ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD SCHEIDEMAN, Employee, Claimant, v. SATORI GROUP, INC., Employer, and AMERICAN INTERSTATE INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 202012731 AWCB Decision No. 22-0039 Filed with AWCB Anchorage, Alaska on June 3, 2022.

Richard Scheideman's (Employee) April 16, 2021 workers' compensation claim (WCC) for a compensation rate adjustment, interest and attorney fees and costs was heard on March 17, 2022, in Anchorage, Alaska, a date selected on February 8, 2022. A December 28, 2021 hearing request gave rise to this hearing. Attorney Robert Rehbock appeared and represented Employee. Attorney Aaron Sandone appeared and represented Satori Group, Inc., and American Interstate Insurance Company (Employer). Employee appeared and testified. The record was held open for the receipt of deposition transcripts and Employer's response to Employee's attorney's affidavit of attorney's fee and costs. The record closed on April 21, 2022 after the receipt of the deposition transcript.

ISSUES

Employee contends his compensation rate for temporary total disability (TTD) should be calculated using his wages at the time of the injury pursuant to AS 23.30.220(a)(5), which would

result in the maximum amount of $1,155.00. He contends calculating his compensation rate using the higher of the total wages he earned during either of the two preceding calendar years immediately preceding the work injury is not an accurate predictor of his future earning capacity.

Employer contends Employee is an hourly employee and his wages fall under AS 23.30.220(a)(4). In addition, it contends Employee's work is project-to-project and seasonal. Employer also contends as the parties have been attempting to come to an agreement on Employee's compensation rate but have been unable to do so, Employer used the statutory framework provided in AS 23.30.220(a)(4), and used Employee's 2020 wages, the year of his injury, which were $31,574.18, resulting in a $447.54 weekly compensation rate. Employer started paying Employee the $447.54 weekly compensation rate on March 11, 2022, retroactive to December 1, 2020.

1) **Is Employee entitled to a compensation rate adjustment?**

Employee contends he is entitled to interest on the compensation rate adjustment.

Employer contends Employee is not entitled to interest because he is not entitled to a compensation rate adjustment.

2) **Is Employee entitled to interest?**

Employee contends he is entitled to attorney fees and costs as he is entitled to a compensation rate adjustment. He requests actual attorney fees and costs.

Employer contends Employee's attorney is not entitled to an hourly rate of $500.00 nor a paralegal rate of $185.00. Employer also objected to certain entries in Employee's attorney fee affidavit as excessive for the task or unrelated to the current claim.

3) **Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

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

1) On December 11, 2019, the Department of Labor and Workforce Development issued Bulletin No. 19-08 (Revised), setting the maximum compensation rate under AS 23.30.175(a) at $1,255.00 for 2020. (Bulletin No. 19-08, December 11, 2019).

2) On June 30, 2020, Employee suffered an injury to his right thumb, wrist and shoulder while working for Employer when he pulled a pull-start cord on a roof cutter machine. He wrapped the pull-start code around his wrist as it was oily and slippery. When the engine started it jerked Employee's arm back which resulted in an arm injury which brought him to the ground and popped his shoulder out; and it felt like it had dislocated his shoulder. (Employee's deposition, August 11, 2021).

3) On March 3, 2021, Employee underwent right shoulder surgery to repair an acute-on-chronic superior labral anterior and posterior tear, acute-on-chronic high grade articular-supraspinatus tendon avulsion, impingement syndrome and acromioclavicular joint arthrosis with spurring. (Alaska Surgery Center operative report, March 3, 2021).

4) On April 16, 2021, Employee filed his workers' compensation claim (WCC) for a compensation rate adjustment, interest, and attorney's fees and costs. (WCC, April 16, 2021).

5) On August 11, 2021, Employee testified in a deposition. He was hired by Employer to be an asbestos foreman and superintendent on a project in Fairbanks, Alaska. The job was an asbestos roof tear-off. The job was to last two to three weeks, weather permitting. After Employee's June 30, 2020 work injury , he continued to work, but his shoulder, his arm, elbow and thumb, his whole arm continued to hurt. On July 17 or 19, 2020, he left the job site to get his arm checked. Employee asked for the weekend off, and at first received permission from the roofing foreman, Mr. Rodriguez, but the owner called him and told him he could not leave. His direct supervisor for Employer, Alan Caldwell, who works in Anchorage, also told him he could not leave and if he did, he would be considered to be walking off the job. Employee subsequently worked as a non-working foreman or superintendent job for Alaska Demolition for a couple of months at $30.00 per hour plus benefits. He has been a member of the Laborers 341 union for about 15 years. Employee worked for Tanik/Frawner in 2017, but due to a work injury he did not work after that until his employment at Employer in June 2020. He had difficulty getting a doctor's appointment to have his right arm evaluated due to the pandemic. In late November or early December Employee was finally evaluated by orthopedic surgeon Michael McNamara, M.D., who ordered an MRI which demonstrated a double superior labrum anterior posterior (SLAP) tear and a

damaged rotator cuff. An x-ray showed a fractured elbow with bone fragments. Surgery was recommended for the right shoulder and performed on March 3, 2021. (Employee deposition, August 11, 2021).

6) Employee testified after he suffered a motor vehicle accident in 2011, he returned to work with Alaska Abatement on and off as he was recovering. He did not work full-time but did job specific work. Employee testified he spends four to five months a year, usually in the winter, in Phoenix, Arizona, where he has a home. He spent the winter of 2021, from October or November of 2020 through May of 2021, in Phoenix. Aside from the time periods when he was off work for work injuries, Employee testified he worked six to seven months a year. His trade is mostly summer-related, but if he gets a winter job that is good, he will take it. (*Id*.).

7) On February 8, 2022, a prehearing conference (PHC) was held to set the issues for the March 17, 2022 hearing as a compensation rate adjustment, interest, and attorney's fees and costs. (Prehearing Conference Summary, February 8, 2022).

8) On February 24, 2022, Employer filed its notice of intent (NOI) to rely, which included Employee's compensation record while working for Employer from June 8, 2020 through July 16, 2020, showing $40.71 hourly rates and $56.07 hourly rates for overtime. Employee's gross pay was $2,576.78 for the week ending June 13, 2020, $1,861,32 for the week ending June 19, 2020, $1,936.76 for the week ending July 2, 2020, $2,973.96 for the week ending July 11, 2020, and $1,585.05 for the week ending July 16, 2020, totaling $12,578.66, or an average of $2,096.44 per week for six-week period of employment. The Davis Bacon Fringe pay was added to each paycheck, varying from $1,4025.27 to $1,733.44 for a total of $7,855.79. Employee's total pay for the six weeks worked for Employer was $20,434.45, or an average of $3,405.67 per week. Employee also earned $11,139,73 working for Alaska Demolition in 2020 (Employer's NOI, Exhibit 3, February 24, 2022).

9) On March 10, 2022, Employer controverted a compensation rate greater than $447.54, which it based on Employee's 2020 earnings. (Controversion notice, March 10, 2022).

10) On March 11, 2022 Employer, increased Employee's compensation rate from the previous minimum rate of $276.00 to $447.54 per week, based on Employee's 2020 earnings of $31,574.18. The increase was retroactive to December 1, 2020. (Compensation report, March 11, 2022).

11) On March 14, 2022, Employee's attorney submitted his affidavit of attorney's fees documenting 30.82 hours of attorney time at $500.00 per hour for a total of $15,410.00. Also

documented were 29.83 hours of paralegal time at $185.00 per hour for a total of $5,518.55, 1.01 hours paralegal hours at $125.00 per hour and 0.75 hours at $150 per hour, for a total of $238.75. The grand total for paralegal fees was thus $5,757.30. Costs were $455.35. (Attorney fees and costs affidavit, March 14, 2022).

12) On March 15, 2022, Employer objected to Employee's request for attorney's fees. Its objections were: 1) the $500 hourly rate for attorney fees, contending $450 an hour would be fully compensatory; 2) the $185 hourly rate for paralegal fees, contending $165.00 an hour would be reasonable. Employer also objected to certain entries as excessive for the task or unrelated to the current claim: 1) April 15, 2021 entry for 0.25 paralegal time to file a WCC; 2) May 6, 2021 entry for 0.13 for correspondence with an attorney; 3) May 21, 2022 entry for 0.25 to file a medical summary; 4) August 16, 2021 entry for 0.75 to begin drafting an affidavit of readiness for hearing; 5) September 8, 2021 entry for 0.25 to file a notice of intent to rely; 6) October 19, 2021 entry for 2.0 hours for correspondence with client, draft petition for a second independent medical evaluation (SIME), direction from attorney Rehbock, as no SIME petition has been presented in this matter; 7) February 14, 2022 entry for 0.75 to calendar lead dates for hearing. (Employer's objection to attorney fee affidavit, March 15, 2022).

13) On March 17, 2022, Employee testified at hearing. He typically works project-to-project, for a total of six to seven month per year. When he worked for Employer, Employee did not have any expectation he would work 12 months, 52 weeks per year. He jumped from project to project. There were other jobs Employee could have taken, and he was a union member, so he could have worked through the union. He could not work from December 2017 to May 2020, due to his work injury with a prior employer. Employee could have taken a lesser job at a lesser rate a year after his 2017 injury, doing something minute during that time, but he could not have performed a supervisor position such as he had done at Alaska Demolition. He felt he could not present himself as a healthy worker. After he left his employment with Employer in July 2020, Alaska Demotion asked him to work for them for $30 an hour plus benefits to train their newest asbestos laborers and to perform non-working supervisory duties. He had to stop working at Alaska Demolition due to right shoulder pain. His shoulder kept dislocating. His employment with Alaska Demolition ended on October 23, 2020. Employee testified he does not own a house in Alaska, but does own one in Phoenix, Arizona, where he spends three to four months a year. He has not worked when he is in Arizona. (Employee's hearing testimony, March 17, 2022).

14) Employee is credible. (Experience, judgment, observations, and inferences drawn from all of the above.).

15) Employee's earnings for the year 2017 reported on the 2017 W2 forms were $37,684.44 from three employers; and in 2020 he earned $31,574.18, $20,434.45 from his work with Employer and $11,139.73 from his work at Alaska Demolition. (2017 W2 and 2020 W2 forms, Employer's hearing exhibit 5).

16) On March 22, 2022, Jill Lucas, president and co-owner, with her husband, of Employer testified by deposition. Employer generally has about five full-time office staff and everybody outside the office is in a part-time, on-call position. Employee was hired as a site supervisor to supervise Employee's asbestos abatement crew on a project in Fairbanks, ensuring the project ran smoothly and everybody stayed safe. Employer was the subcontractor on the project, which was expected to last three to four weeks maximum for Employer. Employee started work on June 7, 2020, and the project began on June 11, 2020. Employee earned Davis-Bacon wages for his work on the project. The project ended on July 30, 2020, and lasted seven weeks, which was longer than expected due to rain delays. Ms. Lucas stated July 16, 2020 was the last day Employee worked for them. Employee called her on July 17, 2020 while she and her husband were on vacation to complain about the job and that the job was taking too long. The base pay rate for per Pamphlet 600 Davis-Bacon scale for Employee was $40.71 and $56.07 an hour with overtime. Employee reported an injury to his wrist when pulling a roof cutter machine cord to the operation manager, but Employee continued to work through July 16, 2020. The operation manager did not report the injury to the Department of Labor within 10 days because Employee had stated he just needed some Advil and ice and he had continued working. Ms. Lucas agreed Employee worked six weeks and earned $20,434 during that time, or an average of $3,405 a week. She agreed Employee had earned a net pay of $2,365.82 based on a gross pay of $1,861 and add-on of $1,266.17 for the pay period from June 14, 2020 to June 20, 2020, as shown on Employee's check stub, Exhibit 3 to Employer's deposition. Ms. Lucas agreed Employee was hired for the one project, which was a Davis-Bacon wage project. Employee's compensation was similar to the other site supervisor on the job. (Luca's deposition, March 22, 2022).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter; ...

The board may base its decision on not only 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 23.30.120. 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 ...
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> ...

In *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1243 (Alaska 2005), the Alaska Supreme Court said the presumption did not apply to a vocational rehabilitation plan, since the parties did not dispute the employee's entitlement to a plan or the employer's liability to pay for it and he was not seeking "coverage" for it. They were only disputing the plan's details under which his benefits would be provided. The Court in *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010), discussed other instances in which the presumption analysis did not apply and said:

> The presumption analysis does not apply to every possible issue in a workers' compensation case. We have previously held the presumption of compensability inapplicable when evaluating a reemployment plan because the parties agreed that the employee's claim was covered by the provisions of the workers' compensation statute and applying the presumption did not "promote the goals of encouraging coverage and prompt benefit payment" (footnote omitted).
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> Here, the board did not use the presumption analysis in evaluating Burke's chiropractic care claim. The presumption analysis might apply to the question whether *any* chiropractic care was necessary because that would raise the issue whether part of the claim was covered at all. It could also apply if a conforming

> treatment plan had been filed because the regulation related to excess treatment requires a factual determination about the efficacy of the treatment (footnote omitted). But we cannot see how the presumption analysis can be used to defeat the explicit statutory provision about frequency of treatment ...

In *Rusch v. Southeast Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the Court held the presumption did not apply to the amount of attorney's fees because the employer did not dispute the employee's right to attorney's fees; they disputed the fees' reasonableness.

A claimant who bears the burden of proof must "induce a belief" in the minds of the factfinders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 finding "is 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.

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.

Rusch v. Southeast Alaska Regional Health Consortium, 453 P.3d 784 (Alaska 2019), stated the AS 23.30.120 presumption does not apply to attorney fee amounts or reasonableness. The Court emphasized the importance of fully compensatory fees and the concern for encouraging an employee bar. The Court found the Board should consider "the benefits resulting from the services" of the attorney in awarding fees. *Id*. at 797. It further held the Board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* held attorney fee reasonableness is not a factual finding but is a discretionary exercise.

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184 (Alaska 1993), the employee sought workers' compensation benefits for a breathing disorder caused by work-related smoke inhalation. The employer controverted =TTD benefits and the employee had to file a claim to recover those benefits. Although the employer voluntarily paid the TTD after the employee filed the claim, the Court found the payment the equivalent of a Board award because the efforts of the employee's counsel were instrumental in inducing it. The Court thus determined the Board should have awarded attorney fees on the amount of the voluntary payment. However, the employee also argued he should be awarded full attorney fees on his whole claim as he prevailed before the superior court on the question of assessing a penalty on belated TTD payments, even though he lost on most of his other issues. The Court found AS 23.30.145(b) directs a fee award to a "successful" claimant and employee must succeed on the claim itself and not the collateral issue of a penalty.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the Board to award fees under AS 23.30.145(a). "In order for an

employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. "The first element for an award of fees under subsection .145(b) is that the employer "otherwise resisted payment of benefits." *Id*. at 153. The second element is that the claimant "employed an attorney in the successful prosecution of the claim." *Id*.

In *Cavitt v. D&D Services*, AWCAC Decision No. 17-0109 (May 4, 2018), Cavitt appealed the Board's decision, which had awarded reduced fees of $500.00 as employee had only prevailed on his claim for interest and a Board order he was entitled to TTD until medically stable. He lost on his claims for unfair and frivolous controversion, penalty and a compensation rate adjustment. On appeal, the Alaska Workers' Compensation Appeals Commission (Commission) for the most part affirmed the Board's decision, but also decided the Board had awarded insufficient attorney fees. The Commission found the Board had undervalued the overall services of the attorney and the importance of the TTD order and remanded the attorney fee issue to the Board, stating additional fees were owed for prevailing on the TTD issue. The Commission awarded Cavitt $6,000.00 in attorney fees for winning on a significant issue on appeal and finding "an order of the Board, even one without providing any additional tangible benefits, has significant value," which justifies an attorney fee award. *Id*. at 9.

In *D&D Services v. Cavitt*, 444 P.3d 165 (Alaska 2019), the employer appealed the Commission's award of attorney fees on the basis the award was too much. The employer contended the employee had won only on his claim for interest and request for a Board order he was entitled to TTD until medically stable but lost every other issue on his Commission appeal. The Court found the employee had won on "a significant issue" and was thus a successful party. *Id*. at 170.

In *Bennett v. Ketchikan Pulp Company*, AWCB Dec. No. 21-0043 (May 21, 2021), the Board panel found attorney Rehbock's request for $500.00 per hour was not reasonable and $450.00 an hour would be appropriate. It also found paralegal fees of $185.00 per hour were not reasonable and lowered the rate to $165.00 per hour.

AS 23.30.155. Payment of compensation ...

> (p) An employer shall pay interest on compensation that is not paid when due ...
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> **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 may not be paid for any period of disability occurring after the date of medical stability.

Former AS 23.30.220, the 1982 rate calculation statute that caused considerable compensation rate litigation and resultant decisional law, stated in relevant 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 v. RCA/OMS*, 681 P.2d 905 (Alaska 1984), the Court construed the 1982 statute, but did not decide the case on constitutional grounds. *Johnson*'s facts were:

> Johnson's salary for the final year of his military service, 1979, was $20,166.12. He asserted that his salary for the approximately 40 weeks that he worked for RCA-OMS was some $42,000.00, most of it earned after his injury. The Board, using subsection (2) of AS 23.30.220, determined Johnson's average weekly wage according to his military rather than civilian salary. So computed, his average weekly wage was $387.81, resulting in benefits of $258.54 per week. By contrast, if subsection (3) had been used, his average weekly wage would apparently have been approximately $1,000.00 with benefits two-thirds of that. (*Id.* at 906).

Johnson held the board was required to use an alternate sub-section of AS 23.30.220 in cases like Johnson's. Though it did not decide the case on constitutional grounds, *Johnson* also held for the first time:

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

Johnson derived this from Professor Larson's workers' compensation treatise where 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)).

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

> **AS 23.30.220. Determination of spendable weekly wage.** (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
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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.
> >
> > (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 generated additional litigation. The seminal case resulting from

this change is *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). *Gilmore* struck down AS 23.30.220 for the first time on constitutional, equal protection grounds:

> Gilmore started work for Klukwan on June 12, 1989 and was earning average spendable weekly wages of approximately $850. However, for the calendar years 1987 and 1988 he worked for a total of only thirty-nine weeks. He claims that for twenty-two of the thirty-nine weeks he was in vocational training programs learning to be a motorcycle mechanic. He contends that he should have been considered 'absent from the labor market' within the meaning of section .220(a)(2) for these twenty-two weeks. If he is correct, he would be entitled to an alternative wage computation, for he would have been 'absent from the labor market' for at least eighteen months during the two years in question. (*Id.* at 924-925).

The Board rejected Gilmore's claim and he appealed. The Court on its own motion asked for further briefing on whether AS 23.30.220 in effect at that time could pass constitutional muster. The Court ruled it could not and struck down AS 23.30.220 "as applied" to Gilmore's case. The law in effect when Gilmore was injured said 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;
> >
> > (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 Court asked parties to consider two hypothetical examples in their additional briefing:

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

> Example B: Same facts as Example A except that there is a third worker doing the same work at the same wage who suffers the same injury on December 15, 1992. Worker #3, however, did not work during the first seven months of 1991 or at all in 1990 because he was injured. Worker #3 would be entitled to an alternative calculation under AS 23.30.220(a) and may be eligible for compensation benefits based on his current wage which would approximate the wage base of worker #2 and be nearly 3.4 times higher than that of worker #1 (who worked two months longer than worker #3 during 1991). (*Id.* at 925-926).

Based upon these facts and hypothetical situations, *Gilmore* set forth the standard for reviewing the constitutionality of AS 23.30.220 in effect at the time Johnson was injured:

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

Gilmore held the legislature's intent could be gleaned from the session laws, which said: "It is the intent of the legislature that AS 23.30 be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of AS 23.30." (*Id.*). This legislative intent has now been codified into current AS 23.30.001(1). *Gilmore* found these goals were "legitimate purposes" but also found, reflecting back on the *Johnson* decision:

> The overall purpose of AS 23.30.220(a) and the other sections of the Act used to calculate an injured worker's indemnity benefits is 'to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid' (footnote omitted; citation omitted). 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.*).

Gilmore found:

> We ... 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 AS 23.30.220 was constitutional because its application would lead to "quick, efficient results" but the Court declared:

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

Gilmore found Alaska was the only state that did not provide a viable option to take into account periods of unemployment in the rate calculation scheme. *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 the employee's earning capacity that occurred during the year of injury." *Gilmore* at 932 n. 6. Notably, *Gilmore* provided a sample "model statute," which the court said would probably not be struck down as unconstitutional:

> Section 19. Determination of Average Weekly Wage. Except as otherwise provided in this act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute the compensation and shall be determined as follows:
>
> ...
>
> (d)(1) If at the time of the injury the wages are fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury.
>
> (2) If the employee has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, his average weekly wage shall be computed under the foregoing paragraph, taking the wages (not including overtime or premium pay) for such purpose to be the amount he would have earned had he been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.
>
> (e) If at the time of injury the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees ... (*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)).

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

determining what ""was fair" to both parties. *Thompson* said, 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.*). *Thompson* addressed AS 23.30.220(a) that read in relevant part:

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

Thompson noted:

> In fact, a primary purpose of our workers' compensation laws is to predict accurately what wages would have been but for a worker's injury. In *Johnson v. RCA-OMS, Inc.* (footnote omitted) we explained that under past versions of the statute at issue here, the 'entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity' (footnote omitted). We reiterated this theme in *Gilmo*re 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 employment in the future are relevant to a determination of future earning capacity' in determining proper compensatory awards." (*Id.* at 690). Following *Gilmore*, Alaska's legislature amended AS 23.30.220 effective 1995, amended it again slightly in 2000, and incorporated most aspects of the "model statute." The "Model Act" AS 23.30.220(a) took variations in work histories into account to predict lost earnings and compensate injured workers for their actual losses during periods of disability. The amended 2000 AS 23.30.220 said in relevant 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:

> ...
>
> 4) If at the time of injury the
>
> A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
>
> B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1)-(3) of this subsection and (A) of the paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13;
>
> 5) If at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees; ...

AS 23.30.220 was amended in 2005 to its present form, which states in relevant 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: ...
>
> (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 Dec. 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 worker's wages at the time of injury in most cases. An hourly employee has the burden to challenge the compensation rate established under AS 23.30.220(a)(4) if some previous earnings were in self-employment and the employee contends they do not represent equivalent "wages" at the time of injury. The Board "must look at the evidence and decide the facts in each case" when determining the spendable weekly wage. (*Id.* at 4). *Wilson* found the Board could not have ascertained the wage equivalent from the worker's small self-employment record, and therefore was required to use AS 23.30.220(a)(5) in these circumstances. It stressed that AS 23.30.220(a)(5) applies "only in cases of previously self-employed hourly workers if the board finds the employee's wage equivalent cannot be determined from self-employment records and other evidence, so that a spendable weekly wage may be calculated under" AS 23.30.220(a)(4). (*Id.* at 4-5). *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.*). The Board may disbelieve an employee's testimony that he actually received more income than reported to the Internal Revenue Service and its decision must reflect its assessment of the employee's credibility. (*Id.* at 5).

In *Williams v. Abood*, 53 P.3d 134 (Alaska 2002), the Court held the compensability presumption does not apply to a compensation rate adjustment claim and held the party seeking a deviation from the statutory rate calculation must present substantial evidence that past wages will lead to an irrational workers' compensation award. *Abood* further held the Board must use the correct formula from AS 23.30.220(a) to calculate an injured worker's gross weekly earnings unless there is substantial evidence showing that past wage levels will lead to an irrational award.

Straight v. Johnston Construction & Roofing, LLC, AWCAC Dec. No. 231 at 5 (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." *Straight* further said AS 23.30.220(a)(5) in conjunction with AS 23.30.001 mandates looking to future earning capacity

when deciding if an injured worker's compensation rate has been fairly determined "before it can be determined whether AS 23.30.220(a)(4) is the proper method for determining the correct compensation rate." (*Id.*). *Straight* remanded the case for the Board to determine the employee's probable future earning capacity during his disability period and stated, "The burden is on the employee to provide evidence of what his future earning capacity would have been but for the work injury." (*Id.* at 6).

Cavitt v. D&D Services, LLC, AWCAC Dec. No. 248 at 6 (May 4, 2018) said, "In *Straight*, the question involved under which section of AS 23.30.220 should an employee's compensation rate be determined when the employee had been largely out of the labor market in the two years prior to the work injury (footnote omitted). Using AS 23.30.220(a)(4) may have not been an accurate method for calculating Mr. Straight's compensation rate."

In *Turner v. Alaska Quality Sealcoat*, AWCB Decision No. 19-0086 (August 26, 2019) the employee was mostly out of the work force for the two years prior to his work injury. In 2015 he earned $4,779.00 and in 2016 he earned $0.00. He then worked a seasonal job for Employer in 2017 until he was injured. Applying AS 23.30.220(a)(4) and using his 2016 earnings as a basis for calculating his gross weekly wages, resulted in a compensation rate less than the minimum. Employee's gross weekly earnings when working for Employer were almost three times greater. *Turner* found using Employee's 2016 earnings to calculate his gross weekly earnings resulted in a TTD rate calculation which bore no relationship to his lost earnings during the period he was disabled from his work injury with Employer. *Turner* found halving Employee's total gross weekly earnings while working seasonally for Employer six months out of the year, resulted in a TTD rate that represented an accurate predictor of Employee's lost earnings due to the injury.

In *Wilson v. Home Depot USA, Inc*., AWCB Dec. No. 21-0120 (December 20, 2021) the employee, who was mostly out of the work force for two years prior to her employment with the employer at the time of injury, credibly testified she had worked full time from 2011 to 2017. She also testified she was committed to full-time work with the employer to advance her desire to become a kitchen designer. After the work injury, the employee obtained a job with another employer earning more per hour than she had with employer. *Wilson* found employee demonstrated her higher earnings

would have continued either with the employer or elsewhere during her periods of disability, but for her injury. She proved by substantial evidence the calculation under AS 23.30.220(a)(4) led to an irrational award as it was not an accurate predictor of her wage losses due to the work injury. Her compensation rate was calculated pursuant to AS 23.30.220(a)(5).

> **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 ...
>
> **8 AAC 45.142. Interest.** ...
>
> (b) The employer shall pay the interest
>
> (1) on late-paid time-loss compensation to the employee. ...
>
> . . . .
>
> **8 AAC 45.210. Weekly compensation rate.** ...
>
> (c) For the purpose of determining the weekly compensation rate under AS 23.30.175, 23.30.220 … , the number of dependents is determined as of the date of injury, and does not change, even if the employee's number of actual dependents does change.
> . . . .

ANALYSIS

1) Is Employee entitled to a compensation rate adjustment?

Employee contends his weekly TTD benefit should be the maximum rate of $1,155.00 based on his weekly wages while working for Employer. He maintains AS 23.30.220(a)(4) did not fairly compensate him for his lost earnings while he was disabled and his compensation rate should be based on his wages at the time of injury pursuant to AS 23.30.220(a)(5).

Employer contends AS 23.30.220(a)(5) is not applicable to Employee as his earnings can be determined from his income for the 2020 work season. Employer first calculated Employee's TTD

benefits at the minimum rate of $276 as Employee did not provide any income information. Employer contended it had attempted to come to an agreement with Employee, but being unable to do so, unilaterally used Employee's 2020 income of $31,574.18. Employer maintains using AS 23.30.220(a)(5) is inapplicable as Employee's earnings can be determined from the W2's for his 2020 work season. In addition, using AS 23.30.220(a)(5) to calculate the compensation rate ignores the fact Employee's work was seasonal and he only worked six to seven months of the year.

There is no factual dispute about the amount of Employee's earnings in the two calendar years prior to his work injury as he did not work in 2018 or 2019 due to a 2017 work injury. The parties disagree on the TTD benefit weekly rate. The statutory presumption analysis in AS 23.30.120(a)(1) does not apply to a compensation rate adjustment claim. *Rockney*; *Burke*; *Abood*; *Straight*. If the result under AS 23.30.220(a)(4) does not bear any resemblance to Employee's lost future earnings while he is disabled, a rate adjustment may apply under AS 23.30.220(a)(4). *Straight*. The burden is on Employee to provide substantial evidence of what his future earning capacity would have been but for his work injury. *Id*.

A basic principle 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" during his disability period, when calculating a TTD rate. *Johnson*; *Gilmore*; *Larson's. Gilmore* relied on then un-codified legislative intent, which stated the Act must be "interpreted ... to ensure the ... fair ... delivery of indemnity ... to injured workers at a reasonable cost to employers ..." This intent now appears as the first statute in the Act and is applicable here. AS 23.30.001(1). Employer has the right to presume AS 23.30.220(a)(4) will provide a spendable weekly wage fairly approximating the injured worker's wages at the time of injury. *Wilson*. Since the law reverted to a similar scheme in effect when *Gilmore* was decided, *i.e.*, a spendable weekly wage statute that does not take into account higher earnings at a new job, and a legislative mandate to ensure the Act is "fair," *Gilmore* and its relevant progeny now apply to Employee's claim. *Straight*.

Employee must provide substantial evidence showing AS 23.30.220(a)(4) is not an "accurate predictor of losses due to injury" and fairness to both parties is not the deciding factor. *Wilson*;

Thompson; *Saxton*. The factfinders "must conduct a broader inquiry" for evidence to determine his spendable weekly wage and TTD benefit rate. *Wilson*.

Employee contended his work history supports his position the calculation under AS 23.30.220(a)(4) leads to an irrational award. He testified he did not work from the time of his September 22, 2017 work injury with prior employer Tanik Construction Co., Inc. until his employment began with Employer on June 8, 2020. Since Employee had no earnings during the two years prior to the year of his work injury, the compensation rate under AS 23.30.220(a)(4) would result in the minimum $276 compensation rate, which is only 22 percent of the $1,255 maximum rate to which Employee would be entitled based on his earnings with Employer under AS 23.30.220(a)(5). Although Employer adjusted the TTD rate to $447.54 based on Employee's 2020 total earnings of $31,574.18, the $447.54 TTD rate is still only 35 percent of the $1,255 maximum rate under AS 23.30.220(a)(5). Thus, Employee has met his burden and has shown the compensation rate established under AS 23.30.220(a)(4), whether using the years 2018 and 2019 during which he had no income or his income from the year 2020, does not represent "an accurate predictor of losses due to injury" and is irrational. *Rogers & Babler*; *Straight*; *Wilson*; *Thompson*; *Abood*. However, unlike the employee in *Wilson v. Home Dept*, Employee did not present substantial evidence he would have continued to work full-time for twelve months a year with another employer after his employment period with Employer ended. To the contrary, Employee credibly testified he only worked six to seven month a year and spent three to four months a year in Arizona, where he did not work. AS 23.30.122; *Smith*.

Employee earned $12,578.66 in wages during the six weeks he worked for Employer, averaging gross weekly wages of $2,096.44. While Employee testified if he gets a winter job that is good, he will take it, he did not provide any evidence to show winter jobs were available. Therefore, but for his June 30, 2020 work injury, Employee demonstrated he would have continued to work for Employer until the job was completed and he might have continued to work for another employer at similar wages for the remainder of the summer, for a total of six months. *Wilson*; *Abood*; *Saxton*. As Employee normally works six to seven months per year, his gross weekly wage while working for Employer should be halved to $1,048.22 per week ($2,096.44/wk. x 52 wks. X 6 months / 12 months = $1,048.22). *Turner*. Employee is entitled to claim two exemptions, as he is married. 8

AAC 45.210(c). Using $1,048.22 as Employee's gross weekly earnings and applying this number to the division's online "Benefit Calculator," Employee's weekly TTD benefit rate would be $717.80. AS 23.30.185. Employee has proven using Employee's 2020 earnings as a basis for calculating his gross weekly wages under AS 23.30.220(a)(4)results in a TTD rate of $447.54, which is not "an accurate predictor of the losses to injury" and is not rational. *Straight*; *Wilson*; *Thompson*; *Abood*; *Saxton*. Therefore, Employee's weekly earnings when injured while working for Employer will be used to calculate his TTD rate. Halving Employee's gross weekly wage is an accurate calculation of his lost wages because it accounts for the fact Employee only worked six months per year. *Turner*. Employee's request for a compensation rate adjustment will be granted. *Gilmore*; *Straight*. Employer will be ordered to pay Employee the $717.80 TTD benefit rate for any future periods of TTD, if there are any, and the difference between the $447.54 TTD benefit compensation rate already paid and the $717.80 TTD benefit compensation rate.

2) Is Employee entitled to interest?

Employee was successful on his claim for a compensation rate adjustment. Interest on benefits not paid when due is mandatory. AS 23.30.155(p); 8 AAC 45.142(b)(1). Employer will be ordered to pay interest on the difference between the minimum $447.54 TTD benefit already paid and the $717.80 compensation rate awarded in this decision for all past periods it paid benefits.

3) Is Employee entitled to attorney's 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*. Here Employee filed his April 16, 2021 WCC requesting a compensation rate adjustment, interest, and attorney fees and costs. Employer and Employee could not come to agreement on the appropriate compensation rate, but Employer unilaterally decided a compensation rate of $447.54 based on Employee's 2020 earnings was appropriate. Employer filed its March 10, 2022 controversion for a compensation rate greater than $447.54. Employee was successful in obtaining an increase in his compensation rate against Employer's resistance, including the March 10, 2022 controversion. Employee is entitled to actual attorney fees. *Moore*; *Cavitt*. However, Employer objects to the

amount of attorney fees on several grounds. This decision will address the attorney fees and Employer's objections.

a) Attorney hourly rate

Employee's attorney claims a $500.00 attorney hourly rate and $185.00 an hour for a paralegal rate. Employer objected, noting in a recent decision Employee's attorney requested a fee of $500.00 per hour, but it was held to be unreasonable and a fully compensatory rate of $450.00 attorney rate would be appropriate and a $165.00 hourly paralegal rate would also be appropriate. Employer also noted in 2022 there is no case where an attorney has been awarded fees in excess of $400.00 to $450.00 per hour.

Rusch requires examination of the factors in Alaska Rules of Professional Conduct 1.5(a) in determining a reasonable fee. Employee's claim was not factually complex, nor did it require an especially high degree of legal skill to represent Employee. Employee's brief was well supported by the law and evidence and was helpful. *Rogers & Babler*. Employee's attorney did not state the work for Employee precluded him from other employment, but the time he spent representing Employee could not be spent representing another client. *Id*. Employer cited to *Bennett v. Ketchikan Pulp Company*, AWCB Dec. No. 21-0043 (May 21, 2021) to contend Employee's attorney was not entitled to more than an hourly fee of $450.00, as well as the fact no attorney has been awarded fees in excess of $400.00 to 450.00 per hour in 2022 as a rate of $500.00 per hour is more than the fee customarily charged in the locality for similar services. *Id*. The result obtained, that is, the increase in Employee's compensation rate is of benefit to Employee. *Id*. Employee's attorney did not identify any time limitation imposed by the client or the circumstances, nor did he explain how the length of the professional relationship would affect the fee. Employee's attorney is experienced, has represented injured employees in workers' compensation cases for years and has a good reputation as an attorney. *Id*. Nearly all fees for employees' attorneys in workers' compensation are contingent. The contingent nature of the work is considered in determining an appropriate hourly rate. *Bignell.* After consideration of all the required factors, $450.00 per hour remains a reasonable and fully compensatory hourly attorney's fee rate. Employer will be ordered to pay $13,869.00 (30.82 hours X $450 / hour = $13,869.00) in attorney's fees.

b) Paralegal hourly rate

Employer objected to the hourly paralegal rate of $185.00 per hour as well. Employer requested a reduction to $165.00 per hour. Employee did not provide any explanation for the increase in paralegal hourly fees. Therefore, Employee's request for an hourly paralegal rate of $185.00 will be denied and the $165.00 hourly rate, which Employer agreed was reasonable, will be granted.

c) Tasks unrelated to WCC; excessive time.

Employer also objected to the October 19, 2021 entry for two hours in paralegal fees as that time was related to a petition for an SIME, not to the compensation rate adjustment at issue in this WCC. Therefore, the total paralegal hours will be reduced by two hours. Employer characterized six entries as excessive, but time spent on all these entries were *de minimus*, and the attorney fees will not be reduced on that basis.

Employer will be ordered to pay $4,830.70 in paralegal fees (27.83 hours X $165/hour = $4,591.95; 1.01 hours X $125/hour = $126.25; 0.75 hours X $150/hour = $112.50; $4,591.95 + 126.25 + $112.50 = $4,830.70).

Employee documented $455.35 in costs, which Employer did not object to. Employer will be ordered to these costs as well.

Employer will be ordered to pay $19,155.05 for attorney's fees and costs ($13,869 in attorney's fees + $4,830.70 in paralegal fees + $455.35 costs = $19,155.05).

CONCLUSIONS OF LAW

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

ORDER

1) Employee's April 16, 2021 WCC is granted.

2) Employer is ordered to pay Employee (1) the difference between the $447.54 TTD benefit compensation rate already paid and the $717.80 TTD benefit compensation rate awarded in this decision; and (2) the $717.80 TTD benefit rate for any future periods of TTD, if there are any.

3) Employer is ordered to pay Employee interest on the difference between the $717.80 TTD benefit compensation rate awarded in this decision and the $447.40 TTD benefit rate actually paid by Employer for all past periods it paid benefits.

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 $19,155.05 in attorney fees and costs.

Dated in Anchorage, Alaska on June 3, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Judith A DeMarsh, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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 RICHARD SCHEIDEMAN, employee / claimant v. SATORI GROUP, INC., employer; AMERICAN INTERSTATE INSURANCE COMPANY, insurer / defendants; Case No. 202012731; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on June 3, 2022.

/s/
Kim Weaver, Office Assistant II