

Alaska Workers' Compensation Appeals Commission

Ryan Straight,
Appellant,

vs.

Johnston Construction & Roofing, LLC
and American Interstate Insurance
Company,
Appellees.

Memorandum Decision

Decision No. 231 November 22, 2016

AWCAC Appeal No. 16-002
AWCB Decision Nos. 16-0026 and
16-0030
AWCB Case No. 201514431

Memorandum decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 16-0026, issued at Anchorage, Alaska, on March 31, 2016, by southcentral panel members Ronald P. Ringel, Chair, and Rick Traini, Member for Labor; and, Alaska Workers' Compensation Board Interlocutory Decision and Order No. 16-0030, issued at Anchorage, Alaska, on April 11, 2016, by southcentral panel members Ronald P. Ringel, Chair, and Rick Traini, Member for Labor.

Appearances: Joseph A. Kalamardes, Kalamardes & Lambert, for appellant, Ryan Straight; Michael A. Budzinski, Russell Wagg Meshke & Budzinski, PC, for appellees, Johnston Construction & Roofing, LLC and American Interstate Insurance Company.

Commission proceedings: Petition for review filed April 19, 2016; order converting petition for review to appeal issued May 19, 2016; briefing completed August 16, 2016; oral argument was not requested.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

This appeal concerns whether the Board erred as a matter of law by finding "Employee's spendable weekly wage was properly calculated,"¹ whether Mr. Straight's spendable weekly wage should be increased using AS 23.30.220(a)(5), and whether

¹ *Straight v. Johnston Construction & Roofing, LLC*, Alaska Workers' Comp. Bd. Dec. No. 16-0026 (Mar. 31, 2016) (*Straight I*).

using AS 23.30.220(a)(4) to determine his compensation rate is unconstitutional as applied to him.

Our review of the record convinces us the Board failed to take sufficient evidence in order to ascertain if Mr. Straight's spendable weekly wage was properly calculated under AS 23.30.220(a)(4), and, thereby, erred as a matter of law. We remand this matter to the Board to take additional evidence in order to formulate a fair approximation of Mr. Straight's probable future earnings capacity, but for the injury, into the period in which benefits have been paid.² In other words, additional evidence is needed to ascertain what might be a fair and reasonable spendable weekly wage for Mr. Straight, based on the Alaska Workers' Compensation Act. The Board may use AS 23.30.001 and AS 23.30.220(a)(5) to assist in ascertaining a fair spendable weekly wage. We do not decide if AS 23.30.220(a)(4) is unconstitutional as applied to Mr. Straight.

2. Factual background and proceedings.³

Ryan Straight was injured on September 9, 2015, while employed by Johnston Construction & Roofing, LLC (Johnston).⁴ He was paid temporary total disability (TTD) benefits beginning on September 11, 2015.⁵ His spendable weekly wage was determined to be \$315.66 as calculated under AS 23.30.220(a)(4) and his compensation rate was set at \$255.00.⁶ Mr. Straight filed a claim for TTD payments on

² *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922, 927 (Alaska 1994).

³ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁴ *Straight I* at 2 (Nos. 1, 4). According to *Straight I*, this is the date of injury identified in the initial Report of Injury. *Id.* In *Straight v. Johnston Construction & Roofing, LLC*, Alaska Workers' Comp. Bd. Dec. No. 16-0030 (Apr. 11, 2016) (*Straight II*), the Board noted that Mr. Straight's October 7, 2015, Claim identified the date of injury as September 11, 2015. *Straight II* at 2 (No. 1).

⁵ *Straight II* at 2 (No. 4).

⁶ *Straight I* at 3 (No. 7 and 8).

October 15, 2015.⁷ This claim for TTD is still pending.⁸ At a prehearing conference on November 19, 2015, the claim was amended to include a compensation rate adjustment and attorney's fees.⁹ Following a prehearing conference on February 17, 2016, a hearing was scheduled, limited to the issues of compensation rate adjustment and attorney's fees.¹⁰ The hearing was held on March 22, 2016. On March 31, 2016, the Board issued a decision denying a compensation rate adjustment and, accordingly, attorney's fees.¹¹ The Board identified its decision as an Interlocutory Decision and Order.¹² Mr. Straight filed a petition for modification, asserting that no issues remained in dispute and that, therefore, the March 31, 2016, decision should be characterized as final.¹³ In its decision issued on April 11, 2016, the Board concluded that because Mr. Straight had not withdrawn his claim for TTD, its March 31, 2016, decision was properly characterized as interlocutory.¹⁴

Based on the Board's characterization of its decision, Mr. Straight filed a petition for review with the Commission.¹⁵ Johnston filed a response in which it agreed with Mr. Straight that the Board's March 31, 2016, decision was a final decision for purposes of appeal to the Commission, "since no further proceedings will occur that would give rise to a final decision from which there would be a right of appeal[,] and on that basis agreeing that the petition should be granted.¹⁶ Thereafter, the parties submitted a

⁷ *Straight I* at 3 (No. 11).

⁸ *Id.*; *Straight II* at 2 (No. 5).

⁹ *Straight I* at 3-4 (No. 11).

¹⁰ *Straight II* at 2 (No. 2).

¹¹ *Straight I*.

¹² *Id.*

¹³ *Straight II* at 1.

¹⁴ *Id.* at 5.

¹⁵ Petition for Review, filed April 19, 2016.

¹⁶ Response to Petition for Review, filed May 2, 2016, at 1.

Stipulation to treat the Board's March 31, 2016, decision as final.¹⁷ The Commission converted the Petition to an Appeal in its Order on Petition for Review (May 19, 2016).

Mr. Straight has worked as a roofer since 1973.¹⁸ Between 1973 and 2009, he worked through the Roofers Union, or until the Union left Alaska.¹⁹ Following the departure of the Union, Mr. Straight worked for Johnston.²⁰ However, in 2013 and 2014, Mr. Straight took time off from working for Johnston to build his own home.²¹ He did almost all of the work himself, including the concrete, framing, sheetrock, and electrical work.²² At some point, Mr. Straight began receiving Social Security Retirement benefits.²³ Sometime in 2015, Mr. Straight returned to work with Johnston and on September 9, 2015, injured his right shoulder.²⁴ He was unable to work for some period of time following this injury and was entitled to and was paid TTD. It is not known if Mr. Straight has returned to work as a roofer.

During the time Mr. Straight worked for Johnston he was paid by the hour.²⁵ The hourly rates varied by project, sometimes being paid under the Davis Bacon Act and sometimes not, depending on the nature of the project.²⁶ At the time of injury Mr. Straight was working on a Davis Bacon project and was earning \$41.45 per hour. His reported weekly wage was \$2,108.80.²⁷ During the years when Mr. Straight was working his annual earnings were as follows:

¹⁷ Stipulation filed May 4, 2016.

¹⁸ *Straight I* at 2 (No.1).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (No.3).

²² *Id.*

²³ Appellees' brief at 2, 9.

²⁴ *Straight I* at 2 (No.4).

²⁵ *Id.* (No. 2).

²⁶ *Id.*

²⁷ *Id.* at 3 (No. 5).

2010	\$66,909
2011	\$56,086
2012	\$66,010
2013	\$ 7,810
2014	\$18,657 ²⁸

Johnston paid Mr. Straight a compensation rate of \$255.00 per week based on a strict application of AS 23.30.220(a)(4) since he was paid by the hour.²⁹ Johnston arrived at this rate using Mr. Straight's 2014 earnings of \$18,657.00 divided by 50 weeks for gross weekly earnings of \$373.14 which gave him a spendable weekly wage of \$315.66.³⁰ \$255.00 is the minimum compensation rate for 2015.³¹ Solely using Mr. Straight's weekly wages at the time of injury of \$2,108.80, his spendable weekly wage would be \$1,524.11 for a compensation rate of \$1,159.00, which is the maximum for 2015.³² If Mr. Straight's yearly earnings for 2010 through 2012 are averaged, he has yearly average earnings of \$63,001.67, which when divided by 50 weeks gives him a gross weekly wage of \$1,260.03 for a spendable weekly wage of \$959.76.³³ This spendable weekly wage results in a compensation rate of \$767.80.³⁴ No evidence was presented as to how long, on what projects, and/or at what rate of pay, Mr. Straight would likely have worked but for the injury.

Johnston applied the provision in AS 23.30.220(a)(4) as written to pay Mr. Straight TTD at \$255.00 per week. Johnston based this compensation rate on Mr. Straight's 2014 earnings divided by 50 weeks.³⁵ The Board held that since

²⁸ *Straight I* at 3 (No. 6).

²⁹ *Id.* (No. 7 and 8).

³⁰ *Id.* (No.8).

³¹ *Id.*

³² *Id.* (No. 9).

³³ *Id.* (No. 10).

³⁴ *Id.*

³⁵ *Id.* at 3 (No. 7).

Mr. Straight was paid by the hour, Johnston correctly calculated his rate based on his 2014 earnings divided by 50 weeks as directed by AS 23.30.220(a)(4). The Board further held the Alaska Workers' Compensation Act (Act) no longer contains a "general fairness" provision because the Legislature removed this provision when it amended the Act in 1988.³⁶

3. Standard of review.

Mr. Straight contends the Board erred in concluding that his compensation rate was correctly calculated under AS 23.30.220(a)(4), the Board erred in not applying AS 23.30.220(a)(5) to calculate his compensation, and the Board erred in not finding AS 23.30.220(a)(4) unconstitutional as applied to him. We must uphold the Board's factual findings if they are supported by substantial evidence in the light of the record as a whole.³⁷ On questions of law we do not defer to the Board's conclusions but exercise our independent judgment.³⁸ We may remand matters if we find the matters were incompletely or insufficiently developed.³⁹ The Commission does not have jurisdiction to address issues of constitutionality.⁴⁰

4. Discussion.

Johnston contends AS 23.30.220(a)(4) is the best and only possible means by which to determine a fair spendable weekly wage for Mr. Straight.

AS 23.30.220(a)(4) states:

(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:

. . .

³⁶ *Straight I* at 13.

³⁷ AS 23.30.128(b).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

- (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
- (5) if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees. . . .⁴¹

AS 23.30.220 has had a wide and varied history. In 1982, this statute included the provision:

- (3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating compensation shall be the usual wage for similar service paid employees under similar circumstances, as determined by the board. . . .⁴²

The Alaska Supreme Court construed this provision in *Johnson v. RCA/OMS*, and required the Board to use subsection .220(3) when an injured worker's wages from the prior years had no relationship to the worker's wages at the time of injury.⁴³

The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid. Normally the formula in subsection (2) will yield a fair approximation of this figure. However, sometimes it will not, and those cases subsection (3) of the statute is to be used.⁴⁴

⁴¹ AS 23.30.220(a)

⁴² AS 23.30.220(3) (1982).

⁴³ *Johnson v. RCA/OMS, Inc. and Zurich-American Insurance Co.*, 681 P.2d 905 (Alaska 1984).

⁴⁴ *Id. at* 907.

The Alaska Supreme Court, since *Johnson*, has reiterated several times the objective of looking at the injured worker's probable future earnings capacity during the period of disability when calculating a compensation rate.⁴⁵

In 1988, the Legislature amended the statute to account for workers who had been absent from the labor market for some time. The revised AS 23.30.220(a) reads:

The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. . . .

- (1) the gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury;
- (2) if the employee was absent from the labor market for 18 months or more of the two calendar years preceding the injury, the board shall determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history, but the compensation may not exceed the employee's gross weekly earnings at the time of injury. . . .⁴⁶

In adding language to determine the spendable weekly wage for workers absent from the labor market in the preceding two calendar years, the Legislature dropped the provision allowing the Board to determine the wage at the time of injury if it could not be fairly determined otherwise.

The Alaska Supreme Court reviewed this statute in *Gilmore v. Alaska Workers' Compensation Board* and held the statute unconstitutional as applied to Mr. Gilmore on equal protection grounds. The court looked at legislative intent as stated in session laws and quoted "[i]t is the intent of the legislature that AS 23.30 be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to

⁴⁵ See, e.g., *Thompson v. United Parcel Service*, 975 P.2d 684, 689 (Alaska 1999); *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922, 927 (Alaska 1994); *Wrangell Forest Products v. Alderson*, 786 P.2d 916, 917 (Alaska 1990); *Houston Contracting, Inc. v. Phillips*, 812 P.2d 598 (Alaska 1991).

⁴⁶ AS 23.30.220 (1988).

the provisions of AS 23.30.”⁴⁷ The court further stated “[e]fficiency . . . does not require unfairness. A quick, efficient, and predictable scheme for determining a worker’s gross weekly earnings could be formulated without denying workers . . . benefits commensurate with their actual losses.”⁴⁸ The court further stated “[w]e recognize that rigid application of the mechanical formula set out in AS 23.30.220(a)(1) probably leads to quick and predictable results. This efficiency is gained, however, at the sacrifice of fairness in result.”⁴⁹

In 1995, the Legislature again amended AS 23.30.220, this time adopting a scheme based in part on the Council of State Governments’ Draft Workmen’s Compensation and Rehabilitation Law quoted in 2 Arthur Larson, *The Law of Workmen’s Compensation* §60.11(a)(1), at 10.606 n.77 (1993), which the court noted had “a much closer fit between an employee’s work history and his expected losses. . . .”⁵⁰

The Alaska Supreme Court, in looking at the 1995 statute in *Flowline of Alaska v. Brennan*, affirmed that

a fair approximation of a claimant’s future earning capacity lost due to a the injury is the ‘essential component of the basic compromise underlying the Workers’ Compensation Act – the worker’s sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation’ (footnote omitted). Despite subsequent amendments to the statute aimed at increasing the efficiency and predictability of the compensation process, this compromise, and the fairness requirements it engenders, provide the context for interpreting the Workers’ Compensation Act.⁵¹

⁴⁷ *Gilmore*, 882 P.2d at 927. This language has now been codified at AS 23.30.001.

⁴⁸ *Id.* at 928.

⁴⁹ *Id.*

⁵⁰ *Id.* at 928, fn. 15.

⁵¹ *Flowline of Alaska v. Brennan*, 129 P. 3d 881, 882-83 (Alaska 2006).

In *Thompson v. United Parcel Service*,⁵² the court reiterated “a primary purpose of our workers’ compensation laws is to predict accurately what wages would have been but for a worker’s injury. . . . [Therefore] ‘the entire objective of wage calculation is to arrive at a fair approximation of claimant’s probable future earning capacity’ (footnote omitted).”⁵³

The current statute was adopted in 2005, with almost no discussion as to why the Legislature felt the need to make the change from the statute adopted in 1995 and which the Alaska Supreme Court implicitly approved in *Gilmore*.⁵⁴ This 2005 change has reverted to language substantially similar to that found unconstitutional as applied in *Gilmore*. While not including a specific “general fairness” provision in AS 23.30.220(a), the Legislature did codify a fairness provision applicable to the whole Act in AS 23.30.001 which states:

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; (2) workers’ compensation cases shall be judged on their merits except where otherwise provided by statute. . . . (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.⁵⁵

Nonetheless, the Alaska Supreme Court has, on numerous occasions, indicated that a fair compensation rate must take into consideration the injured worker’s probable future earnings capacity. This doctrine may be what the legislature intended when it adopted AS 23.30.220(a)(5) which provides for calculating an injured worker’s spendable weekly wage “if at the time of injury the employee’s earnings have not been fixed or cannot be ascertained, the employee’s earnings for purpose of calculating compensation are the usual wage for similar services when the services are rendered by

⁵² *Thompson v. United Parcel Service*, 975 P.2d 684 (Alaska 1999).

⁵³ *Id.* at 689-90.

⁵⁴ *Gilmore*, 882 P.2d at 928, fn. 15.

⁵⁵ AS 23.30.001

paid employees. . . ." It is not clear how or when the Legislature intended this provision to be used. It is, nonetheless, evident that in some circumstances an injured worker's earnings "for purpose of calculating compensation" may not be readily ascertainable under the preceding sections of AS 23.30.220. This section in conjunction with AS 23.30.001 and the mandates from the Alaska Supreme Court to look to the future earnings capacity when deciding if an injured worker's compensation rate has been fairly determined, requires a remand to the Board for additional evidence. This additional evidence as to Mr. Straight's probable future earnings capacity is necessary before it can be determined if AS 23.30.220(a)(4) is the proper method of determining his compensation rate.

5. Conclusion.

Since no evidence was presented to the Board as to Mr. Straight's probable future earnings capacity in the period of disability, a REMAND is necessary. The burden is on Mr. Straight to provide evidence of what his future earnings capacity would have been but for the work injury.⁵⁶ This evidence needs to be determined in order to ascertain whether Mr. Straight's compensation rate was properly calculated under AS 23.30.220(a)(4). Under Gilmore, the question is "whether a worker's past employment history is an accurate predictor of losses due to injury."⁵⁷ Mr. Straight's

⁵⁶ *Thompson*, 975 P.2d at 689-90: "We have recognized, however, that 'intentions as to employment in the future are relevant to a determination of future earnings capacity' in determining proper compensation awards." (Citation omitted).

⁵⁷ *Id.*

compensation rate may have been properly calculated under AS 23.30.220(a)(4) but it is impossible to make that determination without additional evidence.

Date: 11-22-2016 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

This is a non-final order remanding the Board's decision so that the Board may take additional evidence regarding what Mr. Straight's future earnings capacity would have been but for the work injury.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted. For the date of distribution, see the box below.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file a petition for review within 10 days after the date of this order's distribution. You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:

<http://www.courts.alaska.gov/>

RECONSIDERATION

This is not a final decision issued under AS 23.30.128(e), so reconsideration is not available.

I certify that, with the exception of changes made to correct typographical errors and format for publication, this is a full and correct copy of Decision No. 231 issued in the matter of *Ryan Straight vs. Johnston Construction & Roofing, LLC and American Interstate Insurance Company*, AWCAC Appeal No. 16-002, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 22, 2016.

Date: November 28, 2016



Signed

K. Morrison, Appeals Commission Clerk