson*, 681 P.2d at 907. This 'fair approximation' is an essential component of the basic compromise underlying the Workers' Compensation Act -- 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. The 1988 amendments to AS 23.30.220(a) attempt to further the Act's overall purpose by decreasing the amount of litigation over the determination of an employee's 'spendable weekly wage.' (*Id*.).

In step three the court said the statute's means must be substantially related to the ends to be achieved. (*Id*. at 927-28). Most notably, this is where §220 in effect at the time of Gilmore's injury failed the test. The court found:

> We nevertheless conclude that no substantial relationship exists between calculating a worker's weekly wage by dividing the worker's earnings over the last two calendar years by 100 regardless of whether the number reached reflects the worker's actual losses and the goals of fairly approximating a worker's probable future earning capacity and achieving a 'quick, efficient, fair, and predictable delivery of indemnity and medical benefits.'
>
> The benefit levels among injured workers based on section 220(a) bear no more than a coincidental relationship to the goal of compensating injured workers based on their actual losses. In any of the many situations in which a worker's past wage and time of employment do not accurately reflect the circumstances existing at the time of the injury, the formula will misrepresent the losses (footnote

> omitted). The means chosen for determining an injured worker's gross weekly wage therefore do not bear a substantial relationship to that goal. (*Id*. at 928).

The employer in *Gilmore* argued former §220 was constitutional because its application would lead to "quick, efficient results" but the court declared:

> This efficiency is gained, however, at the sacrifice of fairness in result. The purpose of the Act, as expressed by the legislature, is to provide a 'quick, efficient, *fair*, and predictable delivery of indemnity and medical benefits.' The facts of the present case amply demonstrate the potential unfairness of a rigid application of the mechanical formula (footnote omitted). Under the section 220(a)(1) formula as applied by the Board, Gilmore received only the statutory minimum amount of compensation, despite his earning over seven and one-half times more per week at the time of injury.
>
> Efficiency in this area does not require unfairness. A quick, efficient, and predictable scheme for determining a worker's gross weekly earnings could be formulated without denying workers like Gilmore benefits commensurate with their actual losses (emphasis in original). (*Id*. at 928).

The court concluded Alaska was the only state that did not provide a viable option to take into account such factors as periods of unemployment in the rate calculation scheme. (*Id*.). Consequently the court held:

> The gross weekly wage determination method of AS 23.30.220(a) creates large differences in compensation between similarly situated injured workers, bears no relationship to the goal of accurately calculating an injured employee's lost wages for purposes of determining his or her compensation, is unfair to workers whose past history does not accurately reflect their future earning capacity, and is unnecessary to achieve quickness, efficiency, or predictability. Therefore, the formula expressed in AS 23.30.220(a) is not substantially related to the purposes of the Act. It cannot survive scrutiny on even the lowest end of our sliding scale and is therefore an unconstitutional infringement on the equal protection clause of the Alaska Constitution. Art. I, § 1. (*Id*. at 929).

Gilmore also provided a good summary of prior, statutory construction case law dealing with §220 TTD rate adjustments under pre-*Gilmore* versions of the statute, as well as other rate calculation issues. *See, e.g.*: *Deuser v. State*, 697 P.2d 647, 649 (Alaska 1985) (alternative method based on injured worker's wages on projected renewal of six-month contract must be used for purpose of temporary disability payments, where formula method substantially underestimates future income); *Brunke v. Rogers & Babler*, 714 P.2d 795, 800 (Alaska 1986)

(employee injured three months after beginning new job at dramatically higher salary entitled to have temporary total disability payments based on alternative method instead of formula); *Peck v. Alaska Aeronautical, Inc.*, 744 P.2d 663, 666-67 (Alaska 1987) (alternative method must be used when injury produces permanent total disability many years later, and injured employee's earning capacity has increased substantially in interim), *reh'g granted*, 756 P.2d 282 (Alaska 1988); *Wrangell Forest Products. v. Alderson*, 786 P.2d 916, 918 (Alaska 1990) (use of alternative method proper where formula method so substantially underestimates employee's projected future income as to no longer fairly calculate that amount); *Houston Contracting, Inc. v. Phillips*, 812 P.2d 598, 600-01 (Alaska 1991) (use of alternative method proper where injured employee's employment history consisted of regular pattern of discontinuous, short-term employment).

Gilmore noted in some cases the statute might work well and "may roughly approximate the employee's lost wages when the employee worked full time during the entire two year period at the same job held at the time of injury" or "when the employee has consistently worked only at seasonal occupations," but it does not "account for any upward or downward change in the employee's earning capacity and punishes workers who have newly committed to full time employment." *Gilmore* stated the "formula also fails entirely to take account of any change in the employee's earning capacity that occurred during the year of injury." (*Gilmore* at 932 n. 6).

Notably, *Gilmore* provided a sample of a "model statute," which the court said would probably not be struck down as unconstitutional:

> Section 19. Determination of Average Weekly Wage. Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the compensation and shall be determined as follows:
>
> (a) If at the time of the injury the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
>
> (b) If at the time of injury the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;

> (c) If at the time of injury the wages are fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two;
>
> (d)(1) If at the time of the injury the wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.
>
> (2) If the employee has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
>
> (e) If at the time of injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees.
>
> (f) In occupations which are exclusively seasonal and therefore cannot be carried on throughout the year, the average weekly wage shall be taken to be one-fiftieth of the total wages which the employee has earned from all occupations during the twelve calendar months immediately preceding the injury.
> . . . .
>
> (i) When the employee is working under concurrent contracts with two or more employers and the defendant employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation. (*Id*. at 932 n. 15; citing the Council of State Governments' Draft Workmen's Compensation and Rehabilitation Law, quoted in 2 Arthur Larson, *The Law of Workmen's Compensation* §60.11(a)(1), at 10.606 n. 77 (1993)).

Following *Gilmore*, Alaska's legislature amended §220 effective 1995, and amended it slightly again in 2000, and incorporated most aspects of the "model statute," above. This last §220 version worked relatively well for many years. The "model statute" version of §220(a) had a viable method of taking variations in work histories into account to predict lost earnings and compensate injured workers for their actual losses during periods of disability. The amended, 2000 version of §220 said:

AS 23.30.220. Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

1) If at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;

2) If at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;

3) If at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;

4) If at the time of injury the

A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;

B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1) – (3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13;

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;

6) If at the time of injury the employment is exclusively seasonal or temporary, then, notwithstanding (1) – (5) of this subsection, the gross weekly earnings are $1/50^{th}$ of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;

7) When the employee is working under concurrent contract with two or more employers, the employee's earnings from all employers is considered as if earned from the employer liable for compensation;

> 8) If an employee when injured is a minor an apprentice, or a trainee in a formal training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee;
>
> 9) If the employee is injured while performing duties as a volunteer ambulance attendant, volunteer police officer or volunteer firefighter, then, notwithstanding (1)-(6) of this subsection, the gross weekly earnings for calculating compensation shall be the minimum gross weekly earnings paid a full-time ambulance attendant, police officer, or firefighter employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance attendants, police officers, or firefighters, at a reasonable figure previously set by the political subdivision to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week;
>
> 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.
>
> (b) The commissioner shall annually prepare formulas that shall be used to calculate an employee's spendable weekly wage on the basis of gross weekly earnings, number of dependents, marital status, and payroll tax deductions.
>
> (c) In this section
>
> (1) 'Seasonal work' means employment that is not intended to continue through an entire calendar year but recurs on an annual basis.
>
> (2) 'Temporary work' means employment that is not permanent, ends upon completion of the task, job, or contract, and ends within six months from the date of injury.

There was relatively little litigation over TTD rates since 2000. The "Model Act" version of §220 was, however, amended in 2005 to its present form.

In *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999), the Alaska Supreme Court further explained *Gilmore* and declined to accept a "broad" view that *Gilmore* required the board

to calculate TTD rates by determining what "was fair" to both parties. *Thompson* said, referring to and citing *Gilmore*, "We noted that 'section 220(a) may be applied constitutionally in a number of circumstances, for example, where an injured worker has had the same occupation for all of the past two calendar years.'" *Id*. at 689. Thus, the first question under *Gilmore* is not whether an award calculated according to AS 23.30.220(a)(1) is "fair." Rather, "it is whether a worker's past employment history is an accurate predictor of losses due to injury." *Id*. At the time Thompson was injured, AS 23.30.220 read in relevant part:

> (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> > (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury; . . . .

Thompson noted:

> In fact, a primary purpose of our workers' compensation laws is to predict accurately what wages would have been but for a worker's injury. In *Johnson v. RCA-OMS, Inc.* (footnote omitted) we explained that under past versions of the statute at issue here, the 'entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity' (footnote omitted). We reiterated this theme in *Gilmore* with regard to the 1988 version of the statute involved in this case when we quoted *Johnson* with approval (footnote omitted). (*Id*. at 689-90).

Thompson also stated "'intentions as to employment in the future are relevant to a determination of future earning capacity' in determining proper compensatory awards." (*Id*. at 690; *citing State v. Gronroos*, 697 P.2d 104 n. 2 (Alaska 1985)).

In *Dougan v. Aurora Electric, Inc*., 50 P.3d 789 (Alaska 2002), the Alaska Supreme Court stated, after the Legislature adopted the "model law" set forth in *Gilmore*, the *Gilmore* test was no longer applicable. *Id*. at 797. *Dougan* held the law in effect at the time of Dougan's injury provided for a variety of methods to calculate a TTD rate, while *Gilmore's* version of §220 relied exclusively on the average wage earned during a period of over a year without providing an alternate approach if the result was unfair. (*Id*.)

In *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006), the Alaska Supreme Court again referenced *Gilmore* and stated;

> As we pointed out in *Gilmore,* a fair approximation of a claimant's future earning capacity lost due to the injury is the 'essential component of the basic compromise underlying the Workers' Compensation Act-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' (footnote omitted). Despite subsequent amendments to the statute aimed at increasing the efficiency and predictability of the compensation process, this compromise, and the fairness requirements it engenders, provide the context for interpreting the Workers' Compensation Act.

The version of AS 23.30.200 in effect on Employee's injury date stated:

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
>
> (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;
>
> (2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;
>
> (3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;
>
> (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;
>
> (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;
>
> (6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and

the employment is exclusively seasonal or temporary, then the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;

(7) when the employee is working under concurrent contracts with two or more employers, the employee's earnings from all employers is considered as if earned from the employer liable for compensation;

(8) if an employee when injured is a minor, an apprentice, or a trainee in a formalized training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee; if the minor, apprentice, or trainee would have likely continued that training program, then the compensation shall be the average weekly wage at the time of injury rather than that based on the individual's prior earnings;

(9) if the employee is injured while performing duties as a volunteer ambulance attendant, volunteer police officer, or volunteer firefighter, then, notwithstanding (1)-(6) of this subsection, the gross weekly earnings for calculating compensation shall be the minimum gross weekly earnings paid a full-time ambulance attendant, police officer, or firefighter employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance attendants, police officers, or firefighters, at a reasonable figure previously set by the political subdivision to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week;

(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.

(b) The commissioner shall annually prepare formulas that shall be used to calculate an employee's spendable weekly wage on the basis of gross weekly earnings, number of dependents, marital status, and payroll tax deductions.

(c) In this section,

(1) 'seasonal work' means employment that is not intended to continue through an entire calendar year, but recurs on an annual basis;

> (2) 'temporary work' means employment that is not permanent, ends upon completion of the task, job, or contract, and ends within six months from the date of injury.
>
> **8 AAC 45.182. Controversion**. (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.
> . . . .
>
> (d) After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,
>
> > (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155(o); or
> > . . . .
>
> (e) For purposes of this section, the term 'compensation due,' and for purposes of AS 23.30.155(o), the term 'compensation due under this chapter,' are terms that mean the benefits sought by the employee, including but not limited to disability, medical, and reemployment benefits, and whether paid or unpaid at the time the controversion was filed.

ANALYSIS

1) Should Employer be assessed penalties or should a finding be made that it frivolously or unfairly controverted compensation due Employee?

It is undisputed Employer never formally controverted Employee's initial right to right hip surgery. AS 23.30.155(d). However, Employee contends Employer controverted-in-fact by not authorizing surgery in a timelier manner. *Alaska Interstate*; *Tweden*. Employee contends Employer actually delayed his receipt of left hip surgery. He contends the adjuster mentioned the EME to the OPA representative knowing full well the provider would not perform the surgery for fear of not being paid. Employee contends adjuster Green's testimony to the contrary is not credible. Employer disputes all these allegations.

Whether the adjuster controverted-in-fact Employee's right to have right hip surgery raises factual disputes to which the presumption of compensability applies. AS 23.30.120; *Meek*.

Employee raises the presumption with his testimony stating he wanted right hip surgery promptly, but his provider said the adjuster refused to preauthorize it. *Cheeks*. Employer rebutted the raised presumption through adjuster Green's testimony that she promptly and thoroughly investigated Employee's request for a surgical preauthorization when the original body part changed from Employee's lower spine to his right hip. *Runstrom*. Employee must prove Employer controverted-in-fact his right to right hip surgery by a preponderance of the evidence. *Saxton*.

Employee's First Report of Injury states he injured his lower back. On December 4, 2014, OPA called adjuster Green seeking preauthorization for right hip surgery. AS 23.30.155(a). It is not too surprising Green would be hesitant to preauthorize treatment when Employee was seeking right hip surgery. *Rogers & Babler*. Green credibly stated she had no right hip medical records and no inkling Employee claimed a right hip injury while working for Employer. AS 23.30.122; *Smith*. It is true Employer must either agree to pay for requested medical care or controvert it. AS 23.30.095(a); AS 23.30.155(a). Compensation payment to Employee had already begun. Employer had seven days to controvert continuing benefits payable without an award. AS 23.30.155(d). Here, when first Employee's mother and then Employee called Green to complain about the purported delay, Green advised Employee she had no medical records or knowledge of any right hip injury. *Ford*. In response, Employee obtained his medical records showing a work-related right hip injury and gave them to Green. Within five days, Green expressly preauthorized the requested right hip surgery. AS 23.30.155(a). Thus, not only did Green not formally controvert or controvert-in-fact, she expressly preauthorized the surgery OPA and Employee requested. *Alaska Interstate*; *Tweden*. Had a hearing been held on December 4, 2014, and had the only evidence adduced been the medical records Green had in her possession, Employee would not have been entitled to the right hip surgery. *Harp*.

Further, Green credibly testified OPA decided to delay surgery pending results from Green's EME. AS 23.30.122; *Smith*. Green's testimony is supported by Vickery's January 13, 2015 letter stating OPA advised Employee OPA could not move forward with surgery until the EME had been completed and a determination made. Therefore, the undisputed evidence demonstrates OPA and not the adjuster decided to delay the surgery. While Employee's testimony about what

OPA told him caused the delay was credible, in context, it demonstrates OPA's representative did in fact tell Employee right hip surgery was not authorized. But that conversation occurred before the adjuster was aware Employee had a hip injury. *Ford*. Without medical evidence linking the hip injury to the work injury with Employer, no surgery for a right hip injury was due and payable. AS 23.30.155(a), (e). Once Green obtained the right hip medical records, she promptly preauthorized surgery within the allotted seven days. AS 23.30.155(d); 8 AAC 45.182. Given these facts, no penalty will be assessed against Employer and there was no unfair or frivolous controversion or controversion-in-fact. Employee's penalty claim and his request for an order finding an unfair or frivolous controversion-in-fact will be denied.

2) Is Employee entitled to a compensation rate adjustment?

It is undisputed Employee's compensation rate was calculated under AS 23.30.220(a)(4). Claimant requests a compensation rate adjustment. A history of compensation rate adjustment cases is included in the principles of law section, above. For many years compensation rate adjustment claims were hotly litigated until the legislature adopted something similar to the "Model Act." *Johnson*; *Gronroos*; *Deuser*. For several years thereafter, there was little if any litigation over weekly compensation rates. *Thompson*; *Dougan*. However, in 2005 the legislature changed the law back to something quite similar to what the Alaska Supreme Court had declared unconstitutional as applied in *Gilmore*.

Though the legislature took the "fairness" requirement out of AS 23.30.220, the legislature subsequently implemented AS 23.30.001(1), which requires the entire Act be interpreted to provide for, among other things, "fair" delivery of indemnity benefits to injured workers at a reasonable cost to employers. *Brennan*. Employee's compensation rate adjustment claim is based upon the notion that the current compensation rate statute applicable to Employee's injury may have the same infirmities as the statute the Alaska Supreme Court said was unconstitutional as applied in some circumstances. Assuming Employee is correct, a compensation rate adjustment may be claimed based upon an injured worker's actual earnings at the time of injury if the statutory formula does not result in a fair approximation of an injured worker's lost earnings during the continuance of his disability. AS 23.30.001(1); *Gilmore*.

Employee's compensation rate adjustment claim raises factual disputes to which the presumption of compensability must be applied. *Meek*. Employee raises the presumption he is entitled to a higher compensation rate through his testimony stating he earned four dollars per hour more working for Employer than he did in the job he held in the two calendar years prior to his work injury, and his increased earnings would have continued through his period of disability. *Cheeks*. Employer rebuts the presumption through Brawn's testimony he probably would not have retained Employee or sent him through the apprenticeship program at AVTEC. *Runstrom*. Employee must prove he is entitled to a compensation rate adjustment by a preponderance of the evidence. *Saxton*.

It is undisputed Employee was on new-hire probation when he was injured. Brawn testified Employee by all reports was not performing satisfactorily as a plumber's helper. Employee's probation would have ended around October 29, 2014, had he not been injured. Brawn credibly stated he probably would not have retained Employee. AS 23.30.122; *Smith*. It is also undisputed Employee has not completed his Charter College training and is not certified in HVAC. Such training, had Employee completed it, would not have assisted him in his work as a plumber's helper while working for Employer, because Employer did very little HVAC work. Employee is not yet an apprentice or licensed plumber. He remains disabled following his second hip surgery. There is no credible or substantial evidence Employee would have continued to make $15 per hour but for his injury at least through the relatively lengthy period during which his work injury disables him. *Johnson*. Therefore, assuming Employee's legal theory is correct, Employee failed to demonstrate the statutory compensation rate formula used to calculate his TTD rate results in an unfair representation of his probable lost earnings during the period of his expected disability. *Johnson*; *Gilmore*; *Thompson*. Therefore, his compensation rate adjustment claim will be denied.

CONCLUSIONS OF LAW

1) Employer will not be assessed penalties and a finding will not be made that it frivolously or unfairly controverted compensation due Employee.
2) Employee is not entitled to a compensation rate adjustment.

ORDER

1) Employee's March 25, 2015 claim for a compensation rate adjustment is denied.
2) Employee's March 25, 2015 claims for penalties are denied.
3) Employee's March 25, 2015 request for a finding Employer made an unfair or frivolous controversion is denied.
4) Employee's March 25, 2015 claims for attorney's fees, costs and interest are denied.

Dated in Anchorage, Alaska on September 17, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Dave Kester, Member

_____
Mark Talbert, 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 Cody R. Rhode, Employee / claimant v. Anchorage Plumbing & Heating, Employer; Liberty Northwest Insurance Corp., insurer / defendants; Case No. 201418303; 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 September 17, 2015.

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Elizabeth Pleitez, Office Assistant