ALASKA WORKERS' COMPENSATION BOARD

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

TRACY BULL, Employee, Claimant, v. LIVING LANDSCAPE, INC., Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201814431 AWCB Decision No. 19-0095 Filed with AWCB Fairbanks, Alaska On September 19, 2019.

Tracy Bull's (Employee) April 18, 2019 claim was heard on August 8, 2019, in Fairbanks, Alaska, a date selected on June 3, 2019. Employee's May 9, 2019 hearing request gave rise to this hearing. Attorney Robert Beconovich appeared and represented Employee, who appeared telephonically and testified. Attorney Vicki Paddock appeared and represented Living Landscape, Inc. and Alaska National Insurance (Employer). The record remained open until August 20, 2019, for additional evidence, fee affidavit, objections and replies. The record closed on August 20, 2019.

ISSUES

Employee contends her earnings history prior to his work injury did not fairly and accurately reflect her earning capacity and lost earnings during her post-injury disability. She contends her temporary total disability (TTD) compensation rate should be adjusted based upon her earnings at the time she was injured while working for Employer.

Employer contends Employee's hourly rate at the time of injury is not reflective of her potential future earnings. It contends her request for a compensation rate adjustment should be denied.

1) Is Employee entitled to compensation rate adjustment?

Employee contends her attorney provided valuable services that will result in the award of benefits; thus, she should be awarded reasonable attorney fees and costs.

Employer contends block billing in Beconovich's fee affidavits impedes determination of reasonable fees and costs. It also objects to several entries in them.

2) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) From May 2000 through July 2005, Employee worked for North Star Alaska Housing (North Haven Communities) as a lead painter. From January 2009 through April 2009, Employee worked for Employer as a journeyman painter. From April 2009 through February 2010, Employee worked for Full Spectrum Painting as a painter. From October 2012 through February 2015, Employee returned to North Star Alaska Housing (a.k.a. North Haven Communities) to work as a lead painter. She was paid $25.00 per hour and worked 40 hours per week. From 2016 to 2018, Employee stayed in Tennessee to take care of her ailing father. From November 2017 through May 2018, Employee worked for Mark Conner Heating and Air Conditioning, a HVAC installation and service company located in Tennessee, owned by her brothers. She worked full time and was paid on project basis. From May 15, 2018 through June 30, 2018, Employee held a temporary painter position with One Precision Painting. She worked eight to ten hours per day and was paid $52.00 per hour. (Employee; Deposition of Tracy Bull, July 9, 2019, at 20-27).

2) Employee operated a painting business, The Right Touch, for approximately six years. (Employee; Deposition of Tracy Bull, July 9, 2019, at 17).

3) From July 1, 2018, through September 10, 2018, Employee worked for Employer as a painter. She was paid $35.00 per hour and worked 40 hours per week. There was no express agreement between Employer and Employee defining her as a full-time regular employee. However,

Employee expected the employment to last as long as she wanted because Employer has always had ongoing projects that needed painters. Even if her employment with Employer had ended, Employee would have continued working as an independent contractor as she had "enough contacts." (Employee).

4) Employer did not provide any evidence it hired Employee for a temporary position. (Record; Observation).

5) In 2014, Employee earned $46,185.00 in wages; in 2015, $13,886.00 ($4,501.00 + $9,385.00 = $13,886.00); in 2016, $3,214.00; and in 2017, $11,503.75 ($7,263.75 + $4,240.00 = $11,503.75). (Affidavit of Service, July 12, 2019; Notice of Intent to Rely, August 19, 2019).

6) In her 2018 tax return, Employee reported herself as single with no dependent. (Deposition of Tracy Bull, July 15, 2019, at 9-10).

7) Employee planned to take two weeks per year off without pay to visit her father in Tennessee. (Employee).

8) On September 10, 2018, Employee injured her right shoulder when she slipped and fell from a step ladder while working for Employer. (Employee Report of Occupational Injury or Illness, September 27, 2018).

9) On September 19, 2018, Employer initiated TTD benefits at a rate of $266.00 per week. (Employer's Brief, July 31, 2019, Exhibit I).

10) The minimum compensation under AS 23.30.175(a) is $266.00. (Bulletin Number 18-05, Alaska Workers' Compensation Division, December 21, 2018).

11) On September 19, 2018, Employee sought treatment with Grayson Westfall, M.D., for her right shoulder pain. (Westfall report, September 28, 2018).

12) On October 3, 2018, a magnetic resonance imaging of Employee's right shoulder showed labrum tear and calcific tendonitis. (Mark Wade, M.D., report, October 11, 2018).

13) On October 29, 2018, Employee underwent a diagnostic arthroscopy of the right shoulder, arthroscopic transection of the biceps tendon, anterior acromioplasty with subacromial decompression, and excision of the distal clavicle. (Wade report, November 15, 2018).

14) On March 7, 2019, Dr. Westfall predicted Employee will not have the permanent physical capacities to perform the physical demands of her job at time of injury, or any of the other jobs that she performed during the ten-year period prior to her injury. Dr. Westfall also predicted that

at the time of her medical stability, a permanent impairment is expected. (Physician's Review, March 7, 2019).

15) On March 27, 2019, the Reemployment Benefits Administrator Designee (RBAD) determined Employee is eligible for reemployment benefits based on a rehabilitation specialist's report relying on Dr. Westfall's March 7, 2019 predictions. (RBAD letter, March 27, 2019).

16) On April 8, 2019, Employer asked for a reconsideration of the March 27, 2019 RBAD's eligibility determination. (Employer's Brief, July 31, 2019; Hearing Brief, July, 31, 2019; Petition, June 24, 2019).

17) On April 18, 2019, Employee claimed TTD benefits, compensation rate adjustment, attorney fees and costs, interest, and a penalty. (Workers' Compensation Claim, April 18, 2018).

18) On May 8, 2019, Employee opposed Employer's April 8, 2019 request to reconsider the RBA determination. (Opposition to Employer Petition, May 8, 2019).

19) On May 9, 2019, Employer admitted TTD benefits but denied compensation rate adjustment, attorney fees and costs, interest, and a penalty. (Answer, May 9, 2019; Controversion, July 2, 2019).

20) On July 10, 2019, Dr. John Shannon, a chiropractor, determined Employee has a six percent whole person impairment as a result of her September 10, 2018 work injury. (Shannon report, July 10, 2019).

21) On July 30, 2019, Employer withdrew its April 8, 2019 petition seeking reconsideration of the March 27, 2019 RBAD's eligibility determination. (Withdrawal, July 30, 2019).

22) On August 2, 2019, Employee asked for $11,440.00 in attorney fees and $148.30 in litigation costs, for a total of $11,588.30. (Affidavit of Counsel, August 2, 2019).

23) On August 8, 2019, Employee asked for an additional $2,560.00 in attorney fees, for a new total of $14,148.30. (Affidavit of Counsel, August 8, 2019).

24) On August 14, 2019, Employer opposed to Employee's request for attorney fees and costs based on block billing and specifically disputed the following: (1) the July 24 and 25, 2019 entries regarding draft of settlement offer; (2) the July 11 and 19, 2019 entries regarding communication with Dr. Shannon; and (3) the July 25, 2019 entry regarding an email to Employer's attorney. (Employer's Objection to Affidavit and Supplemental Affidavit of Counsel, August 14, 2019).

25) On August 19, 2019, Employee replied to Employer's August 14, 2019 objection. (Employee's Reply to Objection, August 19, 2019).

26) Employee's August 2 and 8, 2019 affidavits of counsel contained the following entries from July 23, 2019, through August 8, 2019:

DATE	LAWYER	TASKS	HOURS BILLED	HOURLY RATE	TOTAL
07-23	Robert Beconovich	Review ER releases; Telephone conference with client; Memo to file; Email to client x2; File review and draft of settlement offer.	1.50	$400	$600
07-24	Robert Beconovich	Review releases; Draft and edit release transmission letter; continued draft of settlement offer; Research *Straight* et al; Telephone conference with client; Conference with client; Memo to file.	2.90	$400	$1,160
07-25	Robert Beconovich	File review; Email to Paddock; Research, draft and edit hearing brief; Memo to file.	2.80	$400	$1,120
07-29	John Franich	Telephone conference with client (extensive); Continued research and draft of hearing brief; Hearing preparation; Memo to file.	2.80	$400	$1,120
07-31	Robert Beconovich	Telephone conference with client; Continue edit and draft of hearing memorandum; Draft and edit witness list; Memo file.	3.80	$400	$1,520
08-01	Robert Beconovich	File review; Text string with client; Preparation for hearing; Memo to file.	1.40	$400	$560
08-02	Robert Beconovich	Telephone conference with client; Research and draft settlement offer; Email to defense and client	1.30	$400	$520
08-05	Robert Beconovich	Telephone conference with Paddock; Telephone conference with client (vm); Text string with client; Memo to file	0.60	$400	$240
08-06	Robert Beconovich	File review; Email to client; Email to Paddock; Telephone conference with client; Conference with JJF (N/C); Memo to file	1.60	$400	$640

08-07	Robert Beconovich	Telephone conference with client; Preparation for hearing; Memo to file			
08-08	Robert Beconovich	Preparation for hearing; Appearance re: hearing; Telephone conference with client.	2.90	$400	$1,160
TOTAL			21.6		$8,640

(Affidavit of Counsel, August 2, 2019; Supplemental Affidavit of Counsel, August 2, 2019).

27) Based on the nature, length, and complexity of the services performed, and the benefits resulting from the services to Employee, the following is the reasonable fee for tasks Employee's attorney performed from July 23, 2019, through August 8, 2019:

TASK	**REASONABLE TIME PER TASK**	**HOURLY RATE**	**TOTAL FEE**
File review (4 times)	0.4 (0.1 x 4 = 0.4)	$400	$160
Review releases (2 times)	0.2 (0.1 x 2 = 0.2)	$400	$80
Draft and edit release transmission letter (1 time)	0.5	$400	$200
Email to client (4 times)	0.8 (0.2 x 4 = 0.8)	$400	$320
Telephone conference with client (11 times)	2.2 (0.2 x 11 = 2.2)	$400	$880
Text with client (2 times)	0.2 (0.1 x 2 = 0.2)	$400	$80
Email opposing counsel (3 times)	0.6 (0.2 x 3 = 0.6)	$400	$240
Telephone conference with opposing counsel (1 time)	0.3	$400	$120
Draft settlement offer	1.0	$400	$400
Research, draft and edit four-page hearing brief citing one case	1.5	$400	$600
Draft witness list (three witnesses)	0.5	$400	$200
Memo to file (9 times)	0.9 (0.1 x 9 = 0.9)	$400	$360
Preparation for hearing	1.5	$400	$600
Hearing appearance	1.5	$400	$600

Travel: hearing	1.0	$400	$400
TOTAL	13.1	$400	$5,240

The August 8, 2019 hearing lasted 1.5 hours. (Experience; Observation; Judgment).

28) Employee's July 31, 2019 hearing brief is a four-page document with two pages of introduction, argument, and conclusion and one page citation of *Straight*. (Observation).

29) There is no statute, regulation or case law stating a claimant's attorney cannot get paid for the time he spent drafting a settlement offer or the time he spent communicating with Employee's physician. (Observation).

30) Although drafting a complex settlement offer may take a significant amount of time, there is no evidence in this case to corroborate such. Beconovich did not file or provide a copy of the settlement offer he drafted. (Experience; 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 . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

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

> **AS 23.30.122. 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. . . . 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. . . .

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*. at 973, 975.

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed.

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

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;

> . . . .
>
> (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;
>
> (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 held the board was required to use an alternate section 220's 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)).

AS 23.30.220 was amended 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:

> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
>
> (2) if the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history. . . .

AS 23.30.220 was amended 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:
>
> (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
>
> (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but compensation may not exceed the employee's gross weekly earnings at the time of injury. . . .

The seminal case resulting from this section 220 iteration is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* held rigid application of the mechanical formula set out in section 220 leads to quick and predictable results, but such an efficiency is gained at the sacrifice of fairness in result, and struck it down "as applied" to the case on equal protection grounds. It held legislative intent could be gleaned from session laws stating, "[i]t 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." *Gilmore*.

Following *Gilmore*, Alaska's legislature amended section 220 in 1995 and incorporated many provisions from the "model statute." The "model" section 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, section 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 section 220(a) version. In *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006), the court affirmed the board's decision to use section 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 declined to accept a "broad" view requiring the board to calculate TTD rates by determining what was "fair" to both parties: the main question under *Gilmore* is not whether an award calculated according to AS 23.30.220(a)(1) is "fair," but rather, "it is whether a worker's past employment history is an accurate predictor of losses due to injury." *Id.* The objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. *Id.* *Thompson* also held "intentions as to [future] employment . . . are relevant to [determine] future earning capacity' in determining proper compensatory awards." *Id.*

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. *Dougan* held the law in effect at the time of Dougan's injury provided for a variety of methods to calculate a TTD rate, while *Gilmore's* version of section 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.

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;
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> (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;
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> (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. . . .
> . . . .

Wilson v. Eastside Carpet Co., AWCAC Decision No. 106 (May 4, 2009), 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 section 220(a) if it does not represent the equivalent wages at the time of the injury. 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 a different section 220(a) subsection 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. *Id*. Once an injured worker claims a compensation rate adjustment, "the board must conduct a broader inquiry" to obtain evidence sufficient to determine the spendable weekly wage. *Id*.

Further, *Straight v. Johnston Construction & Roofing, LLC*., AWCAC Decision No. 231 (November 22, 2016), held "while not including a fairness provision in AS 23.30.220(a), the Legislature codified a fairness provision applicable to the whole Act in AS 23.30.001. The Alaska Supreme Court held on numerous occasions a fair compensation rate must take into consideration the injured worker's probable future earnings capacity, and this doctrine may be what the legislature intended when it adopted AS 23.30.220(a)(5) which provides for calculating an injured worker's spendable weekly wage "if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees. . . ." *Straight.* AS 23.30.220(a)(5) in conjunction with AS 23.30.001 and the mandates from the Alaska Supreme Court to look to the future earnings capacity when deciding if an injured worker's compensation rate has been fairly determined requires looking into an employee's probable future earnings capacity before it can be determined whether AS 23.30.220(a)(4) is the proper method

for determining the correct compensation rate. *Id*. The burden is on the employee to provide evidence of what his future earning capacity would have been but for the work injury. *Id*.

> **8 AAC 45.180. Costs and attorney's fees**. . . .
> . . . .
>
> (b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
> . . . .

ANALYSIS

1) Is Employee entitled to a compensation rate adjustment?

Employee requested a TTD compensation rate adjustment. AS 23.30.220(a); *Gilmore*. It is undisputed Employee was paid hourly while working for Employer. Employer, however, contends Employee's earnings history for the two years prior to the work injury, rather than what she earned with Employer, properly reflects her probable future earnings capacity. It contends AS 23.30.220(a)(4) is the proper method to determine compensation rate. On the other hand, Employee contends under the *Gilmore* rationale, which was explained in the *Straight* decision, the standard method for determining her spendable weekly wage under AS 23.30.220(a)(4) as an hourly worker is not an "accurate predictor of losses due to injury." *Thompson*. Compensability is not at issue. On July 10, 2019, Employee was rated at six percent whole person impairment as a result of her September 10, 2018 work injury. Therefore, the relevant period for determining Employee's lost future earning capacity is from the date of injury, September 10, 2018, through July 10, 2019. *Johnson*.

A basic premise in Alaska workers' compensation law, and the "entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity" when calculating a TTD rate. *Johnson*; *Gilmore*. The Alaska Supreme Court in *Gilmore* relied upon legislative intent, now codified in the Act, "to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers." AS 23.30.001(1). But in amendments to section 220(a) subsequent to *Gilmore* but before the current law, the legislature adopted the "model law," which provided alternative methods for calculating gross weekly earnings when the "standard" method used for hourly employees did not accurately reflect an injured worker's lost earnings during the disability period. Thus, for a time and for injuries arising under the amended "model" statute, the *Gilmore* test was no longer applicable. *Dougan*. However, in 2005, the legislature amended section 220 to its current form, which bears a striking resemblance to its past form when *Gilmore* was decided. Since the law reverted back to a similar statutory scheme in effect when *Gilmore* was decided, there is no reason to suppose *Gilmore* and its relevant progeny do not apply to Employee's claim. That may have been what the legislature intended when it adopted AS 23.30.220(a)(5) which states, "if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees." *Straight.* Thus, *Gilmore* will be applied but Employee bears the burden to show AS 23.30.220(a)(4) is not "an accurate predictor of losses due to injury." *Id*; *Wilson*; *Thompson*.

It is presumed for an hourly worker, AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the worker's wages at the time of injury in most cases. *Wilson*. Therefore, Employee has the burden to challenge the compensation rate established under section 220(a) if it does not represent the equivalent wages at the time of the injury. *Id*. From 2014 to 2017, Employee earned between $3,214.00 and $46,185.00 per year. Based on her W-2 forms, she earned $3,214.00 in 2016 and $11,503.75 in 2017. Under AS 23.30.220(a)(4), by using Employee's higher 2017 earnings of $11,503.75, her gross weekly earnings would be $230.08 per week ($11,503.75 / 50 = $230.08). AS 23.30.220(a)(4). This is less than the minimum TTD rate of $266.00. *Rogers & Babler*. Employer paid her the statutory minimum of $266.00 per week.

In this case, greater weight will be given to Employee's earnings with Employer. AS 23.30.122; *Smith*. Employer has always had ongoing projects that needed painters; thus, but for the work injury, it likely would have kept Employee on its payroll. *Rogers & Babler*. Employee worked for Employer at $35.00 per hour and 40 hours per week. Therefore, but for her September 10, 2018 work injury, Employee would have continued working and would have earned at least $1,400.00 ($35/hr x 40 hrs = $1,400.00) in gross weekly earnings. However, as she intended to take leave without pay for two weeks per year to visit her father in Tennessee, the gross weekly earnings is reduced to $1,346.00 ($1,400.00 /wk x (52 wks - 2 wks) / 52 wks = $1,346.00 / wk). *Rogers & Babler*. Employee is entitled to claim herself with no dependent. 8 AAC 45.210(c). Using $1,346.00 as Employee's gross weekly earnings and applying this number to the division's online "Benefit Calculator," Employee's spendable weekly wage would have been $1,057.93, and her weekly TTD benefit rate $846.34. AS 23.30.185; *Id.*

Employee's gross weekly earnings while working for Employer are $1,115.92 more per week -- almost five times greater -- than Employee's gross weekly earnings based upon the higher of her two prior year's income information ($1,346.00 - $230.08= $1,115.92). No other factual variable brings her situation under any other 220 subsection. But applying AS 23.30.220(a)(4) and using her 2017 earnings as a basis for calculating her gross weekly wages, spendable weekly wage and TTD rate would result in a TTD rate calculation bearing no relationship whatsoever to her lost earnings during the period she was disabled from her work injury with Employer. *Gilmore*; *Straight*.

Given the above analysis, Employee met her burden and has shown the compensation rate established under section 220(a)(4) does not represent an "accurate predictor of losses due to injury." *Wilson*; *Thompson*. Therefore, Employee's hourly earnings when injured while working for Employer will be used to calculate her TTD rate, and her request for a compensation rate adjustment will be granted. *Gilmore*; *Straight*. As calculated above, her spendable weekly wage will be $1,057.93, and her weekly TTD benefit rate will be $846.34 from September 10, 2018, to July 10, 2019.

2) Is Employee entitled to attorney fees and costs?

Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. Employer objects to the fee affidavits submitted based on several grounds. This decision will address fees and costs based on services Beconovich performed, Employer's resistance, and the benefits resulting from the legal services provided. *Bignell*.

a) Block-billing

Block-billing is generally discouraged because it is hard to determine whether specific tasks were related to issues prevailed upon or not. AS 23.30.145(a); *Childs*; *Rogers & Babler*. Although entries in Beconovich's affidavits might be characterized as block-billing, some entries address work on a specific issue or closely related issues.

However, it is difficult to estimate how much time Beconovich spent on particular tasks in his eleven entries from July 23, 2019, through August 8, 2019, set forth in the August 2 and 8, 2019 affidavits of counsel. *Rogers & Babler*. Employee seeks $8,640.00 for tasks performed during that period as set forth in Paragraph 26 of Findings of Fact. The entries are ambiguous, and the charges are unreasonable. 8 AAC 45.180; *Bignell*; *Id.* This decision dissected each entry from July 23, 2019, through August 8, 2019, and finds $5,240.00 is reasonable as set forth in Paragraph 27 of Findings of Fact. *Rogers & Babler.* Therefore, attorney fees will be reduced by $3,400.00 ($8,640.00 - $5,240.00 = $3,400.00) from the total amount of $14,148.30 requested in Beconovich's August 8, 2019 affidavit. AS 23.30.145(a); *Childs.*

b) July 24 and 25, 2019 entries regarding "draft of settlement offer"

Attorneys often weigh different options during the course of litigation, and settlement is one of them. *Rogers & Babler*. No statute, regulation or case law states a claimant's attorney cannot get paid for time he spent drafting a settlement offer. *Id*. Therefore, attorney fees will not be reduced on that basis.

Drafting a complex settlement offer may take a significant amount of time; yet, Beconovich did not provide a copy of the settlement offer he drafted for this decision to weigh the reasonableness

of the time he billed. *Rogers & Babler*; *Bignell*. The reasonableness of the time Beconovich spent drafting settlement offer on July 23 and 24, 2019, has been addressed above.

c) July 11 and 19, 2019 entries regarding phone calls and emails with Dr. Shannon

No statute, regulation or case law states a claimant's attorney cannot get paid for time he spent communicating with Employee's physician. *Rogers & Babler*. Whether Employer resisted PPI payment or not is irrelevant; Employee's attorney is entitled to contact Employee's physician to work on his client's case. *Id*. Therefore, attorney fees will not be reduced on that basis.

d) July 25, 2019 entry regarding email to Employer's attorney

Attorney fees will not be reduced based on the July 25, 2019 entry regarding Beconovich's email to Employer's attorney as his explanation in Employee's August 19, 2019 reply is credible. AS 23.30.122; *Smith*.

In short, Employee is awarded $10,748.30 ($14,148.30 - $3,400.00 = $10,748.30) in attorney fee and costs.

CONCLUSIONS OF LAW

1) Employee is entitled to a compensation rate adjustment.
2) Employee is entitled to attorney fees and costs.

ORDER

1) Employee's request for a TTD compensation rate adjustment is granted.
2) Employee's TTD benefits rate shall be adjusted from September 10, 2018, through July 10, 2019.
3) Employee's spendable weekly wage for this injury is $1,057.93 and her weekly TTD benefit rate is $846.34.
4) Employee's request for attorney fees and costs is granted in part and denied in part.
5) Employer is ordered to pay Employee's attorney directly $10,748.30 in fees and costs.

Dated in Fairbanks, Alaska on September 19, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Lake Williams, Member

JULIE DUQUETTE, BOARD MEMBER, DISSENTING

I don't agree that we should set a standard that would allow compensation to be calculated on past history more than two years. It would cause other cases to be reevaluated if an individual was off work for personal reasons. Tracy was off with a sick parent and was the primary care giver for her father. They have rules under the Family Leave Act for extended time off, but it does not allow for the employer to pay the injured employee. The other family members should have helped or compensated Tracy, and maybe they did and we don't know about it. How a family chooses to take care of an ill family member should not be something we bring into our decision making.

/s/
Julie Duquette, 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 TRACY BULL, employee / claimant v. LIVING LANDSCAPE, INC., employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201814431; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 19, 2019.

/s/

Ron Heselton, Office Assistant II