ALASKA WORKERS' COMPENSATION BOARD

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

PATRICK D. TURRI, Employee, Claimant, v. THE HOME DEPOT USA, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201416531 AWCB Decision No. 18-0129 Filed with AWCB Fairbanks, Alaska on December 21, 2018

Patrick Turri's (Employee) October 19, 2018 request for a compensation rate adjustment and related attorney fees and Home Depot's (Employer) November 8, 2017 Social Security offset petition were heard on November 8, 2018, in Fairbanks, Alaska, a date selected on July 30, 2018. A July 30, 2018 prehearing conference gave rise to this hearing. Attorney John Franich appeared and represented Employee who appeared and testified. Attorney Rebecca Holdiman-Miller appeared and represented Employer and its insurer. On October 19, 2018, the parties stipulated the following three issues would be heard at the November 8, 2018 hearing, with other issues reserved pending mediation. The record closed at the hearing's conclusion on November 8, 2018.

ISSUES

Employee contends, though he did not work for Employer in 2015, he received performance bonus payments in 2015 for work he performed for Employer in 2014. He contends these amounts should be included in his disability compensation rate calculation. Employee further contends his compensation package included restricted stock, which he contends should also be included in his compensation rate formula. He contends these peculiar factors require a compensation rate adjustment under AS 23.30.220(a)(5).

Employer contends it properly calculated Employee's compensation rate based on his annual earnings under AS 23.30.220(a)(3). It contends Employee did not receive "guaranteed" bonuses and his "irregular bonuses" were not an accurate predictor of his lost earnings.

1) Is Employee entitled to a compensation rate adjustment?

Employer contends, the fact Employee became disabled beginning the day after his work injury is adequate to support a retroactive offset for his subsequent receipt of Social Security disability benefits. It contends, if the retroactive offset is applied, Employee will have 104 weeks of disability, which would require the Second Injury Fund (SIF) to participate during mediation.

Employee contends he applied for Social Security disability benefits in early 2013, well before Employer hired him. He contends the judge's 2015 Social Security disability award decision is based solely on his legal blindness. Since he has no claim for benefits under the Act for blindness, Employee contends the offset provision for Social Security disability does not apply to his case.

2) Is Employer entitled to a Social Security offset?

Employee contends his lawyer's efforts resulted in significant benefits to him before hearing. He contends these results alone justify an interim attorney fee award. Further, Employee contends if he successfully obtains a compensation rate adjustment or defeats Employer's request for a Social Security offset, his attorney is entitled to additional interim attorney fees.

Employer did not directly address Employee's contention his attorney's services on his behalf obtained pre-hearing benefits for which he is entitled to an attorney fee. This decision presumes Employer disagrees. However, Employer contends Employee is not entitled to a compensation rate adjustment and Employer is entitled to a Social Security offset. Accordingly, Employer contends if it prevails on these issues Employee is not entitled to an attorney fee award.

3) Is Employee entitled to interim attorney fees?

FINDINGS OF FACT

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

1) On January 16, 2013, Employee applied for Social Security disability benefits and requested a hearing on his claim, before he obtained employment with Employer. (Employee; Social Security Administration Decision, May 11, 2015, at 1, 4).

2) Employee had diabetes mellitus and diabetic retinopathy in both eyes before he began working for Employer in February 2013. He lost sight in his left eye before working for Employer. He had surgery in his right eye in May 2013, and Employee developed a cataract after the surgery, which occurred after beginning work for Employer. Employee eventually lost the vision in his right eye completely while he was working for Employer. (Employee).

3) On October 6, 2014, Employee was at work on "the orange ladder" lifting an empty pressure tank out of an overhead storage area when he missed a step and fell or slid off the ladder, injuring his hip. He later claimed injuries to his back, knee and ankle. Employee has not worked since October 7, 2014, due to Type I Diabetes and blindness in both eyes related thereto. He also has chronic pain in various body parts, attributed to his work injury with Employer, which contributes to why he can no longer work. (First Report of Injury, October 10, 2014; Claimant's Hearing Memorandum, November 5, 2018; Employee).

4) The "orange ladder" is the moveable staircase omnipresent in all Home Depot stores, which associates use to reach stock on shelves high above the floor. (Experience; observations).

5) Employee first began working for Employer as a department supervisor. Employer paid him hourly and he typically worked up to 60 hours per week. He subsequently earned promotions and became the front desk supervisor, operations manager, the "key carrier" and finally an assistant manager effective May 31, 2014. The assistant manager job is not an hourly position; it

paid a base salary of $52,000 per year. Employee kept contemporaneous, handwritten notes of his teleconference with a human resources supervisor about his compensation package. Though they discussed bonuses, his supervisor did not say anything about bonuses not being guaranteed. Included in Employee's notes was the memo, "MIP 1st half /2nd half up to 250% of base pay." MIP stands for Manager Incentive Program, which is divided into two halves reflecting the fiscal year, each half representing different aspects of store performance. The first half is based on store performance; the second half is based on safety, operating expenses and other considerations. Any MIP payments Employee earned in 2014 were actually paid to him in 2015, with one check for the first half of the fiscal year and one check for the second half. The notes' reference to "Restricted Stock" referred to his personal performance as an assistant manager. Employee received restricted stock in 2015 based upon his personal performance in 2014. Between the date he became store manager and the date of his injury, Employee received at least one employee bonus plan check paid in 2014. (Employee; Claimant's Hearing Memorandum, November 5, 2018, Exhibit 2).

6) "Orange Life" refers to Employer's human resources financial report. Employer sent Employee Orange Life, stating his 2014 "Annual Compensation" totaled $62,035, including $52,000 in salary and $10,035 in estimated MIP payouts. The 2014 MIP payouts included $1,585 for the first half and an $8,450 "target" for the second half of the fiscal year. Since Employer promoted Employee in mid-2014, the first-half amounts were reduced; had he worked as an assistant manager the entire first half of 2014, the first half numbers would have been higher. All assistant store managers in the same store received the same bonuses because bonuses were based on store performance; the annual salaries potentially differed among managers in the same store. A footnote on the Orange Life document says the listed annual compensation includes Employee's salary, his September MIP payout and his "target March 2015" payout and states, "Bonus payouts are not guaranteed." (Employee; Claimant's Hearing Memorandum, November 5, 2018, Exhibit 3).

7) Employer paid Employee $2,150.04 net for pay-period beginning March 30, 2015 and ending April 12, 2015. This April 1, 2015 check was money Employee earned working for Employer in 2014, which was not paid to him until 2015, and shows these earnings were taxable to employee at the time they were paid. (Employee; Claimant's Hearing Memorandum, November 5, 2018, Exhibit 5).

8) Employer paid Employee $2,168.95 net pay for September 14, 2015 through September 27, 2015. This October 2, 2015 check was money Employee earned working for Employer in 2014, which was not paid to him until 2015, and shows these earnings were taxable to employee at the time they were paid. (Employee; Claimant's Hearing Memorandum, November 5, 2018, Exhibit 6).

9) Employer sent Employee another Orange Life report stating that on November 20, 2015, Employer paid him 24 shares of its stock with a fair market value totaling $3,125.04. Employee earned this stock in 2014, but Employer did not pay him this compensation until 2015. (Employee; Claimant's Hearing Memorandum, November 5, 2018, Exhibit 7).

10) In his April 14, 2015 claim, Employee said, "Date of onset of EE's blindness may be causally related to work injury." (Workers' Compensation Claim, April 14, 2015).

11) On May 11, 2015, a Social Security administrative law judge addressed Employee's Social Security disability claim filed before his work for Employer began, with an "amended" disability onset date of "October 7, 2014." The Social Security judge found Employee met requirements under federal law and was disabled beginning October 7, 2014, and continuing through the date of her decision. The decision states if a person is engaged in substantial gainful activity he is not disabled regardless how severe his physical impairments are. The judge's decision also lists Employee's "severe impairments" upon which her decision was based, including only: "diabetes mellitus, diabetic retinopathy of both eyes, and cataract of the right eye." The decision notes Employee's impairment meets federal listings for loss of visual acuity with remaining vision in the better eye after best correction is 20/200 or less. There is no reference to any other disabling condition in the judge's decision. (Social Security Decision, May 11, 2015).

12) On February 24, 2016, Katherine Johnson, M.D., opined the work injury was not the substantial cause of vision loss in Employee's right eye. Consequently, given this opinion, Employee is no longer making a claim for benefits related to his right eye. (Deposition of Katherine Johnson, M.D., February 24, 2016, at 48; Employee).

13) Employee contends at the time of his work injury, his earnings were not "fixed" and "could not be ascertained" because his total earnings relied upon additional store numbers not available on the injury date. He contends his bonuses were "guaranteed"; only the amount was in question based upon store performance. Employee contends he was entitled to receive a "regular bonus." However, he contends while the "amount" of the bonus was not guaranteed, the

bonus itself was. The bonus calculation had to be deferred until 2015 because the store's performance could not be ascertained until later. Employer was contractually bound to pay him this bonus. Employee contends any argument to the contrary fails for lack of proof on Employer's part, which would have access to all relevant information to dispute Employee's testimony and the documents he presented at hearing. Therefore, Employee contends his 2014 bonuses paid to him in 2015, plus his stock compensation, should all be included as part of his "compensation package" when determining his compensation rate. As for the Social Security offset issue, Employee contends his vision loss is the primary reason he received Social Security disability benefits, and he has no workers' compensation claim for benefits for that condition and no evidence supporting it as work-related. Consequently, he contends Employer is not entitled to a Social Security offset under the Act. He further contends workers' compensation is not a "needs-based" system. Therefore, if Employee has contractual arrangements with third-parties entitling him to additional disability benefits from other sources, this income is irrelevant to the issues set for hearing. Furthermore, Employee contends his lawyer has already obtained significant benefit for him resulting from his legal efforts, justifying an interim attorney fee award. Employee contends if he prevails on his compensation rate adjustment claim and on preventing a Social Security offset, he is entitled to additional attorney fees. He contends his weekly disability rate should be calculated as follows: Employee worked as an assistant manager from May 31, 2014 through October 6, 2014 (128 days = 18.286 weeks). During this time he earned his $1,000 per week as base salary ($1,000 x 128 / 7 equals $18,285.71). Additionally, Employee contends he earned $5,219.58 and $5,247.90 (totaling $10,467.48) in MIP compensation and earned restricted stock worth $3,125.04. He contends this totals $31,878.23 ($18,285.71 + $5,219.58 + $5,247.90 + $3,125.04 = $31,878.23). Employee contends his gross weekly earnings during the time he worked as a store manager are $1,743.31 ($31,878.23 / 18.286 weeks = $1,743.31). He contends his weekly compensation rate must be based upon these earnings as these are a fair approximation of his probable future earnings before the injury into the period during which benefits are paid. (Employee's hearing arguments).

14) Employer contends the only accurate income information to look at in formulating a compensation rate is Employee's $52,000 a year salary. It contends the MIP bonuses were not "guaranteed" and are an unreliable predictor of future earnings. Employer contends there is no evidence showing what other store managers made in 2014 or 2015. Further, it contends the law

excludes "irregular bonuses" from the compensation rate calculation. Employer contends even the Orange Life report Employee relies upon states the bonuses are "not guaranteed," weakening his rate adjustment argument. As for the Social Security offset issue, Employer contends Employee was only unable to work after the work injury, notwithstanding his application for Social Security disability benefits before his work injury with Employer. It contends Employee's own testimony was that he had preexisting conditions that the work injury aggravated rendering him disabled after the work injury. Further, Employer contends Employee's initial claim states blindness as one reason for his claim for disability benefits. It contends Alaska Supreme Court case law and commission precedent supports the notion that aggravations of preexisting conditions can form the basis for applying the Social Security offset provision. Consequently, Employer contends it is entitled to a retroactive Social Security offset. It also contends Employee now makes more money through all his disability entitlements than he made while working for Employer. As for attorney fees, Employer contends these were not included in the stipulation for the issues set for hearing and there should be no interim attorney fee award. (Employer's hearing arguments).

15) Using the division's online benefit calculator, an October 6, 2014 injury for a married Employee with two dependents, who earns $1,000 in gross weekly wages, results in a weekly temporary disability benefit totaling $670.56. By contrast, using the same calculator, marital status and dependency, if the injured worker earned $1,170.88 in gross weekly wages, his weekly temporary disability benefit would total $775.46. Similarly, if the same worker earned $1,743.31 in gross weekly wages, his weekly benefit would be $1,129.78. (Observations).

16) On November 5, 2018, Employee identified 94 hours attorney time at $400 per hour plus16.7 hours of paralegal time at $210 per hour along with $1,663.75 in litigation costs "spent on this case" through that date. Employee's "Total Fees" are $41,152.50. Employee's attorney fee affidavit does not identify which entries relate to the compensation rate adjustment claim or relate to defending against Employer's Social Security disability offset petition. (Affidavit of Attorney's Fees, November 5, 2018).

PRINCIPLES OF LAW

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 23.30.001. 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 the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
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> **AS 23.30.010. Coverage.** (a) . . . . [C]ompensation 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. . . .
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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. . . .

The presumption of compensability is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption analysis involves three steps. To attach the presumption, an injured worker must first establish a "preliminary link" between his injury and his employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the Act's 2005 amendments, if an injured worker establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence demonstrating 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 (March 25, 2011). Because the board considers the employer's evidence by itself, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient to rebut the presumption, it drops out and the injured worker 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 his disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. This means the injured worker

must "induce a belief" in the fact-finders' minds that the asserted facts are probably true. *Saxton v. Harris,* 395 P.2d 71, 72 (Alaska 1964).

In the third step, evidence is weighed, inferences are drawn and credibility is considered. Neutral evidence is not adequate to rebut the raised presumption. *Harp v. ARCO, Alaska, Inc*., 831 P.2d 352 (Alaska 1992). Where the presumption is raised and not rebutted, the claimant need not produce further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State,* 938 P.2d 1065 (Alaska 1997). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.,* 115 P.3d 1240 (Alaska 2005).

> **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 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the

> proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered. . . .

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 (May 11, 2011) the appeals commission addressed the employer's claim the board erred by awarding attorney's fees under both §§145(a) and (b). Though the commission vacated the board's decision on other grounds, it discussed attorney's fee awards anticipating the issue would arise again, and stated:

> The board awarded reasonable fees under AS 23.30.145(b), but concluded 'the employee is entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits exceeds the attorney fee awarded under AS 23.30.145(b)' (footnote omitted). Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (footnote omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (footnote omitted). Subsection (b) may apply to fee awards in controverted claims, (footnote omitted) in cases in which the employer does not controvert but otherwise resists, (footnote omitted) and in other circumstances (footnote omitted). It is undisputed that Uresco controverted Porteleki's claim. Thus, we see no reason his attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b).

The 1982 average weekly wage and compensation rate statute stated in part:

> **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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> . . . .
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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. . . .

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. *Johnson* held the board was required to use an alternate §220 sub-section in cases where an injured worker's wages from prior years had no relationship to his earnings at the time he was injured. Though it did not decide the case on constitutional grounds, *Johnson* 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 Alaska Supreme 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)).

The legislature amended AS 23.30.220 in 1983 to read in 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:
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> (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.
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> (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 legislature amended AS 23.30.220 again in 1988 to take into account workers who were "absent from the labor market" for a time. This version stated in 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:
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> (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;
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> (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. . . .

The seminal case resulting from this §220 iteration is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* for the first time struck down §220 on equal protection grounds. Gilmore claimed he was entitled to an alternative wage calculation because he was off work for a time in a vocational reemployment training plan, thus reducing his earnings. *Id.* at 924-25. The board rejected Gilmore's claim and he appealed. The Alaska Supreme Court asked for further briefing on whether §220 could pass constitutional muster. Subsequently, the court ruled it could not and struck down §220 "as applied" to the case. *Gilmore* held legislative intent could be gleaned from session laws stating, "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.* *Gilmore* found these goals were "legitimate purposes" but also found, reflecting on *Johnson*:

> The overall purpose of AS 23.30.220(a) . . . 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. (*Id.*).

Most notably, *Gilmore* 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 is constitutional as applied 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.
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> 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. (*Id.* at 928; emphasis in original).

Gilmore concluded Alaska was the only state that did not provide an option to take into account such factors as unemployment in rate calculations. *Id.* Consequently *Gilmore* 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 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* further stated the "formula also fails entirely to take account of any change in . . . earning capacity that occurred during the year of injury." *Gilmore* at 932 n. 6. *Gilmore* provided a "model statute," which the court said would probably not be struck down:

> 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:
> . . . .
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> (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.
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> (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. . . . (*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 in 1995 and incorporated many provisions from the "model statute." The "model" §220(a) included a method to account for variations in work histories, predict earnings and compensate injured workers for actual losses during their disability. Effective 1995, §220 said in part:

> **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:
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> . . . .
>
> (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. . . .

Only two Alaska Supreme Court cases addressed this §220(a) version. In *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006), the court affirmed the board's decision to use §220(a)(4)(A) because it was the most appropriate formula for calculating the injured worker's rate, based on the facts in a 1999 case. *Brennan* 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. (*Brennan*, 129 P.3d 882-83).

In *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999), the Alaska Supreme Court said the 1995 §220 version did not apply to Thompson's case because her injury happened a month before the amended statute's effective date. *Thompson* instead construed an earlier §220

iteration and further explained *Gilmore*. The court declined to accept a "broad" view requiring the board to calculate TTD rates by determining what "was fair" to both parties. *Thompson* said, 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.* When Thompson was injured, AS 23.30.220 read in relevant 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. . . .

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 said "'intentions as to [future] employment . . . are relevant to [determine] future earning capacity' in determining proper compensatory awards." *Id*. at 690; (citation omitted).

In *Dougan v. Aurora Electric, Inc*., 50 P.3d 789, 797 (Alaska 2002), the Alaska Supreme Court stated, after the legislature adopted the "model law" suggested in *Gilmore*, the *Gilmore* test was no longer applicable because 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.

In *Circle De Lumber Company v. Humphrey*, 130 P.3d 941 (Alaska 2006), the Alaska Supreme Court, in a case based on 1993 law, approved a departure from the standard TTD rate calculation method. The board calculated Humphrey's weekly earnings by multiplying his hourly wage at the time of injury ($14.00) with his estimated yearly work period (50 hours per week and six months per year), to derive his gross weekly earnings and his TTD rate. *Humphrey* held the board's employment estimations used for the TTD calculation based on Humphrey's work history and future earning potential were supported by substantial evidence.

AS 23.30.220 was amended in 2005 to its present form, which states:

> **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. . . .

In *Wilson v. Eastside Carpet Co.*, AWCAC Decision No. 106 (May 4, 2009), the Alaska Workers' Compensation Appeals Commission, in a case arising under the current (2005) statute, held an employer may presume that for an hourly worker, AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the employee's wages at the time of injury in most cases. The hourly employee has the burden to challenge the compensation rate established under §220(a) if it does not represent the equivalent wages at the time of the injury, in Wilson's case from prior self-employment. The board "must look at the evidence and decide the facts in each case" when determining the spendable weekly wage. (*Id*. at 4). In *Wilson*, the commission

found the board could not have ascertained the wage equivalent from Wilson's small self-employment record, and therefore was required to use §220(a)(5) to fit these circumstances. *Wilson* further held though tax records may be used to prove reported income, the board is not limited to federal tax returns as proof of an employee's earnings. (*Wilson* at 4). Once an injured worker files a claim requesting a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. (*Id*.).

Most recently, the AWCAC in *Straight v. Johnson Construction & Roofing, LLC*, AWCAC Decision No. 231 (November 22, 2016), reviewed an injured worker's claim for a compensation rate adjustment. *Straight* reiterated the above-referenced compensation rate adjustment history and concluded the legislative changes in AS 23.30.001(1) provided a "fairness provision applicable to the whole Act." *Straight* noted the Alaska Supreme Court on numerous occasions has said a fair compensation rate must take into consideration the injured worker's probable future earning capacity. It further stated this doctrine may be reflected in AS 23.30.220(a)(5), which requires the board to determine an injured worker's spendable weekly wage based on the usual wage for similar services when such services are rendered by paid employees, in cases where earnings are not ascertainable. Consequently, *Straight* determined this requirement in conjunction with the fairness requirement in §001(1) requires a look at future earning capacity when determining whether an injured worker's rate has been fairly calculated.

> **AS 23.30.395. Definitions.**
>
> In this chapter,
> . . . .
>
> > (22) 'gross earnings' means periodic payments, by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer, including compensation that is deferred at the option of the employee, and excluding irregular bonuses, reimbursement of expenses, expense allowances, and any benefit or payment to the employee that is not fully taxable to the employee during the pay period. . . .
> >
> > (23) 'gross weekly earnings' means gross weekly earnings as calculated under AS 23.30.220(a); . . .

8 AAC 45.220. Gross weekly earnings (a) After calculating the gross weekly earnings less the payroll tax deductions under AS 23.30.220, the result will be rounded to the nearest dollar.

(b) The calculation of an employee's gross weekly earnings set out in (c) of this section applies to each of the following periodic payments:

. . . .

(3) 'yearly earnings' under AS 23.30.220(a)(3);

. . . .

(5) 'usual wage' under AS 23.30.220(a)(5). . . .

(c) In calculating an employee's gross weekly earnings, each of the terms set out in (b) of this section means periodic payments made by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer; for purposes of this subsection,

(1) compensation that is deferred at the option of the employee is a periodic payment;

(2) the value of room and board is a periodic payment if taxable to the employee, but the value of room and board that would raise an employee's gross weekly earnings above the state's average weekly wage at the time of injury may not be considered a periodic payment;

(3) the terms set out in (b) of this section do not include as periodic payments:

(A) irregular bonuses, reimbursement of expenses, and expense allowances;

(B) a benefit or payment to the employee that is not fully taxable to the employee during the pay period, except that the amount an employer contributed to provide health or life insurance coverage for the employee or employee's beneficiaries must be included as a periodic payment. . . .

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

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

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

(A) employee is being paid disability benefits;
(B) disability for which the benefits are paid;
(C) amount, month, and year of the employee's initial entitlement; and

> (D) amount, month, and year of each dependent's initial entitlement;
>
> (2) computing the reduction using the employee or beneficiary's initial entitlement, excluding any cost-of-living adjustments;
>
> (3) completing, filing with the board, and serving upon the employee a petition requesting a board determination that the Social Security Administration is paying benefits as a result of the on-the-job injury; the petition must show how the reduction will be computed and be filed together with a copy of the Social Security Administration's award letter;
>
> (4) filing an affidavit of readiness for hearing in accordance with 8 AAC 45.070(b); and
>
> (5) after a hearing and an order by the board granting the reduction, completing a Compensation Report form showing the reduction, filing a copy with the board, and serving it upon the employee. . . .

ANALYSIS

1) Is Employee entitled to a compensation rate adjustment?

It is undisputed Employer calculated Employee's compensation rate under AS 23.30.220(a)(3) based on his $52,000 annual salary with Employer. Employee contends Employer should have applied AS 23.30.220(a)(5). 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 resembling what the Alaska Supreme Court had declared unconstitutional as applied in *Gilmore*.

Though the legislature took "fairness" out of AS 23.30.220, in 2005 it added AS 23.30.001(1), which requires the entire Act to be interpreted to provide for, among other things, "fair" delivery of indemnity benefits to injured workers at a reasonable cost to employers. *Brennan*; *Straight*. Employee's compensation rate adjustment claim is based upon his contention AS 23.30.220(a)(3) is not applicable to his injury because it does not include bonuses and stock he earned in 2014, which Employer did not pay until 2015. Consequently, he contends his rate must be calculated under AS 23.30.220(a)(5) because at the time of his injury, his actual 2014 earnings were not known and not ascertainable. Specifically, Employer did not know how much

it owed him until profits were calculated after it calculated store performance. A compensation rate may be 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*; *Straight*.

Employee's compensation rate adjustment claim is a mixed question of fact and law. Most facts related to this issue are not disputed. The parties agree on Employee's annual salary at the time of injury and Employer does not dispute the amounts Employee claims as 2015 payments for 2014 bonuses and restricted stock values. Accordingly, the presumption analysis does not apply to this part of his rate adjustment claim. *Rockney*. The only disputed fact is whether or not Employee's bonuses were "irregular." Employee says they were not; Employer says they were. This raises a factual dispute to which the presumption of compensability must be applied. *Meek*. Employee raises the presumption through his testimony MIP bonuses were in his compensation package, as were restricted stock payments. *Cheeks*. Employer rebuts the presumption through language on the Orange Life document, which states bonuses are not guaranteed. *Runstrom*. Employee must prove his bonuses and restricted stock payments were not "irregular bonuses" by a preponderance of the evidence. *Saxton*.

Employee credibly testified his overall compensation package included guaranteed bonuses. AS 23.30.122; *Smith*. The only contrary evidence Employer offered was language printed on the Orange Life document stating bonuses were not guaranteed. However, there is a difference between "guaranteed" bonuses and the regularity or amount of said bonuses. Employer presented no contrary testimony explaining how, so long as Employer made a profit, Employee's bonuses were not regular and part of his total compensation package. Furthermore, the statute defining "gross earnings" does not require bonuses included as gross earnings for calculating compensation rates to be "guaranteed"; it just requires they not be "irregular." AS 23.30.395(22). In this instance, there is no question if Employer made a profit Employee was entitled to regular bonuses as stated in his compensation package. Similarly, he was also entitled to restricted stock with a definable value. The Orange Life document simply noted the otherwise regular bonuses might not be paid if, in fact, Employer failed to meet its revenue goals.

The next part of the analysis is a legal question. Employee contends he is entitled to a higher weekly compensation rate based on his additional 2014 earnings Employer paid to him and 2015. He bases this claim on AS 23.30.220(a)(5) and his contention AS 23.30.220(a)(3) does not apply to his situation and is not accurately predict his actual earnings lost during his disability period. Employer contends it properly calculated and paid Employee's disability benefits based upon his annual $52,000 salary under AS 23.30.220(a)(3). Employee has the better legal argument. Employee's regular bonuses depended upon Employer's Fairbanks location meeting its revenue goals. These goals cannot be ascertained and were unknown until the year was over and Employer had an opportunity to compute its earnings and calculate Employee's regular bonuses. Accordingly, Employee's 2014 earnings were not fixed, ascertained or paid in full until 2015. Employee's bonus check stubs and his tax documents demonstrate the earnings were taxable to Employee during the period in which they were paid, and Employer did not raise this as a defense against the compensation rate adjustment claim.

Therefore, since Employee's bonuses were regular and taxable to him, and since his 2014 earnings had not been fixed and could not be ascertained until a subsequent calendar year, his earnings for purposes of calculating his compensation rate should be the usual wage for similar services rendered by paid employees. Employee provided the only evidence on this point. He credibly testified all assistant managers working for Employer received a salary and regular bonuses. Employer provided no contrary evidence. Therefore, Employee's request for a compensation rate adjustment will be granted and Employer will be directed to calculate his compensation rate based upon his 2014 salary plus his regular bonuses and restricted stock payments earned in 2014, but ascertained and paid in 2015.

2) Is Employer entitled to a Social Security offset?

Employer contends it is entitled to a Social Security disability offset for benefits it paid Employee for his work injury. Employee contends Employer is not entitled to an offset because he received Social Security disability benefits for a medical condition unrelated to his work injury. The applicable statute is plain: When periodic Social Security disability benefits are payable for an injury for which a claim has been filed under this chapter, weekly workers' compensation disability benefits shall be offset pursuant to a statutory formula. AS

23.30.225(b); 8 AAC 45.220. Employer contends the fact Employee's initial claim said his right eye blindness "may be causally related to work injury" is enough to require a Social Security offset. However, the injury giving rise to Employee's Social Security disability payments must be the same injury for which he receives workers' compensation benefits. In other words, the Social Security benefits must be payable for an injury Employee suffered when he fell from the moveable stairs while at work for Employer. Employee's prophylactic mention of a possible link to his work injury with Employer and his blindness is not adequate to establish a compensable claim. Once his attending physician opined his preexisting diabetes was "the substantial cause" of his right eye blindness, Employee did not pursue his protective filing on this issue. AS 23.30.010(a). There is no contrary medical evidence. Therefore, since there is no evidence linking Employee's blindness to his work injury with Employer, and since the Social Security judge's decision is clear that the only basis for Employee's receipt of Social Security disability benefits is his blindness in both eyes, Employer is not entitled to Social Security offset.

3) Is Employee entitled to interim attorney fees?

Employer's only objection to Employee's request for attorney fees and costs is its contention he is not entitled to a compensation rate adjustment and it is entitled to a retroactive Social Security disability offset. Employer does not object to Employee's claimed attorney fees or costs. *Rogers & Babler*. Employee has prevailed on his compensation rate adjustment claim. He has also successfully defended against Employer's request for a Social Security disability offset. Therefore, he is fully successful on these issues and is entitled to an attorney fee.

Employee's November 5, 2018 attorney fee and cost affidavit, though itemized, does not specifically identify attorney fees and costs limited to the compensation rate adjustment and Social Security disability offset issues. Since those were the only two issues along with attorney fees and costs set for hearing, Employee will be directed to submit another affidavit limited to those attorney fees and costs related to these two issues on which he has prevailed.

CONCLUSIONS OF LAW

1) Employee is entitled to a compensation rate adjustment.

2) Employer is not entitled to a Social Security offset.

3) Employee is entitled to interim attorney fees.

ORDERS

1) Employer shall calculate Employee's compensation rate based upon his 2014 salary plus his regular bonuses and restricted stock payments earned in 2014, but ascertained and paid in 2015.

2) Employer is not entitled to a Social Security offset.

3) The hearing record is re-opened. Employee shall submit another attorney fee affidavit limited to those attorney fees and costs related to these two issues on which he has prevailed. Employer shall then have 14 days following service of the revised attorney fee affidavit to file its objections. Employee may then request a prehearing conference in order to schedule a date for the hearing's conclusion.

Dated in Fairbanks, Alaska on December 21, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Patrick D. Turri, employee / claimant v. The Home Depot USA, Inc., employer; New Hampshire Insurance Company, insurer / defendants; Case No. 201416531; 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 December 21, 2018.

/s/
Ronald C. Heselton, Administrative Assistant II