

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

YEVGENIY P. SHASTITKO,)
)
Deceased Employee,) FINAL DECISION AND ORDER
)
ANNA SHASTITKO,) AWCB Case No. 200913721
RADIMIR SHASTITKO (minor child),)
SIMON SHASTITKO (minor child),) AWCB Decision No. 15-0154
and THOMPSON VALLEY)
FUNERAL HOME,) Filed with AWCB Fairbanks, Alaska
) on November 27th, 2015
Claimants,)
)
v.)
)
MTI, INC., KONSTANTIN MISYUK,)
VICTOR MISYUK,)
VALENTINA MISYUK, and)
ELENA (MISYUK) MEDVEDEV,)
)
Uninsured)
Respondents, and,)
)
STATE OF ALASKA, WORKERS')
COMPENSATION BENEFITS)
GUARANTY FUND,)
)
Respondent.)
)
)
)

The State of Alaska Workers' Compensation Benefits Guaranty Fund's (Fund) June 19, 2015 petition for reimbursement of an overpayment was heard October 15, 2015 in Fairbanks, Alaska.

This hearing date was selected on July 8, 2015. Assistant Attorney General Siobhan McIntyre appeared and represented the Fund. Attorney Robert Beconovich appeared and represented Anna Shastitko, Radimir Shasitko, and Simon Shastitko (Claimants). Uninsured respondents MTI, Inc., Konstantin Misyuk, Viktor Misyuk, Valentina Misyuk, and Elena Medvedev (collectively, Employer) represented themselves and did not present any written briefing or evidence on the Fund's petition. McKenna Wentworth testified as a witness. The record closed at the hearing's conclusion on October 15, 2015.

SUMMARY OF PREVIOUS DECISIONS

A brief overview of past decisions in this case places in context the issues considered here. *Estate of Shastitko v. MTI, Inc.*, AWCB Decision No. 13-0027 (March 19, 2013) (*Shastitko I*) held that at the time of his death Yevgeniy Shastitko was Employer's employee and Claimants were entitled to death benefits under the Act, subject to a statutory offset for Social Security benefits received. *Shastitko I* ordered Employer to pay the death benefits and reserved jurisdiction to determine the amount of the benefits if the parties were unable to agree.

The Employers, other than MTI, Inc., appealed *Shastitko I* to the Alaska Workers' Compensation Appeals Commission (AWCAC). The Fund applied for and was granted a stay as to past death benefits by the AWCAC. AWCAC affirmed *Shastitko I* in *Misyuk v. Shastitko*, AWCAC Decision No. 202, (November 4, 2014) (*Shastitko II*).

Claimants' application for a supplemental order on default was addressed in *Estate of Shastitko v. MTI, Inc.*, AWCB Decision No. 15-0099 (August 19, 2015) (*Shastitko III*). *Shastitko III* found Employer had failed to pay the benefits ordered in *Shastitko I*, and because Employer was uninsured for worker's compensation liability at the time of Employee's death, *Shastitko III* ordered the fund to pay past and ongoing death benefits as ordered by *Shastitko I*.

ISSUES

The Fund contends it overpaid the minor beneficiaries¹ from March 2013 to June 2015 because it inadvertently failed to apply the Social Security offset and a cost of living (COLA) adjustment.

¹ The benefits due to Anna Shastitko, Employee's surviving spouse, are not in dispute.

The Fund asks that it be permitted to recover the overpayment by recovering more than twenty percent of the lump-sum due to the beneficiaries. Claimants contend that because the amount of benefits due the minor beneficiaries has not yet been determined by the board, it is unclear whether an overpayment occurred. Claimants further contend that if an overpayment did occur, the Fund should be equitably estopped from recovering the overpayment by withholding more than twenty percent of any benefits due.

1. Did the Fund overpay the minor beneficiaries?

2. Should the Fund be permitted to recover the overpayment by withholding more than twenty percent of future payments?

FINDINGS OF FACT

All findings of fact in *Shastitko I* and *Shastitko III* are incorporated herein. The following facts and factual conclusions are reiterated from *Shastitko I*, *Shastitko III*, or are established by a preponderance of the evidence.

- 1) On July 12, 2009, Employee was killed when the truck he was driving for MTI, Inc. rolled over and landed in a ditch in British Columbia, Canada. (*Shastitko I*).
- 2) MTI, Inc. was uninsured for workers' compensation liability at the time of Employee's death. (*Shastitko I*).
- 3) In 2007, Employee earned \$30,624.04; in 2008, he earned \$33,106.78. ((*Shastitko I*).
- 4) At the time of his death, Employee and Anna Shastitko had two children: Radimir Shastitko, born March 30, 2006; and Simon Shastitko, born June 24, 2009, just three weeks before Employee's death. (*Shastitko I*).
- 5) The Claimants first received Social Security survivor benefits in August 2009. (*Shastitko I*). The benefits were retroactive to July 2009, and each of the children received \$732.00 per month. (Social Security Administration (SSA), Notice of Award, August 18, 2009). In April 2010, the children's benefit was retroactively increased to \$736.00 per month each because of a correction to Employee's income. (SSA Benefit Letter, April 2, 2010).
- 6) On December 2, 2009, Anna Shastitko filed a workers' compensation claim on behalf of herself and her two children for death benefits, penalty, interest, attorney fees and costs. (*Shastitko I*).

- 7) On December 29, 2009, Employer filed its answer to Anna Shastitko's claim, denying all benefits based on its assertion that Employee was an independent contractor at the time of his death. (*Shastitko I*).
- 8) In September 2010, Anna Shastitko remarried. (*Shastitko I*; Wentworth). After she remarried, she was no longer entitled to Social Security survivor benefits. (SSA Overpayment Notification, October 13, 2010). Because Anna was no longer entitled to benefits, the benefits to the children increased to \$928.00 per month each. (SSA Benefit Letters, October 13, 2010).
- 9) Beginning December 2011, the children's Social Security benefits were increased to \$962.00 per month each. (SSA Benefit Letters, March 10, 2012).
- 10) The *Shastitko I* hearing was held on August 2 and 3, 2012. Claimants were represented by Mr. Beconovich, Employers were represented by attorney James Hackett, and the Fund was represented by Assistant Attorney General Toby Steinberger. The record was held open to allow the parties to file additional evidence and closed on January 29, 2013. (*Shastitko I*).
- 11) *Shastitko I* issued on March 19, 2013. Employee was found to be an employee of MTI, Inc. at the time of his death, and the individual Employers were found to be jointly and severally liable with MTI, Inc. Employers were ordered to pay death benefits to Claimants with an offset for Social Security benefits in accordance with AS 23.30.225. The decision did not calculate the amount of death benefits, but reserved jurisdiction to resolve any disputes over the calculation of the benefits. (*Shastitko I*).
- 12) On April 16, 2013, the individual Employers appealed *Shastitko I* to the AWCAC. The individual Employers argued *Shastitko I* had erred in finding Employee was not an independent contractor and that the individual Employers were jointly and severally liable with MTI, Inc. (*Shastitko II*).
- 13) On June 20, 2013, the AWCAC granted the Fund's motion for a stay of the lump-sum of past benefits ordered in *Shastitko I*. Ongoing periodic benefits were not stayed. (AWCAC, Order on Motion for Stay, June 20, 2013).
- 14) On June 24, 2013, the Fund began paying the minor claimants death benefits of \$238.82 per week each, from the date of *Shastitko I*. (Fund, Payment Ledger).
- 15) In July 2013, the Claimants moved to Vancouver, Washington. (*Shastitko I*; Wentworth).

- 16) From July 2013 through December 2013 the COLA adjustment for Vancouver, Washington was 76.2 percent. (Workers' Compensation Bulletin No. 11-02, June 13, 2011).
- 17) Beginning January 1, 2014, the COLA for Vancouver, Washington was 76.69 percent. (Workers' Compensation Bulletin No. 14-01 Revised, January 5, 2015).
- 18) On November 4, 2014, AWCAC issued *Shastitko II*, affirming *Shastitko I*.
- 19) On May 7, 2015, Claimants filed an application for a supplemental order of default, contending Employers had not been paid the benefits awarded in *Shastitko I* and affirmed by AWCAC in *Shastitko II*. (Application for Supplemental Order of Default, May 7, 2015).
- 20) On June 19, 2015, the Fund filed a petition alleging it had overpaid the minor Claimants and asking that it be allowed to recoup the overpayment by withholding more than 20 percent of any future payments. (Petition, June 19, 2015).
- 21) On August 19, 2015, *Shastitko III* found Employers in default and ordered them to pay past and ongoing death benefits to claimants as well as attorney fees and other benefits. (*Shastitko III*). *Shastitko III* did not address the computation of the death benefits to the Claimants, any offsets, or the Fund's June 19, 2015 petition. (Observation).
- 22) Beginning June 24, 2013, the Fund paid the minor Claimants death benefits from March 19, 2013 through June 5, 2015 at the weekly rate of \$238.82 per child. Beginning June 6, 2015, the Fund began paying each child \$60.60, which it alleged was the correct rate after the Social Security and COLA offsets and a 20 percent reduction to recoup its overpayment. The total payments to each child through September 11, 2015 were \$28,024.95. (Fund, Payment Ledger; Wentworth). From September 11, 2015 to October 15, 2015, the date of the hearing was four weeks and six days (4.857 weeks). By October 15, 2015, each child would have been paid an additional \$294.33, for a total of \$28,319.28. (Observation).
- 23) The Fund's proposed compensation calculations reflect changes to the children's worker's compensation benefit based on changes in the Social Security benefit they received. (Proposed Compensation Report).
- 24) In 2009 and 2010, the interest rate on late-paid benefits was 3.5 percent. From 2011 through 2015, the interest rate is 3.75 percent.
(<http://www.courtrecords.alaska.gov/webdocs/forms/adm-505.pdf>).
- 25) Neither Employers nor the Fund have paid death benefits to the minor Claimants for the period prior to March 19, 2013. (Wentworth; Observation).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

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

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

...

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

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

AS 23.30.010. Coverage.

(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

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

- (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.

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

....

(f) If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment. The additional amount shall be paid at the same time as, but in addition to, the compensation, unless review of the compensation order making the award as provided under AS 23.30.008 and an interlocutory injunction staying payments is allowed by the court. The additional amount shall be paid directly to the recipient to whom the unpaid compensation was to be paid.

....

(j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

....

(p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.

AS 23.30.175. Rates of compensation.

....

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

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

AS 23.30.215. Compensation for death.

(a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:

(1) reasonable and necessary funeral expenses not exceeding \$10,000;

(2) if there is a widow or widower or a child or children of the deceased, the following percentages of the spendable weekly wages of the deceased:

....

(C) 30 percent for the widow or widower with two or more children and 70 percent divided equally among the children;

....

(3) if the widow or widower remarries, the widow or widower is entitled to be paid in one sum an amount equal to the compensation to which the widow or widower would otherwise be entitled in the two years commencing on the date of remarriage as full and final settlement of all sums due the widow or widower;

....

(b) In computing death benefits, the spendable weekly wage of the deceased shall be computed under AS 23.30.220 and shall be paid in accordance with AS 23.30.155 and subject to the weekly maximum limitation in the aggregate as provided in AS 23.30.175, but the total weekly compensation may not be less than \$75 for a widow or widower nor less than \$25 weekly to a child or \$50 for children.

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:

....

(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;

(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.

AS 23.30.225. Social security and pension or profit sharing plan offsets.

(a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.

8 AAC 45.225. Social security and pension or profit sharing plan offsets

(a) An employer may reduce an employee's or beneficiary's weekly compensation under AS 23.30.225(a) by

(1) getting a copy of the Social Security Administration's award letter showing the

(A) employee or beneficiary is being paid retirement or survivor's benefits;

(B) amount, month, and year of the initial entitlement; and

(C) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee's or beneficiary's initial Social Security entitlement, and excluding any cost-of-living adjustments; and

(3) completing, filing with the board, and serving upon the employee or beneficiary a Compensation Report form showing the reduction and how it was computed, together with a copy of the Social Security Administration's award letter.

ANALYSIS

1. Did the Fund overpay the minor beneficiaries?

Death Benefits:

To determine whether an overpayment occurred, it is first necessary to calculate what the minor beneficiaries should have been paid. Under AS 23.30.220(a)(4), an employee's gross weekly earnings are calculated by dividing the higher of the earnings for the two calendar years preceding the injury by 50. Employee earned \$33,106.78 in 2008, which was more than he earned in 2007. Dividing \$33,106.78 by 50 results in gross weekly earnings of \$662.14. With gross weekly earnings of \$662.14, the board's online benefit calculator gives a spendable weekly

wage of \$588.75 for a married employee with four exemptions.² Under AS 23.30.215(a), the minor beneficiaries were entitled to 70 percent of Employee's spendable weekly wage, divided equally, before the reductions for Social Security benefits or §175(b) COLA. Seventy percent of \$588.75 is \$412.13, which results in a weekly workers' compensation death benefit of \$206.06 per child.

From July 12, 2009, the date of Employee's death, until September 2010, when Anna Shastitko remarried, the children each received \$736.00 per month in Social Security benefits. Although the exact date of Anna's remarriage is unknown, because she did not receive Social Security Benefits for September 2010, it can be assumed she remarried on September 1, 2010. Because the Claimants resided in Alaska, there is no §175(b) COLA for this period. The weekly Social Security benefit can be calculated by multiplying the monthly benefit of \$736.00 by twelve for a yearly benefit of \$8,832.00. Dividing that amount by 52 gives a weekly Social Security benefit of \$169.85. Under AS 23.30.225(a), the Social Security offset is one-half of that amount, or \$84.92. As a result, each minor beneficiary was entitled to a weekly death benefit of \$121.14 (\$206.06 - \$84.92). From July 12, 2009 to September 1, 2010 is 59 weeks and three days, or 59.428 weeks. During that time, each child should have received \$7,199.11 in death benefits (\$121.14 x 59.428).

Beginning September 1, 2010, the children's Social Security increased to \$928.00 per month each. Under 8 AAC 45.225, a Social Security offset is based on the amount of initial entitlement and does not change because of later cost of living adjustments. Here, however, the children's Social Security benefit did not change because of a cost of living adjustment; the change was due to a reallocation of the initial entitlement due to Anna Shastitko's remarriage. The change in the Social Security benefit results in a change in the death benefit from then until March 19, 2013, when the Fund began paying benefits. The death benefit before any Social Security and §175(b) COLA remains \$206.06 ($\588.75×0.35). Again, there is no §175(b) COLA because the Claimants resided in Alaska. The Social Security offset changes, however. The weekly Social

² Based on gross weekly earnings of \$662.14, the board's 2009 Weekly Compensation Rate Table provides a weekly temporary total disability (TTD) benefit of \$470.91 for a married employee with four exemptions. Because TTD is 80 percent of an employee's spendable weekly wage, the spendable weekly wage can also be computed by dividing \$470.91 by 0.8, which results in \$588.64. This decision uses \$588.75 as the spendable weekly wage.

Security benefit is calculated by multiplying the monthly benefit of \$928.00 by twelve for a yearly benefit of \$11,136.00. Dividing that amount by 52 gives a weekly Social Security benefit of \$214.15. The Social Security offset is one-half of that amount, or \$107.07. As a result, each minor beneficiary was entitled to a weekly death benefit of \$98.99 ($\$206.06 - \107.07). From September 1, 2010 to March 19, 2013 is 132 weeks and six days, or 132.857 weeks. During that time, each child should have received \$13,151.51 in death benefits ($\$98.99 \times 132.857$).

From March 19, 2013 to July 1, 2013, Claimants continued to reside in Alaska and their compensation rate remained unchanged at \$98.99 per week. From March 19, 2013 to July 1, 2013 is 14 weeks and six days, or 14.857 weeks. Consequently, from March 19, 2013 to July 1, 2013, each child should have been paid \$1,470.69 ($\98.99×14.857).

On July 1, 2013, Claimants moved to Vancouver, Washington. At that point, the §175(b) COLA is applied. The death benefit before any offset or adjustment remains \$206.06 ($\588.75×0.35). The §175(b) COLA for Vancouver, Washington for 2013 was 76.2 percent. That reduces each child's pre-Social Security benefit to \$157.02 per month ($\206.06×0.762). The Social Security offset remains at \$107.07 per week. As a result, each minor beneficiary was entitled to a weekly death benefit of \$49.95 ($\$157.02 - \107.07). From July 1, 2013 until January 1, 2014, when the §175(b) COLA was changed is 26 weeks and two days, or 26.286 weeks. During that time, each child should have received \$1,312.99 in death benefits ($\$49.95 \times 26.286$).

From January 1, 2014 through the date of hearing, October 15, 2015, the §175(b) COLA for Vancouver, Washington was 76.69 percent. As a result, Claimants' benefit changed again. The death benefit before any offset or adjustment is still \$206.06. The §175(b) COLA reduces that to \$158.03 ($\206.06×0.7669). The Social Security offset remains at \$107.07 per week. As a result, each child was entitled to a weekly death benefit of \$50.96 ($\$158.03 - \107.07). From January 1, 2014 to October 15, 2015 is 93 weeks and one day, or 93.143 weeks. During that time, each child should have received \$4,746.56 in death benefits ($\$50.96 \times 93.143$).

All told, each child should have received \$27,880.86 in death benefits from July 12, 2009 to October 15, 2015 (\$7,199.11 from July 12, 2009 to September 1, 2010; \$13,151.51 from

September 1, 2010 to March 19, 2013; \$1,470.69 from March 19 to July 1, 2013; \$1,312.99 from July 1, 2013 to January 1, 2014; and \$4,746.56 from January 1, 2014 to October 15, 2015). Each child will continue to receive weekly benefits of \$50.96 unless the §175(b) COLA changes again.

Interest:

No death benefits have been paid to the minor Claimants for periods between July 12, 2009 and March 19, 2013, the date of *Shastitko I*. Because these benefits were not timely paid, Claimants are entitled to interest. Because both the amount of the death benefit and the interest rate changed at various times, calculation of interest is somewhat convoluted. Simple interest on a series of payments can be calculated by determining the time in years from the midpoint of the series of payments to the date interest was paid, multiplying that by the annual interest rate and the total payments due during the period.³ The interest rate used is the rate in effect at the time the benefits became due.

For the period from July 12, 2009 to September 1, 2010, a period of 59 weeks and three days, the total benefits due each child were \$7,199.11. Fifty nine weeks and three days is 416 days. Half of that, or 208 days after July 12, 2009, is February 5, 2010. From February 5, 2010 to October 15, 2015, the date of the hearing is 2,078 days or 5.69 years. The interest rate in 2009 and 2010 was 3.5 percent. The interest due is \$1,433.70 ($\$7,199.11 \times 3.5\% \times 5.69$ years).

From September 1, 2010 through December 31, 2010, a period of 17 weeks and two days (17.286 weeks or 122 days), the interest rate remained 3.5 percent. The children's weekly death benefit during that time was \$98.99, and the total benefit due during the period was \$1,711.14 ($\98.99×17.286). The midpoint of the time period is half of the 122 days, or 61 days, after September 1, 2010. That date is November 1, 2010. From November 1, 2010 to October 15, 2015 is 1,811 days or 4.96 years. The interest on payments due from September 1, 2010 through December 31, 2010 is \$297.05 ($\$1,711.14 \times 3.5\% \times 4.96$ years).

³ Because this method assumes benefits are paid weekly rather than biweekly as required by the Act, it somewhat overstates interest. Because of the low interest rates and the long time periods involved in this case, the overstatement is insignificant.

Beginning January 1, 2011, the interest rate increased to 3.75 percent. From January 1, 2011 to March 19, 2013, when the Fund began paying ongoing death benefits, is a period of 808 days or 115 weeks and three days (115.429 weeks). The children's death benefit during this time was \$98.99 per week, resulting in total benefits due of \$11,426.32. The midpoint of the time period is half of the 808 days, or 404 days after January 1, 2011. That date is February 9, 2012. From February 9, 2012 to October 15, 2015 is 1,344 days, or 3.68 years. The interest on payments due from January 1, 2011 to March 19, 2013 is \$1,576.83 ($\$11,426.32 \times 3.75\% \times 3.68$).

Although the Fund began paying weekly benefits as of March 19, 2013, the date of *Shastitko I*, it did not do so immediately. The first payment to the children was on June 24, 2013. Because the payments were not timely, the Claimants are entitled to interest. From March 19, 2013 to June 24, 2013 is 97 days, or 13.857 weeks. The weekly benefit for each child was \$98.99, and the total benefit for the period was \$1,372.99 ($\98.99×13.857). The interest rate was 3.75 percent. The midpoint of the period was one-half of 97 days, or 48 days, after March 19, 2013. That date is May 6, 2013. From May 6, 2013 to June 24, 2013 is 49 days, or 0.13 years. The interest due is \$6.69 ($\$1,372.99 \times 0.0375 \times 0.13$).

The total interest due each child is \$3,314.27 (\$1,433.70 for the period from July 12, 2009 to September 1, 2010; \$297.05 for the period from September 1, 2010 through December 31, 2010; \$1,576.83 for the period from January 1, 2011 to March 19, 2013; and \$6.69 for the period from March 19, 2013 to June 24, 2013).

Overpayment:

The total amount each minor beneficiary should have received from July 12, 2009 to October 15, 2015 is \$27,880.87 in death benefits, plus \$3,314.27 in interest for a total of \$31,951.14. From July 12, 2009 until the Fund began paying benefits, each child is due \$23,664.89 (\$7,199.11 from July 12, 2009 to September 1, 2010; \$13,151.51 from September 1, 2010 to March 19, 2013; and interest of \$3,314.27).

Between March 19, 2013, when the Fund began paying benefits, and October 15, 2015, each child should have been paid \$7,530.24 (\$1,470.69 from March 19 to July 1, 2013; \$1,312.99

from July 1, 2013 to January 1, 2014; and \$4,746.56 from January 1, 2014 to October 15, 2015). However, once it began paying benefits, the Fund overpaid the children; rather than the \$7,530.24 to which each child was entitled, they were each paid \$28,319.28, an overpayment of \$20,789.04.

2. Should the Fund be permitted to recover the overpayment by withholding more than twenty percent of future payments?

Under As 23.30.155(j), an employer who had overpaid benefits may, without a board order, reduce future payments by 20 percent to recover the overpayment. Here, the Fund overpaid each child \$20,789.04; 20 percent of that amount is \$4,157.81. That leaves an overpayment of \$16,631.23, which the Fund would have to recover from future periodic death benefits, which are currently \$50.96 per week. Twenty percent of the periodic death benefit would be \$10.19. At that rate, it would take almost 1,637 weeks, or over 31 years to recover the overpayment, far longer than the children will be entitled to benefits.

The Claimants contend the Fund should be equitably estopped from recovering more than 20 percent of the benefits still owed. Claimants point out that the children received no benefits from July 12, 2009 until March 19, 2013, and the Fund, not the children, should bear the cost of its error. Claimants also contend that because only the individual Employers, not MTI, Inc., appealed, MTI became liable and the Fund should have paid all benefits due. Although no benefits were paid during that time, the reason was that Employers, not the Fund, raised the issue of whether Employee was an independent contractor or a covered employee. Under the Act, the Fund is not liable for benefits unless the employer is liable. While MTI was not a party to the appeal, one of the issues the individual Employers raised was whether *Shastitko I* erred in finding Employee was not an independent contractor. Because all of the Employers were jointly and severally liable, had the individual Employers prevailed on that issue, the Fund's obligation would be unclear at best. Requiring a party who made a mistake, rather than an innocent party, to bear the cost of the error has appeal. However, the sole purpose of the Fund is to provide benefits to injured employees whose employers were uninsured. Depriving the Fund of the ability to recover the overpayment means other injured employees may bear that cost.

Allowing the Fund to recover 50 percent of future payments is a fair resolution. It allows the Fund to recover most of the overpayment, but does not unduly decrease the already small weekly benefit. If the Fund recovers 50 percent of the \$20,789.04 overpayment, or \$10,394.52, from the benefits already due of \$23,664.89, each child will receive a lump-sum of \$12,270.37. The balance of the overpayment, \$10,394.52, would be recovered at \$25.48 per week (\$50.96 x 50%). At that rate, the overpayment would be recovered in about 408 weeks, or 7.8 years.

CONCLUSIONS OF LAW

- 1) The Fund overpaid each of the minor beneficiaries \$20,789.04.
- 2) The Fund will be permitted to recover the overpayment by withholding 50 percent of future payments.

ORDER

- 1) The Fund's June 19, 2015 petition is granted.
- 2) The Fund may recover its overpayment to the minor beneficiaries by withholding 50 percent of future payments until the overpayment has been recouped.

Dated in Fairbanks, Alaska on November 27th, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Amanda Eklund, Designated Chair

/s/ _____
Julie Duquette, Member

/s/ _____
Lake Williams, 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

YEVGENIY P. ESTATE OF SHASTITKO v. MTI, INC.

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of YEVGENIY P. ESTATE OF SHASTITKO, employee / claimant; v. MTI, INC., employer; STATE OF ALASKA, WORKERS' COMPENSATION BENEFITS GUARANTY FUND; Case No. 200913721; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on November 27th, 2015.

/s/ _____
Jennifer Desrosiers, Office Assistant II