Alaska Workers' Compensation Appeals Commission

Bradford T. Wilson,
Appellant,

vs.

Trena Heikes, Director, Division of Workers' Compensation,
Intervenor,

and

Eastside Carpet Co. and AIG Claim Services,
Appellees.

Memorandum Decision and Order
on Director's Request for Clarification
Decision No. 106 May 4, 2009

AWCAC Appeal No. 08-013
AWCB Decision No. 08-0043
AWCB Case No. 200709372

Appeal from Alaska Workers' Compensation Board Decision No. 08-0043, issued at Anchorage, Alaska, on March 5, 2008, by southcentral panel members Janel Wright, Chair, Patricia Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant Bradford T. Wilson. Colby Smith, Griffin and Smith, for appellees Eastside Carpet Co. and AIG Claim Services. Richard A. Svobodny, Acting Attorney General, and Erin Pohland, Assistant Attorney General, for intervenor Trena Heikes, Director, Division of Workers' Compensation.

Commission proceedings: Appeal filed April 3, 2008. Appellant's request for extension of time to file opening brief granted June 19, 2008. Order denying appellant's motion to certify appeal to the Supreme Court issued July 16, 2008.[1] Appellees' request for extension of time to file brief partially granted August 18, 2008. Appellees' request for extension of time granted August 28, 2008. Oral argument on appeal presented November 4, 2008. Motion to Intervene filed by the Director on February 20, 2009, and granted on March 4, 2009. Motion for Reconsideration filed March 13, 2009; opposed by appellant March 18, 2009. Appellees' limited non-opposition to the motion for reconsideration filed March 18, 2009. Notice of decision and order denying reconsideration and announcing clarification issued April 3, 2009.

[1] *See Wilson v. Eastside Carpet Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009).

Appeals Commissioners: Philip Ulmer, David Richards, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Appellant Bradford Wilson sought a compensation rate adjustment because of the disparity between his actual hourly wage when he was injured and his "spendable weekly wage at the time of injury" calculated under AS 23.30.220(a)(4), which was based entirely on past self-employment income. The commission held that the board improperly applied AS 23.30.220(a)(4) to Wilson's calculation of his spendable weekly wages.[2] Shortly after the commission's decision was issued, the director intervened pursuant to AS 23.30.127(a), seeking reconsideration.

The director has the right to intervene at any stage of proceedings before the commission in the interest of preserving the "quick, efficient and fair" operation of the workers' compensation system as a whole. Responding to the practical demands on the workers' compensation system is peculiarly the director's responsibility. When the commission permits appeals on motion for extraordinary review, it is not uncommon that the commission invites the director to intervene in order to have the benefit of the director's views on the practical, operational impact of legal arguments in an appeal. The commission requires copies of the notice of appeal be sent to the director so that the director may choose to intervene in the course of the appeal. The commission prefers director intervention to occur prior to a decision, but the director may intervene as of right under AS 23.30.127(a) to request reconsideration under AS 23.30.128(f).

The commission decided not to reconsider its decision. The circumstances addressed in the commission's decision are uncommon and should not result in disruption of the system of quick, efficient payment of compensation and benefits for which the director is concerned. However, in the order denying reconsideration, the commission undertook to clarify portions of its final decision in this appeal in order to provide guidance on two issues raised by the director's motion for reconsideration that

[2] *Wilson v. Eastside Carpet Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009).

the director asserted may create confusion in the administration of the workers' compensation system.

> 1. *An employer may presume the use of the statutory method that most closely fits the employee's earnings fact pattern when injured is correct when setting a compensation rate, but the board's duty when analyzing a claim for rate adjustment does not end at determining which statutory fact pattern matches the employee earning pattern when the injury occurred.*

The director argued that the statute mandates use of AS 23.30.220(a)(4) if the employee is an hourly wage earner at the time of the injury, regardless of his past earning history. The director argues that, if factual circumstances make a deviation from AS 23.30.220(a)(4) necessary, achieving that deviation by reference to AS 23.30.220(a)(5) "leaves the Board in the untenable position of guessing in which cases it should apply [at] the first step of the inquiry."[3]

The board is not in the position of guessing which statute it should apply. First, the board does not initially decide how to calculate compensation. The employer, acting through its adjuster or insurer, makes the initial decision to apply a method of calculation based on the information available from its own records and the employee. The employer does not err in relying on an employee's reported taxable income in making an initial calculation of compensation under AS 23.30.220(a). The employer may presume that for an hourly worker, the statutory method in AS 23.30.220(a)(4) will produce a spendable wage that fairly approximates the value of the employee's wages. AS 23.30.220(a)(4) is the embodiment of the legislature's policy that *in the vast majority of cases* this method will produce a fair approximation for hourly workers injured in employment. Nothing in the commission's decision in this appeal requires the employer to do otherwise in setting an initial compensation rate — or the division to require otherwise of an employer.

The burden is on the hourly employee to challenge the compensation rate established by statute when an AS 23.30.220(a)(4) spendable wage does not represent

---

[3] Director's Mot. for Reconsideration of Order, 3.

the equivalent of employee wages when derived from self-employment profits. The employee first must persuade the board that his or her reported self-employment income, the basis of an AS 23.30.220(a)(4) calculation, did not represent the equivalent of employee wages when it was earned. If the board finds that the reported self-employment profits represented the equivalent of employee wages, then the employee's spendable weekly wage may be calculated under AS 23.30.220(a)(4). The board need not go beyond AS 23.30.220(a)(4) if (1) the reported self-employment profits represented the equivalent of employee wages; or, (2) the board is able to determine that, with adjustments to reflect claimed depreciation, value of uncompensated services, receipts from prior years' billings, sales of company assets and the like, the self-employment profit represents the equivalent of employee wages.[4]

The commission's decision outlined a number of possible considerations the board may take into account in determining if reported self-employment profits are equivalent to employee wages. The board may find other considerations as important in different cases. The commission listed three instances when use of self-employment profits reasonably may be expected to fairly approximate employee wages. However, the board must look at the evidence and decide the facts in each case.

The circumstances presented in this appeal were unusual. It is not common that a person, after years of self-employment, closes his or her business, takes a six-month sabbatical, secures employment paid hourly, and then is injured before he or she completes a single year of employment. In this already uncommon case, there was not substantial evidence in the form of tax returns of the business, business records, bank records, or the like, to support a finding that the self-employment profits reflected the equivalent of employee wages. Therefore, the employee's earnings could not be ascertained using the method required by AS 23.30.220(a)(4). Because the board

---

[4] As the commission noted, the basis for calculating wages in the current workers' compensation act no longer includes "self-employment income." *Wilson*, App. Comm'n Dec. No. 099 at 8, n.34. Therefore, profits from an employee's business must be equivalent to "wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury," AS 23.30.220(a)(4), to be included in the calculation of a spendable weekly wage.

could not have ascertained the wage equivalent from the small record of the employee's self-employment profits, the board was required to move to AS 23.30.220(a)(5) on remand. The commission stresses that AS 23.30.220(a)(5) applies only in cases of previously self-employed hourly workers if the board finds the employee's wage equivalent cannot be determined from self-employment records and other evidence, so that a spendable weekly wage may be calculated under AS 23.30.220(a)(4).

> *2. Tax records may be used to prove reported income, but the board is not limited to accepting federal tax records as proof of all wage equivalent income received by an employee.*

The director argues that the commission's decision casts doubt on the use of tax records as proof of income by which prior years' wages are determined and urges that the commission's decision should be reconsidered as to the use of tax records.[5] Nothing in the commission's decision should cast doubt on the use of tax records as proof of taxable income. The question is whether adjusted gross income is necessarily equivalent to income from wages. Individuals pay federal income taxes on income from many sources; the taxpayer may report some income as "wages, salaries, tips," but other self-employment income may be wage equivalent income. The commission's decision examined whether the material the employee may produce to prove wage equivalence of business income is *limited* to reported self-paid "wages, salaries, tips," on tax records and concluded that it is not.

The commission pointed to a number of reasons why records of a business, including tax records, may need to be examined further and parts of the income adjusted by the board in order to fairly approximate an employee's wage equivalent. This conclusion is driven by the Supreme Court's decision in *Pioneer Constr. Co. v. Conlon*, 780 P.3d 995 (Alaska 1989). The board may choose to disbelieve an employee's testimony that he actually received more income than he reported to the Internal Revenue Service, but the board's decision must reflect its assessment of the

---

[5] Director's Mot. for Reconsideration of Order, 5.

credibility of the offered testimony. However, an employee need not falsify tax records for a small business owner's tax return not to show all wage equivalent income as "wages, salaries, tips." A small business is not required to report all its income or profit as "wages" under federal tax law. If the commission accepted the reasoning advanced by the director, a previously self-employed person would be barred from claiming any income except self-paid wages reported on his or her federal tax return as "wages, salaries, tips, etc." Such a result would deny an employee a compensation rate based on previously earned wage-equivalent income solely because it was taxed as a business profit instead of wages.

However, as the commission clarifies here, reliance on tax records and the statutory method to set an initial compensation rate is not error. After the employee has filed a claim and challenged the determination of his spendable weekly wage, the board must conduct a broader inquiry to determine if the self-employment business generated other income that is wage equivalent.

ORDER

The commission's Decision No. 099 is clarified as set out above. The commission's order in Decision No. 099, REVERSING the board's decision and REMANDING the case to the board for REHEARING, so that the board can determine Wilson's gross weekly earnings under AS 23.30.220(a)(5) and recalculate his compensation rate, remains in effect without modification.

Date: *May 4, 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of the director's request for clarification of the commission's final decision on appeal. This decision responds to questions regarding the scope of the commission's Decision No. 099 raised by the Director of the Division of Workers' Compensation, but it does not alter the outcome of the commission's decision on Mr. Wilson's appeal in any way. The commission's Decision No. 099, reversing the board's decision and remanding the case to the board to recalculate the appellant's compensation rate, still stands. The board will rehear Bradford Wilson's claim and decide what his compensation rate should be under AS 23.30.22(a)(5). Reconsideration of this decision is not available, because the commission already denied reconsideration of the final decision in this appeal.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. Because the final decision in this appeal was issued February 2, 2009, and the commission denied reconsideration by order dated April 3, 2009, the Supreme Court might find the time has passed for an appeal.

However, other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under the Appellate Rules, you should file your petition for review or hearing within 10 days after the date this decision is distributed to you. You may wish to consider consulting with legal counsel before filing a petition for review or hearing, or an appeal.

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street,
Anchorage, AK 99501-2084
Telephone 907-264-0612

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 106, Memorandum Decision and Order on Director's Request for Clarification, in *Wilson vs. Eastside Carpet Co.*, AWCAC Appeal No. 08-013, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this _4th_ day of _____May_____, 2009.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on 5-4-09 a copy of this Memorandum Decision and Order in AWCAC Appeal No. 08-013 was mailed to: D. Walther, J. Kalamarides, E. Pohland & C. Smith at the addresses on record and faxed to: D. Walther, J. Kalamarides, E. Pohland, C. Smith, AWCB Appeals Clerk, & the Director WCD.

Signed
B. Ward, Appeals Commission Clerk