ALASKA WORKERS' COMPENSATION BOARD

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

STEPHAN C. MITCHELL, Employee, Claimant, v. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 199523875 AWCB Decision No. 24-0009 Filed with AWCB Anchorage, Alaska on February 21, 2024

Stephan C. Mitchell's (Employee) January 21, 2022 claim was heard on January 17, 2024, in Anchorage, Alaska, a date selected on October 31, 2023. An August 23, 2023 hearing request gave rise to this hearing. Attorney Richard Harren appeared and represented Employee, who appeared and testified. Attorney Nora Barlow appeared and represented United Parcel Service and Liberty Mutual Fire Insurance Company (Employer). Witnesses included Jeanne Mitchell, David Nichols and Dennie Castillo, who appeared and testified for Employee. All participants appeared by Zoom. The record remained open until January 26, 2024 to receive Employee's supplemental attorney fee affidavit, and Employer's defense to attorney fees and costs for time spent before the Alaska Workers' Compensation Appeals Commission (Commission), Employer's objection to Employee's attorney fee affidavits, and Employee's Social Security retirement award letter. The record closed after final deliberation on February 5, 2024.

ISSUES

Employee contends he is entitled to an order awarding permanent total disability (PTD) benefits, from April 1, 2004 to January 27, 2017, based upon *Mitchell XVIII* which found he was disabled from April 1, 2004 and remanded the case. He contends Employer never produced a legacy compensation report showing how the amount Employer paid was calculated.

Employer contends it already paid PTD benefits back to April 1, 2004, in a lump-sum pursuant to Mitchell *XVIII*. It contends *Mitchell XVI* calculated the PTD weekly benefit and Social Security offset, and it was simple to figure out the remaining PTD benefits due.

1) **Is Employee entitled to additional PTD benefits?**

Employee contends the PTD compensation rate does not fairly and equitably reimburse him for earnings he would have realized had he continued to work, including cost-of-living increases, benefits paid by Employer but not fully taxable to Employee, and raises UPS truck drivers received over the last 28 years. He contends he would have continued to drive truck up to and until his normal retirement age at least, and he lost the earnings and benefits he would have continued to receive due to the work injury. Employee contends his compensation rate should be increased annually to recognize the scheduled increases in earnings he would have realized, which amounts to a rate of 4.25% per year. He contends he should receive the maximum compensation rate as of 2007, based upon increases in cost-of-living, inflation, and UPS truck driver wages over the last 28 years. Employee contends it is unconstitutional to use his wages in 1995 to set the compensation rate because it does not accurately reflect his actual economic losses. He contends he became eligible for normal Social Security retirement in 2021, but Employer failed to revise the offset. Employee contends Employer's failure to revise PTD benefits due to his Social Security retirement benefits amounted to an assertion that no Social Security offset would be required. Employee contends the panel has authority to modify the PTD compensation rate under AS 23.30.130. He contends the Social Security offset was not ripe when *Mitchell XVI* was decided because PTD benefits had not been awarded.

Employer contends res judicata and the rule against claim-splitting bars Employee's compensation rate adjustment claim. It contends *Mitchell XVI*, a final decision, granted Employer's request for a Social Security offset and calculated his average weekly wage under AS 23.30.225(b), gross weekly wage in AS 23.30.220 and PTD benefit rate, and Employee failed to appeal the Social Security offset or benefit rate calculations. Employer contends the claim arises out of the same transaction or core set of facts because Employee's 2017 claim sought PTD benefits but did not seek a compensation rate adjustment and Employer has paid at the rate of $570.84 for over 21 years. It contends the Social Security offset issue was ripe and Employee agreed its petition should be heard in *Mitchell XVI*. Employer contends Employee's opposition to its petition seeking a Social Security offset disagreed with Employer's PTD benefits rate calculation because it did not comply with *Darrow* but he failed to provide any analysis or alternative calculation for the PTD disability compensation rate, average weekly wage calculation or Social Security offset. It contends Employee's weekly compensation rate cannot exceed $700 because AS 23.30.175 caps PTD benefits at $700 per week. Employer contends if a compensation rate adjustment is granted, the Social Security offset must be recalculated based upon the new PTD disability compensation rate. It contends a revision of PTD benefits based upon Employee's Social Security retirement has not occurred because Employee failed to provide it with a copy of the Social Security Administration's award letter as required by the Alaska Workers' Compensation Act (Act). Employer contends it has never implied it would not seek a revision based upon a copy of the Social Security Administration award letter. It contends Employee's January 21, 2022 claim failed to meet requirements to seek modification as his claim lacked specificity. Employer contends that if modification is granted, it cannot apply retroactively before *Mitchell XVI*.

2) Is Employee entitled to a compensation rate adjustment?

Employee contends he is entitled to interest on the PTD benefits awarded in *Mitchell XVIII*.

Employer contends it paid interest on the PTD benefits awarded in *Mitchell XVIII*.

3) Is Employee entitled to additional interest?

Employee contends he is entitled to additional attorney fees and costs on PTD benefits awarded in *Mitchell XVIII* and contends he is entitled to attorney fees for work performed at the Commission.

Employer does not object to attorney fees Employee seeks for the PTD benefits awarded in *Mitchell XVIII*. It contends this decision has no authority to award attorney fees incurred for time spent on an appeal at the Commission. Employer contends Employee waived his right to fees incurred before the Commission because he did not file a motion for attorney fees within 10 days after the Commission's order remanding the case.

4) 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 or about October 30, 1995, Employee injured his back at work for Employer. (Report of Occupational Injury or Illness, October 31, 1995).

2) On October 31, 1995, Employer began paying temporary total disability (TTD) benefits. Employee's gross weekly earnings were calculated at $880 based on gross earnings of $11,440 / 13 under AS 23.30.225(a)(4)(A); his weekly TTD rate is $570.84. (Compensation Report, December 8, 1995).

3) On May 16, 1997, the rehabilitation specialist submitted a Vocational Rehabilitation Services Plan stating Employee was earning $21.06 per hour at the time of injury. (Vocational Rehabilitation Services Plan, May 16, 1997).

4) Effective April 1, 2009, Employee began receiving Social Security disability benefits at an initial $2,093.10 per month entitlement. (Social Security Administration Notice of Award letter, May 20, 2009).

5) On March 12, 2014, Employer sought a Social Security offset under AS 23.30.225(b), if Employee obtained any workers' compensation benefits after April 1, 2004. Employer attached no calculations with its request. (*Mitchell XVI*).

6) No answer from Employee to the March 12, 2014 Social Security offset petition is found in the agency file. (*Mitchell XVI*).

7) On November 23, 2016, Employer amended its March 12, 2014 request for a Social Security offset and provided calculations based on Employee's initial entitlement, $2,093.10 per month:

> Mr. Mitchell is receiving $2,093.10 in monthly social security benefits which began as of April 2009. He is therefore receiving a weekly benefit of $483.20 ($2,093.10 x 12 months / 52 weeks = $483.02). $483.02 added to $570.84 equals $1.053.86. This combined benefit amount exceeds the maximum allowed combined total of $673.92 by a total of $379.94. Liberty hereby petitions the Board to allow it to reduce Employee's PTD rate by $379.94 on an ongoing basis. (Employer's Amended Petition for Social Security Disability Offset, November 23, 2016).

8) On December 13, 2016, Employee answered Employer's request for a Social Security offset:

> Employee acknowledges the concept and right of the insurance carrier (Employer) to offset Social Security payments but disputes the equity of its numbers and calculations presented in the amended petition. Once the carrier accepts its responsibility to pay PPD, either voluntarily or by board mandate, legal analysis of the amount of and offset will be ripe.
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> Employee disagrees with the computation set forth by the Employer as it fails to comply with the Appeals Commission decision in [*Darrow v. Alaska Airlines*, AWCAC Dec. No. 218 (October 13, 2015)]. (Employee's Answer to Employer's Amended Petition for Social Security Disability Offset, December 13, 2016).

9) On July 12, 2017, an oral hearing was set on October 5, 2017. The issues set for hearing included Employee's March 2, 2017 claim for PTD and TTD benefits and Employer's November 23, 2016 petition for a Social Security offset. (Prehearing Conference Summary, July 12, 2017).

10) On September 11, 2017, the October 5, 2017 hearing was continued until November 21, 2017, due to the Division's scheduling error. The issues set for hearing included Employee's March 2, 2017 claim for PTD and TTD benefits and Employer's November 23, 2016 petition for a Social Security offset. (Prehearing Conference Summary, September 11, 2017).

11) Employee did not seek modification of the September 11, 2017 prehearing conference. (Agency Record).

12) On September 28, 2017, Employee filed a hearing brief for *Mitchell XVI*; it did not contend Employer's November 23, 2016 amended petition was not ripe nor ask it to be held in abeyance. (Employee's Hearing Brief, September 28, 2017; Observations).

13) On April 30, 2018, Employee filed a Social Security form showing Employee, in 2009, received retroactive Social Security disability payments beginning December 2005, and continuing. (*Mitchell XVI*.).

14) On December 6, 2017, Employee filed a hearing brief for *Mitchell XVI*; it did not contend Employer's November 23, 2016 amended petition was not ripe nor ask it to be held in abeyance. (Employee's Hearing Brief, December 6, 2017; Observations).

15) On January 3, 2018, Employee filed closing arguments for *Mitchell XVI*; it did not request Employer's November 23, 2016 amended petition be held in abeyance. (Closing Argument of Employee Attorney Representative Richard Harren, January 3, 2018).

16) On May 1, 2018, *Mitchell v. United Parcel Service*, AWCB Dec. No. 18-0042 (May 1, 2018) (*Mitchell XVI*) found Employee was temporarily and totally disabled from May 1, 2006 through March 26, 2007, and from March 3, 2010 through May 24, 2010; permanently and totally disabled beginning January 28, 2017; Employer was entitled to a Social Security offset under AS 23.30.225(b); Employer properly calculated the Social Security disability offset at $379.94 based on the information provided by the parties; Employee's weekly TTD and PTD benefit rate was $570.84 before offset and $190.90 after offset; and his PTD benefits were subject to revision upon his receipt of Social Security retirement benefits. *Mitchell XVI* ordered Employer to pay Employee past TTD benefits from May 1, 2016 through March 26, 2007, totaling $8,972.30 and from March 3, 2010 through May 24, 2010, totaling $2,235.44; PTD benefits from January 28, 2017 through May 1, 2018, totaling $12,490.58; and ongoing PTD benefits beginning May 2, 2018. It awarded Employee interest totaling $9,750.11 and 20 percent of his total attorney fees and costs as he prevailed on 20 percent of his claims. (*Mitchell XVI*.).

17) On May 16, 2018, Employee through his wife requested reconsideration or "rehearing" of *Mitchell XVI*, contending:

> Employee became aware that his union contract wages/benefits at UPS would somehow have an impact on any potential award of benefits. Mitchells continued to document the existence of a union contract/wage in the issue at prehearing notes and at hearings both before and after Mr. Harren joined in representation. Mitchell was not aware or advised of any other requirement to document the union wage.
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> Mitchell does not know what documentation the Board relies upon or requires and does not know how to calculate any offset for union wage/benefit.

> Mitchells request direction and reconsideration of this offset calculation. (Verified Petition of Non-Attorney Employee Spouse, Jeanne Mitchell for Reconsideration and or Rehearing, May 16, 2018).

18) The Board took no action on Employee's May 16, 2018 petition. (Agency file).

19) Employee did not ask to hold the Social Security offset issue in abeyance. (Agency file).

20) Employee appealed *Mitchell XVI* to the Commission. (Agency file).

21) On December 6, 2019, *Mitchell v. United Parcel Service*, AWCAC Dec. No. 272 (December 6, 2019) (*Mitchell XVII*), affirmed *Mitchell XVI*. (*Mitchell XVII*.).

22) On November 21, 2021, *Mitchell v. United Parcel Service*, 498 P.3d 1029 (Alaska 2021) (*Mitchell XVIII*), the Alaska Supreme Court (Court) found Employer failed to rebut the presumption of compensability for PTD because it failed show the availability of jobs which would accommodate Employee's limitations in 2004. It reversed the Commission's conclusion that Employer rebutted the presumption Employee was permanent and totally disabled as of April 1, 2004, and remanded the case to the Commission with instructions to remand the case to the Board for an award of PTD benefits. (*Mitchell XVIII*).

23) On December 16, 2021, the Commission remanded the case to the Board for an award of PTD benefits. (Order on Remand from the Alaska Supreme Court, December 26, 2021).

24) Employee did not appeal *Mitchell XVI*'s PTD compensation rate, average weekly wage or gross weekly wage findings, or Social Security offset calculation to the Commission or the Court. (Agency file).

25) On January 21, 2022, Employee sought PTD benefits from April 1, 2004 forward based on the Court's remand, plus interest and attorney fees and costs. He stated "Correction/recalculation of social security offset and/or compensation rate is necessary in equity." (Claim for Workers' Compensation Benefits, January 21, 2022).

26) On February 28, 2022, Employer answered Employee's claim, admitting responsibility for PTD benefits, interest and attorney fees per Mitchell *XVIII* and contending Employer already paid the PTD benefits and interest. It contended a hearing should be set only to reconsider attorney fees and costs awarded in *Mitchell XVI*. Employer denied Employee's request for a compensation rate adjustment recalculation, contending it was already properly determined in *Mitchell XVI* and Employee failed to appeal the decision. (Employer's Answer to Employee's

Workers' Compensation Claim dated 01/21/22 and Board Served on 01/28/22, February 28, 2022).

27) On February 9, 2023, Employee filed portions of the UPS Union Agreements from August 1, 1993 to July 31, 1997; August 1, 1997 to July 31, 2002; August 1, 2002 to July 31, 2008; August 1, 2008 to July 31, 2013; August 1, 2013 to July 31, 2018; August 1, 2018 to July 31, 2023; and the established hourly wages for employees. (Employee's Evidence for March 1, 2023 Hearing, February 9, 2023).

28) On February 27, 2023, Employee filed attorney fees and costs affidavits for time spent pursuing *Mitchell XVII*. (Affidavit of H. Lee, Re: Appeal Commission Level, February 27, 2023; Affidavit of Richard L. Harren, Re: Appeal Commission Level, February 27, 2023).

29) On October 31, 2023, the parties stipulated to an oral hearing on January 17, 2024, to address "compensation rate adjustment, interest and attorney fees/costs." (Prehearing Conference Summary, October 31, 2023).

30) On January 9, 2024, in his hearing brief Employee relied on hourly wage data from the Alaska Department of Labor from 2012 to 2017 in the Minimum Rates of Pay for Laborers and Mechanics, Effective September 1, 2022; Laborers' and Mechanics' Minimum Rates of Pay, Effective September 1, 2021; Laborers' & Mechanics' Minimum Rates of Pay, Effective September 1, 2019; and Laborers' & Mechanics' Minimum Rates of Pay, Effective September 1, 2018; and extrapolated the hourly wage rage between 2004 to 2011 based upon an average of the hourly wage increases between 2012 to 2017. (Employee's Hearing Brief for January 17th, 2024 Hearing, January 9, 2024; observations).

31) Employee contended his earnings would have increased at a rate of 4.25 percent per year over the last 28 years and he lost $1,299,912.76 in wages he would have earned had he not been injured and continued to work 40 hours for 52.16 weeks per year for 12 years based upon the hourly wage data, and 80 percent of that amount is $1,039,930.21. (Employee's Hearing Brief for January 17th, 2024 Hearing, January 9, 2024; observations).

32) Employee contended "by the virtue of the utter disregard for obvious entitlement to [Employee's] increased WC benefit of PTD, [Employer] has, in effect, conceded to the forgoing analysis, wherein the SSA offset disappeared approximately 15 years ago by virtue of the factors of inflation and the equitable principles of the authorities cited above." He contended the limitation in AS 23.30.220(a)(10) is inapplicable because $700 is the cap on his compensation

rate. He sought an additional 47.47 percent of claimed attorney fees and costs totaling $57,960 and $15,474, respectively, on time spent before the Board on the Court-awarded PTD benefits. Employee also sought attorney fees and costs for time spent before the Commission on appeal in *Mitchell XVII*. (Employee's Hearing Brief for January 17th, 2024 Hearing, January 9, 2024; observations).

33) Employee's Exhibit 12 included a table with calculations for PTD benefits with the recalculation he sought and interest, concluding Employer should have paid $870,910.57 in total for both. Employee calculated a Social Security offset under AS 23.30.225(a) using the PTD rate from *Mitchell XVI* and subtracting $1,500 * 7 / 30 to result in $395.84; $1,500 is the average monthly Social Security benefit according to usafacts.org. He used $350 instead of $700 as the PTD weekly benefit in Exhibit 12 from October 2, 2021, and ongoing. Employee calculated a Social Security offset under AS 23.30.220(b) by taking $842.40 and multiplying it by 0.8 and subtracting $379.94. The entirety of Employee's brief addressed his claim for recalculation of the weekly PTD benefit rate and Social Security offset. (Employee's Hearing Brief for January 17th, 2024 Hearing, January 9, 2024; observations).

34) On January 16, 2024, Employee filed a hearing brief with corrected exhibits. The calculations he provided in his January 9, 2024 brief remained the same. (Employee's Hearing Brief for January 17th, 2024 Hearing, January 16, 2024).

35) On January 17, 2024, Employee testified he loved working for Employer. He switched from delivery driver to driving truck because he liked driving. He expected to drive truck until he retired. If Employee had not been injured, he expected to keep working. He stopped working due to the work injury and did not return to work. (Employee).

36) On January 17, 2024, Employee's wife testified Employee enjoyed working for Employer and loved his job. He adored driving truck and had comradery with his coworkers and managers. It also provided a good living, most weekends off and a good benefit package. Employee's job with Employer was his dream job. (Mitchell).

37) On January 17, 2024, Castillo testified she is the administrator for Alaska Teamster Employer Welfare Trust and the Alaska Teamster Pension. Plan participants include members of the Teamsters Union. It received contributions from Employer for Employee into the pension plan for 281.96 hours between January 1996 and October 1996. In 1995, Employer contributed $4,951.11 for 1,650.37 hours and in 1994, Employer contributed $6,593.88 for 2,197.96 hours

into the pension plan for Employee. The health and welfare fund provides medical, dental, vision and prescription coverage to plan participants and their dependents. In 1995, employers contributed $4.09 per hour worked into the health and welfare fund; in June 1996, the contribution went up to 4.34 per hour. In 2013, employers began to pay a composite rate into the health and welfare plan for each employee; in 2024, it was $2,344 per month, in 2023, it was $2,254 per month, in 2022, it was $2,097 per month, and in 2021, it was $1,951 per month. Both contributions were made by the employer of the plan participant and were not taxable to the participant. Employers reported the contributions every month for the previous month. The trust stopped receiving contributions on Employee's behalf from Employer in 1996. Employee was placed into retirement status on August 1, 2010. He had 21.81 years of service. Participants reach normal retirement eligibility based upon the rule of 80, when the total years of service and age equal 80. Employee had 3.19 years before he was eligible for normal retirement. He took an early retirement, which reduced his benefits, and a survivor benefits for his wife, which also reduced his benefit. (Castillo).

38) On January 17, 2024, Nichols testified he is a business manager for Teamsters Local 959, which was the union to which employee belonged when he worked for Employer. A full-time feeder driver for Employer makes $47.10 per hour. The person currently driving the feeder driver route Employee drove while he worked for Employer in 1995 makes $47.10 per hour. Wages are set out in the bargaining unit contract, including hourly wages and cost-of-living adjustments. There are feeder drivers making from $90,00 to $140,000 per year, depending on route driven, seniority, overtime, holiday pay, sick leave and vacation. Many drivers work at least five extra hours per week. (Nichols).

39) On January 17, 2024, Employee requested that Employer's defense against attorney fees and costs he seeks for *Mitchell XVII* be stricken because Employer first raised it in its hearing brief five days before hearing. (Petition, January 17, 2024).

40) Employer contended Employee filed the fee affidavit in February 2023, when it had no opportunity to respond to it. It also expected a post-hearing right to object to his recently submitted attorney fee affidavits, which include the same time spent on appeal in *Mitchell XVII*. (Employer).

41) Employee contended he did not raise the compensation rate and Social Security offset issue before the Commission or the Court because he thought his case would lack credibility if he raised more than two issues, and he chose the PTD date and medical benefit issues. (Record).

42) Employee contended he should receive a $700 weekly PTD compensation rate without an offset for Social Security benefits. (Record).

43) On January 22, 2024, Employer stated it did not object to $57,960 in attorney fees and $15,474 in costs Employee claimed for time spent before the Board on the PTD benefits awarded by the Court. (Employer's Objection to Attorney's Fees, January 22, 2024).

44) On January 26, 2024, Employee responded to Employer's opposition to attorney fees and costs. He contended the Commission remanded the case to the Board without considering Employee's attorney fees incurred for his appeal to the Commission. Employee contended that the Commission's final decision was the December 6, 2019 decision, not the December 16, 2021 order remanding the case back to the Board. He contended there was no clear guidance in the law when he was supposed to file a motion for fees before the Commission when he lost the appeal at the Commission but won before the Court. Employee contended it would be inequitable to forfeit Employee's attorney fees due to a procedural matter and it "would result in unconstitutional deprivation of his right to due process and right to property." He contended the Board can award fees for time spent before the Commission and remand the matter to review by the Commission and he will have 10 days from the date of the instant decision and order to file his fee affidavit and motion with the Commission. (Attorney Richard Harren's Response to Opposition to Claim for Attorney Fees, January 26, 2024).

45) On January 29, 2024, Employee filed his September 3, 2021 Social Security retirement award letter which stated he would receive $2,315 beginning September 2021, paid around October 27, 2021. (Social Security Administration Notice of Award letter, September 3, 2021).

46) The parties stipulated that Employer paid Employee $143,333.11 in February 2022 for past PTD benefits per *Mitchell XVIII* and $89,802.61 in interest on the PTD benefits. (Record).

47) Table I below shows PTD benefits Employer owed Employee pursuant to *Mitchell XVIII*:

Table I

From	To	Weeks	Days	Rate	PTD Benefits
April 1, 2004	November 30, 2005	86	6	$570.84	$49,581.53
December 1, 2005	April 30, 2006	21	4	$190.90	$4,117.99
March 27, 2007	March 2, 2010	153	1	$190.90	$29,234.97

May 25, 2010	January 26, 2017	348	3	$190.90	$66,515.01
				Totals	$149,449.50

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

When a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice it may be filed at a later date when it becomes timely. *Egemo v. Egemo Const. Co.*, 998 P.2d 434, 441 (Alaska 2000) (applied in *Bankhead v. Yardarm Knot, Inc.*, AWCB Decision No. 13-0084 (July 18, 2013). The doctrine or ripeness pertains to whether there is an actual controversy between the parties. *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC Decision No. 153 (June 14, 2011) at 5 (citing *Brause v. State, Dept. of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001)).

"Ripeness asks whether there yet is any need for the court to act." *Id*. The concept of ripeness can be explained in both abstract and practical formulations. The abstract formulation is that ripeness depends on 'whether ... there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' On a more practical level, our ripeness analysis fundamentally 'balances the need for decision against the risks of decision.' We examine 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' *Settje* at 5 (quoting *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 368 (citations omitted)). Consideration of the "risks of the decision" refers to the risks of deciding hypothetical cases. *Settje* at 6 n.76.

AS 23.30.008. Powers and duties of the commission. . . .

> (d) In an appeal, the commission shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the commission determines to be fully compensatory and reasonable. . . .

"Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers' compensation claim." The Board has no jurisdiction "to decide issues of constitutional law." *Alaska Public Interest Research Group (AKPIRG) v. State*, 1267 P.3d 27, 36-37 (Alaska 2007).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
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> (b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

For an alleged factual mistake, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. Modification under AS 23.30.130(a) "is not appropriate when a party is seeking to" change the result of a decision "based on an allegation that the board committed a mistake of law." *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743-44 (Alaska 2005). The substantial evidence standard is applied to requests for modification. *Interior Paint Co. v. Rodgers*, 522 P.2d 164 (Alaska 1974). "Substantial evidence" is such "relevant evidence" as a "reasonable mind might accept as adequate to support a conclusion." *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999).

The Court discussed AS 23.30.130(a) in *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158, 162 (Alaska 1996), and said "under this statute, the Board 'is granted broad discretion to modify its prior decisions and findings' and may modify its prior factual findings if it finds they were mistaken" (citations omitted). "The concept of 'mistake' requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a backdoor route to retrying a case because one party thinks he can make a better showing on the second attempt." *Rodgers* at 169 (citing 3 Larson, *The Law of Workmen's Compensation* §81.52, at 354.8 (1971)).

When a party seeks modification based on a mistake of fact and desires to present new evidence, the key element in the regulation is the requirement that the new evidence could not have been discoverable prior to the hearing through due diligence. *Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948 (Alaska 2005). Due diligence requires the new evidence "could not" have been developed prior to hearing, and it is not an abuse of discretion to reject a petition for modification when the evidence simply "was not" developed. *Id*. at 957. Strict compliance with specific pleading requirements at 8 AAC 45.150(d) may not always be required. *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 624 (Alaska 2007) (pro se claimant following instructions set forth in a prior decision and order); *Sulkosky* at 164 (petition sufficiently specific to allow the board to identify the facts challenged).

In *Burke v. Raven Electric, Inc.*, 420 P.3d 1196 (2018), the Board dismissed a claim seeking death benefits and damages filed by the mother of a worker killed on the job. The Commission affirmed and the mother appealed. The Court affirmed the dismissal of the claim and held the exclusive remedy of the Act did not violate the mother's right to due process and equal protection. It noted:

> The workers' compensation system consists of a trade-off, sometimes called the "grand bargain," in which workers give up their right to sue in tort for damages for a work-related injury or death in exchange for limited but certain benefits, and employers agree to pay the limited benefits regardless of their own fault in causing the injury or death. This system has been in place in the United States for over a century and has withstood constitutional challenge. New York's workers' compensation statute was found constitutional under the United States Constitution in 1917. New York's compensation law became the model for the

> federal Longshore and Harbor Workers' Compensation Act, which in turn served as the model for Alaska's Act.
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> As *Larson's Workers' Compensation Law* observes, workers' compensation in the United States is similar to "social insurance" because "the right to benefits and amount of benefits are based largely on a social theory of providing support and preventing destitution, rather than settling accounts between two individuals according to their personal deserts or blame," even though the funding mechanism for the system is "unilateral employer liability." *Larson's* observes that "[a] compensation system, unlike a tort recovery, does not pretend to restore to the claimant what he or she has lost." Instead, the goal of workers' compensation is to "give[ ] claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable claimant to exist without being a burden to others." (Citations omitted). *Id*. at 1202-03.
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> **AS 23.30.145. Attorney fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.
>
> (c) If proceedings are had for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

Adamson v. University of Alaska, 819 P.2d 886, 895 (Alaska 1991) held that an injured worker must succeed "on the claim itself, not on a collateral issue" to obtain an attorney fee award.

However, if the injured worker succeeds on part of the claim's merits that results in benefits under the Act, attorney's fees are awardable. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993) stated when an employee does not prevail on all issues, attorney fees should be based on the issues on which he prevailed.

The substantive law in effect when Employee was injured in 1995 stated in relevant part:

> **AS 23.30.175. Rates of compensation.** (a) The weekly rate of compensation for disability or death may not exceed $700. . . .
>
> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
> (2) area of last employment;
> (3) the state of residence; and
> (4) the State of Alaska.
>
> **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, not including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;
> . . . .
>
> (10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1)-(7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the

> employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury.
>
> **AS 23.30.225. Social security and pension or profit sharing plan offset.** (a) When periodic retirement or survivors' benefits are payable under 42 U.S.C. 401 - 433 (Title II, Social Security Act), the weekly compensation provided for in this chapter shall be reduced by an amount equal as nearly as practicable to one-half of the federal periodic benefits for a given week.
>
> (b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee or the employee's dependents for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 per cent of the employee's average weekly wages at the time of injury.
> . . . .

In *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993), the Court held the Board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights. It said equitable estoppel elements include "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Id*. The Court concluded, "a finder of fact could not reasonably find that a person in the position of Van Biene could reasonably interpret Wausau's conduct as amounting to an implied communication that no Social Security offset would be required. At best, such conduct subsequent to Gerke's conversation and letter indicates only neglect or an internal mistake." The Court relied significantly on the fact Wausau apprised Van Biene both orally and in writing that workers' compensation benefits would be offset in the event she received Social Security survivor's benefits, and no representations were made by Wausau to Van Biene that it would not seek to offset Social Security survivor's benefits if she received such payments. *Id*. at 589.

"Average weekly wages" as used in AS 23.30.225 refers to measure of historical earning capacity used to calculate workers' compensation and is the same as "gross weekly earnings" in AS 23.30.220 used to calculate compensation. It does not refer to the higher of state historical

earning capacity or "average current earnings" as defined in federal statutes. *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150, 154 (Alaska 1994).

Darrow v. Alaska Airlines, AWCAC Dec. No. 218 (October 13, 2015) (*Darrow I*) held the "average weekly wages at the time of injury" in AS 23.30.225(b) is equivalent to "gross weekly earnings" determined under AS 23.30.220(a), including AS 23.30.220(a)(10) when applicable, and reversed the Board's calculation of the Social Security disability offset. *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116 (Alaska 2017) (*Darrow II*) affirmed the Commission decision reversing the Board's calculation of the Social Security disability offset. It held the phrase "average weekly wages at time of injury" used in AS 23.30.225 was not limited to the claimant's actual wages at time of injury but included any amount calculated under AS 23.30.220, including alternative calculations. *Id*. at 1125. *Darrow* noted using the wage of time of injury to set benefits for injured workers that returned to work for a long period of time before becoming completely disabled could result in hardship. *Id*.

> **AS 23.30.265. Definitions.** In this chapter. . . .
>
> (15) "gross earnings" means periodic payments, by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer, including compensation that is deferred at the option of the employee, and excluding irregular bonuses, reimbursement of expenses, expense allowances, and any benefit or payment to the employee that is not fully taxable to the employee during the pay period, except that the total amount of contributions made by an employer to a qualified pension or profit sharing plan during the two plan years preceding the injury, multiplied by the percentage of the employee's vested interest in the plan at the time of injury, shall be included in the determination of gross earnings; the value of room and board if taxable to the employee may be considered in determining gross earnings; however, the value of room and board that would raise an employee's gross weekly earnings above the state average weekly wage at the time of injury may not be considered;

McKean v. Municipality of Anchorage, 783 P.2d 1169 (Alaska 1989), held res judicata applies in workers' compensation cases and set forth the test to determine when res judicata or its subset collateral estoppel may be applied in a particular workers' compensation case:

> (1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;

> (2) The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action;
> (3) The issue in the first action must have been resolved by a final judgment on the merits. *Id*. at 1171.

The Court has held res judicata, or claim preclusion, applies to workers' compensation cases. However, "it is not always applied as rigidly in administrative proceedings as it is in judicial proceedings. When applicable, res judicata precludes a subsequent suit 'between the same parties asserting the same claim for relief when the matter raised was or could have been decided in the first suit.' It requires that '(1) the prior judgment was a final judgment on the merits, (2) a court of competent jurisdiction rendered the prior judgment, and (3) the same cause of action and same parties or their privies were involved in both suits.'" The rule against claim splitting provides that "all claims arising out of a single transaction must be brought in a single suit, and those that are not become extinguished by the judgment in the suit in which some of the claims were brought." When analyzing claim splitting, "the relevant inquiry is not whether the two claims are grounded in different theories, but whether they arise out of the same transaction or core set of facts." *Robertson v. American Mechanical, Inc.*, 54 P.3d 777, 780 (Alaska 2002).
In *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079 (Alaska 2008), the Court held res judicata did not bar a trial court's remand of a workers' compensation case to the Board so it could decide an issue the claimant raised at the trial court because all proceedings were part of the same action, not a subsequent lawsuit.

> **AS 44.62.540. Reconsideration.** (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

> **8 AAC 45.065. Prehearings.** . . . (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

8 AAC 45.070. Hearings. . . . (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

8 AAC 45.225. Social security and pension or profit sharing plan offsets. (a) An employer may reduce an employee's or beneficiary's weekly compensation under AS 23.30.225(a) by

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

(A) employee or beneficiary is being paid retirement or survivor's benefits;
(B) amount, month, and year of the initial entitlement; and
(C) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee's or beneficiary's initial Social Security entitlement, and excluding any cost-of-living adjustments; and
(3) completing, filing with the board, and serving upon the employee or beneficiary a Compensation Report form showing the reduction and how it was computed, together with a copy of the Social Security Administration's award letter.

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

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

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

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

. . . .

(d) An employee or beneficiary who is receiving weekly compensation benefits shall

(1) send the employer a copy of the award letter from the Social Security Administration or a copy of the first payment documents from a pension or profit sharing plan; and
(2) upon the employer's request, sign a release for the employer to get information from the Social Security Administration or the pension or profit sharing plan.

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;
(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
(3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

8 AAC 57.260. Motions for attorney fees and costs. (a) A party may request an award of attorney fees and costs on appeal by filing a motion no later than 10 days after the date shown in the commission's notice of distribution of the final decision.

(b) A request under (a) of this section for an award of attorney fees must include an affidavit of the party's attorney itemizing the services performed, the amount of time devoted to those services, and the amount sought.

(c) A request under (a) of this section for an award of costs must include an itemization of costs.

(d) No later than 10 days after service of a motion for attorney fees and costs under (a) of this section, any other party may file an opposition to the motion.

(e) The commission may award attorney fees and costs to a successful party on appeal, with or without a hearing, as provided in AS 23.30.008(d).

ANALYSIS

1) Is Employee entitled to additional PTD benefits?

Mitchell XVIII reversed the Commission's conclusion that Employer rebutted the presumption that Employee was PTD as of April 1, 2004, and remanded the case. The Commission remanded the case to the Board for an award of PTD benefits. Employer does not oppose an award of PTD benefits from April 1, 2004. Therefore, Employee is entitled to PTD benefits from April 1, 2004 and continuing. However, because Employer already paid TTD and PTD benefits pursuant to *Mitchell XVI*, it should only pay an amount equal to the difference between the amount it paid in TTD and PTD benefits pursuant to *Mitchell XVI* and PTD benefits owed pursuant to *Mitchell XVIII*. The parties stipulated that Employer paid Employee $143,333.11 in February 2022. Neither party provided calculations showing the amount Employer paid was correct or not.

Pursuant to *Mitchell XVIII*, Employer owed Employee PTD benefits from April 1, 2004, and continuing. The following calculations are taken from Table I above in Findings of Fact 47:

Employer owed Employee $49,581.53 in PTD benefits at $570.84 per week from April 1, 2004 to November 30, 2005 ($570.84 x 86 weeks, 6 days = $49,581.53). In December 2005, Employee received Social Security Disability benefits and his PTD benefits were reduced to $190.90 per week. From December 1, 2005 to April 30, 2006, Employer owed Employee $4,117.99 in PTD benefits at $190.90 per week ($190.90 x 21 weeks, 4 days = $4,117.99). Employer paid TTD benefits at $190.90 per week from May 1, 2006 to March 26, 2007, pursuant to *Mitchell XVI*; this is the correct PTD rate Employee should have received for that period, so no additional benefits are owed for that period.

From March 27, 2007 to March 2, 2010, Employer owed Employee $29,234.97 in PTD benefits at $190.90 per week ($190.90 x 153 weeks, 1 day = $29,234.97). Employer paid TTD benefits at $190.90 per week pursuant to *Mitchell XVI* from March 3, 2010 to May 24, 2010; this is the correct PTD rate Employee should have received for that period, so no additional benefits are owed for that period.

Employer owed Employee $66,515.01 in PTD benefits at $190.90 per week from May 25, 2010 to January 26, 2017, as *Mitchell XVI* ordered Employer to begin paying PTD benefits on January 27, 2017, and continuing ($190.90 x 348 weeks, 3 days = $66,515.01). Thus, Employer owed Employee $149,449.50 pursuant to *Mitchell XVIII* ($49,581.53 + $4,117.99 + $29,234.97 + $66,515.01 = $149,449.50). It only paid him $143,333.11. Employer will be ordered to pay Employee $6,116.39 in additional PTD benefits ($149,449.50 - $143,333.11 = $6,116.39).

2) Is Employee entitled to a compensation rate adjustment?

Employee's January 21, 2022 claim seeks a compensation rate adjustment, stating, "Correction/recalculation of social security offset and/or compensation rate is necessary in equity." He contends he should receive $700 per week in PTD benefits, the maximum allowable under AS 23.30.175, without any Social Security offset under AS 23.30.225. *Mitchell XVI* granted Employer's request for a Social Security offset under AS 23.30.225(b). In doing so,

Mitchell XVI decided Employee's PTD compensation rate and the offset due to Employee's receipt of Social Security Disability benefits as the average weekly wages in AS 23.30.225 used to calculate the Social Security offset is the same as gross weekly earnings in AS 23.30.220. *Shirley*. Employer contends res judicata bars Employee's January 21, 2022 compensation rate adjustment claim. Employee contends the Social Security offset was not ripe when *Mitchell XVI* was decided because PTD benefits had not been awarded.

Ripeness requires a substantial, actual controversy between parties having adverse legal interests. *Settje*. The ripeness analysis examines the fitness of the issue for decision and the hardship to the parties of withholding consideration. *Id*. An issue not yet ripe should be held in abeyance. *Egemo*. Res judicata applies to administrative proceedings, but it is not always applied as rigidly. *Robertson*. A judgment has res judicata effect when it is a final judgment on the merits, from a court of competent jurisdiction, in a dispute between the same parties about the same cause of action. *McKean*; *Robertson*. It precludes relitigation between the same parties of claims that were raised in the initial proceeding and claims which could have been raised. *Robertson*. The question of whether there is a dispute about the same cause of action rests on whether the claims arise out of the same set of underlying facts. *Id*. However, a panel may exercise its discretion to modify an award at any time until one year after the last compensation payment is made or the claim was rejected if a prior decision's factual findings were mistaken. AS 23.30.130; *Lindekugel*; *Sulkosky*. An allegation of mistake should not permit a party to retry a case because he could make a better showing on the second attempt. *Rodgers*.

Mitchell XVI was a final judgment on the merits by a properly authorized administrative panel on Employer's November 23, 2016 request for a Social Security offset, and Employer and Employee were parties to *Mitchell XVI*. *McKean*; *Robertson*. The hearing issues were set on September 11, 2017, and included PTD benefits and Employer's November 23, 2016 petition for a Social Security offset. *Id*. A Social Security offset under AS 23.30.225(b) depends on Employee's weekly PTD compensation rate and his weekly Social Security Disability benefits. *Shirley*. Employee disputed the PTD compensation rate and Social Security offset calculation issue in his December 13, 2016 answer to Employer's November 23, 2016 amended petition where he "acknowledge[d] the concept and right of the insurance carrier (Employer) to offset

Social Security payments but dispute[d] the equity of its numbers and calculations presented in the amended petition" and contended Employer's offset calculation failed to comply with *Darrow I*. Thus, there was an actual controversy regarding the calculation of the Social Security offset. *Settje*. While his December 13, 2016 answer to Employer's amended petition contended the Social Security offset issue was not ripe, he never asked to hold the Social Security offset issue in abeyance. Given the parties' arguments, there was no need to. *Egemo*.

The September 11, 2017 prehearing conference summary included PTD benefits and Employer's November 23, 2016 amended petition for a Social Security offset as issues for hearing. The prehearing conference summary limits the issues for hearing to those in dispute at the end of the prehearing and governs the issues and the course of the hearing unless modified or when unusual and extenuating circumstances exist. 8 AAC 45.065(c); 8 AAC 45.070(g). Employee never sought modification of the September 11, 2017 prehearing conference. He had adequate notice that the Social Security offset calculation was at issue, which included calculating his weekly PTD compensation rate. *Shirley*. Employee was provided with a full and fair opportunity to litigate in *Mitchell XVI*. It would not be quick, efficient, fair or predictable at a reasonable cost to Employer to allow Employee to relitigate his weekly compensation rate and Social Security offset rate, which were already decided after they were properly identified and noticed in the September 11, 2017 prehearing conference summary as issues for hearing and he was provided an opportunity to litigate. AS 23.30.001(1), (4). Had Employer's Social Security offset request not been decided in *Mitchell XVI*, Employer could have overpaid PTD benefits because *Mitchell XVI* found Employee permanently and totally disabled as of January 27, 2017, and ordered Employer to pay PTD benefits from January 27, 2017 to May 1, 2018, and ongoing PTD benefits beginning May 2, 2018. *Settje*. The Social Security offset calculation was ripe to be decided in *Mitchell XVI*. *Id*.

For the instant hearing, Employee provided union contract agreements containing wages for UPS drivers from 1993 to 2023 as evidence of his lost future earnings in February 2023. All the union agreements, which control wages for UPS employees, were in existence when *Mitchell XVI* was decided except the last union agreement which went into effect on August 1, 2018. Thus, the upward trend in wages as evidenced in the union contracts for the job Employee held

when he was injured was available and could have been discovered and produced but Employee failed to provide good reason for not providing them for *Mitchell XVI*. 8 AAC 45.150(d)(2); *Lindhag*. Similarly, the information Teamsters Pension Health and Welfare Trust administrator Castillo provided at hearing regarding contributions made by Employer to Employee's union trusts based upon his hours worked were available for the *Mitchell XVI* hearing and could have been discovered and produced when *Mitchell XVI* was decided, because they already existed since Employer reported its contributions to the union trusts monthly; they were made until contributions stopped in 1996 and Employee began receiving his union pension in 2010. *Id*. Employee could have made the same arguments and presented the same evidence for the *Mitchell XVI* hearing.

Employee disputed Employer's Social Security offset calculation in his December 13, 2016 answer, but he failed to produce any argument, alternative calculation or evidence when the evidence was available, and he could have provided it in his pleadings had he exercised due diligence. 8 AAC 45.150(d)(2); *Lindhag*. Employee raised the Social Security offset and PTD compensation rate as an issue again in his May 16, 2018 petition for reconsideration of *Mitchell XVI* but did not pursue the issue before the panel, Commission or Court. *Seybert*. The panel took no action on Employee's reconsideration and rehearing petition, and it was therefore considered denied. AS 44.62.540. He did not appeal these issues. Most importantly, Employee admitted he made a conscious decision to not raise the compensation rate adjustment issue before the Commission or Court because he thought his case would lack credibility and fail if he presented too many issues on appeal. A tactical decision, error or neglect is not good cause to justify his failure to appeal *Mitchell XVI*'s Social Security offset calculation and PTD benefit rate. In short, Employee is attempting to retry the PTD benefit rate calculation and the Social Security offset already decided in *Mitchell XVI* with "new evidence," which was discoverable when those issues were first decided. *Rodgers*. Employee very expressly asked for modification; he raised that issue in his briefing. Nevertheless, he has not provided substantial evidence that *Mitchell XVI* made a factual mistake through new evidence which was not discoverable with due diligence when these current issues were first decided. AS 23.30.130; 8 AAC 45.150; *Tolbert*. Employee's compensation rate adjustment claim is barred by res judicata.

Employer has a statutory right to a Social Security offset. AS 23.30.225. This decision has authority to invoke equitable principles to prevent an employer from asserting statutory rights. *Van Biene*. Employer has contended since its March 12, 2014 petition that it was entitled to a Social Security offset. It amended its petition on November 23, 2016, to include a calculation, and *Mitchell XVI* granted its November 23, 2016 petition. Employee contended that because Employer failed to revise the Social Security offset when he was eligible for retirement benefits, Employer "conceded" that the Social Security offset should be revised. However, Employer has continued to pay Employee PTD benefits at the rate determined in *Mitchell XVI* based upon the offset calculated under AS 23.30.225(b).

Regulation 8 AAC 45.225 required Employer to obtain a copy of the Social Security retirement award letter before reducing benefits under AS 23.30.225(a) and required Employee to provide it. Employee failed to provide Employer a copy of the letter until January 29, 2024. He presented no facts which could reasonably suggest that Employer's conduct or words implied it would not pursue a Social Security offset under AS 23.30.225(a) or (b). Employee failed to provide evidence that a factfinder could reasonably interpret as Employer's expressed or implied communication that no Social Security offset would be required. *Van Biene*.

Employee contended it is unconstitutional to use his wages in 1995 to set the compensation rate because it does not accurately reflect his actual economic losses. Employee misses the point; he had an opportunity to make these arguments at the *Mitchell XVI* hearing and failed to present any evidence when the issue with the same "core facts" was squarely raised. Nonetheless, this panel does not have jurisdiction to decide issues of constitutional law. *AKPIRG*. Based upon the above analysis, Employee is not entitled to a compensation rate adjustment, and his compensation rate adjustment claim will be denied.

3) Is Employee entitled to interest?

Employee is entitled to interest on an award of PTD benefits from April 1, 2004, pursuant to *Mitchell XVIII*. Employer's interest calculation was dependent on $143,333.11 in past PTD benefits Employer paid in February 2022, which this decision and order found to be insufficient; it found Employer owed $6,116.39 in additional PTD benefits. Employer must pay interest on

$149,449.50 in PTD benefits awarded in this decision and order; additional interest is owed. The parties stipulated that Employer paid Employee $89,802.61 in February 2022 for interest based on $143,333.11 in past PTD benefits. However, neither party provided the payment date for PTD benefits or interest Employer already paid so that this panel could properly calculate the difference between the interest on $149,449.50 owed pursuant to *Mitchell XVIII*, interest Employer already paid, and additional interest Employer owes on $6,116.39 in additional PTD benefits. Therefore, Employer will be ordered to calculate and pay interest in accordance with the decision and pursuant to the Act and applicable regulations.

4) Is Employee entitled to attorney fees and costs?

Employer does not oppose awarding Employee $57,960 and $15,474 in additional attorney fees and costs for time spent on *Mitchell XVI* for his award of PTD benefits back to April 1, 2004. Employee's request for additional attorney fees and costs he seeks for time spent on *Mitchell XVI* will be granted.

Employee also wants this panel to award him attorney fees and costs for time spent on appeal before the Commission in Mitchell *XVII*. Employer opposed, contending this panel does not have authority under the Act to make such an award. Employer is correct. AS 23.30.008(d) permits the Commission to award a successful party attorney fees and costs in an appeal, and 8 AAC 57.260 outlines the procedure for a party to request attorney fees and costs for an appeal before the Commission. Employee sought review before the Commission, and only the Commission may award his fees for that appeal. AS 23.30.145(c). The Act does not provide this panel authority to award Employee attorney fees and costs for time spent pursuing an appeal. Employee's request for attorney fees and costs before the Commission in *Mitchell XVII* will be denied.

Employee's January 21, 2022 claim sought "Correction/recalculation of social security offset and/or compensation rate is necessary in equity." The entirety of Employee's brief addresses his claim for recalculation of the weekly PTD benefit rate and Social Security offset. This was the primary issue sought in his claim and it will be denied in this decision and order. Therefore, he

is not entitled to attorney fees and costs for time spent pursuing recalculation of the Social Security offset and PTD compensation rate.

Employee also sought PTD benefits, interest and attorney fees and costs. Employer paid $143,333.11 in PTD benefits due pursuant to *Mitchell XVIII* in February 2022. It did not controvert or resist paying the PTD benefits or interest resulting from *Mitchell XVIII*. AS 23.30.145(a), (b). While Employee was not awarded any additional PTD benefits and interest he claimed in his hearing brief, this decision awards $6,116.39 in past PTD benefits and associated interest pursuant to *Mitchell XVIII*. With exception of the additional attorney fees and costs awarded for work done on *Mitchell XVI* and statutory fees on the $6,116.39 in past PTD benefits and associated interest, Employee will not be awarded full and actual attorney fees and costs for time spent pursuing his January 21, 2022 claim because Employee did not succeed on his claim. *Adamson*; *Childs*. Employee will be awarded statutory fees on $6,116.39 in past PTD benefits and associated interest. AS 23.23.145(a).

CONCLUSIONS OF LAW

1) Employee is entitled to additional PTD benefits.
2) Employee is not entitled to a compensation rate adjustment.
3) Employee is entitled to interest.
4) Employer is entitled to attorney fees and costs.

ORDER

1) Employee's January 21, 2022 claim is granted in part and denied in part.
2) Employee's claim for additional PTD from April 1, 2004, and continuing pursuant to *Mitchell XVIII* is granted.
3) Employer shall pay Employee past PTD benefits from April 1, 2004, to the present and continuing. Employer shall pay Employee an additional $6,116.39 in past PTD benefits.
4) Employee's claim for a compensation rate adjustment is denied.
5) Employee's claim for interest on his request for a compensation rate adjustment is denied.

6) Employee's request for interest on past PTD benefits pursuant to *Mitchell XVII* is granted. Employer is ordered to calculate and pay Employee interest in accordance with this decision and pursuant to the Act and applicable regulations.

7) Employee's claim for attorney fees and costs is denied in part and granted in part.

8) Employer is ordered to pay $57,960 in attorney fees and $15,474 in costs for PTD benefits and interest resulting from *Mitchell XVIII*.

9) Employee's request for attorney fees and costs for time spent on appeal before the Commission in Mitchell *XVII* is denied.

10) Employer is ordered to pay statutory attorney fees under AS 23.30.145(a) on the $6,116.39 in past PTD benefits and associated interest.

Dated in Anchorage, Alaska on February 21, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Robert Weel, Member

/s/
Steven Heidemann, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the

reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Stephan C. Mithcell, employee / claimant v. United Parcel Service, employer; Liberty Mutual Fire Insurance Company, insurer / defendants; Case No. 199523875; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on February 21, 2024.

/s/
Lorvin Uddipa, Workers' Compensation Technician