

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MARK YOST,)	
)	
Employee,)	
Respondent,)	
)	FINAL DECISION AND ORDER
v.)	
)	AWCB Case No. 202216211
DELTA AIR LINES, INC.,)	
)	AWCB Decision No. 25-0023
Employer,)	
and)	Filed with AWCB Anchorage, Alaska
)	on April 4, 2025
INDEMNITY INSURANCE COMPANY)	
OF N AMERICA,)	
)	
Insurer,)	
Petitioners.)	

Delta Air Lines, Inc.'s and Indemnity Insurance Company of North America's (Employer) January 28, 2025, petition for a Social Security offset and overpayment recoupment was heard in Anchorage, Alaska on March 25, 2025, a date selected on February 25, 2025. A February 18, 2025, request gave rise to this hearing. Mark Yost (Employee) appeared telephonically, represented himself, and testified. Attorney Martha Tansik appeared in person and represented Employer. The record closed at the hearing's conclusion on March 25, 2025.

ISSUES

Employer contends it is entitled to a Social Security offset. Employee did not object.

1) Is Employer entitled to a Social Security offset?

Employer contends it overpaid Employee from April 1, 2023, when he began receiving Social Security Disability Income (SSDI), to the present, resulting in a large overpayment. In addition to the statutory recoupment, it requests it be permitted to recover the overpayment by recoupment against a future permanent partial impairment (PPI) rating should one be awarded.

Employee did not object.

2) Should Employer's request for a Social Security offset against future PPI benefits, if awarded, be granted?

FINDINGS OF FACT

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

- 1) On October 22, 2022, Employee was throwing bags to load a cart and experienced back pain. (First Report of Injury, October 31, 2022).
- 2) On May 22, 2023, Employer reported Employee's weekly temporary total disability (TTD) benefit rate is \$931.23 and it began paying TTD benefits on October 23, 2022. (Subsequent Report of Injury, May 22, 2023).
- 3) On July 22, 2024, Employee was informed that he became disabled on October 24, 2022, and the first month he became entitled to Social Security Disability Insurance (SSDI) benefits was April 2023. He received \$30,935 around July 23, 2024 for money due April 2023 through June 2024. Employee's next payment for July 2024 would be \$2,097. The initial benefit amount was \$2,032. He was entitled to a cost-of-living adjustment in December 2023, which resulted in the benefit amount of \$2,097. (Notice of Award, Social Security Administration (SSA) Retirement, Survivors and Disability Insurance, July 22, 2024).
- 4) On July 30, 2024, Employee faxed a copy of the Notice of Award to Sherrie Arbuckle, the claims adjuster. (Fax Cover Sheet, July 30, 2024).
- 5) On January 28, 2025, Employer requested a \$340.59 per week Social Security offset under AS 23.30.225(b). It contended Employee was overpaid at least \$32,356.05 starting April 1, 2023 (April 1, 2023, to January 28, 2025, = 95 weeks; $\$340.59 \times 95 \text{ weeks} = \$32,356.05$). Employer calculated Employee's weekly SSDI benefit as \$483.92 based upon the \$2,097 monthly benefit ($\$2,097 \times 12 \text{ months} = \$25,164 / 52 \text{ weeks per year} = \483.92); when combined with Employee's weekly TTD benefit rate of \$931.23, the total is \$1,415.15, which exceeds the maximum allowable

total of \$1,074.56 by \$340.59; and the maximum allowable total is 80 percent of Employee's average weekly wage at the time of injury, which was \$1,343.20 ($\$1,343.20 \times 80 \text{ percent} = \$1,074.56$). Employer requested the standard 20 percent offset and an additional "offset against any future PPI should such occur." It contended the additional recoupment from PPI benefits, if Employee is entitled, is fair and just based on the significant overpayment and the difficulty and improbability Employer will be able to recoup the full amount if the additional offset is not permitted. Employer contended the offset prevents any additional weekly reduction of TTD benefits beyond the statutory limit. Employer requested the overpayment be calculated by the panel because it continues to grow until the offset is granted. (Petition and Memorandum in Support of Petition for Social Security Benefit Offset, January 28, 2025).

6) On February 18, 2025, Employer requested a hearing on its petition. (Affidavit of Readiness for Hearing (ARH), February 18, 2025).

7) On March 5, 2025, Employer filed Employee's 2020 W-2 which showed his gross yearly earnings was \$68,837.69 and his 2021 W-2 which showed his gross yearly earnings was \$54,836.11. (Employer's Hearing Evidence, March 5, 2025).

8) On March 18, 2025, Employer contended Employee's TTD benefit compensation rate is \$931.23 based upon his gross yearly earnings in 2020, which were \$68,837.69 and his gross weekly earnings were \$1,376.75 ($\$68,837.69 / 50 \text{ weeks} = \$1,376.75$). It contended the overpayment from April 1, 2023 has grown to \$35,421.36 as of the March 25, 2025 hearing and it will continue to grow while it waits for its petition to be granted. Employer contended a recoupment against a future PPI rating should one be awarded in addition to the 20 percent recoupment it is statutorily entitled to without an order. (April 1, 2023, to March 25, 2025, = 104 weeks; $\$340.59 \times 104 \text{ weeks} = \$35,421.36$). It contended it would take 300 weeks, or six years, to fully recoup it alleged overpayment under the statutory rate of \$118.13 per week (weekly TTD benefit $\$931.23 - \text{Social Security offset } \$340.59 = \$590.64$ weekly TTD benefit after Social Security offset; $\$590.64 \times 0.2 = \118.13 20 percent reduction). Employer suspected reducing Employee's weekly TTD benefit by more than the standard 20 percent recoupment would cause Employee financial hardship. It does not know whether Employee still has the lump sum from Social Security, and it does not know how long Employee will remain temporarily and totally disabled. (Employer's Hearing Brief, March 18, 2025).

9) At hearing, Employer reiterated the arguments contained in its petition and hearing brief. It also contended Employee has had the benefit of the overpayment, including interest. Employer contended the SSDI initial entitlement of \$2,032, beginning on April 1, 2023, should be used to calculate the Social Security offset through November 30, 2023, and the increased entitlement beginning on December 1, 2023, at \$2,097 should be used to calculate the Social Security offset on and after December 1, 2023. (Record).

10) At hearing, Employee testified he is experiencing financial stress due to the monthly Medicare premiums being deducted from his SSDI benefits and due to a \$200 monthly payment to repay a short-term disability insurance benefit which he had received after the work injury. He and his wife are struggling to figure out their budget and what they can afford. Employee does not want to receive any benefit he is not entitled to and he does not object to Employer recouping an overpayment. (Record).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the Legislature and Construction of Chapter. It is the intent of the legislature that

(1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers

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

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

AS 23.30.155. Payment of compensation.

. . . .

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

AS 23.30.155(j) permits withholding up to 20 percent of future compensation installments and can be invoked at an employer's discretion. *Davenport v. K&L Distributors, Inc.*, AWCB Dec. No. 92-0180 (July 22, 1992). It does not, however, provide any criteria or factors that should be considered in determining whether a higher withholding rate is appropriate. Thus, decisions have entertained various considerations when deciding appropriate withholding amounts. For examples, *Barnett v. Lee's Custom Designs*, AWCB Dec. No. 99-0146 (July 8, 1999), considered the financial hardship the employee would suffer as result of a higher withholding rate; *Decker v. Price/Northland J.V.*, AWCB Dec. No. 930304 (November 24, 1993), considered the length of time employee was expected to be disabled and whether the overpayment could be recouped within that time at 20 percent; and *Bathony v. State*, AWCB Dec. No. 98-0101 (April 22, 1998), considered the fact the overpayment arose or was exacerbated by the employee's resistance to providing correct information to the employer.

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

. . . .

(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 percent of the employee's average weekly wages at the time of injury.

Stanley v. Wright-Harbor, AWCB Decision No. 82-0039 (February 19, 1982) *aff'd* 3 AN-82-2170 Civil (Alaska Super. Ct. May 19, 1983), established guidelines for calculating an employer's Social Security offset under AS 23.30.225(b) and held an offset must be based upon an employee's initial Social Security entitlement. Social Security offsets are calculated as follows:

A. Determine employee's Gross Weekly Earnings (GWE)

- B. From GWE, determine Weekly Compensation Rate for worker's compensation (Weekly WC Rate)
- C. Calculate employee's Weekly Social Security benefit by multiplying monthly payment x 12 and ÷ 52 (Weekly SS Benefit)
- D. Add Weekly WC Rate + Weekly SS Benefit [B + C]
- E. Calculate 80% of GWE [80% of A]
- F. Calculate Social Security Offset [D – E]. *Id.*

As of May 14, 2021, the statute in effect at the time of the work injury, stated:

AS 23.30.190. Compensation for permanent partial impairment; rating guides.

(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

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

....

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

(1) getting a copy of the Social Security Administrations 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 . . . who is receiving weekly compensation benefits shall

(1) send the employer a copy of the award letter from the Social Security Administration . . . ; and

(2) upon the employer's request, sign a release for the employer to get information from the Social Security Administration

In *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150 (Alaska 1994), the Alaska Supreme Court held "'average weekly wages' as a benefit cap under AS 23.30.225(b) is synonymous with 'gross weekly earnings' under AS 23.30.220, insofar as both terms represent a measure of historical earning capacity." *Id.* at 156.

ANALYSIS

1) Is Employer entitled to a Social Security offset?

An employer seeking a Social Security offset to reduce an employee's weekly compensation must first obtain an order before it is entitled to offset its compensation liability against an employee's Social Security disability benefit entitlement. 8 AAC 45.225(b). Employer has complied with the required procedures for its Social Security offset request. *Id.* Employer obtained a copy of the SSA's Notice of Award showing Employee receives monthly SSDI benefits of \$2,097, after a cost-of-living increase in December 2023. Employee's initial entitlement began April 2023 at \$2,032 per month. 8 AAC 45.225(b)(1)(A) and (C). The award notice states Employee is receiving SSDI benefits for his disability that started on October 24, 2022, one day after the date Employer commenced paying Employee TTD benefits. 8 AAC 45.225(b)(1)(B). Employee is married and

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has two dependents. 8 AAC 45.225(b)(1)(D). Employer calculated a \$340.59 Social Security offset, using \$2,097 as Employee's initial monthly entitlement, and Employer showed how the reduction was calculated. 8 AAC 45.225(b)(2) and (3). Employer filed its affidavit of readiness for hearing on February 18, 2025. 8 AAC 24.225(4).

Employer's calculation of Employee's initial award amount did not exclude the December 2023 cost of living increase in Employee's Social Security disability benefit as required under 8 AAC 45.225(b)(2). Employee's initial entitlement is shown on the SSA award notice and it was \$2,032. *Id.*

Employer has met 8 AAC 45.225(b)'s criteria to reduce Employee's weekly compensation under AS 23.30.225(b). Employee does not object to Employer's Social Security offset.

Applying the *Stanley* Social Security offset formula, Employee's compensation rate with the offset is calculated as follows:

Employee's Gross Weekly Earnings (GWE)	\$1,376.75
Weekly Compensation Rate (CR)	\$931.23
Weekly Social Security Benefit ($\$2,032 \times 12 = \$24,384 \div 52 =$)	\$468.92
Weekly WC Rate + Weekly SS Benefit	\$1,400.15
80% of GWE [$\$1,376.75 \times 0.8$]	\$1,101.40
Social Security Offset ($\$1,400.15 - \$1,101.40$)	\$298.75
Weekly Compensation Rate with Social Security Offset ($\$931.23 - \298.75)	\$632.48

Id.

Employer is entitled to take a weekly \$298.75 Social Security offset both prospectively and retroactively to April 1, 2023, the date Employee's SSDI benefits began. Employee's weekly TTD benefit compensation rate reduced by the Social Security offset is \$632.48. AS 23.30.001; AS 23.30.225.

2) Should Employer's request for a Social Security offset against future PPI benefits if awarded be granted?

Without an order, an employer can withhold up to 20 percent of future compensation payments if it has made an overpayment. AS 23.30.155(j); *Davenport*. If an employer wishes to withhold more than 20 percent, an order is required. *Id.* Employee's entitlement to SSDI started on April 1 2023, and he continues to receive SSDI benefits. From April 1, 2023, through the date this decision is issued, Employee received TTD benefits and SSDI benefits. This is a 104-week, 5-day period. Employer overpaid Employee \$298.75 per week, resulting in an overpayment of \$31,326.07 ($\$298.75 \times 104 \text{ weeks} + \$298.75 \times 6 \text{ days} / 7 \text{ days per week} = \$31,326.07$). Employer is permitted to withhold up to 20 percent of Employee's weekly compensation rate with the Social Security offset, which is \$632.48, resulting in a weekly TTD compensation rate of \$505.98, without an order ($\$632.48 \times 0.2 = \126.50 ; $\$632.48 - \$126.50 = \$505.98$).

Employer also requests a Social Security offset against any future PPI benefits if awarded; it expects Employee will be found to have incurred a permanent partial impairment. It would take approximately 247 weeks or almost five additional years of TTD benefit payments to recoup the overpayment at the statutory 20 percent rate; it is unknown how long Employee will be temporarily and totally disabled. *Decker*. Therefore, it is unknown whether Employer will be able to recoup the entire overpayment with only the statutory overpayment on TTD benefits. Based upon Employee's credible testimony at hearing, Employee is experiencing financial stress and withholding more than 20 percent of PPI benefits to which Employee may be entitled would exacerbate his financial stress. AS 23.30.122; *Rogers & Babler*; *Barnett*. Employee provided the SSA letter to the adjuster eight days after it was dated, and he testified he only wants the benefits he is entitled to under the Act. *Bathony*. He did not object to recoupment against any future PPI benefits if awarded. Employer's request for a Social Security offset against future PPI benefits if awarded will be granted.

CONCLUSIONS OF LAW

- 1) Employer is entitled to a Social Security offset.

- 2) Employer's request for a Social Security offset against future PPI benefits if awarded should be granted.

ORDER

- 1) Employer's January 28, 2025, petition is granted
- 2) Employer is entitled to take a \$298.75 Social Security offset retroactively to April 1, 2023, and continuing from Employee's weekly TTD benefits.
- 3) Employer is entitled to take a Social Security offset against future PPI benefits, if awarded, at the 20% statutory recoupment rate.
- 4) Employer has overpaid Employee \$31,326.07.

Dated in Anchorage, Alaska on April 4, 2025.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Brian Zematis, 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 Mark Yost, employee / respondent v. Delta Air Lines, Inc., employer; Indemnity Insurance Company of North America, insurer / petitioner; Case No. 202216211; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on April 4, 2025.

/s/

Rochelle Comer, Workers' Compensation Technician