

SB

322

(FILE 14)

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February 19, 1988

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ADMITTED IN WASHINGTON, D.C.
AND ALASKA

ALL OTHERS ADMITTED
IN ALASKA

The Honorable Tim Kelly, Chairman
Senate Labor & Commerce Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

and

The Honorable Dave Donley, Chairman
House Labor & Commerce Committee
Alaska State Legislature
P. O. Box V
Juneau, Alaska 99811

Dear Senator Kelly, Representative Donley,
and Committee Members:

The American Insurance Association, which represents more than 180 companies writing property/casualty insurance, is vitally concerned with the changes in workers' compensation law proposed by SB 322 and HB 352. The 17 AIA companies writing comp in Alaska in 1986, including Industrial Indemnity of Alaska, Alaska Pacific Assurance Company (ALPAC), Providence Washington of Alaska, and Fireman's Fund, accounted for slightly more than 50% of the direct premiums written in that market, according to statistics compiled by A. M. Best & Company.

Although the insurance industry did not participate directly in the deliberations that produced these bills, we support reforms designed not only to improve and increase the delivery of benefits to injured workers, but also to reduce the cost to the Alaska employers. While recognizing that employers

Senator Tim Kelly
Representative Dave Donley
Alaska State Legislature
February 19, 1988
Page -2-

are laboring under substantial cost pressures, the industry has also been struggling with what it and others view as inadequate rates. The Milliman & Robertson report presented to the joint committee, for example, suggests that not only have recent increases been warranted, but also that rates should increase further.

Generally, we applaud the efforts of the management/-labor ad hoc committee that produced the reform package now before the Legislature. We especially support, for example, the statement of legislative intent concerning judicial interpretation; proposed changes in vocational rehabilitation; and the use of the AMA "whole person" concept for compensation of permanent partial impairment.

However, one obvious difficulty in analyzing the proposed legislation, especially from the insurance industry's perspective, is attempting to predict what impact the changes will have on the overall cost of the workers' compensation system, i.e., whether premiums will increase, stay the same or decrease. On February 12, 1988, the joint committee heard testimony from representatives of the National Council on Compensation Insurance (NCCI), and Milliman & Robertson, that there is no significant "hard dollar" savings.

The management/labor ad hoc committee itself, in a January 14, 1988 letter to this joint committee, said the savings would be difficult to quantify. While some elements of the proposed legislation conceivably might produce a long-term cost reduction, that potential reduction is highly speculative. Other elements of the legislation will increase cost. For example, the proposed bill would increase the maximum permanent partial disability benefits for the more severely injured workers by 400% from a maximum of \$60,000 to \$240,000.

The American Insurance Association and its member companies are concerned about possible amendments that would mandate an immediate rate reduction. A mandatory rate reduction is not supported by the reports of the NCCI or Milliman & Robertson and would be strongly opposed by the insurance industry.

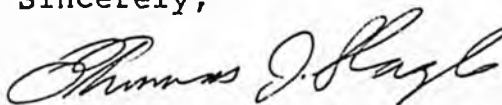
It will take several years for the actual effect of the changes to be known. No one can predict how the Board or courts will interpret the changes. Ultimately, if the changes reduce the overall cost of providing benefits to injured workers, those savings will, because of adequate competition in the market place, be passed onto employers in the form of rate reductions. In our view, however, it would be irresponsible, and negatively affect the availability of workers' compensation insurance, to

Senator Tim Kelly
Representative Dave Donley
Alaska State Legislature
February 19, 1988
Page -3-

reduce already inadequate rates, in the absence of any evidence suggesting the proposed changes will, in fact, reduce costs.

Notwithstanding these concerns, the American Insurance Association again commends the work of the management/labor ad hoc committee. We look forward to assisting the Legislature in any way we reasonably can in attempting to resolve the difficult problems in the worker's compensation system.

Sincerely,



Thomas J. Slagle

TJS:sd/11.76

cc: Senator Dick Eliason
Senator Rick Uehling
Senator Bettye Fahrenkamp
Senator Mike Szymanski

Representative Niilo Koponen
Representative Red Boucher
Representative Cliff Davidson
Representative Johnny Ellis
Representative Walter Furnace
Representative Curt Menard

Mary Pierce (Management/Labor Ad Hoc Committee)
Robert Anders (Management/Labor Ad Hoc Committee)

Alaska Division of Insurance

March 4, 1988

House and Senate Labor & Commerce Committees
Re: HB 352\CSSB 322 Workers Compensation
On March 8th and 10th you will have hearings on the Workers
Compensation Bills.

Before major changes are made in the bill(s) consideration should be given to the parties with a vital interest in Workers Compensation.

1. Self Insureds. This group of Municipalities and Corporation pay no Workers Compensation premiums. They pay -0- in Alaska State Premium Tax that is 3% of premiums paid to a private carrier. At present no method is available to collect an "in lieu" of tax payments from self insureds. They receive the same service from the Division of Workers Compensation and Division of Insurance without any financial contribution. This may be checked with the Department of Revenue.
2. Medium and small firms that purchase Workers Compensation thru private carriers and pay the premium tax.

On July 1, 1988 the Alaska Municipal League will have a self insurance plan available so that many cities, boroughs and school districts in Alaska will participate.

At present the self insureds are -

1. State of Alaska
2. Municipality of Anchorage
3. Anchorage School District
4. Carr-Gottstein
5. Alyeska Pipeline Service Co.
6. City of Fairbanks
7. Fairbanks North Star Borough
8. City & Borough of Juneau
9. Fred Meyer
10. Safeway
11. Pay N Save
12. Sears
13. Sea Land Industries
14. Veco, Inc.

The list of self insured accounts is growing and those firms buying insurance is getting smaller. (see attached list)

The Governor Oversight committee on Workers Compensation had the actuaries from the National Council on Compensation Insurance and Milliman & Robertson testify. NCCI stated a 4% reduction had been recommended but after the Alaska Classification & Rating Committee "sanitized" the data a 1.8% increase was due on SB 322. Milliman & Robertson estimate was .006 increase.

Since the purpose of the legislation is to get a decrease in rates, the only means is for the legislature to mandate a rate reduction.

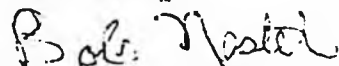
The Governor has the choice to veto or sign the resulting bill.

If he signs a bill which mandates a rate decrease the Worker Compensation carriers may withdraw. Alaska does not have a standby plan to write Workers Compensation. Studies have been made in 1974 and 1987 on this subject.


A blue ribbon task force should be established to explore a competitive state fund. A State Industrial Division could be set up in the Department of Administration.

This plan would allow private insurance carriers to compete with the State Fund.

Sincerely,



Bob Nestel, CPCU, ARM



Myron G. Schweigert, D.C.

CHUGACH CHIROPRACTIC CLINIC

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700 ALASCOM INC.
POUCH 6607

ANCHORAGE

AK 99502

SCOTT WETZEL SERVICES
741 SESAME STREET
SUITE 1A

ANCHORAGE
907 561 1725

AK 99500

701 ALASKA AIRLINES INC
19300 PACIFIC HWY SOUTH
**** EXPIRED 7/84 ****
SEATTLE WA 98138

SCOTT WETZEL SERVICES
741 SESAME STREET
SUITE 1A

ANCHORAGE
907 561 1725

AK 99503

702 ALASKA INTERNATIONAL INC
**** EXPIRED 7-1-81 ****

ANCHORAGE

AK 99505

ROSEMURGY & COMPANY
1205 EAST INTL AIRPORT
SUITE 202

ANCHORAGE
907 502 3141

AK 99502

CODE	COMPANY	ADJUSTOR
703	ALASKA RURAL ELECTRIC CO 237 E. FIREWEED LN. #300 *****EXPIRED 1-1-84***** ANCHORAGE AK 99503	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99503 907 501 1725
704	ALASKA, STATE OF **** EXPIRED 7-1-82 **** JUNEAU AK 99311	NORTHERN ADJUSTERS ***** DO NOT USE ***** ANCHORAGE AK 99503
705	ALASKA LUMBER AND PULP 5000 RAINIER BANK TOWER *** EXPIRED 11-13-84 *** SEATTLE WA 98101	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1-A ANCHORAGE AK 99503 907 501 1725
706	FAIRBANKS, CITY OF 410 CUSHMAN FAIRBANKS AK 99701	WILTON ADJUSTMENT SERVICES P. O. BOX 244 FAIRBANKS AK 99707 907 450 4342
707	ALYESKA PIPELINE SERV CO 1835 S. BRAGAW ***** *** EXPIRED 1-1-84 *** ANCHORAGE AK 99512 907 278 1611	ALPAC / INA CIGNA COMPANIES P. O. BOX 190020 ANCHORAGE AK 99519 907 263 0200
708	AMPAC INC. P.O. BOX 7813 SAN FRANCISCO CA 94120	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99503 907 501 1725
709	STANDARD OIL/AMOCO PROJ P.O. BOX 7710-A *** DO NOT USE *** CHICAGO IL 60680	AMOCO PRODUCTION COMPANY P.O. BOX 777 ANCHORAGE AK 99510

CODE	COMPANY	ADJUSTOR
710	ANCHORAGE, MUNICIPLTY OF POUCH 6-550	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99502
	ANCHORAGE AK 99502	ANCHORAGE AK 99503 907 561 1725
711	ANCHORAGE SCHOOL DIST. INSURANCE OFFICE POUCH 6-514 ANCHORAGE	G.A.B. BUSINESS SERVICES P.O. BOX 92230 ANCHORAGE AK 99509
	ANCHORAGE AK 99502	ANCHORAGE AK 99509 707 272 6404
712	CANADIAN NATIONAL - RAILWAYS//DO NOT USE//** BOX 5108 MONTREAL, QUEBEC CN HC 33NC	CANADIAN NAT'L RAILWAY 1150 STATION STREET VANCOUVER, BC CN V6 A2X7
713	STANDARD MIL CO OF CA *** DO NOT USE *** ** USE 708 *** SAN FRANCISCO CA 94104	CHEYKON J.S.A. P.O. BOX 7-359 ANCHORAGE AK 99510
714	CHICAGO BRIDGE & IRON CO 809 JONES BLVD *** EXPIRED 12-22-85 ** DAR BROOK IL 60521	NORTHERN ADJUSTERS, INC. 1401 RODAKOF CIRCLE ANCHORAGE AK 99503
		ANCHORAGE AK 99503 907 338 7484
715	CONSOLIDATED FREIGHTWAYS 175 LINFIELD DRIVE **DO NOT USE / USE 736** MENLO PARK CA 94025	CONSOLIDATED FREIGHTWAYS 801 - 1ST AVENUE P.O. BOX 191559 ANCHORAGE AK 99510
		ANCHORAGE AK 99510 907 272 6451
716	CROWN ZELLERBACH ONE BUSH STREET SAN FRANCISCO CA 94104	ZELLERBACH PAPER COMPANY 1546 SHIP AVENUE ANCHORAGE AK 99501
		ANCHORAGE AK 99501

CODE	COMPANY	ADJUSTOR
717	FAIRBANKS, CITY OF 410 CUSHMAN *EFF 020187 USE 706*	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1-A ANCHORAGE AK 99503 907 561 1725
718	FAIRBANKS NJ STAR BOROUG BOX 1207 **USE PRIOR TO 7-1-84** FAIRBANKS AK 99707	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1-A ANCHORAGE AK 99503 907 561 1725
719	FUSS ALASKA LINES 660 WEST EWING STREET SEATTLE WA 98119	FUSS ALASKA/D.E. REG MOR P.O. BOX 1508 JUNEAU AK 99802
720	FRED HEYER SHOPPING CTR 14500 1ST AVE SOUTH **** EXPIRED 2-1-84 **** SEATTLE WA 99168	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE AK 99508 907 338 7484
721	GRAYBAR ELECTRIC COMPANY 1919 6TH AVENUE **** EXPIRED 1-4-84 **** 5. SEATTLE WA 98124	GRAYBAR ELECT/F.T. JOGAN 5501 "A" STREET ANCHORAGE AK 99509
722	INTERNATIONAL HARVESTER **** EXPIRED 2/1/82 **** CHICAGO IL 60611	INTL HARVESTER/M. BLANDER 524 W INTL AIRPORT RD ANCHORAGE AK 99502
723	JUNEAU, CITY & BOROUG 155 SOUTH SEWARD STREET JUNEAU AK 99801 907 535 5250	G.A.B. BUSINESS SERVICES P.O. BOX 5559 JUNEAU AK 99803 907 759 4377

CODE	COMPANY	ADJUSTOR
724	LITTON INDUSTRIES 360 N. CRESCENT DR **** EXPIRED 9-2-83 **** BEVERLY HILLS CA 90210	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222
725	LOOMIS CORPORATION **** EXPIRED 8-1-81 **** SEATTLE WA 98121	G.A.B. BUSINESS SERVICES P.O. BOX 92230 ANCHORAGE AK 99509 907 272 0404
726	FAIRBANKS, NORTH STAR BOROUGH (6 SD) P.O. BOX 1267 FAIRBANKS AK 99707 907 456 4218	WILTON ADJUSTMENT SERVICES P. O. BOX 244 FAIRBANKS AK 99707 907 456 4342
727	LOUISIANA-PACIFIC CORP ATTN: WORK COMP INS. 111 S.W. 5TH AVE PORTLAND OR 97204	ALASKA TIMBER INSURANCE- EXCHANGE 111 STEDMAN SUITE 201 KETCHIKAN AK 99901 907 225 9451
728	MARATHON OIL COMPANY. INSURANCE ANALYST FINDLAY OH 45340	MARATHON OIL COMPANY C/O JOHN A. PINELLI P.O. BOX 102380 ANCHORAGE AK 99510 907 561 5311
729	Mobil OIL CORPORATION **** EXPIRED 1-1-82 **** NEW YORK NY 10017	WILTON ADJUSTMENT SERVICES P. O. BOX 244 FAIRBANKS AK 99707 907 456 4342
730	MONTGOMERY WARD MONTGOMERY WARD PLAZA **** EXPIRED 1-1-83 **** CHICAGO IL 60671	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222

CODE	COMPANY	ADJUSTOR
731	NANA REGIONAL CORP. INC. 4706 HARDING DRIVE *** EXPIRED 1-1-83*** ANCHORAGE AK 99509	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99503 907 561 1725
732	ALASKA MARINE HIGHWAYS DEPT OF TRANSPORTATION P.O. BOX 'C' JUNEAU AK 99811 907 465 2150	EPIC INSURANCE SERVICES EAGLE PACIFIC INS. CO. P. O. BOX 9576 KETCHIKAN AK 99901 907 225 7010
733	PRY N' SAVE CORPORATION 1511 6TH AVENUE SEATTLE WA 98101	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1-A ANCHORAGE AK 99503 907 561 1725
734	PHILLIPS PETROLEUM CO. *** EXPIRED 7-1-83 *** 3 C4 PHILLIPS BLDG BARTLESVILLE OK 74004	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222
735	SAFeway STORES INC. 4TH & JACKSON STREET OAKLAND CA 94600	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99503 907 561 1725
736	SEALASKA CORPORATION ONE SEALASKA PLAZA *** EXPIRED 8-31-84*** JUNEAU AK 99801 907 586 1512	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99503 907 561 1725
737	SEA - LAND INDUSTRIES P. O. BOX 905 EDISON NJ 08816	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222

CODE	COMPANY	ADJUSTOR
738	SEARS ROEBUCK & COMPANY SEARS TOWER *EFF 010187 **NO NOT USE** CHICAGO IL 60684	SEARS STORE MANAGER 700 EAST NORTHERN LIGHTS ANCHORAGE AK 99503
739	SHELL OIL COMPANY P.O. BOX 4494 HOUSTON TX 77210 715 241 5508	SHELL OIL PRODUCTS SUPT 601 WEST 5TH AVENUE SUITE 810 ANCHORAGE AK 99501
740	UNION OIL CO. / UNOCAL P.O. BOX 7500 LOS ANGELES CA 90051	UNION OIL CO. / UNOCAL INDUSTRIAL RELATIONS P. O. BOX 6247 ANCHORAGE AK 99502
741	VECO INCORPORATED **** EXPIRED 7-31-82 *** ANCHORAGE AK 99501	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1-A ANCHORAGE AK 99503 907 561 1725
742	WIEN AIR ALASKA 4100 INTL AIRPORT RD *** EXPIRED 12-14-84 *** ANCHORAGE AK 99502	SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1-A ANCHORAGE AK 99503 907 561 1725
743	A T & I TECHNOLOGIES INC HAWTHORNE STATION CHICAGO IL 60623 312 494 4955	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE AK 99508 907 338 7484
744	WESTERN GEOPHYSICAL CO 160 N. CRESCENT DRIVE *** EXPIRED 9-2-83 *** BEVERLY HILLS CA 90210	CRAWFORD & COMPANY 5501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222

CODE	COMPANY	ADJUSTOR
745	WESTERN UNION CORP. **** EXPIRED 8-1-81 **** **** DO NOT USE***** UPPER SADDLE RVR NJ 07433	WESTERN UNION CORP ATTN: J.R. MOENCH 655 SOUTH ORCAS STREET SEATTLE WA 98106
746	NABORS ALASKA DRILLING 4300 'B' STREET ****EXPIRED 5-31-85**** ANCHORAGE AK 99503 907 561 4440	SCOTT WEITZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE AK 99503 907 561 1725
747	CARR - GUTTENBERG *** EXPIRED 12-31-82 *** ANCHORAGE AK 99502	PACIFIC MARINE INSURANCE 201 DANNER AVENUE SUITE 110 ANCHORAGE AK 99502 907 349 6461
749	LOUISIANA-PACIFIC CORP PO BOX 158 L P DRIVE ***** DO NOT USE***** SAMOA CA 95564	LA PACIFIC/KENAI LUMBER P.O. BOX 735 SEWARD AK 99664
750	GEORGIA PACIFIC CORP. 133 PEACHTREE ST. N.E. ATLANTA GA 30303	NORTHERN ADJUSTERS, INC. 1401 BUDAKOF CIRCLE ANCHORAGE AK 99506 907 338 7484
751	KENAI PENINSULA BOROUGH P.O. BOX 850**DO NOT USE AS OF 070185 USE 791** SOLUDTRA AK 99669	NORTHERN ADJUSTERS, INC. P.O. BOX 536 KENAI AK 99611 907 285 4402
752	UNION CHEM DIV / UNOCAL P.O. BOX 7600 LOS ANGELES CA 90051	UNION CHEMICAL DIVISION P.O. BOX 375 KENAI AK 99611

CODE	COMPANY	ADJUSTOR
753	ALASKA, STATE OF RISK MANAGEMENT POUCH 'C' JUNEAU 907 465 2180	AK 99811
		SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE 907 561 1725
754	ALASKA, STATE OF POUCH C / RISK MANAGMENT ***** DO NOT USE ***** JUNEAU 907 465 2180	AK 99811
		SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE 907 561 1725
755	ALASKA, UNIVERSITY OF ATTN: RISK MANAGER L 303 TANANA DR #13 BUNELL FAIRBANKS 907 474 7428	AK 99701
		NORTHERN ADJUSTERS, INC. 1401 RUDAKOFF CIRCLE ANCHORAGE 907 338 7484
756	CARR - GUTTSTEIN 6441 'C' STREET ANCHORAGE	AK 99502
		SCOTT WETZEL SERVICES 741 SESAME STREET SUITE 1A ANCHORAGE 907 561 1725
757	ALYESKA PIPELINE SERV CO 1835 SOUTH BRAGAW ST. M.S. 512 ANCHORAGE 907 278 1611	AK 99512
		ALYESKA PIPELINE SVC. CO 1835 SOUTH BRAGAW ST. M.S. 512 ANCHORAGE 907 278 1611
758	U.S.S.R. & MINING CO C/O ALASKA GOLD CO 610 ILLINOIS AVE FAIRBANKS	AK 99701
		U.S.S.R. & MINING CO C/O ALASKA GOLD CO 610 ILLINOIS AVE FAIRBANKS AK 99701
759	NANA REGIONAL CORP INC 4706 HARDING DRIVE **** EXPIRED 2-1-86**** ANCHORAGE 907 246 5030	AK 99509
		PACIFIC MARINE INSURANCE 201 DANNER AVENUE SUITE 110 ANCHORAGE 907 347 6461

CODE	COMPANY	ADJUSTOR
760	SEALASKA CORPORATION ONE SEALASKA PLAZA **S.E. CLAIMS**** JUNEAU 907 586 1512	NORTHERN ADJUSTERS, INC. P.O. BOX 1407 JUNEAU 907 789 4104
761	ALASKA AIRLINES INC. **DO NOT USE /USE762* P.O. BOX 68900 SEATTLE 206 455 3200	COMMERCIAL CLAIMS SERVICES 1577 'C' STREET ANCHORAGE 907 258 3043
762	ALASKA AIRLINES INC. P.O. BOX 68900 SEATTLE 206 455 3200	COMMERCIAL CLAIMS SERVICES 1577 'C' STREET ANCHORAGE 907 258 3043
763	FAIRBANKS NORTH STAR BJR EFF * 020187 USE 720** P.O. BOX 1267 FAIRBANKS 907 456 4218	NORTHERN ADJUSTERS, INC. ATTN: DICK STONE 1401 RUDAKOF CIRCLE ANCHORAGE 907 338 7484
764	SEALASKA CORPORATION ONE SEALASKA PLAZA **NORTHERN CLAIMS** JUNEAU 907 586 1512	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE 907 338 7484
765	ALASKA RAILROAD C/O S. OF AK *EXP 7-1-85* RISK MANAGEMENT-POUCH C JUNEAU 907 465 2180	ALASKA NATIONAL INSURANCE COMPANY 7001 JEWEL LAKE ROAD ANCHORAGE 907 248 2642
766	STANDARD OIL / AMOCO PRO P.O. BOX 3910-B CHICAGO LL 00680	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE 907 338 7484

CODE	COMPANY	ADJUSTOR
767	MONTGOMERY WARD CO INC 1200 NORTHERN LIGHTS	MONTGOMERY WARD CO INC. 1200 NORTHERN LIGHTS
	ANCHORAGE AK 99504 907 279 4444	ANCHORAGE AK 99504 907 279 4444
768	KETCHIKAN CITY OF 334 FRONT STREET *NOT USED 072330* KETCHIKAN 907 225 5111	EAGLE PACIFIC INSURANCE P.O. BOX 9576 KETCHIKAN AK 99901 907 225 7310
769	NABORS ALASKA DRILLING 4300 8 TH STREET **DO NOT USE**USE 792** ANCHORAGE AK 99503 907 561 4440	PACIFIC MARINE INSURANCE 201 DANNER AVENUE SUITE 110 ANCHORAGE AK 99502 907 349 6461
770	ALASKA RAILROAD CORP. P.O. BOX 7-2111	WILTON ADJUSTMENT SERVICES P. O. BOX 72870 ANCHORAGE AK 99509 907 276 3511
771	ALASKA RAILROAD CORP. P.O. BOX 7-2111	WILTON ADJUSTMENT SERVICES P. O. BOX 244 FAIRBANKS AK 99707 907 456 4342
780	ALASKA RAILROAD CORP RISK MANAGEMENT **DO NOT USE/060187** JUNEAU AK 99311 907 465 2130	ALASKA NATIONAL INSURANCE COMPANY 7001 JEWEL LAKE ROAD ANCHORAGE AK 99502 907 245 2642
781	MONTGOMERY WARD MONTGOMERY WARD PLAZA	ADJUS CO INC. 51 4 TH STREET SUITE 200 ANCHORAGE AK 99501 907 275 2010

CODE	COMPANY	ADJUSTOR
782	PHILLIPS PETROLEUM COMP INSURANCE 3 C4 PHILLIPS BLDG WARTLESVILLE 913 661 5306	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE 907 336 7464
	AK 74004	AK 99508
783	MABORS ALASKA DRILLING ATTN: WORK COMP DEPT. 4300 13 th STREET ANCHORAGE 907 561 4440	ADJUSTCO INC. 510 "L" STREET SUITE 200 ANCHORAGE 907 276 2010
	AK 99503	AK 99503
784	NANA REGIONAL CORP. ATTN: WORK COMP. 4706 HARDING DRIVE ANCHORAGE 907 248 3030	ALASKA NATIONAL INSURANCE COMPANY 7001 JEWEL LAKE ROAD ANCHORAGE 907 248 2642
	AK 99502	AK 99502
85	CONTINENTAL BAKING CO. P.O. BOX 4-1353 ANCHORAGE 907 277 3548	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE 907 561 5222
	AK 99509	AK 99503
86	CONSOLIDATED FREIGHTWAYS P.O. BOX 4670 PORTLAND OR 97208	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE 907 561 5222
	AK 99708	AK 99503
87	NORTH SLOPE SDRUGH ATTN: WORK COMP INS. P. O. BOX 69 BARRUW AK 99723	ALASKA NATIONAL INSURANCE COMPANY 7001 JEWEL LAKE ROAD ANCHORAGE 907 248 2642
	AK 99723	AK 99502
88	CHEVRON CORPORATION P.O. BOX 7137 SAN FRANCISCO 415 394 0157	CHEVRON U.S.A. ATTN: T.O. 110 P.O. BOX 101580 ANCHORAGE 907 786 6676
	CA 94120	AK 99510

CODE COMPANY ADJUSTOR

791 KENAI PENINSULA BOROUGH ALPAC INA
P.O. BOX 850 ***DO NOT- CIGI COMPANIES
** USE EFFECT 070187*** P. O. BOX 196620
SOLDOTNA AK 99669 ANCHORAGE AK 99519
907 262 4441 907 263 0200

792 NABORS ALASKA DRILLING ALASKA NATIONAL
4300 'R' STREET INSURANCE COMPANY
ANCHORAGE AK 99503 7001 JEWEL LAKE ROAD
907 561 4440 ANCHORAGE AK 99502
907 243 2642

800 ALASKA WORKERS COMP POOL ALASKA WORKERS COMP POOL
AK COUNCIL ON COMP. INS. AK COUNCIL ON COMP. INS.
620 S.W. 5TH AVE #1110 620 S.W. 5TH AVE #1110
PORTLAND OR 97204 PORTLAND OR 97204
503 228 4173 800 547 1689

808 ALASKA INS GUARANTY ASSN NORTHERN ADJUSTERS, INC.
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AS 23.30.190(a)(1)-(19) SCHEDULED PPD EXCLUSIVE
(AS OPPOSED TO AS 23.30.190(a)(20) UNSCHEDULED PPD)

NOT AN ISSUE TO MY KNOWLEDGE

such contention was raised. Thus, the state was entitled to summary judgment on the counts relating to this claim.

For these reasons I would reverse the decision of the superior court and remand this case with directions to enter judgment for the state.



John RATLIFF, Appellant,

v.

ALASKA WORKERS' COMPENSATION BOARD, Wright Schuchart Harbor/ASAG (Employer), and Wausau Insurance Companies (Insurer), Appellees.

No. 1126.

Supreme Court of Alaska.

July 3, 1986.

Claimant appealed from decision of the Superior Court, Fourth Judicial District, Fairbanks, Gerald J. Van Hoomissen, J., affirming decision of the Workers' Compensation Board holding that claimant was entitled only to permanent partial benefits for a scheduled injury. The Supreme Court, Rabinowitz, C.J., held that claimant suffered only a single injury, and so was not entitled to concurrent award of both scheduled and unscheduled benefits.

Affirmed.

1. Workers' Compensation ⇌876

Finding by the Workers' Compensation Board that effect of claimant's knee injury did not extend to other parts of his body constituted finding that claimant did not suffer unscheduled injury and that statutory schedule applied exclusively, so that claimant was limited in his recovery to benefits provided for in schedule even were he

to suffer economic disability, despite allegation by claimant that the Board's finding merely constituted a finding that claim was not governed by statute providing for scheduled award for loss of use of body part not otherwise provided for in schedule. AS. 23.30.190(a)(19)(B), (a)(20).

2. Workers' Compensation ⇌876

Despite workers' compensation claimant's allegation that fact that knee injury disabled him from working constituted a separate "injury" from knee injury, claimant suffered only a single injury, and so was not entitled to concurrent award of both scheduled and unscheduled benefits. AS 23.30.190(a)(20).

3. Workers' Compensation ⇌877

Under statute providing that workers' compensation shall be paid "as follows" and that unscheduled benefits apply in all other cases, scheduled permanent partial disability benefits for claimant's knee injury were the exclusive benefits that claimant could recover. AS 23.30.190, 23.30-190(a)(2, 20).

4. Workers' Compensation ⇌876

Scheduled workers' compensation benefits are not exclusive as to a claimant who is found to be permanently totally disabled. AS 23.30.180, 23.30.190(a)(21).

5. Workers' Compensation ⇌1846

Claimant did not raise issue of whether he was fully disabled before the Workers' Compensation Board and expressly disavowed total disability as an issue, and thus, argument that claimant was permanently totally disabled would not be considered for first time on appeal.

Arthur Lyle Robson, Fairbanks, for appellant.

Ralph R. Beistline, Ann E. Stoloff, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

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OPINION

RABINOWITZ, Chief Justice.

Appellant John Ratliff appeals from the superior court's affirmance of the Alaska Workers' Compensation Board's (the "board") decision holding that he was entitled only to permanent partial disability benefits for a scheduled injury under AS 23.30.190(a)(2). Ratliff argues that his injury also should have been classified as a concurrent unscheduled permanent partial disability under AS 23.30.190(a)(20), or as a permanent total disability under AS 23.30.180. Appellees Wright Schuchart Harbor/ASAG and Wausau Insurance Companies (referred to collectively as "Wright Schuchart") argue that the injury was properly classified as a scheduled injury and that Ratliff therefore may receive benefits only under the schedule.

Ratliff was employed as a pipe-fitter/welder for Wright Schuchart when he injured his right knee while working on January 13, 1983.

Ratliff was examined by Dr. Young Ha. Dr. Ha rated Ratliff's "lower extremity impairment" at 19% based upon American Medical Association guidelines and at 50% based upon Ratliff's subjective symptoms. Wright Schuchart averaged the two ratings and paid Ratliff permanent partial disability benefits for a scheduled knee injury based on a 35% impairment rating. Ratliff was initially paid \$14,112 in permanent partial disability benefits in a lump sum and is

currently receiving \$329 per week in permanent partial disability benefits.¹ Apparently these benefits will soon be exhausted under the terms of AS 23.30.190(a)(2).² Ratliff was also previously paid \$69,693 in temporary total disability benefits and \$17,828.95 in medical costs and vocational rehabilitation.

Ratliff completed a vocational rehabilitation program under the direction of Alaska Placement Services, Inc. ("APS"). He worked for six months in an on-the-job training program as a mechanical engineering technician for Sunfair Engineering Company ("Sunfair") and demonstrated potential for working as either a plumbing designer or a cost estimator. Although Sunfair had originally indicated it could offer Ratliff a full-time position, it did not do so because it did not obtain the contracts it had anticipated. AFS then performed a labor market survey and located four local heating firms with which Ratliff might work as a cost estimator. Ratliff apparently never contacted these employers. Ratliff contends that his injury has virtually eliminated his earning capacity.

Ratliff petitioned the board, asking it to find that he had suffered an unscheduled injury under AS 23.30.190(a)(20).³ The board denied the petition, stating that the legislature intended that scheduled awards be the exclusive remedy whenever applicable. The board found no evidence that Ratliff's injury resulted in disability to any

1. The initial lump sum payment was calculated by multiplying the 35% impairment rating with the then maximum allowable payment under AS 23.30.190(a)(2) of \$40,320. This court declared such a calculation improper in *Providence Washington Insurance Co. v. Grant*, 693 P.2d 872, 877-78 (Alaska 1985). Apparently this is why Ratliff is receiving \$329 per week, which is based on multiplying 66⅔% of Ratliff's average pre-injury weekly salary by the 35% impairment rating.

2. AS 23.30.190 as applicable at the time of Ratliff's injury provided:

(a) In case of disability partial in character but permanent in quality the compensation is 66⅔ per cent of the injured employee's average weekly wages . . . and shall be paid to the employee as folio 1s:

(2) leg lost, 2-18 weeks compensation, not to exceed \$40,320.

AS 23.30.190 has since been amended to increase the maximum amounts and percentages for the schedule.

3. AS 23.30.190(a)(20), as applicable to Ratliff, provided that:

in all other cases in this class of disability the compensation is 66⅔ per cent of the difference between [the injured employee's] average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise payable during the continuance of the partial disability. . . .

AS 23.30.190(b) stated:

Total compensation paid under (a)(20) of this section may not exceed \$60,000.

part of his body other than to the right leg and no evidence that the effect of the loss of use of the right leg extended to other parts of his body and interfered with their efficiency. The board also stated that it was aware of no legal authority for it to grant an award based on a concurrent unscheduled disability.

Ratliff appealed the board's decision to the superior court, which affirmed. The superior court rejected Ratliff's argument that his injury should be treated as unscheduled because it was "total," extending beyond his right leg. The superior court concluded that substantial evidence supported the board's conclusion that there was no disability to any part of the body other than to the scheduled right leg. The court stated that there was no evidence demonstrating holistically debilitating effects of Ratliff's pain that might lead to a conclusion that the injury had an effect extending beyond the leg. The superior court also stated that Ratliff's subjective complaints of pain were accounted for in the 35% disability rating for the leg. The court further concluded that the fact that Ratliff had suffered extreme impairment of his earning capacity did not provide grounds for relief outside the limits provided by the schedule.

Ratliff now brings this appeal.

I. *Is Ratliff Limited to a Recovery Under the Schedule if His Knee Injury has Produced a Permanent Partial Disability?*

Ratliff contends that the board's finding that the effect of his knee injury did not extend to other parts of his body only constituted a finding that AS 23.30.190(a)(19)(B) was inapplicable. AS 23.30.190(a)(19)(B) provides for a scheduled award for loss of use of a body part not otherwise provided for in the schedule. Ratliff further argues that this did not constitute a finding that he did not suffer an unscheduled disability under AS 23.30.190(a)(20).

[1] Ratliff advances the additional argument that his knee injury should be con-

sidered a concurrent unscheduled injury because it has rendered him practically unable to work, thereby causing him extreme economic disability. Ratliff cites our decision in *Providence Washington Insurance Co. v. Grant*, 693 P.2d 872 (Alaska 1985), as authority for his argument that a concurrent unscheduled disability should have been found in this case.

We think, however, that the board in its decision and order unambiguously found that Ratliff did not suffer an unscheduled injury. The crux of the board's decision is that Ratliff injured only his knee and that therefore the statutory schedule applies exclusively, so that Ratliff is limited in his recovery to the benefits provided for in the schedule even were he to suffer extreme economic disability.

We also agree with Wright Schuchart that although *Grant* allows for benefits for a scheduled injury to be awarded concurrently with benefits for an unscheduled injury, *Grant* does not control here. *Grant* involved, in addition to two scheduled injuries (leg and foot), another, separate injury that was clearly unscheduled (back injury). *Id.* at 875. It was in that context that both scheduled and unscheduled benefits were awarded concurrently.

[2] In the case at bar, it is apparent that there is but one injury. Ratliff seems to argue that the fact that the knee injury has greatly disabled him from working somehow constitutes a separate "injury" from the knee injury itself. This begs the question, which is whether the fact that the economic impairment from this injury exceeds the benefits provided for in the schedule enables the employee to have his injury classified as "unscheduled," so that he can obtain benefits reflecting this greater economic impairment.

The argument in favor of applying the schedule exclusively in cases of permanent partial disability is simple and persuasive—the statute means what it says. The United States Supreme Court applied this reasoning in interpreting the similarly worded Longshoremen and Harbor Workers' Com-

pensation Act (LHWCA) in *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980).⁴

In *Potomac*, the Supreme Court, reversing the D.C. Court of Appeals, held that an employee who was permanently partially disabled due to a knee injury was limited to recovery under the schedule, and could not choose to recover under the non-schedule paragraph which measured benefits by loss of wage-earning capacity. The Court stated that the plain language of the statute indicated that Congress intended the benefits under the schedule to be exclusive when there was an injury that fell under the schedule. 449 U.S. at 273-74, 101 S.Ct. at 512. The Court noted that the schedule paragraphs and the non-schedule paragraph were all under the same section entitled "permanent partial disability." *Id.* at 274, 101 S.Ct. at 513. The Court pointed out that the statutory direction that preceded the schedule provided that compensation under the schedule "shall be paid to the employee, as follows." *Id.* at 274, 101 S.Ct. at 512 (emphasis in opinion). The Court also noted that the non-schedule, loss of wage-earning capacity paragraph was to apply in "all other cases," and stated that this language foreclosed reading the statute to apply to all of the foregoing (i.e., scheduled) cases as well. *Id.* at 274, 101 S.Ct. at 512-13 (emphasis in opinion.).

The Supreme Court then rejected the argument that such a construction would not fulfill the remedial purpose of the Act and that it would produce anomalous results that Congress probably did not intend. The Supreme Court pointed out that the Act represents a compromise between the interests of employers and employees. The

Court stated that the use of fixed scheduled benefits as an exclusive remedy:

[I]s consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible.

Id. at 282, 101 S.Ct. at 517. The Court also recognized the incongruous results which the schedule could produce by over or undercompensating an employee for his true wage-earning loss. The Court stated, however, that this fact did not give it license to disregard the "compelling statutory language" and that it was up to Congress to re-examine the statute if anomalies were occurring frequently. *Id.* at 283-84, 101 S.Ct. at 517.

AS 23.30.190 contains the same "compelling statutory language" that was present in *Potomac*. AS 23.30.190(a) provides that scheduled benefits "shall" be paid "as follows" and AS 23.30.190(a)(20) applies in "all other cases." In addition, we have recently stated, in another context, that the legislative policy behind the schedule was to place "absolute limits on an employer's liability" by awarding "no more than specific amounts for specific disabilities." *Grant*, 693 P.2d at 878.

[3] Given the language of AS 23.30.190, and the reasoning of *Potomac*, we hold that in the case at bar the scheduled permanent partial disability benefits provided for under AS 23.30.190(a)(2) for Ratliff's knee injury are the exclusive benefits that Ratliff can recover. There is no language in the statute remotely suggesting that the schedule and section (a)(20) are alternative remedies.⁵ Thus we conclude that the su-

4. The Alaska Workers' Compensation Act is modeled after the LHWCA and this court has held that interpretations of the LHWCA are persuasive in interpreting the Alaska Act. *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805, 807 (Alaska 1963).

5. See also *Meadowlake Nursing Home v. Sullivan*, 253 Ark. 403, 486 S.W.2d 82, 82-83 (1972); *Graves v. Eagle Iron Works*, 331 N.W.2d 116, 118 (Iowa 1983); *Hardman v. City of Iola*, 219 Kan. 840, 549 P.2d 1013, 1017 (1976); *Doggett v.*

Brunswick Corp., 217 Neb. 166, 347 N.W.2d 877, 880 (1984); *Hise Construction v. Candelaria*, 98 N.M. 759, 652 P.2d 1210, 1212 (1982). *Contra Jacks v. Banister Pipelines America*, 418 So.2d 524, 527-29 (La. 1982) (Compensation under the workers' compensation statute is an economic, not a medical, concept, based on the employee's loss of earning capacity. Therefore the schedule should be viewed as providing a presumed minimum loss in recognition of the likelihood that the loss of a body part will eventually result

perior court's affirmance of the board's holding that Ratliff did not suffer an un-scheduled injury under AS 23.30.190(a)(20) was correct, since the legislature intended that the scheduled award be the exclusive remedy whenever applicable.

II. Ratliff's Assertions of Permanent Total Disability.

Ratliff also argues that he is permanently totally disabled under AS 23.30.180⁶ and therefore his recovery should not be limited to the schedule. Wright Schuchart argues, however, that Ratliff did not raise this issue before the board and therefore should not be allowed to raise it here. Ratliff responds that the issue was included in his points on appeal. Ratliff argued to the superior court that he was totally disabled. The court rejected this argument, stating that the schedule was exclusive.⁷

[4,5] Ratliff did not raise the issue of whether he was totally disabled before the board and in fact expressly disavowed this as an issue.⁸ Ratliff's Application for Adjustment of Claim indicates that the claim

in some loss of earning capacity, such that the employee should be compensated for that expected loss even if he does not presently have a loss in earning capacity. However, if the employee can prove an actual loss of earnings greater than the schedule presumes, he should be allowed to recover for that loss by electing recovery outside the schedule); *General Electric Co. v. Industrial Commission*, 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671, 673-74 (1982) (dicta); *Potomac Electric Power Co. v. Director, OWCP*, 606 F.2d 1324 (D.C. Cir.1979), *overruled*, 449 U.S. 268, 101 S.Ct. 509, 66 L.Ed.2d 446 (1980); *Potomac Electric*, 449 U.S. at 285-91, 101 S.Ct. at 518-521 (Blackmun, J., dissenting).

6. AS 23.30.180 as applicable to Ratliff provided:

In case of total disability adjudged to be permanent 66 $\frac{2}{3}$ percent of the injured employee's average weekly wages shall be paid to the employee during the continuance of the total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts.

7. The superior court did not make a finding whether Ratliff was totally disabled under AS 23.30.180.

was being made for temporary total and permanent partial disability. At the hearing before the board, Ratliff's attorney stated, "The permanent partial disability is what we are concerned with here. That's the only issue that we have before you." Ratliff's attorney indicated several times during the hearing that his goal was to try to get Ratliff's injury classified as an un-scheduled permanent partial disability, so that Ratliff could be paid some percentage of his total temporary disability benefits.

Wright Schuchart's attorney indicated that at the pre-hearing conference the parties agreed that the only issue to be addressed at the hearing was whether Ratliff's permanent partial disability was to be classified as scheduled or un-scheduled. Ratliff's attorney agreed that he did not want to discuss any other issue.

Given the foregoing, we reject Ratliff's argument that he is permanently totally disabled since this point was not raised below.

AFFIRMED.

8. If Ratliff had raised the issue below and was found to be totally permanently disabled, the scheduled benefits should not be exclusive. The definition of permanent total disability and the schedule provisions for permanent partial disability are found in separate subsections involving two separate types of disability. See *London v. Fairbanks Municipal Utilities, Employers Group*, 473 P.2d 639, 642 (Alaska 1970) (compensation for each category of disability reflects a unique set of policy considerations). AS 23.30.180 provides that total disability is to be determined "in accordance with the facts." If the facts show that an employee is totally disabled so that AS 23.30.180 is applicable, the schedule becomes irrelevant. See *Potomac Electric*, 449 U.S. at 271 n. 4, 101 S.Ct. at 511 n. 4. Further support for this reading is provided by AS 23.30.190(a)(21), which states that loss of more than one body part under the schedule, *not amounting to permanent total disability*, is to be compensated as a scheduled loss for each member. (Emphasis added.)

The clear trend in other states has been to hold the schedule not exclusive when the injury has resulted in total permanent disability. *E.g.*, *Meadowlake*, 486 S.W.2d at 83; *Graves*, 331 N.W.2d at 118; *Hise*, 652 P.2d at 1211; *Turner v. Jones & Laughlin Steel Corp.*, 479 Pa. 618, 389 A.2d 42, 45 (1978).

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AS 23,30055 EXCLUSIVE REMEDY - NO IMPLIED INDEMNITY AGAINST EMPLOYER

PROVIDENCE WASH. INS. v. DeHAVILLAND AIRCRAFT Alaska 355

Cite as 699 P.2d 355 (Alaska 1985)

NOT AN ISSUE AS FAR AS I KNOW

show any mistake concerning DeHavilland's identity.⁴

III. INTERVENTION

Atkins also argues that the amendment should be viewed as an attempt to intervene as a party plaintiff in *Walters v. DeHavilland Aircraft*. Walters' complaint asserted a products liability claim against DeHavilland, so Atkins reasons that Civil Rule 15(c) requires only that the claim arise from the same conduct, transaction, or occurrence set forth in Walters' original pleading.⁵ *Jakoski v. Holland*, 520 P.2d 569 (Alaska 1974); *Burns v. Anchorage Funeral Chapel*, 495 P.2d 70 (Alaska 1972).

[3] Atkins' reliance on *Jakoski* and *Burns* is misplaced. *Jakoski* involved a derivative claim of loss of consortium; *Burns* an amendment adding the decedent's next of kin as plaintiff in a suit brought by the administrator. We refuse to extend these narrow decisions to allow a total stranger to the original plaintiff to avoid the statute of limitations by intervening in a suit timely filed.

The order of the superior court granting DeHavilland's motion for partial summary judgment based on the statute of limitations is therefore AFFIRMED.



4. We also note that Atkins' complaint against Ehredt and Walters did not allege a products liability claim, which is the basis of the amended complaint against DeHavilland. Arguably, Atkins does not meet the threshold requirement that the amendment change a "party against whom a claim is asserted" since he asserted no products liability claim against Ehredt and Wal-

PROVIDENCE WASHINGTON INSURANCE COMPANY, Appellant,

v.

DeHAVILLAND AIRCRAFT COMPANY OF CANADA, LTD., Appellee.

No. S-365.

Supreme Court of Alaska.

May 10, 1985.

Workers' compensation insurer which paid benefits to injured aircraft passenger brought action against aircraft manufacturer. The Superior Court, Third Judicial District, Anchorage, Brian Shortell, J., entered summary judgment in favor of manufacturer, and insurer appealed. The Supreme Court, Compton, J., held that: (1) tort claim action of insurer was barred by statute of limitations, and (2) insurer had no independent noncontractual right of implied indemnity.

Affirmed.

1. Workers' Compensation ⇄2189

Rights acquired by employer and its workers' compensation insurer were subject to all-defenses which manufacturer of aircraft could have raised against injured employee who received workers' compensation following aircraft accident in the course of his employment, including statute of limitations, since all his rights against manufacturer were assigned to employer, and thus to its insurer, upon his receipt of benefits. AS 90.10.070, 23.30.0.5(b, i).

2. Workers' Compensation ⇄2142

Exclusive liability provision of Workers' Compensation Act precludes an implied

terms. See, *Jakoski v. Holland*, 520 P.2d 569 (Alaska 1974); *Furns v. Anchorage Funeral Chapel*, 495 P.2d 70 (Alaska 1972). We need not reach this issue.

5. Atkins did not argue that Rule 24 applies, nor do we see any basis for relief thereunder.

indemnity claim against an employer. AS 23.30.005 et seq.

3. Indemity \approx 13.2(2)

No right of common-law indemnity exists between concurrently negligent tortfeasors.

4. Workers' Compensation \approx 2190

Employer's workers' compensation insurer could not assert a common-law indemnity claim against manufacturer of aircraft in which workers' compensation claimant was passenger when he was injured during crash, absent any contractual or other duty between manufacturer and insurer.

Constance A. Cates, Paul A. Barrett, Call, Barrett & Burbank, Fairbanks, for appellant.

Steven S. Tervooren, Frank A. Pfiffner, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

This is an appeal from a summary judgment for an aircraft manufacturer against a workers' compensation insurance carrier which paid benefits to an injured passenger. The superior court concluded that the insurer's statutory subrogated claim is barred by the statute of limitations and it has no right of implied indemnity absent a contractual relationship with the manufacturer. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 1978, a Twin Otter aircraft manufactured by DeHavilland Aircraft of Canada, Ltd. (DeHavilland)

crashed in Barrow. M.O. Ehredt, d/b/a Arctic Guide Air Taxi (Ehredt), owned the aircraft, which was piloted by Ehredt's employee, Patrick Charles Walters (Walters), who died in the crash. Alfred S. Atkins (Atkins) was a passenger injured in the crash.

At the time of the accident, Atkins was acting in the course and scope of his employment for the North Slope Borough. Providence Washington Insurance Company (Providence Washington) is the North Slope Borough's workers' compensation insurance carrier; it paid Atkins compensation benefits and medical and rehabilitation treatment expenses.

In 1979, Atkins filed suit against Ehredt and Walters, but did not name DeHavilland.¹ In 1980, Walters sued Ehredt and DeHavilland alleging negligence claims against both and a strict products liability claim against DeHavilland.² These suits were eventually consolidated.³ In 1982, Atkins asserted a claim against DeHavilland for the first time. The trial court granted DeHavilland partial summary judgment based on the statute of limitations. We affirmed in *Atkins v. DeHavilland Aircraft*, 699 P.2d 352 (Alaska 1985).

In January 1983, Providence Washington filed a complaint in intervention against Ehredt and DeHavilland, seeking reimbursement and indemnity for amounts Providence Washington paid Atkins. DeHavilland moved for summary judgment on the ground that the two year tort statute of limitations had expired. Providence Washington moved for summary judgment against DeHavilland to establish its right to indemnity as a matter of law. The superior court denied Providence Washington's motion and granted that of DeHavilland. The court then entered final judgment for DeHavilland. Providence Washington appeals.

1. *Atkins v. Ehredt*, No. 4FA-79-1549 Civil.

2. *Walters v. DeHavilland Aircraft*, No. 2NO-80-172 Civil.

3. The consolidated caption is *In Re Barrow Air Crash*, October 13, 1978, 3AN-81-2321 Civil.

II. STATUTE OF LIMITATIONS

[1] Atkins could have asserted a tort claim against DeHavilland. When Atkins accepted workers' compensation payments from the North Slope Borough and failed to sue DeHavilland within one year of the accident, all Atkins' rights against DeHavilland were assigned to the North Slope Borough by operation of law.⁴

Since the North Slope Borough was insured and Providence Washington paid Atkins' compensation benefits, Providence Washington was subrogated to all of the North Slope Borough's rights.⁵

The rights thus acquired by the North Slope Borough and Providence Washington were subject to all defenses which DeHavilland could have raised against Atkins, including the statute of limitations. Tort claims are subject to a two-year statute of limitations, which expired in October 1980. AS 09.10.070. Because Providence Washington did not assert a claim against DeHavilland until 1983, its subrogated claim against DeHavilland is barred by the statute of limitations.

III. IMPLIED INDEMNITY

Providence Washington also argues that it has an independent noncontractual right of implied indemnity from DeHavilland which is subject to a six-year statute of limitations. AS 09.10.050. The threshold question is whether Providence Washington meets the requirements for common law indemnity.

- 4. AS 23.30.015(b) provides in pertinent part: Acceptance of compensation ... operates as an assignment to the employer of all rights of the person entitled to compensation ... to recover damages from the third person unless the person ... entitled to compensation commences an action against the third person within one year
- 5. AS 23.30.015(i) provides:
 - (i) If the employer is insured and the carrier has assumed the payment of compensation, the carrier shall be subrogated to all the rights of the employer.
- 6. Restatement of Restitution § 76 (1936) provides:

Although this court has never set forth the requirements, a federal district court, relying on the Restatement of Restitution, interpreted Alaska law to permit an implied indemnity claim when (1) the claimant discharged a legal obligation to a third party, (2) the defendant is also liable to the third person and (3) as between the claimant and defendant, the obligation should be discharged by the latter. *Industrial Risk Insurers v. Creole Production Services*, 568 F.Supp. 1323 (D.Alaska 1983), *aff'd*, 746 F.2d 526 (9th Cir.1984).⁶ The same test is used in many other states. *See, e.g., School District No. 4 v. United States Gypsum*, 65 Or.App. 570, 672 P.2d 1201, 1204 (1983); *Perry v. Pioneer Wholesale Supply*, 681 P.2d 214, 218 (Utah 1984).

[2, 3] We have sustained an implied indemnity claim when the indemnitor and indemnitee are in a manufacturer-retailer relationship. *Heritage v. Pioneer Brokerage & Sales*, 604 P.2d 1059 (Alaska 1979). However, the exclusive liability provision of the workers' compensation act precludes an implied indemnity claim against an employer. *Golden Valley Electric Association v. City Electric Service*, 518 P.2d 65 (Alaska 1974). Further, no right of common law indemnity exists between concurrently negligent tortfeasors. *State Mechanic v. Liquid Air*, 665 P.2d 15 (Alaska 1983); *Vertecs Corp. v. Reichhold Chemicals*, 661 P.2d 619 (Alaska 1983).

[4] The unspoken element in cases allowing implied indemnity is the existence of a contractual or other duty between the indemnitor and indemnitee.⁷ In no case

A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.

- 7. Providence Washington urges us to follow the decision in *Federal Marine Terminals v. Burnside Shipping*, 394 U.S. 404, 89 S.Ct. 1144, 22 L.Ed.2d 371 (1969). Since we believe that the *Burnside* rule is based on the existence of a duty between the indemnitor-shipowner and the indemnitee-stevedore, we conclude that *Burnside* does not support Providence Washington's

have we required a stranger to indemnify another, and we decline to do so now. Providence Washington fails to meet the requirements to assert a common law indemnity claim against DeHavilland because it had no pre-existing legal relationship with DeHavilland.

The judgment of the superior court granting DeHavilland's motion for partial summary judgment is therefore **AFFIRMED**.



Helena Mary Faro
GERLACH, Appellant,

v.

STATE of Alaska, Appellee.

No. A-501.

Court of Appeals of Alaska.

May 10, 1985.

Mother was convicted in the Superior Court, Third Judicial District, Anchorage, Seaborn J. Buckalew, Jr., J., of custodial interference in first degree, and she appealed. The Court of Appeals, Singleton, J., held that mother was not entitled to argue necessity as defense to hiding daughter out of state for over one year, in light of reasonable foreseeability that father's contact with child would be totally eliminated and fact that adequate remedies were available at law.

Affirmed.

1. Criminal Law Ⓢ38

Mother, who hid daughter out of state for over one year in violation of interim custody order, was not entitled to argue necessity as defense to charge of custodial claim, since DeHavilland had no duty to Prov-

interference, despite offer of proof that she believed father was not properly caring for daughter, that father abused his children by former marriage, that she had little faith in judicial proceedings as means for resolving custody disputes, that she feared she would run out of funds before custody dispute was resolved, and that court-appointed psychologists recommended daughter remain with mother, where total elimination of father's contact with child was reasonably foreseeable and adequate remedies were available at law. AS 11.41.320, 11.41.330.

2. Criminal Law Ⓢ38

In prosecution for custodial interference, one relying on defense of necessity must offer some evidence justifying duration of interference as well as initial act of interfering. AS 11.41.320, 11.41.330.

3. Infants Ⓢ19.3(1), 131

Where legislature has established procedure for determining custody disputes and separate but complementary procedures for investigating and preventing child abuse and neglect, person cannot ignore those procedures and rely on self-help simply because he or she distrusts lawyers, judges, and social workers. AS 11.41.320.

Linda Wilson, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

David Mannheimer, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Helena Mary Faro Gerlach was convicted of custodial interference in the first degree, idence Washington.

AS 23.30.055 EXCLUSIVE REMEDY (EMPLOYEE WITHOUT STATUTORY DEPENDENTS) UNDER AS 23.30.046 (c) the Employer

1160 Alaska

694 PACIFIC REPORTER, 2d SERIES

Robin L. TAYLOR, as Personal Representative of the Estate of Donald C. Kiedrowski, Appellant,

v.

SOUTHEAST-HARRISON WESTERN CORPORATION, Appellee.

No. S-266.

Supreme Court of Alaska.

Feb. 8, 1985.

Wrongful death action was filed against employer on behalf of estate of worker killed in a dynamite blast at work. The Superior Court, First Judicial District, Ketchikan, Thomas E. Schulz, J., granted employer's motion to dismiss the complaint based on argument that estate's exclusive remedy was claim for death benefit provided by the Workers' Compensation Act. The estate appealed, alleging that different treatment Workers' Compensation Act provides estate of a worker leaving no dependents denied it equal protection of the law. The Supreme Court, Burke, J., held that: (1) test for determining whether estate of worker leaving no dependents is denied equal protection of the law is whether the different treatment provided the worker bears a fair and substantial relationship to the legitimate goal of the Workers' Compensation Act, and (2) there is a fair and substantial relationship between overall purpose of the Act and greater compensation provided to estates of deceased workers leaving dependents than that provided to estates of workers leaving no dependents, and thus, the Act did not deprive worker's estate of equal protection of the laws under either the State or Federal Constitution, despite fact that the estate could recover only funeral expenses, and not survivors' benefits.

Judgment affirmed.

1. Constitutional Law §245(4) Workers' Compensation §29

Question in determining whether Workers' Compensation Act denies equal

protection to estate of a worker leaving no dependents, in that the estate can recover only reasonable and necessary funeral expenses but no survivors' benefits, is whether the different treatment provided bears a fair and substantial relationship to the legitimate goal of the Act. AS 23.30.055; U.S.C.A. Const.Amend. 14, § 1; Const. Art. 1, § 1.

of §055 that is all a negligent Employer has to pay - what is more, under AS 23.30.055(c) 2. Workers' Compensation §11

Goal of the Workers' Compensation Act is to secure guaranteed and expeditious compensation for injured workers and their dependents, without regard to notions of fault and other factors controlling the result in ordinary civil litigation. AS 23.30.055.

right to sue a 3d party passes to Employer - there was a bill to charge 055(c) 3. Constitutional Law §245(4) Workers' Compensation §29 in this past yr.

There is a fair and substantial relationship between overall purpose of the Workers' Compensation Act and greater compensation provided to estates of deceased workers leaving dependents over that provided to estates of workers leaving no dependents, and thus, the Act did not deprive estate of worker who left no dependents of equal protection of the law, despite fact that the estate could recover only funeral expenses, and not survivors' benefits. AS 23.30.055; U.S.C.A. Const.Amend. 14, § 1; Const. Art. 1, § 1.

I don't know what happened to it - Jacques probably knows bill # - I haven't heard this is true raised here.

Mary E. Guss, Law Offices of Clifford H. Smith, Ketchikan, for appellant.

Michael A. Barcott, Faulkner, Banfield, Doogan & Holmes, Anchorage, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

Donald C. Kiedrowski was killed in a dynamite blast.¹ The superior court dismissed an action for wrongful death, filed by Kiedrowski's estate, upon the ground that the action was barred by the exclusive remedy provision of the Alaska Workers' Compensation Act, AS 23.30.055.² In this appeal, the estate challenges the court's ruling, claiming a denial of its right to equal protection of the law. U.S. Const., amend. XIV, § 1; Alaska Const., art. I, § 1.³

At the time of his death, Kiedrowski was employed by Southeast-Harrison Western Corporation. He was unmarried and left no statutory dependents.⁴ A few months after the death, an action was filed on behalf of Kiedrowski's estate, against his employer, Southeast-Harrison. The action was one for wrongful death, filed pursuant to AS 09.55.580.

In the superior court, Southeast-Harrison moved to dismiss the complaint, arguing that the action was barred by AS 23.30.055. Under that section, the estate's exclusive remedy is a claim for the death benefit provided by the Workers' Compensation Act.⁵ The superior court granted the employer's motion, treating it as a motion for summary judgment. See Alaska R.Civ.P. 56.

If Kiedrowski had been survived by a widow or other dependents, the death bene-

fit provided by the Workers' Compensation Act would include an amount for his funeral expenses, *plus substantial survivors' benefits*. AS 23.30.215. Since he left no dependents, Kiedrowski's estate can recover only "reasonable and necessary funeral expenses, not exceeding \$1,000." AS 23.30.215(a)(1).⁶ According to the estate, the different treatment thus provided the estate of a worker leaving no dependents denies it equal protection of the law.

The gist of appellant's argument is that the Workers' Compensation Act operates, in this instance, to deprive it of any meaningful remedy. Since it can recover only a nominal amount for funeral expenses, the estate contends that it is being deprived of the *quid pro quo* that has been relied upon, traditionally, to sustain the constitutionality of the exclusive remedy provision of the Act.

In support of its argument, appellant cites only one case directly on point: *Park v. Rockwell International Corp.*, 121 N.H. 894, 436 A.2d 1136 (1981). In that case, as here, an employee killed on the job left no dependents. Under the New Hampshire compensation act, the employee's estate could recover "only \$1200 in burial expenses." *Id.*, 436 A.2d at 1138. The New Hampshire Supreme Court held that the remedy provided by the act violated the estate's right to equal protection of the law,⁷ because, in the case of "employees ... who leave no dependents, nothing has been given in return for eliminating their [other] rights of action." 436 A.2d at 1138.

entitled to "the equal protection of the laws." The Alaska Constitution, in more detail, provides "that all persons are equal and entitled to equal rights, opportunities, and protection under the law." In this appeal, the estate relies on both of these provisions.

1. The circumstances of Kiedrowski's death are described in a coroner's Certificate of Presumptive Death, which is included in the record: "Donald Kiedrowski was last seen alive enroute to the powder magazine at the Tyee Project, Bradfield, Alaska, which exploded ... within minutes of his departure."
2. AS 23.30.055 provides, in part:
The liability of an employer prescribed in [the Workers' Compensation Act] is exclusive and in place of all other liability of the employer and any fellow employee to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death.
3. Under the Fourteenth Amendment to the Constitution of the United States, all persons are

4. See AS 23.30.215.

5. See *supra* note 2.

6. A 1983 amendment increased the statutory limit from \$1,000 to \$2,500. Ch. 70, § 10, SLA 1983.

7. The court based its decision on state grounds, holding that the act violated "the equal protection provisions of [the] State Constitution. N.H. Const. pt. I, art. 12." 436 A.2d at 1140.

The overwhelming weight of authority, however, is to the contrary. Every other jurisdiction that has addressed this constitutional issue has upheld the exclusive remedy provision as it relates to non-dependents. *E.g.*, *Snow v. United States*, 479 F.Supp. 936 (D.Nev.1979); *Slagle v. Reynolds Metal Co.*, 344 So.2d 1216 (Ala.1977); *Stample v. Idaho Power Co.*, 92 Idaho 763, 450 P.2d 610 (1969); *Leech v. Georgia-Pacific Corp.*, 259 Or. 161, 485 P.2d 1195 (1971); *West v. Zeibell*, 87 Wash.2d 198, 550 P.2d 522 (1976); *see also* 2A A. Larson, *The Law of Workmen's Compensation*, § 65.54 (1983).

Equal protection challenges to the exclusive remedy provision of Alaska's Workers' Compensation Act have been rejected in two prior cases: *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979) and *Wright v. Action Vending Co., Inc.*, 544 P.2d 82 (Alaska 1975). A key factor in both of those decisions was our recognition of the fact that the Act serves "the goal of securing adequate compensation for injured employees without the expense and delay inherent in [ordinary civil litigation requiring] a determination of fault as between the employee and employer." *Arctic Structures, Inc. v. Wedmore*, 605 P.2d at 437. Here, as previously noted, appellant contends that that purpose is not served. We disagree.

[1] The mistake that appellant makes is in viewing the exclusive remedy provided in this instance in isolation, rather than as part of a comprehensive scheme. *Cf. Anchorage Education Association v. Anchorage School District*, 648 P.2d 993, 997 (Alaska 1982) (unequal treatment of striking teachers substantially related to legitimate overall policy reflected in the applicable statutes). The exclusive remedy provided appellant is merely one feature of a program designed to provide compensation in a wide variety of cases. Appellant's equal protection claim must be decided in light of the purposes of the entire Workers' Compensation Act. The question is not simply whether appellant is being treated differently, as it clearly is; the question is

whether that different treatment bears a fair and substantial relationship to the admittedly legitimate goal of the Workers' Compensation Act. *State v. Ostrosky*, 667 P.2d 1184, 1193 (Alaska 1983); *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978).

[2] The goal of the Act is to secure "guaranteed [and] expeditious compensation" for injured workers and their dependents, without regard to notions of fault and other factors controlling the result in ordinary civil litigation. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d at 437. The scheme is essentially a trade-off. "The employer renders itself absolutely liable for the scheduled and fixed compensation liability to the injured employee regardless of [the] absence of negligence on its part or the contributory negligence of the employee." *Id.* at 440, quoting *Schweizer v. Elox Division of Colt Industries*, 70 N.J. 280, 359 A.2d 857, 861 (1976). In return, the employee gives up his other remedies at law. The plan, therefore, is necessarily one that required the legislature to balance a multitude of complex factors, many of which involved competing interests. *See, e.g., Wright v. Action Vending Co., Inc.*, 544 P.2d 82 (Alaska 1975) (wife's loss of consortium claim barred by the exclusive remedy provision of the Workers' Compensation Act).

Here the legislature has chosen to provide greater compensation to the estates of those deceased workers leaving dependents, *i.e.* persons, such as children and spouses, who are generally dependent, at least in part, upon the deceased worker's salary for their own support. The fact that they are entitled to favored treatment, over the estates of workers leaving no dependents, reflects a legislative determination that the former require greater compensation, because of the need to replace the income that provided support for those dependent upon the deceased worker prior to his death.

[3] This determination, in our judgment, is entirely reasonable. The Workers' Compensation Act provides many benefits. Some of those benefits may be realized by

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the worker himself, prior to his death, such as the compensation payable when the worker is injured but not killed. Other benefits accrue only in the event of his death. All, however, are part of the overall plan. Thus viewed, we are satisfied that there is a fair and substantial relationship between the overall purpose of the Workers' Compensation Act and the particular limitation that applies in this case. Accordingly, we hold that the Act does not deprive Kiedrowski's estate of equal protection of the law, under either the state or federal constitution.

The judgment is AFFIRMED.



MUNICIPALITY OF ANCHORAGE, Petitioner,

v.

Patrick M. MARRS, Respondent.

No. A-352.

Court of Appeals of Alaska.

Feb. 8, 1985.

Defendant was charged with driving while intoxicated. The District Court, Third Judicial District, Anchorage, Elaine M. Andrews, J., suppressed evidence of the results of his breathalyzer test, and municipality petitioned for review. The petition was granted, and the Court of Appeals, Singleton, J., held that: (1) although police officers did not guarantee defendant's complete privacy in his conversation with his attorney following his arrest and during observation period prior to his taking breathalyzer test, Court of Appeals' *Farrell* standards were met as a matter of law, since there was no attempt by observing officers to stand next to defendant and write down what he was saying, and (2) once defendant had opportunity to consult

on telephone with his attorney, he received rights guaranteed him by Supreme Court's *Copelin* decision, and police were under no duty to delay administration of breathalyzer examination until his attorney could be present, regardless of how short a period that might, in fact, have entailed.

Reversed.

1. Criminal Law §1158(1)

Lower court's factual finding that after defendant talked to his attorney on the telephone, he told a third police officer that his attorney was on the way to the police station was not clearly erroneous.

2. Criminal Law §641.3(8)

Although police officers did not guarantee defendant's complete privacy in his conversation with his attorney following his arrest for driving while intoxicated and during observation period prior to his taking breathalyzer test, Court of Appeals' *Farrell* standards were met as a matter of law, since there was no attempt by observing officers to stand next to defendant and write down what he was saying. AS 12.25.150(b); Rules Crim.Proc., Rule 5(b).

3. Criminal Law §641.3(8)

Once defendant arrested for driving while intoxicated had opportunity to consult on telephone with his attorney, he received rights guaranteed him by Supreme Court's *Copelin* decision, and police were under no duty to delay administration of breathalyzer examination until his attorney could be present, regardless of how short a period that might, in fact, have entailed. AS 12.25.150(b); Rules Crim.Proc., Rule 5(b).

4. Criminal Law §641.3(8)

Statute expressly providing for an immediate visit with counsel following an arrest does not give an arrestee, who has spoken with counsel by phone and had a reasonable opportunity to speak with him, a right to delay administration of breathalyzer examination to permit further consultation. AS 12.25.150(b).

OCCUPATIONAL DISEASE STANDARDS
ESTABLISHING THAT A DISEASE IS WORK-RELATED

DELANEY v. ALASKA AIRLINES

Alaska 859

Cite as 693 P.2d 859 (Alaska 1985)

interpreted, the defendants were under a duty to take reasonable precautions to keep the seaplane dock available for the plaintiffs' use, and to furnish them access to it. The duty imposed is one of reasonable care.

[8] The defendants were under no duty to provide a seaplane dock at Yakutat, nor were they required to guarantee the availability of docking space for every seaplane that might happen along. They were, however, under a duty to keep the seaplane docking space that was available accessible to seaplanes. Seaplane operators are among the class of persons that AS 02.15-120 was designed to protect; operators of fishing vessels are not. Thus, the superior court erred in concluding that the defendants owed no duty of care to the plaintiffs. The court's decision, therefore, must be reversed.⁹

Having reached this conclusion, it is unnecessary for us to decide whether plaintiffs were owed a common law duty.

REVERSED and REMANDED.



Patrick J. DELANEY, Appellant,

v.

ALASKA AIRLINES, and Industrial Indemnity Company of Alaska, Inc., and State of Alaska Workers' Compensation Board, Appellees.

No. S-226.

Supreme Court of Alaska.

Jan. 25, 1985.

Workers' Compensation Board denied former airline pilot's claim for workers'

9. The trial court's decision was also based upon its conclusion that a violation of the sections cited would not support a private right of action for damages. We reach the opposite conclusion, having determined that such an action "is

compensation benefits. On appeal, the Superior Court, Third Judicial District, Mark C. Rowland, J., affirmed, and the claimant appealed. The Supreme Court, Moore, J., held that: (1) doctor's testimony did not establish a preliminary link between claimant's employment and Crohn's disease; (2) doctor's testimony established preliminary link between claimant's employment and the aggravation of his disease; (3) unequivocal expert testimony rebutted the presumption of compensability; and (4) record contained substantial evidence upon which reasonable mind might rely in concluding that claimant's disease was not aggravated by his employment as an airline pilot and that he was not entitled to workers' compensation.

Affirmed.

1. Workers' Compensation §547

In order to succeed, disabled employee claiming occupational disease must prove two facts: that his disease was caused by conditions of his employment, and that as a result of those working conditions, risk of his contracting disease was greater than that which generally prevails in employment and living conditions.

2. Workers' Compensation §549, 1417

To recover compensation benefits for employment-related disability, disabled employee must establish preliminary link between his employment and his disability; workers' compensation claimant who was suffering from rare and complicated disease, Crohn's disease, required expert medical testimony to establish preliminary link.

3. Workers' Compensation §1530

Doctor's testimony did not establish preliminary link between claimant's employment as a pilot and cause of his disease, Crohn's disease, for purposes of en-

appropriate in furtherance of the purpose of the legislation and needed to assure [its] effectiveness." Restatement (Second) of Torts § 874A (1979).

BUT SEE FOX - (mental injury case)

Jim not aware that this group is interested in this.

titlement to unemployment benefits where doctor testified that cause of claimant's disease is unknown, that there was no way of knowing when claimant contracted disease, and where doctor never stated that disease was originally caused by conditions of claimant's employment nor that other individuals in same employment suffered from same disease to greater extent than public at large.

4. Workers' Compensation ⇐552

In order to succeed on claim that employment aggravated claimant's preexisting disease, employment must have been substantial factor in bringing about disability.

5. Workers' Compensation ⇐1366

Doctor's testimony established preliminary link between claimant's employment and aggravation of disease so that employer was required to rebut presumption of compensability.

6. Workers' Compensation ⇐1366

Presumption of compensability that arises once preliminary link between claimant's employment and aggravation of claimant's disease is established may be overcome only by substantial evidence that injury is not compensable; once employer produces substantial evidence to rebut presumption, presumption drops out.

7. Workers' Compensation ⇐1542

After employer overcomes presumption of compensability which arises when link is established between claimant's employment and aggravation of claimant's disease, Workers' Compensation Board must weigh all of the evidence.

8. Workers' Compensation ⇐1366

Burden of proof as to each element of claim is on claimant after employer has rebutted presumption of compensability which arises once preliminary link is established between claimant's employment and the aggravation of his disease.

9. Workers' Compensation ⇐1366

Doctor's unequivocal expert testimony, based on his experience and recent re-

search, was substantial evidence that occupational stress was not substantial factor in aggravation of claimant's Crohn's disease so that presumption of compensability was rebutted and burden was on claimant to prove all elements of his case before Workers' Compensation Board.

10. Workers' Compensation ⇐1939.4(4)

In reviewing decision of Workers' Compensation Board, Supreme Court must determine whether Board's findings are supported by substantial evidence in light of whole record.

11. Workers' Compensation ⇐1939.4(4), 1939.6

On review of decision of Workers' Compensation Board, task of Supreme Court is not to independently reweigh evidence, but to determine whether there is substantial evidence in light of whole record that reasonable mind might accept as adequate to support Board's conclusion.

12. Workers' Compensation ⇐1545

Testimony of claimant who was seeking to establish occupational stress as aggravating his disease, including that stressful factors in his job were no different from those of other airline pilots, supported conclusion that claimant was "usual" pilot and not subject to "unusual" stress not shared by others in his profession.

13. Workers' Compensation ⇐1545

Workers' Compensation Board could find that doctor's statements identifying several sources of significant stress in workers' compensation claimant other than occupational stress undercut doctor's testimony that occupational stress was substantial factor causing aggravation of claimant's underlying disease.

14. Workers' Compensation ⇐1939.6, 1939.7

It is province of Workers' Compensation Board to weigh witnesses' credibility and competing inferences from testimony.

15. Workers' Compensation ⇐1939.4(1), 1939.5

Workers' Compensation Board's decision will be reversed only if evidence upon which decision relies does not reasonably support it, in and of itself, or in light of contrary evidence in record.

16. Workers' Compensation ⇐1939.8

Whether to accept unequivocal testimony of one doctor based upon his recent medical research and significant experience as Board certified internist or to accept testimony of another doctor whose statements undercut one another, was question for Workers' Compensation Board.

17. Workers' Compensation ⇐1545

Unequivocal testimony of physician was substantial evidence from which to conclude that claimant's Crohn's disease was not aggravated by his employment as an airline pilot and that he was not entitled to workers' compensation.

Chancy Croft, Anchorage, for appellant.

James A. Sarafin, Hagans, Brown & Gibbs, for appellees.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and MOORE, Justices.

OPINION

MOORE, Justice.

I. FACTS

This case involves a claim for workers' compensation benefits by Patrick J. Delaney. Delaney was employed as a pilot by Alaska Airlines from 1966 until April 1, 1976. In October 1971 it was discovered that Delaney had Crohn's disease, a chronic inflammation of the ileum. The cause of the disease is unknown. In Delaney's case the symptoms included bowel obstruction, intestinal bleeding and stomach upset.

Crohn's disease is usually treated by surgical resection of the affected region of the colon. In many cases surgery provides only a respite, followed by a recurrence of

the disease. Delaney had surgery in October 1971, but his symptoms returned about a year later.

After the operation, Delaney maintained a full flight schedule until April 1, 1976, despite the recurrence of his symptoms. On that date, the Federal Aviation Administration (the FAA) revoked Delaney's flight certification because the medication prescribed for the control of his disease violated FAA regulations. Delaney claims to be permanently and totally disabled as a result of Crohn's disease.

On May 1, 1979, the Alaska Workers' Compensation Board (the board) held a hearing on Delaney's claim for workers' compensation benefits. The board denied Delaney's claim on April 3, 1980. On appeal, the board's decision was affirmed by the superior court. Delaney then appealed to this court. We now affirm.

II. DISCUSSION

[1,2] Delaney makes two contentions on appeal. First, Delaney claims that Crohn's disease is an occupational disease of airline pilots caused by excessively stressful conditions. In *Aleutian Homes v. Fischer*, 418 P.2d 769, 777 (Alaska 1966), we defined an occupational disease:

We hold that if a disease is caused by the conditions of employment and these conditions carry with them a risk of incurring the disease greater than that which prevails in employment and living conditions in general, then such disease is an occupational disease within the scope of our act.

(Emphasis added). Thus, in order to succeed, a disabled employee claiming an occupational disease must prove two facts: (1) that his disease was caused by the conditions of his employment; and (2) that as a result of those working conditions, the risk of his contracting the disease was greater than that which generally prevails in employment and living conditions. In proving these facts a claimant is aided by the presumption of compensability found in AS

694

23.30.120.¹ We have held that a disability is presumed to be compensable when a claimant has established a "preliminary link" between his disability and his employment. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 n. 4 quoting 1 A. Larson, *Workmen's Compensation Law* § 10.33 at 121, we described the purpose of the preliminary link requirement:

Apparently, the idea is to rule out cases in which claimant can show neither that the injury occurred in the course of employment nor that it arose out of it, as where he contracted a disease but has no evidence to show where he got it.

To recover compensation benefits for an employment related disability, a disabled employee must establish a preliminary link. In *Smallwood*, we also noted with regard to the preliminary link, that in "'claims based upon highly technical medical considerations' medical evidence is often necessary in order to make that connection." *Id.* at 316.

Since Delaney is suffering from a rare and complicated disease, expert medical testimony was required to establish the preliminary link in his case. Delaney's only medical expert was Dr. Gilbert Schaller, his treating physician. Dr. Schaller testified that the cause of Crohn's disease is unknown to the medical profession. He testified that there was no way of knowing when Delaney had contracted Crohn's disease, but suggested that it had been present since at least 1968, only two years after Delaney began flying for Alaska Airlines. Dr. Schaller never stated that Delaney's disease was originally caused by the conditions of his employment with Alaska Airlines. Nor did he testify that airline pilots suffer from Crohn's disease to a greater extent than the public at large.

[3] Since Dr. Schaller admitted that the cause of Crohn's disease is unknown and could not say when or why Delaney contracted the disease, we must conclude that Dr. Schaller's testimony did not establish a preliminary link between Delaney's employment and his disease. Delaney's first claim fits squarely within Professor Larson's definition of a case barred by the preliminary link requirement.

[4] Delaney's second claim is that his employment as an Alaska Airlines' pilot aggravated his preexisting Crohn's disease. In *Thornton v. Alaska Workers' Compensation Board*, 411 P.2d 209, 210 (Alaska 1966), we held that a preexisting disease does not rule out compensation if employment aggravated, accelerated or combined with the disease to produce disability. However, the employment must have been a substantial factor in bringing about the disability. *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 598 (Alaska 1979).

[5-8] In support of Delaney's second claim, Dr. Schaller testified that Delaney's employment by Alaska Airlines from 1971 through 1976 contributed to his disability in 1976. We believe that Dr. Schaller's testimony established a preliminary link between Delaney's employment and the aggravation of his disease. Therefore, Alaska Airlines was required to rebut the presumption of compensability. The presumption may be overcome only by substantial evidence that the injury is not compensable. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). Once the employer produces substantial evidence to rebut the presumption, the presumption drops out. The board must then weigh all of the evidence. The burden of proof as to each element of the claim is on the claimant. *Id.* at 1049. We have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as

1. AS 23.30.120 provides in part:

In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

adequate to support a conclusion." *Id.* at 1046.

Dr. Peter Fisher, a board certified internist, testified on behalf of Alaska Airlines. Dr. Fisher testified on the basis of his extensive experience as a practitioner of internal medicine and his research concerning the Crohn's disease process undertaken in preparation for his testimony. When asked whether stress could cause or aggravate the Crohn's disease condition, Dr. Fisher responded, "stress is not known to be, has never proved to be, and is likely not an important factor in the disease process." He agreed that it would be "pure speculation" to suggest that stress is an aggravating factor in the Crohn's disease process. He was careful however, to distinguish between stress as a medical cause of aggravation of the underlying disease process and stress as a symptomatic reaction. When asked whether stress might be found to be a contributing factor in the aggravation of Crohn's disease, Dr. Fisher stated:

I can not dispute a general statement that stress may be found to be a factor [in the Crohn's disease process] because I think stress is a factor in everything we do and in all illnesses and in all walks of life, as a general statement. I'm referring to stress being a primary factor or a causative factor. In that reference I feel certain that it will not [be found to be a factor]. . . .

We were confronted with an analogous factual situation in *Miller v. ITT Arctic Services*, 577 P.2d 1044. Miller collapsed at work while loading a toolbox onto a pickup truck. His collapse and subsequent death were due to a ruptured berry aneurism in his brain. Miller's beneficiaries claimed that the aneurism ruptured as a

result of Miller's physical exertion just before his collapse. Three physicians testified about the cause of Miller's death. Only one expert, Dr. Wilson, categorically denied the existence of a relationship between Miller's exertion and the rupture of the aneurism. Nevertheless, we held that Dr. Wilson's categorical statement, based upon accurate and complete information and not undercut by other evidence produced by the employer, was sufficient to overcome the presumption. 577 P.2d at 1048.

[9] Likewise, in the present case, we believe that Dr. Fisher's unequivocal expert testimony, based upon his experience and recent research, is substantial evidence that occupational stress was not a substantial factor in the aggravation of Delaney's disease. Therefore, the burden was on Delaney to prove all the elements of his case before the board.

[10, 11] The board concluded that Delaney failed to meet his burden. According to the board, Delaney produced "no definitive evidence which demonstrates by a preponderance that the applicant's employment aggravated, accelerated or combined with the already existing condition to create the disability." In reviewing the board's decision, we must determine whether the board's findings are supported by substantial evidence in light of the whole record. *Beauchamp v. Employer's Liability Assurance Corp.*, 477 P.2d 993, 997 (Alaska 1970). Our task is not to independently reweigh the evidence, but to determine whether there is substantial evidence in light of the whole record that a reasonable mind might accept as adequate to support the board's conclusion.² *Miller v. ITT Arctic Services*, 577 P.2d at 1046.

2. In *Keiner v. City of Anchorage*, 378 P.2d 406 (Alaska 1963), we first adopted the requirement of substantial evidence in light of the whole record to support an administrative fact finding. That standard had been upheld in federal cases subject to the Administrative Procedure Act. In *Keiner*, we cited *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1950), for that requirement. In *Universal Camera*, Justice Frankfurter, writing for a unanimous Court, stated:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fair-

Delaney relied entirely upon his own testimony and that of Dr. Schaller to prove his case. Delaney's own testimony related primarily to his duties as a pilot and the progression of his symptoms.

[12] At the hearing Delaney voiced some complaints about poor meals and accommodations, nonscheduled flights, aircraft without adequate pressurization and poor weather and landing conditions. However, upon examination by the board, Delaney admitted that his complaint about meals and accommodations related to only one incident, that he flew nonscheduled flights during only four of his ten years as an Alaska Airlines pilot, that he flew only the standard number of hours monthly, and that he flew in a well-pressurized Boeing 727 since late 1972. In addition, when asked what factors in his job he considered stressful, Delaney prefaced his answer by stating: "Well, I suppose the same with any pilot." From Delaney's testimony, the board was entitled to conclude that he was a "usual" pilot and not subject to "unusual" stress not shared by others in his profession.

Dr. Schaller testified that Delaney's occupational stress caused an aggravation of his disease. However, Dr. Schaller's testimony may have been undercut by Dr. Fisher's testimony and the undisputed fact that the basic cause of Crohn's disease is unknown. The board might also have concluded that Dr. Schaller's testimony was weakened by other testimony elicited from him on cross-examination. Specifically, Dr. Schaller testified on cross-examination that:

[Delaney] has a lot of family problems, and I think these aggravate his condition

ly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record....

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not ... mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it de novo. Congress

as well as say the physical stress of flying and his desire to get back to flying where he couldn't and so forth, and I think that stress is diet. I think stress is interpersonal relationships. I think it is the emotional sense. I think it is intermakeup of [Delaney's] volatile high strung individual. I think all of the things accumulate into the course of this, and this is often the makeup of the people who have this disease.

Dr. Schaller also stated that in his opinion Delaney's disease would have progressed the same had he been a physician or an attorney. In fact, Dr. Schaller testified that Delaney's chances of avoiding a recurrence were only somewhat better than 50% even if he had retired from full-time flying after his operation. Dr. Schaller's opinion in this regard was confirmed in a letter written to him by Dr. Beech Barrett, a Crohn's disease specialist who examined Delaney after his 1971 operation.

[13] In sum, Dr. Schaller identified several sources of significant stress in Delaney's life other than occupational stress, and stated that a recurrence of Delaney's Crohn's disease after his operation would not have been unlikely even had Delaney quit flying at that time. The board could reasonably have believed that these statements by Dr. Schaller undercut his testimony that occupational stress was a substantial factor causing an aggravation of Delaney's underlying disease. In addition, the board may have had difficulty reconciling Dr. Schaller's opinion with the fact that stress has not been found to be a cause of Crohn's disease.

[14-17] Dr. Fisher's testimony, on the other hand, was unequivocal, and was

has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. 340 U.S. 487-90, 71 S.Ct. 464-66, 95 L.Ed. 467-68. The test described by Justice Frankfurter is the test we apply when reviewing administrative fact findings.

based upon Dr. Fisher's recent medical research and significant experience as a board certified internist. Moreover, the board decided that Dr. Fisher's testimony was consistent with the fact that the cause of Crohn's disease is unknown. Thus, in light of the contrary evidence, it was not unreasonable for the board to rely on Dr. Fisher's testimony.³ Without independently weighing the evidence, we find that the record contains substantial evidence upon which a reasonable mind might rely in concluding that Delaney's Crohn's disease was not aggravated by his employment as an Alaska Airlines pilot.

AFFIRMED.



VECO, INC., Appellant,

v.

Donald WOLFER and Home Insurance
Company, Appellees.

No. 7205.

Supreme Court of Alaska.

Jan. 25, 1985.

Employee filed a claim for workers' compensation benefits. The Workers' Compensation Board ordered insurer to pay benefits for period of disability occurring while employer was insured, and ordered employer to pay benefits for later period when it was self-insured. Employer appealed. The Superior Court, Third Judicial District, Anchorage, Brian C. Shorteli, J., affirmed Board's ruling, and employer sought further review. The Supreme Court, Moore, J., held that: (1) presumption

3. Even if Dr. Schaller's testimony had been consistent and unequivocal, we believe the board would have been entitled to rely on Dr. Fisher's testimony in this case. It is the province of the board to weigh witnesses' credibility and com-

of compensability and last injurious exposure rule were applicable to dispute between insurer and self-insured employer; (2) Superior Court's application of the reasonable basis standard of review, rather than independently examining sufficiency of employer's evidence to overcome presumption of compensability, was harmless error; (3) lay evidence, rather than medical testimony, was sufficient both to establish and overcome presumption; and (4) employer's evidence regarding earlier injury was sufficient to overcome presumption.

Reversed and remanded.

1. Workers' Compensation ⇐1074

The presumption of compensability and the last injurious exposure rule were applicable to determine whether insurance carrier or self-insured employer which carrier formally insured was liable for employee's back injury, where employee was originally injured while employer was insured by carrier, and employee allegedly aggravated that injury while employer was self-insured. AS 23.30.120.

2. Workers' Compensation ⇐1939.11(1)

Whether evidence presented by self-insured employer to Workers' Compensation Board to rebut presumption of compensability in dispute with employer's prior insurer as to responsibility for compensation is "substantial" is a legal question; therefore, reviewing court must independently determine sufficiency of evidence, and not apply the "reasonable basis" standard of review applicable to other agency decisions involving agency expertise or fundamental policy considerations. AS 23.30.120.

3. Workers' Compensation ⇐1968(1)

Because Supreme Court, on appeal of superior court review of Workers' Compensation Board decision regarding sufficiency of self-insured employer's evidence to overcome presumption of compensability in dis-

puting inferences from the testimony. The board's decision will be reversed only if the evidence upon which the decision relies does not reasonably support it, in and of itself, or in light of contrary evidence in the record.

[5] One matter merits further comment. As we have already noted, the superior court clearly intended to reverse the district magistrate's order of dismissal, on the ground that the mandatory minimum sentence provisions of KCC 8.12.030 are severable from its other provisions. However, that court's opinion failed to expressly mandate the intended result. For that reason, we feel compelled to specifically indicate that the effect of our holding here will be to cause this matter to be remanded to the superior court for entry of an order directing the district magistrate to vacate her order of dismissal.⁷

AFFIRMED and REMANDED for further proceedings consistent with this opinion.



Merlyn MARSH, in his own right, and by Evonne Marsh, Individually, and as Guardian of Merlyn Marsh, Appellants,

v.

ALASKA WORKMEN'S COMPENSATION BOARD, Commercial Union Companies, and Lodge No. 1534, Loyal Order of Moose, Appellees.

No. 3643.

Supreme Court of Alaska.

Oct. 13, 1978.

Assistant bartender filed action seeking review of dismissal by State Workmen's

city argues that such action indicates the state legislature's recognition that certain offenses require mandatory minimum sentences and that, therefore, KCC 8.12.030 does not conflict with state law. The fact that the state itself has the power to enact specific exceptions to AS 12.55.080 and AS 12.55.085, fails to convince us that a home rule city possesses the same power. Thus, we reject the city's argument.

Compensation Board of his claim for injury benefits. The Superior Court, Third Judicial District, S. J. Buckalew, J., affirmed decision of Board and bartender appealed. The Supreme Court, Connor, J., held that evidence supported determination that assault on bartender by customer was not work-connected and did not entitle bartender to compensation.

Affirmed.

1. Workers' Compensation ⇐ 767

Employee is normally covered by workmen's compensation if he is injured while on break. AS 23.30.005-23.30.270.

2. Workers' Compensation ⇐ 1356

When claimant shows that he has been injured at work, substantial evidence is needed to overcome presumption of compensability. AS 23.30.005-23.30.270, 23.30.120(1), 23.30.265(13).

3. Workers' Compensation ⇐ 652

Labeling employee's activity as "personal" may not render injury ensuing from that activity per se noncompensable; however, activity must still be "reasonably foreseeable and incidental" to employment, and not just "but for" employment, to entitle employee to claim compensation. AS 23.30.005-23.30.270, 23.30.120(1), 23.30.265(13).

4. Workers' Compensation ⇐ 1939.4(4)

Review by Supreme Court of factual determination made by State Workmen's Compensation Board is limited to determination of whether Board's findings are supported by substantial evidence in light of record as a whole; "substantial evidence" is

7. Under the superior court's ruling, which we now affirm, the fact that the mandatory minimum sentence requirements of KCC 8.12.030 are unenforceable does not mean that one who violates the ordinance cannot be otherwise charged, convicted and sentenced thereunder. See *Speas v. State, supra*. It simply means that in sentencing the violator the court is not bound by the requirement of the ordinance that he serve a minimum term of imprisonment, but, instead, is free to exercise its discretion according to AS 12.55.080-AS 12.55.085.

CT. FOUND THIS ONE GUY WASN'T COVERED. THIS IS AN INTERESTING CASE FACTUALLY BUT ISN'T INTERESTING AS A DEVELOPMENT OF LAW.

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such relevant evidence as reasonable mind might accept as adequate to support conclusion. AS 23.30.005-23.30.270.

See publication Words and Phrases for other judicial constructions and definitions.

5. Workers' Compensation ⇒ 1565, 1576

In proceedings on petition for workmen's compensation benefits filed by assistant bartender at lodge of fraternal organization, who was also a member of lodge, and who while taking break from his duties sustained injuries when struck by customer after bartender, according to customer's testimony, had kissed customer's wife, evidence supported determination that assault on bartender by customer was not work-connected and did not entitle bartender to compensation. AS 23.30.005-23.30.270, 23.30.265(13).

Ernest Schlereth and Peter B. Walton, Peter Walton & Associates, Anchorage, and Donna C. Willard, Richmond, Willoughby & Willard, Anchorage, for appellants.

Timothy M. Stone, Hagans, Smith, Brown, Erwin & Gibbs, Anchorage, for appellees.

Before BOOCHEVER, Chief Justice, RABINOWITZ, CONNOR, BURKE and MATTHEWS, Justices.

OPINION

CONNOR, Justice.

The issue presented by this appeal is whether injuries sustained by appellant arose out of and occurred in the course of his employment and are, therefore, compensable under Alaska Workmen's Compensation Act.¹

1. AS 23.30.005-.270. AS 23.30.265(13) provides:

"injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection which arises naturally out of the employment or which naturally or unavoidably results from an accidental injury, and includes

On March 14, 1971, Appellant Mervyn Marsh was working as an assistant bartender at the Moose Lodge in Anchorage. Around midnight, Marsh, who was also a member of the Lodge, took a half-hour break to "get something to eat." He sat down at a table where a Mrs. Razo and some friends were sitting. Mr. Razo testified that he was playing pool at the time, but returned to find Marsh sitting with his wife and kissing her.² Mr. Razo exclaimed, "Hey! What the hell is going on here?," to which Marsh replied, "Why don't you go back to playing pool?" Mr. Razo responded by hitting Marsh, who fell to the floor unconscious. Marsh was only briefly unconscious, and was able to return home that evening. However, he suffered a blood clot in the brain which required surgery and has resulted in partial paralysis and a 15-day memory loss.

Marsh filed a notice of possible claim with the Workmen's Compensation Board. The Board determined that it did not have jurisdiction to hear the matter. We remanded the case to the Board for an adjudication of Marsh's claims. *Alaska Workmen's Compensation Board v. Marsh*, 550 P.2d 805 (Alaska 1976).

On February 3, 1977, the Board determined that "the applicant's employment . . . did not significantly contribute to Razo's assault upon the applicant" and that the "applicant took himself outside the employment conditions when he chose to pursue personal activities that resulted in the assault by Razo." The Board dismissed Marsh's claim. On August 15, 1977, the superior court affirmed the Board's decision, noting that it "is supported by substantial evidence." Marsh appeals.

[1] Although an employee is normally covered by workmen's compensation if he is injured while on a break, numerous courts

breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices which function as part of the body and further includes an injury caused by the wilful act of a third person directed against an employee because of his employment.

2. Marsh testified that he could not recall the events of the evening in question.

have held that when the employee's injury arises out of a wholly personal quarrel, the employee is not entitled to compensation.³ Professor Larson summarizes the law:

"When it is clear that the origin of the assault was purely private and personal, and that the employment contributed nothing to the episode, whether by engendering or exacerbating the quarrel or facilitating the assault, the assault should be held noncompensable" (footnotes omitted)

1A. Larson, *The Law of Workmen's Compensation*, § 11.21, at 3-207 (1978).

Marsh does not object to this statement of law, but contends that but for his employment as a bartender he would not have encountered Mrs. Razo on that evening. He argues that although socializing with Mrs. Razo was not directly within the course of his employment, his employer did derive some benefit from his conduct. This benefit would either be in improving relations with customers or that his recreational activities made him a better employee.⁴ Therefore, he urges that just because the motivation for the assault was a personal grievance unconnected with his duties as bartender, his claim is still compensable.

[2, 3] There is a presumption in favor of compensability under the workmen's compensation laws. AS 23.30.120(1). When a claimant shows that he has been injured at work, substantial evidence is needed to overcome the presumption of compensability. *Fireman's Fund American Insurance Cos. v. Gomes*, 544 P.2d 1013, 1014-15 (Alaska 1976). Appellant is correct in stating that labeling the employee's activity as "personal" may not render the ensuing injury per se noncompensable. However, the activity must still be "reasonably foreseeable and incidental" to the employment, and

3. See, e. g., *Dismuke v. Arkansas-Best Freight Systems, Inc.*, 346 F.2d 145 (6th Cir. 1965); *Devlin v. Ennis*, 292 P.2d 469 (Idaho 1956); *Schroeter v. Industrial Commission*, 62 Ill.2d 284, 342 N.E.2d 3 (1976); *Duflath v. City of Monticello*, 241 N.W.2d 645 (Minn.1976); *Ellis v. Rose Oil Co.*, 190 So.2d 450 (Miss.1966); *Wood v. Aetna Cas. & Sur. Co.*, 116 Ga.App. 284, 157 S.E.2d 60 (1967).

not just "but for" the employment, as appellant contends, to entitle the employee to claim compensation. *Anchorage Roofing Co. Inc. v. Gonzales*, 507 P.2d 501, 505 (Alaska 1973); *Lizama v. Workmen's Compensation Appeals Board*, 40 Cal.App.3d 363, 115 Cal.Rptr. 267, 271 (1974); *Ross v. Workmen's Compensation Appeals Board*, 21 Cal. App.3d 949, 99 Cal.Rptr. 79, 83 (1971); see *Northern Corp. v. Saari*, 409 P.2d 845 (Alaska 1966).

"Under even the broadest rule, the but-for test, it must be emphasized that the test is not 'but for the bare existence of the employment,' but rather 'but for the conditions and obligations of the employment.' Surely it would be going too far to say that every assault arises out of employment if it can be proved that the acquaintance of the parties came about through the employment."

1A. Larson, *supra*, at 3-211.

The employer can overcome the presumption of compensability by introducing affirmative evidence that the assault was not work-related. *Fireman's Fund American Insurance Cos. v. Gomes*, *supra*, at 1016. Evidence was offered here to show that Marsh's injuries were directly attributable to his socializing with Mrs. Razo in a manner the Board found wholly unconnected to his employment. It is important to note that Marsh was a member of the Moose Lodge and, even without his employment as a bartender, had every right to be in the Lodge, socializing with Mrs. Razo. Additionally, even if Marsh's only right to be in the Lodge was pursuant to his employment, the Board found that his "presence at the place of fighting was in pursuance of no demand of his employment."⁵

In *Wood v. Aetna Casualty & Surety Co.*, 116 Ga.App. 284, 157 S.E.2d 60 (1967), the

4. See *Anderson v. Employer's Liability Assurance Corp.*, 498 P.2d 288 (Alaska 1972).

5. *Clark v. Clark*, 189 Mich. 652, 155 N.W. 507, 508 (1915).

decendent, an assistant manager at a grocery store, was having lunch with a female co-employee. Her husband saw them together. When the decendent returned to his place of work, the jealous husband shot and killed him. Workmen's compensation was denied. The court found that his death stemmed from a personal dispute with his assailant. His employment as a grocery store manager did not contribute to or cause the danger to his life.

In *Tecca v. McKesson & Robbins, Inc.*, 23 N.Y.2d 594, 256 N.Y.S.2d 413 (1965), order affirmed, 20 N.Y.2d 779, 284 N.Y.S.2d 85, 230 N.E.2d 729 (1967), a liquor salesman danced with a woman in a bar. Later, the woman's husband challenged the salesman in the parking lot. A fight ensued which left the salesman dead. The Workmen's Compensation Board allowed recovery, but the court overturned that decision noting that it was a personally incited quarrel with no relationship to the salesman's employment.⁶

Appellant relies upon *Ross v. Workmen's Compensation Appeals Board*, 21 Cal. App.3d 949, 99 Cal.Rptr. 79 (1971), wherein the court reached a different result. In the *Ross* case the claimant, a store clerk, was shot by the jealous husband of a customer. The husband had heard that his wife and the clerk were having an affair. While the employee admitted to talking with the wife and sitting in her car, he denied any hint of improper behavior. The Board denied compensation, finding that although he was injured while he was working, he was not injured because he was working. The court reversed the board's decision, finding that a personal assault unconnected with work does not necessarily render the injury non-compensable.

Ross, however, is distinguishable from the case at hand. In *Ross* the court held that the motivating factor for the assault was found, at least in part, in the ambient circumstances of the injured employee's employment. 99 Cal.Rptr. at 83. The claimant, as part of his employment duties, helped customers load their purchases into

their automobiles. In addition, as a neighborhood store, the clerks were friendly with their customers and often spoke with them when not busy with other tasks. There was no evidence presented in *Ross*, as there was here, to indicate that the claimant was in any way acting in a "personal" capacity in being friendly with his assailant's wife. Therefore, the record before the court in *Ross* did not contain evidence sufficient to eliminate the possibility that the assault was work-related, and the claim was compensable. See *Fireman's Fund Insurance Cos. v. Gomes, supra*, at 1016.

[4, 5] In deciding whether Marsh's injuries resulted from work-connected activities, the Board was making a factual determination. Our review of factual determinations

" . . . is limited to a determination of whether the Board's findings are supported by substantial evidence in light of the record as a whole. Substantial evidence is 'such relevant [sic] evidence as a reasonable mind might accept as adequate to support a conclusion.'" (footnotes omitted)

Anchorage Roofing Co., Inc. v. Gonzales, 507 P.2d 501, 503 (Alaska 1973). Even though Marsh's injury was sustained while he was at work, there was compelling evidence presented to indicate that Marsh had taken himself outside the scope and duties of his employment in his encounter with Mrs. Razo and, that it was that conduct which motivated the assault on him. Therefore, we hold that there was substantial evidence to support the Board's determination that the assault on Marsh by Mr. Razo was not work-connected and did not entitle Marsh to compensation.

AFFIRMED.



6. See also, *McGinn v. Jack Chambers, Inc.*, 46 A.D.2d 701, 359 N.Y.S.2d 917 (1974).

APPLICATION OF PRESUMPTION OF COMPENSABILITY
AS 23.30.120(CA)(1) - 623 P.2D 312 IS AN IMPORTANT
DEVELOPMENT OF § 120.

court in *Layland v. State*, 549 P.2d 1182 (Alaska 1976), remarked as follows:

Recent statistics indicate that thousands of innocent people are killed or seriously injured nationwide each year by automobile drivers who take to the road in spite of the fact that they are highly intoxicated. Unlike many crimes, the victim has no way of protecting himself. While vehicular homicide does not require a criminal intent, the fact that a loss of life is involved compels us to consider it among the most serious offenses. The unique nature of the offense mandates that the trial court, in fashioning a sentence, place heavy emphasis on societal condemnation of the conduct and the need to protect society.

Id. at 1184. What was said in 1976 is no less true today. I think it fair to say that in the interim public awareness of and attitude toward the problems created by the alcohol-abusing automobile driver have altered significantly. So has the law, for the jury was required to find that Pears' conduct evinced extreme indifference to human life, an element significantly more culpable than that required under the former manslaughter statute.

The court notes Judge Hodges' strong reliance on deterrence of Pears and others, and reaffirmation of societal norms in fashioning Pears' sentence. *Opinion* at 1205. While it suggests that perhaps deterrence ought to be generally deemphasized, as well as deemphasized in this case, it neglects entirely the issue of societal norms on which *Layland* requires trial courts to place heavy emphasis. I agree that Judge Hodges strongly relied on reaffirmation of societal norms in fashioning this sentence, yet his judgment is being afforded little weight. His careful balancing of criteria which he is required to consider, coupled with this court's pronouncement in *Layland* when the law required less culpability to convict for a lesser crime, lead me to conclude that the sentence imposed for the crime charged was not clearly mistaken.

**BURGESS CONSTRUCTION COMPANY,
and Commercial Union Assurance
Companies, Petitioners and Cross-Re-
spondents,**

v.

**William S. SMALLWOOD, Respondent
and Cross-Petitioner.**

Nos. S-42, S-119.

Supreme Court of Alaska.

May 10, 1985.

*You need the two prior
ops. in this case*

Following remand, 550 P.2d 1261, the Worker's Compensation Board denied compensation and claimant appealed. The Superior Court, Fourth Judicial District, reversed, and employer appealed. The Supreme Court, Connor, J., 623 P.2d 312, vacated and remanded. On remand, the Board dismissed claimant's claim. The Superior Court, Fourth Judicial District, Gerald J. Van Hornemissen, J., reversed. On employer's petition for review, the Supreme Court, Rabinowitz, C.J., held that: (1) there was substantial evidence to support Board's decision that statutory presumption of compensability had been overcome by both elimination of all reasonable possibility that injury was work connected and by affirmative evidence that injury was not work related, and (2) after presumption had been successfully rebutted, all elements of claim were not proven by preponderance of evidence.

Superior Court reversed; Worker's Compensation Board affirmed.

1. Workers' Compensation §1956

Where superior court is acting as intermediate Court of Appeal, Supreme Court independently reviews Worker's Compensation Board's findings of fact, rather than those of superior court.

2. Workers' Compensation §1939.4(4)

Supreme Court does not determine substantiality of Worker's Compensation

Board decision which in and of taking into account evidence from sources could be

3. Workers' Compensation

Where presumption established by compensation claims, rebutted, the presumption claimant must prove case by preponderance AS 23.30.120.

4. Workers' Compensation

In reviewing Board's decision not met burden of his case by preponderance of evidence. The Supreme Court applies the AS 23.30.120.

5. Workers' Compensation

"Substantial evidence" test to its review of Board's decision that, in light of the evidence, the Board's conclusion at issue is supported by other just definitions.

See public definitions for other just definitions.

6. Workers' Compensation

Once presumption has been raised in proceeding, it is not the presumption with substantial evidence that injury was not work related.

7. Workers' Compensation

There are no presumptions of compensability of a worker's compensation claim; affirmative evidence that injury was not work related is a reasonable possibility of being work connected. AS

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Board decision merely on basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

3. Workers' Compensation ⇨1421

Where presumption of compensability, established by statute for worker's compensation claims, has been successfully rebutted, the presumption is eliminated, and claimant must prove all elements of his case by preponderance of evidence. AS 23.30.120.

4. Workers' Compensation ⇨1939.4(4)

In reviewing Worker's Compensation Board's decision that claimant has or has not met burden of proving all elements of his case by preponderance of evidence, after statutory presumption of compensability has been successfully rebutted, Supreme Court applies the substantial-evidence test. AS 23.30.120.

5. Workers' Compensation ⇨1939.4(4)

"Substantial evidence," in Supreme Court's application of substantial-evidence test to its review of Worker's Compensation Board's determination, is evidence that, in light of whole record, reasonable mind would accept as adequate to support conclusion at issue.

See publication Words and Phrases for other judicial constructions and definitions.

6. Workers' Compensation ⇨1357

Once presumption of compensability has been raised in worker's compensation proceeding, it is employer's burden to overcome the presumption by coming forward with substantial evidence that injury was not work related. AS 23.30.120.

7. Workers' Compensation ⇨1357

There are two methods by which presumption of compensability established by worker's compensation statute can be overcome; affirmative evidence that injury was not work related, or elimination of all reasonable possibilities that injury was work connected. AS 23.30.120.

8. Workers' Compensation ⇨1521

Evidence that claimant was able to see physicians when necessary, that he ate at very good mess halls, and that he brought his own food with him on trucking road trips, furnished strong inference that claimant was not prevented from lowering his salt ingestion or from seeking medical care while working on road trips; thus, there was substantial evidence to support Workers' Compensation Board's decision that employer had overcome statutory presumption of compensability by presenting substantial evidence eliminating all reasonable possibility that acceleration of claimant's renal failure was work related. AS 23.30.120.

9. Workers' Compensation ⇨1521

Testimony by physician, that claimant's employment was not major factor in causing his kidney failure and that claimant's awareness of his kidney condition was not appropriate to his condition, by itself constituted substantial evidence supporting Workers' Compensation Board's decision as affirmative evidence that injury was not work related, notwithstanding same physician's testimony that claimant's hypertension and kidney condition could have been aggravated by his diet and working environment, and notwithstanding statutory presumption of compensability. AS 23.30.120.

10. Workers' Compensation ⇨1521

After employer had successfully rebutted statutory presumption of compensability of worker's compensation claim for renal failure, claimant did not prove all elements of his claim by preponderance of evidence, where he testified that he was able to see physicians when necessary, that he ate at very good mess halls, that he brought his own food with him on trucking road trips, and physician testified that employment was not major factor in causing claimant's kidney failure; thus, the Worker's Compensation Board's decision was supported by substantial evidence and claim was not compensable.

Sanford M. Gibbs, Hagans, Brown & Gibbs, Anchorage, for petitioner.

Patrick T. Brown, Rice, Hoppner, Brown & Brunner, Fairbanks, for respondent.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

Like a phoenix rising from the ashes, this matter is before the court for the third time. See *Commercial Union Cos. v. Smallwood (Smallwood I)*, 550 P.2d 1261 (Alaska 1976); *Burgess Construction Co. v. Smallwood (Smallwood II)*, 623 P.2d 312 (Alaska 1981). This appeal stems from the dismissal of William Smallwood's claim for worker's compensation by the Alaska Worker's Compensation Board (Board). The Board's dismissal was reversed by the superior court. We, in turn, reverse the superior court and affirm the Board's decision.

In 1970 William Smallwood (Smallwood) experienced acute renal failure, resulting in the removal of both of his kidneys and two kidney transplant operations, one of which was successful. In 1973 he filed a worker's compensation claim, alleging that his employment as a truck driver with Burgess Construction Company (Burgess) contributed to his renal failure. Smallwood's contention here, as in *Smallwood II*, is that his working conditions under Burgess exacerbated his hypertension (high blood pressure), which in turn aggravated his kidney condition and accelerated his renal failure. It is not disputed that Smallwood had a long history of kidney problems that predated his employment with Burgess. Tests taken in the early 1950's during a routine employment checkup revealed that he had chronic glomerulonephritis, a kidney condition which eventually leads to complete kidney failure. His doctors told him that he should maintain a low salt diet, but that he

should not have problems arising from his condition until he was a "much older man." Smallwood concedes that he suffered from moderately severe hypertension at least from the time he began working for Burgess. However, Smallwood's actual working conditions and their effect on his developing hypertension and kidney condition are sharply disputed.

Beginning in 1968, Smallwood began to drive trucks on the haul road to the North Slope for Burgess. According to Smallwood, Burgess's truckers would drive from 4 a.m. until midnight, fuel, eat, and sleep in their trucks and be back on the road again at 4 a.m. He testified that drivers ate what food they could carry in their trucks, and that frequently the food would freeze since there were no facilities for heating it. Smallwood testified that he had carried beans, baloney and bread.

Smallwood testified that his road trips lasted from five days to two weeks.¹ When he returned home to Fairbanks between trips, he claimed that he would sleep for four or five hours and then go back to work, either in town loading for a day or two, or else directly back to the slope. Smallwood stated that he worked under these conditions during the winters of 1967-68 and 1968-69 and took one trip in the winter of 1969-70. Smallwood said that he spent two or three months of the winter of 1968-69 living in Deadhorse and ate at a messhall where the food was very good. Smallwood often drove between Fairbanks and Bettles. In the winter of 1969-70 Smallwood stayed at Burgess' pipeline construction camps in the Yukon where "nice food", "nice bunkhouses" and medivac service were available.

Smallwood testified that he was unable to seek medical assistance because he was in Fairbanks only at odd hours and for brief periods of time. However, Smallwood also said that he was able to see a

roundtrip.

1. Phil Tannehill, another Burgess driver, testified that his trips took only three to four days

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physician when he was not actually working on the slope if he had a cold or did not "feel good". He was once airlifted to Fairbanks from Burgess's camp in the Yukon when he had the flu.

Smallwood initially attributed his physical problems to the long driving hours and rough physical conditions. When he saw a doctor in the spring of 1970, three months prior to his kidney failure, he was told to stop driving, get rest and eat properly. He stopped working the haul road, started working in the Fairbanks area and shortened his hours.

Smallwood's medical expert, kidney specialist Dr. Henry Tenckhoff, first examined Smallwood shortly after his kidney failure in 1970. According to Dr. Tenckhoff, Smallwood's kidney failure was caused by malignant hypertension. Dr. Tenckhoff testified that Smallwood suffered from excessive salt intake or inadequate salt elimination, or both. In Dr. Tenckhoff's opinion, Smallwood's severe hypertension developed after Smallwood began to drive the haul road to the North Slope for Burgess, and that "working conditions played a significant role in Mr. Smallwood's hypertension and therefore his renal disease," since he could neither maintain a proper diet while on the road nor see a physician. He also concluded that Smallwood did not understand the severity of his disease and "the true implications of his dietary regimen." Dr. Tenckhoff's opinions were based solely on his study of Smallwood's medical record and Smallwood's testimony before the Board.

Burgess's medical expert, Dr. William M. Bennett, also a kidney specialist, contended that Smallwood's renal failure was the natural result of a progressive disease, and did not believe that there was a "reasonable probability" that there was any correlation between Smallwood's employment and his

kidney condition. He thought that the course of Smallwood's illness was indistinguishable from that of "someone who stayed home and had the same disease and the same degree of blood pressure control." Dr. Bennett acknowledged that there was a "chance" or "possibility" that Smallwood's hypertension and kidney condition could have been aggravated by his diet and working environment, although he did not think they were probable causative factors. Like Dr. Tenckhoff, Dr. Bennett thought that Smallwood's "awareness of the condition was not appropriate to the condition."

The Board noted that in *Smallwood II*, we held that Smallwood had established a preliminary link between his employment and his kidney failure, thus raising the statutory presumption of compensability under AS 23.30.120.² The Board went on to hold that Burgess had overcome the presumption by presenting substantial evidence eliminating all reasonable possibilities that the acceleration of Smallwood's condition was work related.

The Board found that Dr. Bennett and Dr. Tenckhoff essentially agreed on the causes of Smallwood's accelerated hypertension and that Dr. Tenckhoff had simply gone one step further by stating that Smallwood's ability to control his blood pressure was limited by his working conditions. The Board then examined Smallwood's testimony and found it to be "exaggerated," sometimes "to the point of incredibility." The Board believed Smallwood had exaggerated the amount of time he spent working on the haul road, noting that his testimony conflicted with Phil Tannehill's. It found that Smallwood could see a doctor "with reasonable frequency," noting that he had been airlifted to a doctor once, and had been seen by doctors when

2. AS 23.30.120 states:

(a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter; ...

In *Delaney v. Alaska Airlines*, 693 P.2d 859, 862 (Alaska 1985) we said in part:

We have held that a disability is presumed to be compensable when a claimant has established a "preliminary link" between his disability and his employment.

he did not feel well. The Board believed that Smallwood could have taken lower salt content food with him when he travelled. It found that he was not forced to eat high salt content foods at the pipeline camps, noting that he had not presented testimony regarding the food prepared at the camps, and had not informed his employer of his needs. Neither did the Board believe that Smallwood thought he would lose his job if he informed his employer of his dietary needs.

The Board concluded that Burgess had overcome the presumption of compensability:

We find the employee's working conditions did not prevent him from keeping to a low-salt diet, taking anti-hypertensive and diuretic drugs regularly, or seeking medical assistance. We base this finding on a close, careful assessment of the employee's testimony. The only medical evidence establishing a relationship between the employee's kidney disease and his working conditions [was] based on the assumption that the employee's work limited his ability to stay on a low-salt diet and seek medical care. However, the employee's testimony shows he had this ability. He could see doctors; he bought his own food for the truck; he never told anyone he needed low-salt food. We conclude all, indeed the only, reasonable possibilities that the kidney failure due to accelerated hypertension was work related have been eliminated. We conclude the presumption was overcome. [footnote omitted]

The superior court reversed the Board's decision as clearly erroneous, holding that its decision was not supported by substantial evidence and remanded the case for a determination of the compensation to be awarded. We granted Burgess's petition for review.

3. This does not mean that we determine the substantiality of a Board decision "merely on the basis of evidence which in and of itself justified it, without taking into account contra-

[1] Where, as here, the superior court is acting as an intermediate court of appeal, we independently review the Board's findings of fact, rather than those of the superior court. In *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869 (Alaska 1985) we said the following concerning the applicable standard of review in worker's compensation cases:

[T]he court must independently examine the sufficiency of the employer's evidence when reviewing a Workers' Compensation Board determination that an employer has or has not rebutted the presumption of compensability. [Footnote omitted.]

[2] In *Veco*, we further stated that when reviewing a Worker's Compensation Board determination that an employer either has or has not successfully rebutted the presumption of compensability, the reviewing court should examine the evidence tending to rebut the presumption "by itself" and should "not weigh the evidence tending to establish causation against the rebuttal evidence in deciding whether the employer has produced substantial evidence to rebut the presumption of compensability." 693 P.2d at 869-70 (footnote omitted).³

[3-5] In the circumstance where the presumption of compensability has been successfully rebutted, the presumption is eliminated and the employee must prove all the elements of his case by a preponderance of the evidence. In reviewing the Board's decision that an employee has or has not met that burden, we apply the substantial evidence test. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). Substantial evidence is evidence that, in light of the whole record, a reasonable mind would accept as adequate to support the conclusion at issue. *Delaney v.*

dictory evidence or evidence from which conflicting inferences could be drawn." *Delaney v. Alaska Airlines*, 693 P.2d 859, 863 n. 2 (Alaska

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Alaska Airlines, 693 P.2d 859, 863 (Alaska 1985); *Smallwood II*, 623 P.2d at 315.⁴

[6, 7] Once the presumption of compensability has been raised, it is the employer's burden to overcome the presumption by coming forward with substantial evidence that the injury was not work related. *Smallwood II*, 623 P.2d 312 (Alaska 1981); *Beauchamp v. Employer's Liability Assurance Corp.*, 477 P.2d 993 (Alaska 1970). There are two methods by which the presumption can be overcome: 1) affirmative evidence that the injury was not work-related, or 2) elimination of all reasonable possibilities that the injury was work connected. *Fireman's Fund American Insurance Cos. v. Gomes*, 544 P.2d 1013, 1016 (Alaska 1976). The Board proceeded under the second method, concluding that Smallwood's testimony "eliminates all reasonable possibility that his hypertension was work related, because his testimony is not credible and does not support the assumptions underlying Dr. Tenckhoff's opinion."

The Board did not believe Smallwood's claims that his working conditions prevented him from maintaining a low-salt diet or seeking medical aid. Since Dr. Tenckhoff's opinions regarding the effect of Smallwood's employment on his kidney condition were based on his understanding that Smallwood's working conditions prevented him from seeing doctors and staying on a low salt regime, the Board regarded Dr. Tenckhoff's opinion as based on false information and therefore as unresponsive of Smallwood's claim.

Burgess points to the following as substantial evidence in support of the Board's findings:

(1) Smallwood testified that he was able to see a physician when he needed one while working outside of Fairbanks.

1985) (quoting *Universa Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 455, 95 L.Ed. 456 (1950)).

4. In *Beauchamp v. Employers Liability Assurance Corp.*, 477 P.2d 993, 997 (Alaska 1970) we said:

On review, the court may not weigh the evidence or choose between competing inferenc-

(2) While Smallwood was away from Fairbanks he could eat "awfully good" food at mess facilities.

(3) Smallwood chose the food he brought with him on his trips on the haul road.

(4) Dr. Bennett testified that Smallwood's employment was not a major factor in causing his kidney failure.

[8, 9] Smallwood's testimony that he was able to see physicians when necessary, that he ate at very good mess halls and that he brought his own food with him, furnishes a strong inference that he was not prevented from lowering his salt ingestion or from seeking medical care while working on the haul road. Thus, we conclude that there was substantial evidence to support the Board's decision under the "eliminating all possibilities that the injury was work-connected" prong of *Gomes*.⁵ Additionally, we are of the view, and so hold, that Dr. Bennett's testimony, in and of itself, constitutes substantial evidence supporting the Board's decision under the affirmative evidence prong of *Gomes*.

[10] Once it has been determined that the presumption has been successfully rebutted, the next step in the analysis is to determine whether the employee has proved all elements of his claim by a preponderance of the evidence. *Veco v. Wolfer*, 698 P.2d 865, 872 (Alaska 1985). Here again our review of the record persuades us that all elements of Smallwood's claim were not proven by a preponderance of the evidence. We therefore conclude that the Board's decision is supported by substantial evidence and that Smallwood's claim is not compensable.

The judgment of the superior court is REVERSED and the decision of the Board is AFFIRMED.

es reasonably possible from the evidence. We are limited to a determination of whether the Board's findings were supported by substantial evidence in light of the whole record. [footnotes omitted]

5. *Fireman's Fund American Insurance Cos. v. Gomes*, 544 P.2d 1013 (Alaska 1976).

1) LAST INJURIOUS EXPOSURE RULE
2) PRESUMPTION OF COMPENSABILITY (AS 23.30.120 (a)(1))

This group is very interested in 1) at least

VECO, INC. v. WOLFER
Cite as 693 P.2d 865 (Alaska 1985)

Alaska 865

from the point of view of getting benefits to the employee while two insurers are fighting over who is liable

AK is one of those states that has a presumption that the injury is work-related. I don't think this issue has been raised here.

based upon Dr. Fisher's recent medical research and significant experience as a board certified internist. Moreover, the board decided that Dr. Fisher's testimony was consistent with the fact that the cause of Crohn's disease is unknown. Thus, in light of the contrary evidence, it was not unreasonable for the board to rely on Dr. Fisher's testimony.³ Without independently weighing the evidence, we find that the record contains substantial evidence upon which a reasonable mind might rely in concluding that Delaney's Crohn's disease was not aggravated by his employment as an Alaska Airlines pilot.

AFFIRMED.

VECO, INC., Appellant,

v.

Donald WOLFER and Home Insurance Company, Appellees.

No. 7205.

Supreme Court of Alaska.

Jan. 25, 1985.

Employee filed a claim for workers' compensation benefits. The Workers' Compensation Board ordered insurer to pay benefits for period of disability occurring while employer was insured, and ordered employer to pay benefits for later period when it was self-insured. Employer appealed. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., affirmed Board's ruling, and employer sought further review. The Supreme Court, Moore, J., held that: (1) presumption

3. Even if Dr. Schaller's testimony had been consistent and unequivocal, we believe the board would have been entitled to rely on Dr. Fisher's testimony in this case. It is the province of the board to weigh witnesses' credibility and com-

peting inferences from the testimony. The board's decision will be reversed only if the evidence upon which the decision relies does not reasonably support it, in and of itself, or in light of contrary evidence in the record.

Reversed and remanded.

1. Workers' Compensation ⇨1074

The presumption of compensability and the last injurious exposure rule were applicable to determine whether insurance carrier or self-insured employer which carrier formally insured was liable for employee's back injury, where employee was originally injured while employer was insured by carrier, and employee allegedly aggravated that injury while employer was self-insured. AS 23.30.120.

2. Workers' Compensation ⇨1939.11(1)

Whether evidence presented by self-insured employer to Workers' Compensation Board to rebut presumption of compensability in dispute with employer's prior insurer as to responsibility for compensation is "substantial" is a legal question; therefore, reviewing court must independently determine sufficiency of evidence, and not apply the "reasonable basis" standard of review applicable to other agency decisions involving agency expertise or fundamental policy considerations. AS 23.30.120.

3. Workers' Compensation ⇨1968(1)

Because Supreme Court, on appeal of superior court review of Workers' Compensation Board decision regarding sufficiency of self-insured employer's evidence to overcome presumption of compensability in dis-

puting inferences from the testimony. The board's decision will be reversed only if the evidence upon which the decision relies does not reasonably support it, in and of itself, or in light of contrary evidence in the record.



697

pute with employer's insurer as to responsibility for subsequent benefits, was required to independently determine the sufficiency of that evidence, superior court's application of the wrong standard of review was harmless error. AS 23.30.120.

4. Workers' Compensation ⇄1357

The "presumption of compensability" shifts the burden of production of evidence, but not the burden of persuasion, to the employer once employee has established a preliminary link between employment and injury; therefore, in deciding whether employer has produced substantial evidence to rebut the presumption, that evidence must be examined alone, and not weighed against evidence tending to establish causation. AS 23.30.120.

See publication Words and Phrases for other judicial constructions and definitions.

5. Workers' Compensation ⇄1357, 1421

When presumption of compensability has been successfully rebutted by employer, it drops out and employee must prove all elements of his case by a preponderance of the evidence. AS 23.30.120.

6. Workers' Compensation ⇄1939.4(4)

When reviewing determination by Workers' Compensation Board as to whether employee has proven all elements of his case by a preponderance of the evidence, court must determine whether Board's findings were supported by substantial evidence in light of the whole record.

7. Workers' Compensation ⇄1969

On review of Workers' Compensation Board's determination that employer had not produced sufficient evidence to rebut presumption of compensability, Supreme Court was required to determine whether that evidence, viewed in isolation, was evidence that a reasonable mind might accept as adequate to support Board's conclusion. AS 23.30.120.

8. Workers' Compensation ⇄1357

Two factors determine whether expert medical evidence is necessary to overcome presumption of compensability: probative

value of available lay evidence and the complexity of medical facts involved. AS 23.30.120.

9. Workers' Compensation ⇄1357, 1417

Where back strain was the basis for workers' compensation claim, lay evidence, rather than expert evidence, was sufficient both for employee to establish presumption of compensability and for employer to overcome that presumption. AS 23.30.120.

10. Workers' Compensation ⇄1357

Party may overcome presumption of compensability either by presenting affirmative evidence that injury is not work-connected or by eliminating all possibilities that injury is work-connected. AS 23.30.120.

11. Workers' Compensation ⇄1074, 1362

Evidence presented by self-insured employer, in dispute with prior insurer as to which was responsible for claimed benefits, regarding back injury suffered by employee prior to similar injury for which employee claimed workers' compensation benefits, indicating that latter incident did not change type of work employee could do or aggravate original injury, and that employee believed that latter incident was merely a flare-up of earlier condition, was sufficient to rebut presumption of compensability and thus render prior insurer liable. AS 23.30.120.

Phillip J. Eide, Ely, Guess & Rudd, Anchorage, for appellant.

William M. Erwin, Anchorage, for appellee Donald Wolfer.

Marilyn J. Kamm, Lane, Powell, Barker & Hicks, Anchorage, for appellee Home Ins. Co.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

INTRODUCTION

This appeal involves a dispute between an insurance carrier and a company it for-

merly insured over which of them will pay workers' compensation benefits to Donald Wolfer. The carrier provided workers' compensation insurance to Wolfer's employer when he was originally injured in 1979. Wolfer allegedly aggravated his injury in 1980 while working for his employer, then self-insured.

FACTS

Veco, Inc. (Veco) employed Donald Wolfer as a carpenter and heavy machinery operator at Prudhoe Bay in 1979. Wolfer injured his back on December 20, 1979, when he slipped and fell on the ice outside the carpenter's shop at the ARCO base camp. After the fall, Wolfer suffered extreme pain in his lower back, was unable to work, and returned home to Kenai on a regular tour of rest on December 23, 1979. At the time of Wolfer's injury, Home Insurance Company (Home) carried Veco's workers' compensation insurance.

Wolfer's back pain subsided during his two week stay in Kenai. However, his back began to bother him again when he returned to the North Slope in January 1980, especially when he was required to do heavy lifting. As a result, he was evacuated to Anchorage on February 13, 1980, where Declan Nolan, M.D., an orthopedic surgeon, diagnosed lumbar disc syndrome, recommended bed rest, and prescribed physical therapy. Dr. Nolan treated him from February 19, 1980 until March 20, 1980.

After three physicians recommended that Wolfer be released for work in March 1980, he began work in Veco's Anchorage yard on May 23, 1980, operating heavy machinery and doing mechanical work. Wolfer testified that during the summer of 1980, he continued to suffer intermittent flare-ups of back and neck pain, especially after operating heavy equipment for long hours.

After a temporary layoff in September, Wolfer returned to work for Veco on October 23, 1980. He testified that his duties this time involved some heavy work but mostly supervision of a yard crew. On October 26, 1980, while tightening an overhead bolt on a hydraulic transporter, Wol-

fer felt pain and numbness throughout his right side, lost strength in his right arm and leg and collapsed to the ground after losing motor control. Wolfer left work immediately and filed a Report of Occupational Injury or Illness the next day, in which he stated:

Tightening a 2½ bolt on transporter and pulled something in my back. Happens of [sic] and on every so often under hard labor since December 20/79.

Veco was self-insured for its workers' compensation liability at the time of the October 1980 incident.

Wolfer returned to work again on October 28, 1980 and continued working until he was laid off on November 27, 1980. He testified that after the October 1980 incident his back pain was much worse and he did no more heavy labor.

After he was laid off in November 1980, Wolfer moved to Hawaii where he experienced back pain after swimming on December 4, 1980. He consulted James E. Baum, D.O., who referred him to George Siu, M.D., a neurologist. Wolfer mentioned only the December 1979 fall in relating his medical history to Dr. Baum and Dr. Siu. Both physicians believed that Wolfer's description of his December 1979 fall was consistent with his chronic back condition.

Wolfer filed a claim for disability benefits on December 22, 1980. The Alaska Workers' Compensation Board held a hearing on Wolfer's claim and on November 10, 1981, issued a written decision and order, directing Home to pay temporary total disability compensation to Wolfer from February 13, 1980 to March 20, 1980. The board concluded that Wolfer had established a preliminary link between his employment in December 1979 and his initial disability, and applied the presumption of compensability against Home. The board found, however, that Home had produced substantial evidence that Wolfer was not totally disabled after March 20, 1980, and rejected Wolfer's claim for benefits through May, 1980.

The board also concluded that Wolfer had established preliminary links between both the December 1979 and October 1980 injuries and his subsequent disability in November 1980. It concluded that neither Home nor Veco produced substantial evidence to rebut the presumption that each incident was a substantial factor in causing Wolfer's disability. Applying the last injurious exposure rule, the board found Veco liable for all benefits to be paid to Wolfer after November 28, 1980.

On December 8, 1981, Veco appealed the board's decision to the superior court, claiming that Home should be liable for benefits to be paid during the second period of disability. The superior court affirmed the board's ruling. We now reverse.

DISCUSSION

I. *The Presumption of Compensability*

[1] Veco argues that the presumption of compensability should not apply to a dispute between an insurance carrier and its former insured. In *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979), we applied the presumption of compensability and the last injurious exposure rule to a dispute between two employers.¹ We recognized that applying both the presumption and the last injurious exposure rule to disputes involving successive employers might be inequitable to subsequent employers in some cases. 604 P.2d at 598. Nevertheless, we believed that the advantages of applying both the presumption and the rule outweighed the disadvantages. We also recognized the

1. The presumption of compensability is found in AS 23.30.120:

In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter; ...

The last injurious exposure rule applies when employment with successive employers has contributed to an employee's disability. It imposes full liability on the employer at the time of the most recent injury that bears a causal relation to the disability. 4 Larson, *Workmen's Compensation Law* § 95.12 (1984).

mitigating effect of AS 23.30.205, the second injury fund.²

In *Providence Washington Insurance Co. v. Bonner*, 680 P.2d 96 (Alaska 1984), we extended the *Saling* rationale and applied the presumption of compensability to a dispute between successive insurance companies. Justice Rabinowitz noted in concurrence, "The rule adopted today will simplify proceedings before the board and thus reduce the hazards inter-insurer disputes pose for the injured worker." *Bonner*, 680 P.2d at 100 (Rabinowitz, J. concurring). Veco's attempt to distinguish this case from *Bonner* is unpersuasive.

We are not presented with the case in which application of both the presumption and the rule would leave an injured employee uncompensated. As a self-insured employer in October 1980, Veco was required to prove its financial ability to pay compensation directly. AS 23.30.075(a). Nor is this a case in which the unwary insured was surprised by an ambiguous or opaque policy exclusion. In fact, we see no reason why Veco should not be treated as a subsequent insurer in this case.

Moreover, applying the presumption and the rule to a dispute between a carrier and its former insured has two advantages. First, they establish a clear standard for determining liability for a formerly disabled employee's subsequent disability. This helps insurance carriers and employers alike to estimate the risks assumed by each. As Justice Rabinowitz noted, it also reduces the hazards posed by inter-insurer disputes to injured workers. Second, this

2. The second injury fund was established by AS 23.30.205 to encourage employers to hire handicapped or previously disabled employees. The fund reimburses employers for all but the first two years of benefits paid to a qualified previously impaired employee who suffers a subsequent disability. A qualified employee is one who has a "permanent physical impairment" including those listed in paragraph (d)(1) or (d)(2) of the statute. All the statute requires is that the employer provide a written record establishing (1) his knowledge of the impairment before the second injury occurred; and (2) that the employee was hired or retained after the employer acquired that knowledge.

avoids treating employees of a self-insured employer differently from similarly situated employees of an employer with outside insurance. If the presumption and the rule did not apply in these cases, disabled employees of a self-insured employer would likely receive lower benefits based on wages at the time of the initial disability, rather than wages at the time of the last injury. Thus, since salary usually increases over time, applying the presumption and the rule preserves equity among similarly situated employees and furthers the humanitarian goals of the Worker's Compensation Act.³

II. Standard of Review

Veco's second claim is that the superior court applied the wrong standard of review in affirming the board's finding that Veco did not produce substantial evidence to rebut the presumption of compensability. Specifically, Veco objects to the following language from the decision on appeal:

The Board's decision is reasonable, is supported by substantial evidence in the record, and is not an abuse of discretion. *Kodiak Western Alaska v. Harris Flying Service*, 592 P.2d 1200 (Alaska 1979).

[2, 3] If the superior court applied the *Kodiak Western Alaska* standard of review in the present case, then there was error. In *Kodiak*, which reviewed a transportation commission decision, we approved use of the "reasonable basis" standard of review.⁴ We stated:

We use the "reasonable basis" standard of review for questions involving agency expertise or fundamental policy considerations. Under this standard deference will be given to the agency's determination so long as it is reasonable, supported

3. Compensation benefits in Alaska are presently determined by the disabled employee's spendable weekly wage. See AS 23.30.220.

4. *Kodiak Western Alaska* involved an appeal from the transportation commission's decision that an air carrier had violated the Air Commerce Act by charging passenger fares for "reg-

by the evidence in the record as a whole and there is no abuse of discretion.

Kodiak Western Alaska, 592 P.2d 1200 (Alaska 1979).

Here, the board's decision involved agency expertise and is ostensibly within the rule of *Kodiak Western Alaska*. However, in workers' compensation cases, we have held that:

The question of whether the quantum of evidence is substantial is a legal question. Therefore, we must independently review the evidence to determine whether the Board erred in concluding that there was no substantial evidence to overcome the presumption of compensability.

Fireman's Fund American Insurance Cos. v. Gomes, 544 P.2d 1013, 1015 (Alaska 1976). (Footnotes omitted). See also *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support [the board's] conclusion.") Thus the court must independently examine the sufficiency of the employer's evidence when reviewing a Workers' Compensation Board determination that an employer has or has not rebutted the presumption of compensability.⁵

[4] The presumption of compensability shifts the burden of production to the employer once the employee has established a preliminary link. Since the presumption shifts only the burden of production and not the burden of persuasion, the evidence tending to rebut the presumption should be examined by itself. The court does not weigh the evidence tending to establish causation against the rebuttal evidence in deciding whether the employer has produc-

ular" rather than "casual" air service between Dillingham and Togiak. The superior court reversed on the grounds that the evidence did not support the board's finding. We affirmed.

5. Since we must independently examine Veco's evidence, the trial court's application of the wrong standard of review is harmless error.

ed substantial evidence to rebut the presumption of compensability.⁶

[5,6] When the presumption of compensability has been successfully rebutted, it drops out and the employee must prove all the elements of his case by a preponderance of the evidence. *Miller v. ITT Arctic Services*, 577 P.2d at 1046. Upon reviewing a determination that the employee has or has not met that burden, the court must apply the "substantial evidence" test set out in *Beauchamp v. Employers Liability Assurance Corp.*, 477 P.2d 993, 997 (Alaska 1970).⁷

On review, the court may not weigh the evidence or choose between competing inferences reasonably possible from the evidence. We are limited to a determination of whether the Board's findings were supported by substantial evidence in light of the whole record.

[7] In this case, we must decide whether Veco has rebutted the presumption of compensability. Thus we must determine whether Veco's evidence, viewed in isolation, is evidence that a reasonable mind might accept as adequate to support the board's conclusion.

III. The Evidence

Veco contends that the board required it to produce expert medical evidence in order to rebut the presumption in this case. In claims based upon highly technical medical considerations, medical evidence is often necessary to make the connection between a disabled worker's employment and his disability. *Burgess Construction Co. v. Smallwood (Smallwood II)*, 623 P.2d 312, 316 (Alaska 1981). However, we have never stated that expert medical evidence is necessary to establish or rebut that connection in every case. For example, in *Beauchamp v. Employers Liability Insurance Corp.*, 477 P.2d 993 (Alaska 1970), we held

6. The commentary to Rule 301(a) summarizes the view of presumptions adopted in Alaska:

Other authorities, following Thayer's "bursting bubble" theory, approved by Wigmore, hold that the presumption vanishes upon the introduction of evidence that would support a finding of the non-existence of the presumed fact.

that in the absence of conclusive expert medical testimony, lay testimony was substantial evidence establishing a causal link between Beauchamp's disability and his employment.

In *Employer's Commercial Union Co. v. Libco*, 536 P.2d 129 (Alaska 1975), we reaffirmed *Beauchamp* and approved the rationale expounded by Professor Larson in his well-known treatise:

To appraise the true degree of indisposability which should be accorded medical testimony, it is first necessary to dispel the misconception that valid awards can stand only if accompanied by a definite medical diagnosis. Thus, in many instances it may be impossible to form a judgment on the relation of the employment to the injury, or the relation of the injury to the disability, without analyzing in medical terms what the injury or disease is. But this is not invariably so. In appropriate circumstances, awards may be made when medical evidence on these matters is inconclusive, indecisive, fragmentary, inconsistent, or even non-existent.

... [T]wo underlying reasons may be discerned: The first is that lay testimony, including that of claimant himself, is of probative value in establishing such simple matters as the existence and location of pain, the sequence of events leading to the compensable condition, and the actual ability or inability of claimant to perform his work; the second is that industrial commissions generally become expert in analyzing certain uncomplicated kinds of medical facts, particularly those bearing on industrial causation, malingering, and the like.

3 Larson, *Workmen's Compensation Law*, § 79.51 at 180-81, § 79.53 at 196 (1983) (footnotes omitted).

The approach of this Rule approximates more closely the views of Thayer and Wigmore than those of McCormick and Morgan.

The shifting-the-burden of persuasion approach ... is rejected for several reasons....

7. See also *Delaney v. Alaska Airlines*, 693 P.2d 859 (1985).

[8] We held in *Libor* that the board need not always hear expert medical testimony to decide whether or not employment was a substantial factor in causing an injury. Two factors determine whether expert medical evidence is necessary in a given case: the probative value of the available lay evidence and the complexity of the medical facts involved. If lay evidence is sufficiently probative to establish causation in some cases, we see no reason why it should not also be sufficient to establish a lack of causation in appropriate circumstances.

In the instant case, the board relied solely on Wolfer's lay testimony to establish the preliminary link between his October 1980 injury and his employment by Veco in 1980. Wolfer did not produce any expert medical evidence to prove the causal connection between his employment and his October 1980 injury. The board specifically relied on Wolfer's testimony that he collapsed while tightening an overhead bolt with a wrench, and that he was subsequently unable to perform all of his job duties.

[9] Back strain is a relatively uncomplicated and common injury and the factual situation in this case is unusually probative. Thus, the board was entitled to rely on Wolfer's testimony and evidence of the circumstances attending his alleged injury in October 1980 to establish causation. We believe that the board could also have relied on lay evidence to establish a *lack* of causation. We do not believe that the board would have been significantly better informed about the cause of Wolfer's injury had it required all parties to produce expert testimony.

Despite Veco's contention, however, the record does not clearly establish that the board relied on Veco's failure to produce expert medical testimony to conclude that Veco did not rebut the presumption of com-

pensability. Whether or not the board so relied, we must independently review Veco's evidence to determine its sufficiency to overcome the presumption.⁸

Veco argues that Wolfer's testimony and other circumstantial evidence upon which the board "should have relied" is substantial evidence that Wolfer's employment with Veco in October 1980 was not a substantial factor in bringing about his subsequent disability. Specifically, Veco relies on the following evidence:

(1) Wolfer suffered a disabling back injury in December 1979. Wolfer testified, both in his deposition and at his hearing, that since 1979, his back bothered him recurrently whenever he engaged in manual labor.

(2) Wolfer testified that on two prior occasions (in March and April of 1980) he passed out while bending over. Wolfer related these incidents to his December 1979 injury.

(3) It is undisputed that when Wolfer's back gave out in October 1980, he was not engaged in strenuous activity and did not slip or fall.

(4) Wolfer wrote in his October 1980 Report of Occupational Injury or Illness that he had "pulled something in his back" which "happens of [sic] and on every so often under hard labor since 1979."

(5) Wolfer testified that when he returned to Veco on October 23, 1980, he worked primarily as a supervisor. Wolfer continued working after October 26, 1980, until he was laid off on November 27, 1980 because of a reduction in the work force.

(6) Dr. Baum, Wolfer's treating physician after November 1980, testified that Wolfer never mentioned the October 1980 incident when he described the medical history of his injury in December 1980. Dr. Baum found Wolfer's complaints to be consistent with his description of the December 1979 injury. Dr. Siu also referred only to the December 1979 injury in his report.

8. It is a legal question whether Veco produced substantial evidence to rebut the presumption. Therefore, even if the board erroneously concluded that Veco was required to produce ex-

pert medical testimony, we must determine whether the board's decision should be affirmed on the ground that Veco's lay evidence was insufficient to overcome the presumption.

[10] A par. may overcome the presumption of compensability either by presenting affirmative evidence that the injury is not work-connected or by eliminating all possibilities that the injury was work-connected. *Fireman's Fund American Insurance Cos. v. Gomes*, 544 P.2d 1013. Home contends that Veco was required to produce affirmative evidence to rebut the presumption of compensability and that Veco failed to produce such affirmative evidence. We disagree. There are two ways to overcome the presumption of compensability. One is by "negative evidence" eliminating all possibilities that an injury was work-connected. The other is by affirmative evidence. We believe that Veco's evidence is affirmative. Veco offered circumstantial evidence suggesting that Wolfer's December 1979 injury was the cause of his October 1980 disability. This evidence, if relied upon, tends to indicate that the October 1980 incident did not change the type of work Wolfer could do, or aggravate his original injury.⁹

[11] The evidence relied upon by Veco creates a reasonable inference that prior to 1981 Wolfer believed that the October 1980 incident was merely a flare-up of his old condition. Veco's evidence is not the same as the expert opinions found sufficient to rebut the presumption in *Miller v. ITT Arctic Services*, 577 P.2d 1044 or *Delaney v. Alaska Airlines*, 693 P.2d 859 (1985). However, it does indicate that Wolfer believed that the October 26, 1980 injury was merely a flare-up of his chronic back ailment. A reasonable mind might rely on that evidence to conclude that Wolfer's employment by Veco in October 1980 did not aggravate Wolfer's injury so as to cause disability. We conclude that Veco's evidence, standing alone, was sufficient to rebut the presumption of compensability.

Since the board relied on the presumption to find Veco liable for Wolfer's disabili-

⁹ In *Gomes*, we set out several examples of affirmative evidence. All of them involved an alternative explanation offered for the injury. (See 544 P.2d at 1016.) The employer in *Gomes* could offer no explanation for Gomes' death. Having offered no affirmative evidence, the em-

ty after November 1980, and since we have found that the evidence presented was sufficient to rebut the presumption of compensability, this case must be remanded to the board. On remand the board should weigh all of the evidence presented in order to make the ultimate factual determination whether Wolfer's employment by Veco in October of 1980 was a substantial factor in causing the disability from which he now suffers. If the board finds that this proposition is more likely so than not so, then Veco is liable. If the board finds that the evidence on this point is equally balanced or that it establishes that Wolfer's employment by Veco in October 1980 more likely than not was not a substantial factor in causing his current disability, then Home must be found liable.

REVERSED and REMANDED.



PROVIDENCE WASHINGTON INSURANCE COMPANY and Hamilton Painting, Appellants,

v.

Virgil F. GRANT and Alaska Workers' Compensation Board, Appellees.

Virgil F. GRANT, Cross-Appellant,

v.

PROVIDENCE WASHINGTON INSURANCE COMPANY and Hamilton Painting, Cross-Appellees.

Nos. 7903, S-7.

Supreme Court of Alaska.

Jan. 25, 1985.

Appeal and cross appeal were taken from an order of the Superior Court, Third

ployer was obliged to eliminate every reasonable possibility that the injury was work connected. In the instant case, however, Veco's evidence points to the December 1979 event as an alternative explanation for Wolfer's October 1980 disability. Thus it is affirmative evidence.

ATTORNEY'S FEES
AS 23.30.145

490 Alaska

720 PACIFIC REPORTER, 2d SERIES

This group is very inter-
ested in atty's fees
both for Employer
and Employee // there are several
cases involving
atty's fees

Edwin BIGNELL, Appellant,

v.

WISE MECHANICAL CONTRACTORS
& Industrial Indemnity Company of
Alaska, Inc., Appellees.

No. S-742.

Supreme Court of Alaska.

May 30, 1986.

Worker's compensation claimant moved for reconsideration of attorney's fee award. The Workers' Compensation Board denied worker's motion. The Fairbanks Superior Court, Fourth Judicial District, Gerald J. Van Hoomissen, J., affirmed and worker appealed. The Supreme Court, Rabinowitz, C.J., held that: (1) worker was not precluded from raising issue of whether attorney fee award should be compounded, and (2) claimant's attorney should be rewarded in proportion to what entitlements were controverted at each stage of proceeding.

Affirmed in part, modified in part, and remanded.

1. Workers' Compensation ⇨1789

Principles of res judicata apply to judgment of Alaska Workers' Compensation Board.

2. Judgment ⇨715(1)

Under doctrine of "res judicata," plaintiff cannot maintain action on original claim or any part thereof when valid and final personal judgment on that claim has been rendered in his favor.

See publication Words and Phrases for other judicial constructions and definitions.

3. Workers' Compensation ⇨1846

Worker's compensation claimant was not precluded from raising claim for additional attorney's fees by failure to appeal Workers' Compensation Board awards of statutory minimum benefits. AS 23.30-145(a, b).

4. Judgment ⇨720, 724

To warrant collateral estoppel, issue must have been "actually litigated," i.e., properly raised by pleadings or otherwise, submitted for determination, and determined in first action by valid and final judgment to which determination was essential.

See publication Words and Phrases for other judicial constructions and definitions.

5. Judgment ⇨956(1, 5)

Burden of pleading and proving identity of issues rests on party asserting collateral estoppel; to sustain this burden, party must introduce record that is sufficient to reveal controlling facts and to pinpoint exact issues litigated in prior action.

6. Workers' Compensation ⇨1846

Worker's compensation claimant was not precluded from raising issue of whether previous board awards of statutory minimum attorney's fees should be compounded, which was not identical to issue of entitlement that had been actually litigated in earlier proceeding. AS 23.30.145(a).

7. Workers' Compensation ⇨1981

Worker's compensation claimant's attorney whose efforts resulted in payment of controverted claim was not required to perform additional work after first hearing on claim in order for fee to be due. AS 23.30.145(a).

8. Workers' Compensation ⇨1984

Temporary suspension of workers' compensation payments also results in temporary suspension of attorney's fees, applied on compensation paid, which should resume when compensation does.

9. Workers' Compensation ⇨1981

Where employer controverted worker's compensation award only as to benefits due after certain date, award of attorney's fees should have been computed only on those benefits. AS 23.30.145(a).

10. Workers' Compensation ⇨1981

Where dispute between worker's compensation claimant and employer involves

see p. 495 for an important one and P. 497 n. 9 for the fundamental atty's fees cases.

controversion alone, claimant is not entitled to attorney fee award based on employer's failure to make payment of compensation. AS 23.30.145(b).

James A. Parrish and Lance C. Parrish, Parrish Law Office, Fairbanks, for appellant.

Liam J. Moran, Hagans, Brown & Gibbs, Anchorage, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

I. History.

This case involves the question of whether an employee can recover multiple attorney's fees when his employer controverts his workers' compensation claim more than once. Edwin Bignell was injured in the course and scope of employment while employed by Wise Mechanical Contractors.

1. Wise stopped paying temporary benefits when Bignell's medical condition became stable and stationary.

2. Section 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 per cent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 per cent 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.

Wise was insured for workers' compensation claims by Industrial Indemnity Company of Alaska, Inc. (Both will be collectively referred to as "Wise.") Bignell injured his back on March 9, 1978 when he slipped while carrying some lumber. Wise paid temporary total disability benefits to Bignell until July 20, 1979, when it paid him a \$6,000 permanent partial disability benefit.¹

Bignell then filed an application for adjustment of claim, seeking continued payment of temporary total disability benefits. On March 6, 1980, the Alaska Workers' Compensation Board (the board) ruled that because Bignell was a prospective rehabilitation candidate, he remained temporarily disabled and should continue to receive temporary total disability benefits while being retrained. The board also ordered Wise to pay Bignell an attorney's fee pursuant to AS 23.30.145(a).² Section (a) sets a minimum attorney fee equal to 25% of the first \$1,000 of compensation and 10% of any compensation greater than \$1,000.³

Wise appealed the board's order to the superior court.⁴ The superior court re-

(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 a reasonable attorney fee. 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.

3. The attorney's fees award was to be calculated on benefits due in excess of the uncontroverted \$6,000 permanent partial disability payment.
4. Following the filing of the Notice of Appeal, Industrial Indemnity obtained a stay of the board's award from a superior court judge and therefore did not initially pay Bignell workers' compensation benefits during the pendency of the appeal. Upon Bignell's motion for change

versed the board, holding that temporary total disability ended once Bignell's medical condition became stable. In turn this court reversed the superior court in *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163 (Alaska 1982), holding that Bignell was entitled to temporary disability benefits while he was participating in vocational rehabilitation. Bignell then made a motion to this court for attorney's fees on appeal. This motion was not immediately decided.

During the pendency of the appeal in the supreme court, Bignell participated in vocational rehabilitation training at the Colorado School of Trades. In February 1981, Bignell discontinued this training. He petitioned the board for an award of permanent total disability benefits, and the board denied the request and suspended his temporary disability benefits as well on May 14, 1982.

On June 16, 1982, Bignell contacted the Alaska Division of Vocational Rehabilitation (DVR) and expressed an interest in resuming his vocational rehabilitation.

On November 2, 1982, the board held a hearing to settle the parties' disputes regarding Bignell's temporary disability benefits during vocational rehabilitation, costs, and attorney's fees. The major issue was the date on which Bignell again became entitled to temporary total disability benefits. Wise contended that Bignell was not entitled to the benefits until he actually entered a rehabilitation program, which at that point he had not yet done.

In its March 18, 1983 decision, the board found that Bignell was entitled to temporary total disability benefits from June 16, 1982, when he contacted DVR to resume training, through the continuance of his disability or until there was substantial evidence that he was not cooperating with efforts of rehabilitation. In addition to reinstating Bignell's temporary disability benefits, the board ordered the payment of

of venue the case was assigned to another superior court judge who subsequently vacated the stay. Wise then petitioned to the supreme court and the issue was resolved in Bignell's favor in *Wise Mechanical Contractors v. Bignell*, 626 P.2d 1085 (Alaska 1981). Thus, following the peti-

"statutory minimum attorney's fees and legal costs pursuant to AS 23.30.145(a)." Bignell did not appeal this decision.

On April 26, 1983, this court issued an order addressing Bignell's previous motion for attorney's fees for work performed at the appellate level. We stated that Bignell could apply to the superior court for an award of attorney's fees pursuant to AS 23.30.145(c) after attorney's fees had been set by the board under AS 23.30.145(a) and (b).

In response to this order, Bignell filed an application for adjustment of claim, asking the board to "determine attorney's fees pursuant to AS 23.30.145(a) and (b) as set forth in the Supreme Court Order dated April 26, 1983." The board held a hearing on this application on July 12, 1983. At this hearing Bignell argued that the board's two previous awards of statutory minimum attorney's fees should be compounded. Bignell maintained that he should receive 25% of the first \$1,000 and 10% thereafter of all the benefits he had received since Wise first controverted his claim, and in addition, 25% of the first \$1,000 and 10% thereafter of the benefits Bignell had received since Wise controverted his claim a second time. In other words, Bignell wants a doubled attorney's fees award for the benefits due after June 16, 1982.

The board issued an order on September 28, 1983, in which it stated:

1. Employee is entitled to an award of statutory minimum attorney's fees of 25 per cent of the first \$1,000 and 10 per cent of all amounts in excess of \$1,000 paid as compensation for the periods from July 20, 1979, through May 7, 1981. He is also entitled to statutory minimum fees of 25 per cent of the first \$1,000 and 10 per cent thereafter of all compensa-

tion for review, some temporary total disability benefits were paid while the question of Bignell's entitlement to temporary total disability benefits was being examined on appeal. However, the attorney's fees ordered were not paid.

tion paid from June 16, 1982, through retraining.

Bignell appealed this decision to the superior court, and Wise appealed another aspect of the case. The parties agreed to stay these appeals pending determination by the board of Bignell's motion for reconsideration of reasonable attorney's fees. At the hearing on this motion, Bignell again argued that he was entitled to double the statutory minimum fee since Wise had twice controverted his claims for compensation. Alternatively, Bignell argued that he was entitled to a reasonable amount under § 145(b) for the work he performed re-establishing his right to compensation when Wise controverted it the second time.

Wise objected to Bignell's arguments on the ground of res judicata; it argued that the issue of Bignell's entitlement to attorney's fees was foreclosed as a result of his failure to appeal the board's March 18, 1983 decision.

The board denied Bignell's motion for reconsideration of its September 28, 1983 order. It held that the single statutory minimum fee award constituted a reasonable fee and that Bignell was not entitled to an award in excess of that sum. It found that Bignell had received \$8,000 in statutory minimum attorney's fees which, based on 67 hours of work, constituted a compensation of \$120 per hour.⁵

In its March 5, 1984 decision the board stated in part:

If we were to apply employee's mathematical formula, the award of attorney's fees would greatly exceed an amount we consider to be fair and reasonable given the facts of this case. We believe that the purpose of AS 23.30.145 is to provide a fair and reasonable award of attorney's fees. To achieve this goal, the Board will apply the provisions set forth in AS 23.30.145 to determine whether a fee in

excess of the statutory minimum should be awarded. We do not believe that this goal is achieved by utilizing the formula suggested by employee in this case.

In view of its resolution of the attorney fee issue, the board held the defense of res judicata to be moot.

On appeal the superior court ruled that Bignell had failed to establish that the board abused its discretion in the March 5, 1984 decision awarding the statutory minimum attorney fee. This appeal followed.

II. *Res Judicata.*

Wise contends that Bignell cannot argue the issue of attorney's fees because of the doctrine of res judicata.

On March 13, 1983, the Workers' Compensation Board issued an order that, among other things, awarded Bignell statutory minimum attorney's fees. This was the second time that the board had awarded Bignell § 145(a) attorney's fees, and the order did not indicate how this award related to the previous award. Bignell did not appeal this order.

On April 26, 1983, this court issued an order addressing a motion Bignell had previously made for attorney's fees for work performed at the appellate level. We stated that Bignell could apply to the superior court for an award of appellate attorney's fees after attorney's fees had been set by the board under AS 23.30.145(a) and (b).⁶

In response to this order, Bignell filed an application for adjustment of claim with the board. At the July 12, 1983 hearing Bignell argued that the two statutory minimum attorney's fees awards should be compounded. Wise did not raise the issue of res judicata at this hearing, but argued that there was no statutory support for doubling statutory minimum attorney's fees awards. On the motion for reconsid-

appellate attorney's fees downward when application of the statutory minimum formula produces a disproportionately large award for the board proceeding. See *Wien Air Alaska v. Arant*, 592 P.2d 352; 366 (Alaska 1979).

5. Bignell's attorney had filed an affidavit establishing that he had expended 67 hours in pursuing his client's claim before the board.
6. The board's exact fee award is relevant to the superior court's determination of appellate attorney's fees. The superior court will adjust

eration, Bignell again argued that he was entitled to double statutory minimum fees. At this hearing Wise objected on the grounds of *res judicata*. The board denied reconsideration and the superior court ruled that the board did not abuse its discretion. The *res judicata* issue was never actually decided below.

Wise maintains that Bignell was precluded from arguing to the board that he was entitled to attorney's fees exceeding what the board had previously awarded in its orders of March 6, 1980 and March 18, 1983 because he did not appeal those awards. Bignell argues that the language of both fee awards indicates that a second, new award was granted at the March 18, 1983 hearing. He asserts that the March 18, 1983 order cannot be fairly read so as to have put him on notice to appeal; the parties, in good faith, simply interpreted the orders differently.

[1] The first issue we must decide is whether the principles of *res judicata* apply to a judgment of the Alaska Workers' Compensation Board. Wise argues that *res judicata* applies to workers' compensation proceedings, and Bignell does not dispute this. We agree with this view. The same considerations of efficiency and fairness that limit civil plaintiffs to "one bite of the apple" apply equally to workers' compensation proceedings.⁷

[2,3] The second issue is whether Wise's application of *res judicata* is appropriate in this case. When a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof. Restatement (Second) of Judgments § 18(1) (1982). Wise's *res judicata* objection is misplaced in this case. Bignell made a claim for attorney's fees in the proceeding that resulted in the order of March 18, 1983. The order granted him the statutory minimum fees based on a formula incorporating future disability ben-

efits. The board held its July 12, 1983 hearing in order to determine the exact amount of attorney's fees due Bignell under the March 18, 1983 order, in response to our order requesting such a determination. Bignell did not make a claim for attorney's fees in the second action; he was not disputing the award he received in the first action. Rather, he was asking that the amount previously awarded be determined. During the latter proceeding, it became apparent that the parties had different interpretations of the two statutory minimum attorney's fees awards. Therefore the proper focus is on issue preclusion rather than claim preclusion. Wise's only feasible claim is that Bignell was precluded from raising the issue of how to compute the second award because that issue had been determined in a prior proceeding.

[4] To warrant collateral estoppel, an issue must have been actually litigated and determined in the first action by a valid and final judgment, and the determination must have been essential to the judgment. Restatement (Second) of Judgments § 27 (1982). When an issue is properly raised by the pleadings or otherwise, is submitted for determination, and is determined, the issue is actually litigated within the meaning of this section. *Id.*, comment d.

[5] The record contains no indication that the issue of how to compute the second attorney fee award was actually litigated in the November 2, 1982 proceeding, which produced the March 18, 1983 order. The burden of pleading and proving the identity of issues rests on the party asserting the estoppel. *Hernandez v. City of Los Angeles*, 624 F.2d 935, 937 (9th Cir. 1980). To sustain this burden a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action. *Id.* Wise has not met its burden of proving that the

7. See 3 A. Larson, *The Law of Workmen's Compensation* § 79.72(a), at 15-426.226 (1983) (As to *res judicata* in compensation related matters, the beginning point is recognition of the propo-

sition that *res judicata* does apply to the decisions of compensation boards and commissions no less than to the decisions of a court.)

issue was actually litigated and decided in the first action.

The record indicates that at the November 2, 1982 hearing, the parties addressed the issues of temporary total disability, vocational rehabilitation, transportation costs, penalties, costs, and attorney's fees. The resulting order of March 18, 1983 addressed the issues of Bignell's entitlement to reinstated temporary total disability benefits, transportation costs, and attorney's fees. With regard to attorney's fees, the order states only, "We find the employee obtained the services of an attorney who assisted him in the successful prosecution of his claim. We conclude the employee is entitled to the statutory minimum attorney fee and his legal costs under AS 23.30-145(a)." The board did not decide, and apparently did not consider, whether this award was to be added to the March 6, 1980 award to constitute doubled § 145(a) attorney's fees.

[6] On this record we cannot say that the workers' compensation board held in its March 18, 1983 order that the award of attorney's fees was not to be compounded with the previous award. Therefore, Wise has not established that this issue was actually litigated in that proceeding, and Bignell was not precluded from raising it in the July 12, 1983 hearing.

III. *Double Minimum Statutory Attorney's Fees.*

Bignell argues that Wise controverted his claim on two occasions; he challenged Wise both times; and the board awarded him § 145(a) attorney's fees both times. The first award is computed as a percentage of his compensation beginning when Wise first controverted it and continuing indefinitely as to all benefits thereafter. The second award is computed as a percentage of his compensation beginning when Wise controverted it a second time and continuing as to all benefits thereafter. Therefore, Bignell contends, when he was awarded attorney's fees the second time, he was still entitled to attorney's fees for his first compensation award. During this

"overlap" period, Bignell argues, the § 145(a) percentage should be doubled.

In its March 6, 1980 decision the board found a controversion and awarded Bignell § 145(a) attorney's fees for the benefits then due and for all future benefits. Bignell contends that this is the correct award under State, Department of Highways v. Brown, 600 P.2d 9 (Alaska 1979), since Wise controverted Bignell's entitlement to receive all future benefits. Bignell asserts that by virtue of the second statutory fee award, he is entitled to a double award for the compensation paid after June 16, 1982, the date Wise should have resumed Bignell's temporary disability benefits. He points out that if Wise had not controverted his compensation a second time, the first minimum fee would have applied to the total payment. Wise, however, again controverted Bignell's entitlement when he resumed vocational rehabilitation in 1982, and Bignell had to counter Wise's new line of defense. Unless the awards were then doubled Bignell's attorney would not be compensated for any work he did the second time Wise controverted Bignell's claim.

Wise contends that Bignell's original entitlement to statutory minimum attorney's fees ended on May 7, 1981 when he discontinued vocational rehabilitation. His second statutory minimum attorney's fees award alone applied to the temporary disability benefits that commenced on June 16, 1982 and continued through Bignell's completion of his second vocational rehabilitation program. Thus, Wise argues that at no time should the attorney's fees be compounded.

The board did not explain its reasons for refusing to grant Bignell double statutory minimum attorney's fees awards other than to discuss the reasonableness of the award. It appears that the board intended the attorney's fees awards to be distinct and to apply separately to the two discrete compensation awards. In its March 6, 1980 order, the board stated that, "Future temporary total disability benefits are to be paid so long as the applicant continues to do his utmost to minimize his damages by

proper medical treatment and completion of a vocation rehabilitation evaluation." The board also awarded § 145(a) attorney's fees "on all temporary benefits due in excess of the \$6,000.00 advance and continuing on future benefits."

Bignell discontinued vocational rehabilitation and the board suspended his entitlement to any benefits on March 14, 1982. When he later began a second vocational rehabilitation program, Wise again controverted his entitlement. Bignell successfully challenged Wise and was again awarded statutory minimum attorney's fees. It is unlikely that at this point the board considered the first § 145(a) award still operative.

The issue of whether Bignell's first attorney's fees award should have continued to accrue on his second compensation award turns upon the application of *Brown* to the facts of this case.

In *Brown*, Brown claimed that he was injured in the course and scope of employment with the State Department of Highways in December 1974. The state's workers' compensation carrier originally accepted the claim, but later stopped making payments in January 1975 when his physician, Dr. Ha, found that Brown's condition was due to a giant cell tumor that was neither caused nor aggravated by the employment injury. Brown disputed the carrier's action and filed an application for adjustment of his claim. Two physicians who examined Brown later found the condition to be work related, and Dr. Ha modified his previous opinion. The state then accepted Brown's claim without a hearing and paid compensation for the period of January 1975 to January 1976 in the amount of \$10,429. In addition, the state paid attorney's fees pursuant to § 145(a) on the \$10,429.

Brown eventually collected \$30,000 in workers' compensation benefits, but the carrier refused to pay § 145(a) attorney's fees on the remaining \$19,571 that Brown received. Brown applied to the board for attorney's fees and his claim was rejected. The superior court reversed the board and

awarded Brown § 145(a) attorney's fees on the remaining \$19,571.

In affirming the superior court's award we stated:

What [the carrier] had controverted or denied in January, 1975, was its obligation to pay any compensation at all for temporary total disability. The efforts of Brown's attorney did not result in payment by the carrier of only \$10,429. Those efforts resulted in the payment of compensation in the amount of \$30,000. 600 P.2d at 11.

[7, 8] Bignell maintains that under the holding in *Brown*, his attorney did not have to perform any work after the first hearing on his claim in order for the fee to be due. If the carrier had paid as required, the minimum fee would have applied to all of Wise's payments. Furthermore, Bignell contends, it is irrelevant that there was a period when he was not collecting any workers' compensation benefits. When a temporary suspension of compensation occurs, attorney's fees are also temporarily suspended because fees apply only on compensation paid. Once compensation resumes, however, attorney's fees should resume as well.

Bignell's suggested application is consistent with the *Brown* case. Wise, in its original controversion, denied responsibility to ever again pay Bignell temporary disability benefits, and his attorney's efforts established his entitlement to receive temporary disability payments when in vocational rehabilitation. Had Wise paid Bignell's benefits without dispute when Bignell resumed vocational rehabilitation, arguably the attorney's fees award should have been resumed, because Bignell's attorney had already established Bignell's entitlement to temporary disability benefits while engaging in vocational rehabilitation.

Bignell, however, does not address the question of precisely when his entitlement to benefits under the first award resumed. In response to Wise's first challenge, Bignell's attorney established Bignell's entitlement to receive temporary benefits while participating in a vocational rehabilitation

program. He did not establish Bignell's entitlement to receive benefits after contacting the DVR and before actually beginning the program. This court did not decide this question in *Bignell v. Wise Mechanical*, 651 P.2d 1163. When Bignell resumed vocational rehabilitation in 1982, Wise controverted his entitlement to receive temporary benefits before entering the program. Wise conceded that Bignell was entitled to temporary compensation benefits after he entered a program. The dispute was over an entitlement that Bignell's attorney had not previously established.

Thus, Bignell's attorney initially established Bignell's entitlement to receive benefits whenever he was engaged in vocational rehabilitation. Under *Brown*, his efforts should be rewarded with § 145(a) attorney's fees computed on all benefits paid as a result of successfully challenging the controversion. The attorney's initial efforts did not necessarily entitle Bignell to receive temporary compensation for the period between the time he contacted the DVR and the day he actually entered the program. Bignell's attorney established this entitlement only after Wise controverted it in 1982.

[9,10] The amount controverted the second time consisted of the benefits due from June 16, 1982, when Bignell contacted the DVR until he entered the program.⁸ The second § 145(a) attorney's fees award therefore should be computed only on those benefits.

The result of this analysis is that Bignell's attorney is not entitled to double

8. The record does not specify the date when he resumed retraining.
9. We express no opinion as to whether § 145(a) fees can ever be doubled. That issue will be addressed in the event we are presented with the circumstance where an employer has twice controverted an employee's entitlement to the same benefits.

Bignell also argues that, at a minimum, additional fees are mandated by § 145(b). Notwithstanding this position, Bignell maintains that the second dispute was a controversion in fact, rendering § 145(a) fees appropriate. Wise does not disagree. The § 145(a) formula applies to

benefits at any time. The first § 145(a) award entitles him to attorney's fees computed from Bignell's benefits received from July 20, 1979 through February 27, 1981, when Bignell discontinued rehabilitation, and from his benefits received when he entered a rehabilitation program a second time until he discontinued it a second time. The second § 145(a) award entitles him to attorney's fees computed from his benefits received from June 16, 1982 until he entered a rehabilitation program the second time.⁹

AFFIRMED in part, MODIFIED in part, and REMANDED for determination of attorney's fees consistent with this opinion.



Charles R. MORLAN, Appellant,

v.

June M. MORLAN, Appellee.

No. S-1092.

Supreme Court of Alaska.

June 20, 1986.

As part of property division in divorce case, the Superior Court, Third Judicial District, Victor D. Carlson, J., awarded former wife the entire amount of former husband's pension. The Supreme Court, Mat-

"controverted" claims, and the § 145(b) grant of reasonable attorney's fees applies to an employer who otherwise fails to make payment of compensation. *Wien Air Alaska v. Arant*, 592 P.2d 352, 364 (Alaska 1979); *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 840 (Alaska 1973).

The second dispute between Bignell and Wise clearly involved a "controversion." Therefore, § 145(a) minimum statutory attorney's fees for the period in controversy was the correct award, and Bignell is not entitled to any additional award.

worker's medical condition has stabilized—did not present an especially complex issue. Numerous courts in other jurisdictions have considered whether medical stabilization marks the end of temporary disability.³ While most have decided the question differently than we did in Bignell's case,⁴ the issue obviously cannot be deemed novel.

I also disagree with the majority's contention that a multiplier is justified because of the contingent nature of fee awards in workers' compensation cases. Since payment of a fee is contingent upon Board or court approval, *see* AS 23.30.145, the majority suggests that the public policy goal of insuring that competent counsel are available to represent injured workers will be thwarted if claimants' counsel receive no more than an hourly fee when they win and nothing at all when they lose. This reasoning is flawed because we have held that AS 23.30.145(c) authorizes fee awards to counsel for losing claimants on appeal as well as successful claimants. *M-B Contracting Co. v. Davis*, 399 P.2d 433, 436 (Alaska 1965).

Although losing claimants are rarely awarded fees, the majority's solution is inappropriate. It is patently unfair to require Bignell's employer, or its insurance company, to pay a double fee award in order to compensate for cases where counsel for losing claimants receive no fees. A far better approach would be to encourage trial courts to exercise their discretion and award fees routinely to worthy losing claimants.

In sum, I would reverse the court's double fee award because it contravenes the plain language of AS 23.30.145 and our prior holdings, and offends notions of fundamental fairness.

3. *See, e.g., Home Insurance Co. v. Indus. Comm'n*, 23 Ariz.App. 90, 530 P.2d 1123, 1125-27 (1975); *see also* 2 A. Larson, *The Law of Workmen's Compensation* § 57.12, at 10-9 (1983).

4. *See Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1169 (Alaska 1982) (Rabinowitz,

I haven't heard the issue mentioned here, but
Corazon FOX, Appellant, *it is a rapidly in clearing problem and is likely to come up sooner or later*
v. ALASCOM, INC., Appellee.
No. S-482.
Supreme Court of Alaska
May 9, 1986. *(we're having about one a month lately)*

Employee allegedly suffering from a mental disability filed workers' compensation claim against former employer and, after the Workers' Compensation Board ruled against claim, the Superior Court, Third Judicial District, Anchorage, Karen L. Hunt, J., affirmed decision of the Board, and employee appealed. The Supreme Court, Rabinowitz, C.J., held that testimony of psychologist to effect that though stress may be caused by a variety of factors, employee's relationship with her fellow workers and supervisor was such that it produced a tremendous amount of stress in employee was sufficient, despite other likely sources of stress outside work environment, to establish preliminary link necessary for presumption of compensability to arise with respect to employee's alleged mental disability stemming from non-traumatic gradual work-related stress.

Reversed and remanded.

1. Workers' Compensation §546

An employee who suffers a mental disability allegedly due to nontraumatic, gradual work-related stress is not required to establish that his stress is any greater than stress which all employees experience, nor

J., dissenting) and cases cited therein at 1169 n. 1. *But cf. Cenvill Communities, Inc. v. Brown*, 409 So.2d 1147, 1148-49 (Fla.App.1982) (statute requires date of maximum medical improvement to be determined after rehabilitation training program completed).

917
988

is he required to establish that he honestly perceives his employment to be the source of his disability, but is required to establish through evidence, medical or otherwise, that there is preliminary link between the disability and the employment. AS 23.30.120(a)(1).

2. Workers' Compensation §1365

Testimony of psychologist to effect that though stress may be caused by a variety of factors, employee's relationship with her fellow workers and supervisor was such that it produced a tremendous amount of stress in employee was sufficient, despite other likely sources of stress outside work environment, to establish preliminary link necessary for presumption of compensability to arise with respect to employee's alleged mental disability stemming from nontraumatic gradual work-related stress. AS 23.30.120(a)(1).

Ernest N. Rehbock, Rehbock & Rehbock, Anchorage, for appellant.

Marilyn E. Bain, Vancouver, Wash., for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

This case involves an employee who suffered a mental disability allegedly due to non-traumatic, gradual work-related stress. The Workers' Compensation Board held that in order to recover benefits in this situation the employee must make a preliminary showing that the on-the-job stress she experienced was greater than the stress which all employees experience. We hold that under the Workers' Compensation Act the board erred in imposing such a requirement.

FACTS.

Appellant Corazon Fox was hired by appellee Alascom, Inc. in October, 1974, as a Senior Clerk Typist in the field installation

department. Her duties included processing weekly time reports, making travel arrangements, requisitioning supplies, keeping business expense reports, distributing payroll checks, answering the telephone, distributing mail, typing, and filing. In April, 1979, she was transferred to the traffic administration department as a clerk. Her duties in this job included processing weekly time reports, verifying absences, balancing the bi-weekly payroll, doing fill-in secretarial work, typing, and obtaining supplies. Fox continued at this job until she left work in February, 1982.

Fox experienced many medical problems during her years at Alascom. These problems became particularly acute during 1977 and 1980 after the Caesarean birth of her second child. Among these problems were a variety of physical ailments to which no physical cause could be found, such as pains in her legs and breathing difficulties. Fox also experienced irritability and an inability to concentrate.

Fox continued experiencing these problems through 1982. During this time she was seeing a physician, Dr. Wilder, who could not find a physical cause for her complaints and who advised her to see a psychologist. On February 1, 1982, Fox went to Dr. Wilder on an emergency basis, stating that if she had not left work a few moments before she probably would have had a complete nervous breakdown. Fox was placed in a "sick leave" category where she apparently remained until she was terminated in September, 1982.

Fox filed a workers' compensation claim against Alascom for temporary total disability benefits, medical expenses, vocational rehabilitation costs, and attorney's fees and costs. Fox alleged that she had "suffered a nervous breakdown due to stresses and pressures placed upon her in the course of her employment." The board held a hearing on May 5, 1983. The evidence before the board consisted of a variety of medical reports, Fox's deposition, the deposition and reports of Dr. Robert Ohlson, Ph.D., a psychologist who interviewed Fox several times in early 1983, and the

testimony at the hearing of several Alascom employees.

The evidence before the board clearly indicated that Fox perceived her job with Alascom as the source of her physical and emotional problems. Fox attributed her problems solely to her job and denied that she experienced stress from other events in her life such as the Caesarean birth of her child and financial difficulties. Fox also stated that even though she was no longer employed by Alascom her present stress was caused by memories of her job there. Fox felt that stress from the job emanated from not being told what was expected of her and from being treated unequally. Among Fox's more specific complaints were that her supervisors talked behind her back; she was denied requests to take several hours off for personal business; she was the last one to know about her transfer to another department; she had many rush jobs; her supervisors refused to move a filing cabinet closer to her desk; and she was required to answer the phones during lunch.

Fox's three supervisors testified at the hearing. They stated that Fox was good at her job and received regular merit pay increases. They also stated that they did not feel their relationship with Fox was stressful or tense, and they did not believe her job was stressful. They also stated that they did not talk about her behind her back nor fail to tell her what was expected of her. The woman who replaced Fox and worked at her position for ten months testified that in her opinion the job was not stressful and that her personal relationship with her supervisor was neither stressful nor tense.

The major medical evidence upon which the board relied was provided by Dr. Ohlson. Dr. Ohlson indicated that Fox's exact diagnosis was unclear but that her symptoms resembled a "conversion disorder," a "psychogenic pain disorder" or a "somatization disorder." Dr. Ohlson made clear that in his opinion Fox was not malingering and that in Fox's mind her job with Alascom was the only source of her stress.

This conclusion was not disputed by Alascom.

Dr. Ohlson indicated that Fox's work-relationships had created a great deal of stress for her. However, he also indicated that there were many other non-employment factors in Fox's life that were more likely to be the "real sources" of stress. One of these factors was that Fox's husband had been unemployed since 1975, thereby forcing a reversal in expected roles, with Fox becoming the family's main provider. Another factor which Dr. Ohlson felt would be very stressful was that Fox and her husband experienced great financial difficulties, eventually having to declare bankruptcy. Other likely sources of stress were the Caesarean births of her children, her difficulties in caring for them, and surgery which Fox had for the removal of an ovary.

Dr. Ohlson stated that these other factors rated higher as sources of stress on a "Social Re-adjustment Rating Scale" than did "trouble with the boss." Dr. Ohlson acknowledged that the fact that an item rated lower or did not appear on the scale did not necessarily preclude it from being stressful to a given individual. Dr. Ohlson felt, however, that Fox's difficulties would have developed if she had never worked at Alascom:

[I]n my opinion, the condition would have developed no matter where she worked. Just the experience of having to work with all the other kinds of things that were going on in her life would have caused the same kinds of stresses.

Fox, however, denied that these other factors were stressful to her and attributed all her stress to her job at Alascom. In Dr. Ohlson's view this denial was a defense mechanism against intense feelings which would normally be expected from the other factors.

On July 27, 1983, the board issued a Decision and Order denying Fox's claim. The board stated that under the Alaska Workers' Compensation Act "it is presumed that an injury is compensable in the absence of substantial evidence to the con-

trary." The board next stated, quoting this court in *Burgess Construction Co. v. Smallwood, (Smallwood II)* 623 P.2d 312, 316 (Alaska 1981), that "before the presumption attaches, some preliminary link must be established between the disability and the employment." The board stated that in order for this preliminary link to be established the claimant had to show that "the employment situation produces mental stress and tension greater than all employees must experience."

The board held that the preliminary link had not been established in this case. The board found that none of the testimony indicated that work related stress was greater than that which all workers must experience and was not a substantial factor in causing Fox's disability. The board stated that "[h]aving to work is something all employee [sic] must do. Therefore, the stress of having to work is not greater than the stress all employees experience." Since the preliminary link had not been established the presumption did not attach. Therefore Fox had to prove all the elements of her claim and the board concluded that she had not done so.

Fox appealed the board's decision to the superior court. The court upheld the decision, holding in part that the "greater than all employees must experience" requirement was consistent with AS 23.30.265(17)'s definition of "injury" as "arising out of and in the course of employment." The superior court was of the further view that the requirement was consistent with the board's own prior decisions and "with the trend nationally to use objective standards for determining work-relatedness in mental disability claims." The court also rejected Fox's argument that the test should focus on the claimant's "honest perception" of whether the employment was the source of the injury. The superior court concluded that the record fully supported the board's finding that Fox had not proved that "work stress" was a substantial factor in creating her emotional disability. Fox appealed to this court.

DISCUSSION.

A. Introduction

AS 23.30.120(a)(1) provides that it is presumed that a claim for compensation comes within the coverage of the Workers' Compensation Act unless there is "substantial evidence to the contrary." We have held that before this presumption attaches,

some preliminary link must be established between the disability and the employment, and ... in claims 'based on highly technical considerations' medical evidence is often necessary to make that connection.

Smallwood II, 623 P.2d at 316.

The purpose of requiring this preliminary link is to rule out cases in which the claimant can show neither that the injury occurred in the course of employment nor that it arose out of it. See *Smallwood II*, 623 P.2d at 316. Such a requirement is necessary under AS 23.30.265(17) which defines "injury" as "accidental injury or death arising out of and in the course of employment."

The "arising out of" requirement is present in all workers' compensation statutes. The requirement is essential to the political compromise behind the statute whereby the employer bears the initial cost of injuries that arise from employment related risks, regardless of "fault," and the employee surrenders his common-law right to sue in tort when an employment related risk creates his injury. See L. Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 Vand.L.Rev. 263, 280 (1983). The requirement reflects the primary "policy" or "legal" causation formula by holding employers responsible only for compensating employment related risks. *Id.* at 283.

There is an inherent difficulty, however, in determining whether a mental disorder "arises out of" employment. The problem is simply that "the body of knowledge regarding mental or emotional injuries is not certain enough to make rational determina-

tions as to the true nature, extent and cause of injury." S. Sersland, *Mental Disability Caused by Mental Stress: Standards of Proof in Workers' Compensation Cases*, 33 Drake L.Rev. 751, 752 (1983-84).

As another commentator put it:

The precise etiology of most mental disorders is inexplicable. Mental disorders result from an extraordinarily complex interrelation between an individual's internal or subjective reality and his external or environmental reality . . . The precise psychogenesis of an individual's subjective reality is impossible to determine. Moreover, the interrelation between subjective and environmental reality is so profoundly complex that no method exists either to quantify or qualify the extent to which one reality and not the other is a cause of mental disorder. Therefore, the time lapse between an external stress and the manifestation of mental disorder symptoms, and the intensity, suddenness, or gradualness of the external symptoms are irrelevant in determining cause . . . When mental disorder symptoms appear in parts of the body other than the brain, medical science is able, in most cases, to attach a quantitative or qualitative etiological probability. Scientists cannot make this determination, however, when the symptoms manifest themselves subjectively. An individual who suffers a mental disorder has an *a priori* personal subjective vulnerability or predisposition to the disorder.

Joseph, 36 Vand L.Rev. at 271-72 (footnotes omitted); See also Sersland, Drake L.Rev. at 752-58; Comment, *Workmen's Compensation Awards for Psychoneurotic Reactions*, 70 Yale L.J. 1129 (1961).

It is this inherent difficulty in proving causation that has led courts in many jurisdictions to impose additional definitional limits on the compensability of mental injury caused by mental stress by looking "objectively" at the type and/or degree of the stress. Some jurisdictions have held that mental injuries are not compensable unless there is some "physical element" involved

or unless the mental stimulus is a "sudden," "traumatic" event or a series of such events. See *Hanson Buick v. Chatham*, 163 Ga.App. 127 292 S.E.2d 428, 429-30 (1982); *Albanese's Case*, 378 Mass. 14, 389 N.E.2d 83, 86 (1979). See generally Sersland, 33 Drake L.Rev. at 759-67, 767-72; 1B A. Larson, *Workmen's Compensation Law* §§ 42.23, 42.23(a) at 7-647-7-661 (1986). Some jurisdictions have held that mental injury caused by gradual mental stress is compensable, but only if the employee shows that he was subject to mental stress and tension "greater than all employees must experience." See, e.g., *Gloss v. Industrial Commission*, 121 Ariz. 10, 588 P.2d 303, 304 (1978); *Townsend v. Maine Bureau of Public Safety*, 404 A.2d 1014, 1020 (Me.1979); *Seitz v. L & R Industries, Inc.*, 437 A.2d 1345, 1351 (R.I. 1981); *Jose v. Equifax, Inc.*, 556 S.W.2d 82, 84 (Tenn.1977); *School District #1 v. Dept. of Industry, Labor and Human Relations*, 62 Wis.2d 370, 215 N.W.2d 373, 377 (1974).

E. The "Greater Than All Employees Must Experience" Test.

The Board applied the "greater than all employees must experience" test in this case. Courts that have adopted this test have often expressed a fear that due to the difficulty in determining the causes of mental illness, failure to impose additional objective requirements would "open the flood gates" to fraudulent mental injury claims. E.g., *School District #1*, 215 N.W.2d at 377. Courts also often state that worker's compensation acts were not designed to make employers "general insurers," which could happen if there were no objective threshold requirements, since some causal connection between the mental illness and employment could be established in most cases. E.g., *Townsend*, 404 A.2d at 1018-19. Alascom argues that the "greater than all employees must experience" test is appropriate to ensure that the injury "arise out of" employment by providing that there is some objective, realistic, connection between the injury and the employment.

While we recognize these concerns, we reject the "greater than all employees must experience" test, or any other additional "objective" threshold requirement, for several reasons.

First, we are unconvinced that requiring a showing of stress greater than all employees must experience will make it more likely that employment was a contributing cause of the mental injury.

The existence of a mental impact stimulus or unusual excessive mental employment stresses, however, does not medically assure the genuineness of the causal relationship between a worker's mental disability and his employment any more than does the existence of a physical impact. The intensity of the mental stresses is etiologically irrelevant. The metaphorical description of the threshold limitations by courts as "sufficient badge[s] of reliability", therefore, is accurate: like the objective criteria in tort actions for emotional injury, these "badges" at best assure the *appearance* of an objective causal relation.

Joseph, 36 Vand.L.Rev. at 305 (emphasis in original) (footnotes omitted); see Comment, 70 Yale L.J. at 1138-45. We therefore think that the "greater than all employees must experience" test is neither essential nor even germane to the legislative requirement that the injury "arise out of" the employment.

Second, we believe the argument that threshold requirements are necessary for mental injuries because such injuries are easier to feign than physical injuries is unsubstantiated. There is no evidence that it will be easier to feign or more difficult to detect complex patterns of psychoneurotic reactions than certain "physical" injuries. See Comment, 70 Yale L.J. at 1137.

Finally, and most importantly, we think that adoption of the "greater than all employees must experience" requirement is contrary to the fundamental principle in workers' compensation law that the Act should be read liberally and that the employer must take the employee "as he finds him." See, e.g., *S.L.W. v. Alaska Work-*

men's Compensation Board, 490 P.2d 42, 44 (Alaska 1971); *Wilson v. Erickson*, 477 P.2d 998, 1000 (Alaska 1970). There will be employees who will suffer mental injuries from "usual," "everyday," employment stresses. Under this requirement these "eggshell" employees would not be compensated for their injuries, because the stress to which they succumbed was a stress to which the average worker would not have succumbed.

Several jurisdictions have rejected the "greater than all employees must experience" requirement on the explicit or implicit grounds that the employer must take the employee as he finds him, and that there is nothing in the workers' compensation statute that implies there should be any different rule for mental illness. See *Royal State National Insurance Co. v. Labor & Industrial Relations Appeal Board*, 53 Hawaii 32, 487 P.2d 278, 282 (1971); *Yocom v. Pierce*, 534 S.W.2d 796, 798-800 (Ky.1976); *Breeden v. Workmen's Compensation Comm'r*, 285 S.E.2d 398, 400 (W.Va.1981); *McGarrah v. SAIF*, 296 Or. 145, 675 P.2d 159, 167 (1983); *Albertson's, Inc. v. Workers' Compensation Appeals Bd. of State of California*, 131 Cal.App.3d 308, 182 Cal.Rptr. 304, 307 (1982).

We agree with these decisions. "Greater stress than all employees must experience" does not insure that the injury "arises out of employment." While no "test" can adequately insure this, we have not imposed additional threshold requirements in physical injury cases where it was difficult to determine whether employment was a causal factor. See, e.g., *Providence Washington Insurance Co. v. Bonner*, 680 P.2d 96 (Alaska 1984). In *Delaney v. Alaska Airlines*, 693 P.2d 859 (Alaska 1985), a pilot who had Crohn's disease claimed compensation. We rejected Delaney's claim that Crohn's disease was an occupational disease of airplane pilots caused by excessively stressful conditions because there had been no medical testimony that the disease had originally been caused by conditions of employment. *Id.* at 862. Therefore the preliminary link between the ill-

ness and the employment had not been established. We then stated that the "preliminary link" had been established as to whether the employment conditions aggravated, accelerated or combined with a pre-existing disease to produce disability. *Id.* at 863. We held, however, that the employer had produced "substantial evidence" that employment stress was not a contributing factor, based on unequivocal expert testimony, and therefore had rebutted the presumption of compensability. *Id.* at 863.

While ultimately rejecting the employee's claim in *Delaney*, we did not vary from the traditional analysis even though the question of whether the employment contributed to the injury was novel and difficult. We see no reason to vary from the traditional analysis in mental injury cases by imposing additional requirements on the quality or quantity of employment conditions. No legal approach can be entirely accurate in this area because there is insufficient scientific knowledge regarding what actually causes mental disorders. The creation of additional requirements that do not necessarily bear on whether there is a connection between the injury and the employment, and which per se exclude a class of claimants from legislatively directed compensation coverage, is not the way to deal with this reality.

C. The "Honest Perception" Test

Fox urges us to adopt the approach taken in *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 268 N.W.2d 1 (1978). In *Deziel* the court adopted a "strictly subjective" causal nexus to determine compensability. Under this standard:

[A] claimant is entitled to compensation if it is factually established that claimant *honestly perceives* some personal injury incurred during the ordinary work of his employment "caused" his disability. This standard applies where the plaintiff alleges a disability resulting from either a physical or mental stimulus and honestly, even though mistakenly, believes that he is disabled due to that work-related

injury and therefore cannot resume his normal employment.

Id. 268 N.W.2d at 11 (emphasis in original).

The court stated that this test was appropriate because psychoneuroses were, by definition, subjective injuries and disabilities existing only in the minds of their victims. The court viewed the "honest perception" test as reflecting the central fact that the mentally ill claimant was "mismanufacturing" or misperceiving reality. *Id.* at 12. The court also stated that the workers' compensation act should be construed liberally and that "[c]ompensation for disability takes preference over any subsidiary doubts about the existence of an objective causal nexus." *Id.* at 15.

We decline to adopt the "honest perception" test because we believe it is fundamentally inconsistent with the statutory requirement that the injury "arise out of" the employment. The "honest perception" approach does not take into account the fact that objective, environmental realities, such as employment, may or may not contribute to the disability. See *Joseph*, 36 Vand.L. Rev. at 308-09. While it is true, as a general policy preference, that remedial legislation should be construed liberally, this does not give us license to ignore the statutory directive. The "arising out of" requirement is the legislature's primary means of limiting compensation to employment related risks. A test that focuses exclusively upon the employee's honest perception ignores the statutory directive because it does not ask whether the mental injury arose from an employment related risk nor does it even look to whether an employee's subjective reaction to work stresses actually contributed to the injury. Under this test, even if the subjective reaction of a predisposed or "eggshell" employee did not contribute to the employee's injury, the injury would still be compensable if the employee "honestly perceived" that his job caused the injury.

The dissent in *Deziel* pointed out that this scenario could occur often since it is very likely that a claimant would "per-

ceive" his employment as the cause of his disorder:

[F]or a neurotic state to exist, ... the person must be unable or unwilling to recognize and resolve these [inner conflicts and emotional weaknesses]. The disorder is an unconscious attempt at resolution. The only possible causative factor of which the claimant is, or will allow himself to be, consciously aware is the work-related trauma. Reality is elusive. It is, therefore, highly unlikely that the claimant's perception of causation will be anything but his employment.

268 N.W.2d at 24.

D. *The "Preliminary Link"*

[1] We conclude that this case should be analyzed in the same way as any other claim for workers' compensation benefits. We are not alone in treating a claim for mental injury caused by gradual mental stress in the same manner as any other workers' compensation disability claim. See *Royal State National Insurance Co. v. Labor & Industrial Relations Appeal Board*, 53 Hawaii 32, 487 P.2d 278 (1971); *Yocom v. Pierce*, 534 S.W.2d 796 (Ky.1976); *McGarrah v. SAIF*, 296 Or. 145, 675 P.2d 159 (1983); *Breeden v. Workmen's Compensation Comm'r*, 285 S.E.2d 398 (W.Va. 1981). The "preliminary link" and presumption of compensability is established if there is evidence that the employment contributed to the injury. See *Bonner*, 680 P.2d at 99. The fact that the employee perceives employment as the source of the injury is not enough to establish the preliminary link unless there is some testimony that the employment affected the employee to help create the disability. As one court put it, there must be some evidence that the employment played an "active role" in the development of the mental disability and did not "merely provide a stage for the event." *Albertson's, Inc. v. Workers' Compensation Appeals Bd. of State of California*, 131 Cal.App.3d 308, 182 Cal. Rptr. 304, 309 (1982).

[2] Here the evidence establishes a preliminary link between the employment and the disability. While Dr. Ohlson indicated that in his opinion there were a variety of factors more likely to produce stress in Fox, he also stated that "[Fox's] relationship with fellow workers and supervisors at Alascom has evidently produced a tremendous amount of stress in her." Dr. Ohlson also stated that Fox's employment with Alascom was a factor causing stress although he thought it was not the exclusive nor precipitating factor.

In order to establish the preliminary link necessary for the presumption of compensability the claimant need not present substantial evidence that his or her employment was a substantial cause of his disability. Such a showing would be necessary only if the employer had rebutted the presumption of compensability. See *Bonner*, 680 P.2d at 98. The record contains evidence that the employment was a factor in creating Fox's disability. This is enough to establish the presumption of compensability. On remand, Alascom may rebut the presumption by presenting substantial evidence that Fox's disability was not work-related through (1) affirmative evidence that the disability was not work-related, or (2) elimination of all reasonable possibilities that the injury was work connected. *Burgess Construction Co. v. Smallwood (Smallwood III)*, 698 P.2d 1206, 1211 (Alaska 1985). If Alascom does rebut the presumption then Fox will have to prove all the elements of her claim by a preponderance of the evidence. *Id.* at 1211.

REVERSED and REMANDED for proceedings consistent with this opinion.



IV. STORRS' RIGHT TO INTERIM WAGES

Storrs also argues that he is entitled to back pay from the date of discharge to the scheduled trial date. The Municipality contends that Storrs would have been entitled to reinstatement and back pay only if he had demonstrated at trial that his employment was terminated without just cause.

[12, 13] When a constitutionally unlawful dismissal is cured by a post-termination hearing, the employee is entitled to be paid for the period between dismissal and the curative hearing. Kenai Peninsula Borough Board of Education v. Brown, 691 P.2d 1034, 1039 (Alaska 1984); McMillan, 646 P.2d at 867. However, in the instant case, Storrs received all process due, therefore his termination was constitutionally lawful. We therefore conclude that awarding Storrs two years of back pay under these circumstances would be an unwarranted extension of Brown and McMillan.

The decision of the superior court is AFFIRMED.



Michael F. BEIRNE, and Lake Otis Clinic, Inc., a nonprofit Alaska Corporation, Appellants/Cross Appellees,

v.

STATE of Alaska, Appellee/Cross Appellant.

Nos. S-912, S-913.

Supreme Court of Alaska.

July 11, 1986.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS and MOORE, JJ.

1. Rabinowitz, Chief Justice, and Matthews, Justice, would reverse the superior court's affirmation of the Department of Health and Social Service's revocation of appellants' certificate of

ORDER

IT IS HEREBY ORDERED:

The judgment of the superior court is AFFIRMED by an evenly divided court.'

Entered by direction of the court at Anchorage, Alaska, this 11th day of July, 1986.

COMPTON, J., not participating.



SECOND INJURY FUND (AS 23.30.205) -

"COMPENSATION" REIMBURSEMENT TO EMPLOYERS DOES NOT INCLUDE MEDICALS

PROVIDENCE WASHINGTON INSURANCE COMPANY, SIF is an

Appellant, ISSUE - many

v. People think SIF doesn't work to

Watson BUSBY, Deceased, Louise Busby, Widow, Ruth M. Richardson, and State of Alaska (Second Injury Fund), Appellees.

of handicapped as it's

No. S-1154. Supposed to, so

Supreme Court of Alaska. Many want

July 18, 1986. to abolish or totally revamp SIF

Appeal was taken from decision of Worker's Compensation Board concerning Second Injury Fund's reimbursement of carrier. The Superior Court, Third Judicial District, Anchorage, Douglas J. Serdahely, J., affirmed, and appeal was taken. The Supreme Court held that term "compensation," as used in workers' compensation statute mandating reimbursement by Second Injury Fund of carrier for workers' compensation benefits paid, is limited to disability benefits paid to claimant and does

need to build Lake Ot. Hospital. In their view, appellants demonstrate good cause for their failure to complete the activities authorized by the certificate of need.

Digest

not include payments for claimant's medical expenses and attorney fees.

Affirmed.

Workers' Compensation §1030.1(1)

Term "compensation," as used in workers' compensation statute mandating reimbursement by Second Injury Fund of carrier for workers' compensation benefits paid, is limited to disability benefits paid to claimant and does not include payments for claimant's medical expenses and attorney fees. AS 23.30.205(a).

See publication Words and Phrases for other judicial constructions and definitions.

Robert C. Erwin and Vivian R. Senungtuk, Erwin, Smith & Garnett, Anchorage, for appellant.

Paul S. Stahl, Asst. Atty. Gen., Anchorage, Harold M. Brown, Atty. Gen., Juneau, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

The decision of the Worker's Compensation Board is AFFIRMED for the reasons stated in the opinion of the superior court set forth in the appendix.

APPENDIX

In this appeal the Court considers the meaning of "compensation" in AS 23.30.205(a), which mandates reimbursement by the Second Injury Fund of an insurance carrier for workers' compensation benefits paid. Appellant Providence Washington Insurance Co. ("Appellant") contends that the Alaska Workers' Compensation Board

("Board") erred in its Decision and Order of September 28, 1984, by limiting such reimbursement solely to disability benefits paid to a claimant, excluding reimbursement for payments for claimant's medical expenses and attorney's fees.¹ The Court finds the appeal not to be well taken and AFFIRMS the decision of the Board.

Discussion

The Court treats this issue as a question of law on which it may exercise its independent judgment.²

At the outset the Court notes that the issue of the construction of the term "compensation" within the Alaska Workers' Compensation statutes has been addressed in *dicta* by the Alaska Supreme Court in *Williams v. Safeway Stores*, 525 P.2d 1087, 1089 n. 6 (Alaska 1974). In that case, Justice Boochever commented on the difficulty of defining "compensation" within AS 23.30.130(a) and the chapter as a whole. Because of possible contrary interpretations of the term he concluded that the issue was ripe for legislative resolution. *Id.* The Court here recognizes similar ambiguity in construction of "compensation" in the present context of reimbursement of an insurance carrier by the Second Injury Fund under AS 23.30.205(a).

However, in construing "compensation" for this purpose the Court looks primarily to the Second Injury Fund statutes themselves. The Court notes that AS 23.30.040(b) mandates contribution by employers to the Second Injury Fund in proportion to the employee's entitlement to compensation for *disability*. Similarly, the Court notes that the first clause of AS 23.30.205(a), authorizing the reimbursement payments at issue, speaks of "compensation liability for disability." The Court is persuaded that this language is indicative of a legislative intent to establish the Fund as a limited reimbursement scheme for disability payments *only*.

1. Appellant also seeks payment of interest on any money it may be reimbursed. However, the Court concludes that this issue is not properly before the Court. See Decision and Order of the Board of September 28, 1984. R. at 65, 64.

2. The Court finds it unnecessary to synopsise the facts of these consolidated cases in which the issue is presented.

APPENDIX—Continued

Such a limitation is consistent with the fact that Second Injury Fund reimbursement does not begin until after 104 weeks of compensation are paid by a carrier. AS 23.30.205(a). It is also in accordance with the Alaska Supreme Court's narrow interpretation of the responsibility of the Second Injury Fund for rehabilitation payments under the former AS 23.20.191. *Alaska Pacific Assurance Co. v. Julien*, [sic] 513 P.2d 1097 (Alaska 1973).

The Court also concludes that differing interpretations of "compensation" in other contexts cited to the Court, such as that of the broader liability of an employer to an

employee under AS 23.30.045(a), are inapposite to the case at bar.

The Decision of the Alaska Workers' Compensation Board of September 28, 1984 is therefore AFFIRMED.

DATED this 31st day of July 1985.

s/ DOUGLAS J. SERDAHELY
DOUGLAS J. SERDAHELY
Superior Court Judge



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BIGNELL v. WISE MECHANICAL CONTRACTORS Alaska **1163**

Cite as, Alaska, 651 P.2d 1163

Edwin BIGNELL, Appellant,

v.

**WISE MECHANICAL CONTRACTORS
and Industrial Indemnity, Appellees.**

No. 5929.

Supreme Court of Alaska.

Sept. 24, 1982.

Employee appealed from order of the Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., reversing Workers' Compensation Board award. The Supreme Court, Compton, J., held that: (1) employee who suffered unscheduled disability and who undertook approved vocational rehabilitation program could continue to receive temporary disability benefits, and (2) employee was entitled to attorney fees only on that amount of compensation in excess of \$6,000 which had been tendered by employer's permanent partial disability award.

Reversed and remanded.

Rabinowitz, J., dissented and filed opinion in which Matthews, J., joined.

1. Workers' Compensation ⇐ 1624

Although doctor's estimate that worker suffered 10% permanent partial disability could be considered by Workers' Compensation Board, doctor's estimate was not determinative of impairment in worker's earning capacity, as it is responsibility of Board to consider wide array of information regarding worker's earning capacity, and then to determine appropriate disability rating.

2. Workers' Compensation ⇐ 836

Term "disability" within meaning of workers' compensation statute is function of injured employee's capacity to earn wages. AS 23.30.005 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

3. Workers' Compensation ⇐ 803

"Wage earning capacity" within meaning of Worker's Compensation Act may be

determined by reference to actual wages, nature of injury, degree of physical impairment, usual employment and other factors, including age, education, industrial history, trainability and availability of suitable work in community, which may affect capacity to earn wages in disabled condition. AS 23.30.005 et seq., 23.30.210.

See publication Words and Phrases for other judicial constructions and definitions.

4. Workers' Compensation ⇐ 803

Vocational rehabilitation is peculiarly appropriate factor to be considered in determining extent of injured employee's loss of earning capacity.

5. Workers' Compensation ⇐ 839

As pursual of vocational rehabilitation may directly influence worker's compensation applicant's "wage earning capacity," and allowing employee who suffers unscheduled disability and who undertakes approved vocational rehabilitation program to continue to receive temporary disability benefits provides strong incentive for injured employee to pursue vocational rehabilitation, employee who suffers unscheduled disability and who undertakes approved vocational rehabilitation program may continue to receive temporary disability benefits.

6. Workers' Compensation ⇐ 1981

Even though dispute arose regarding disability classification of employee, where \$6,000 tendered by employer was not controverted, employee was entitled to attorney fees only on compensation in excess of \$6,000 tendered by employer as permanent partial disability award. AS 23.30.145(a).

Lance C. Parrish, Parrish Law Office, Fairbanks, for appellant.

Sanford Gibbs and Liam J. Moran, Hagens, Brown & Gibbs, Anchorage, for appellees.

Gordon J. Tans, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for amicus curiae Sea-Land Services, Inc. and Travelers Ins. Co.

Before BURKE, C. J., and RABINOWITZ, CONNOR, MATTHEWS and COMPTON, JJ.

OPINION

COMPTON, Justice.

The main issue in this case is whether an injured worker should be considered temporarily disabled under the Workers' Compensation Act only until his medical condition stabilizes, or whether an employee may continue to receive temporary disability benefits while participating in an approved vocational rehabilitation program. This case also raises a question concerning the award of attorney's fees in workers' compensation cases.

I. FACTUAL AND PROCEDURAL BACKGROUND

Edwin Bignell, a construction worker, suffered a back injury in the course of his employment with Wise Mechanical Contractors (Wise) on March 9, 1978. Wise's insurance carrier, Industrial Indemnity (Industrial), did not contest Bignell's workers' compensation claim and paid him temporary total disability benefits. On December 4, 1978, Dr. Earle Crandall examined Bignell and concluded that his medical condition had become permanent and stable with some back pain. On June 15, 1979, Dr. Paul Dittrich examined Bignell and estimated that he had ten percent permanent partial impairment because of his back injury. Thereupon, Industrial terminated Bignell's temporary total disability benefits and paid him \$6,000.00 as a lump sum for ten percent permanent partial disability.

After examining Bignell on September 24, 1979, Dr. Glen Sizemore concluded Bignell would benefit from retraining in a field where he would use his back less. Dr. George Brown, who examined Bignell three times between December 21, 1979, and Jan-

uary 29, 1980, concluded that Bignell could not return to his old job.

Bignell applied for vocational rehabilitation services on October 8, 1979. The Division of Vocational Rehabilitation conducts a vocational assessment of each applicant for rehabilitation to determine: (1) Is the person disabled? (2) Is the disability a substantial handicap to employment? (3) Is it feasible for the person to return to employment with the services of vocational rehabilitation?¹ At a January 29, 1980 Workers' Compensation Board hearing, Roger Kempfer, a counselor at the Division of Vocational Rehabilitation, testified that as of that moment, he had not completed the vocational assessment of Bignell. Kempfer had determined that Bignell had a disability which was a substantial handicap to employment. However, Kempfer had to do additional testing to assess how feasible it was for Bignell to return to competitive employment.

Bignell filed an application with the Workers' Compensation Board against Wise and Industrial, (hereafter collectively referred to as Wise), claiming it was error to terminate his temporary total disability benefits in July 1979 and award ten percent permanent partial disability compensation. The Board on March 6, 1980 ruled in Bignell's favor,² holding that an applicant is entitled to receive temporary total disability benefits while undertaking an approved vocational rehabilitation program. The relevant portion of the Board decision provides:

Although Mr. Bignell was rated in July 1979, by Dr. Dittrich, the doctor did not indicate whether the back injury prevented the applicant's return to his previous employment. Dr. Crandall had indicated in his December 4, 1978 report that retraining might not be necessary but it was too early for a decision. In his Sep-

from the provision of vocational rehabilitation services."

1. AS 23.15.210(4) defines "handicapped individual" as "an individual having a physical or mental disability which for that individual constitutes or results in a substantial handicap to employment and who can reasonably be expected to benefit in terms of employability

2. *Bignell v. Wise Mechanical Contractors*, Case No. 78-03-0025 (Alaska Workmen's [sic] Compensation Board, March 6, 1980).

tember 24, 1979, report Dr. Sizemore stated that retraining was necessary. According to Roger Kempfer, the counselor from the Vocational Rehabilitation Office for the State of Alaska, Mr. Bignell first applied for vocational rehabilitation assistance on October 8, 1979.

From the record we conclude that the applicant has acted reasonably in connection with his retraining efforts. Mr. Bignell did not definitely know of his need for retraining due to his injury until he consulted Dr. Sizemore. He consulted Dr. Sizemore of the Mayo Clinic at his own expense to see if something could be done about his back so he could return to construction work. When he realized that he could not return to his former occupation, he contacted the Office of Vocational Rehabilitation. He has done his best to minimize his damages. He has cooperated with every request of the rehabilitation counselor.

....

Under these circumstances, temporary benefits should have continued despite the medical rating of the impairment by Dr. Dittrick. Future temporary total disability benefits are to be paid so long as the applicant continues to do his utmost to minimize his damages by proper medical treatment and completion of a vocational rehabilitation evaluation.

Based on both Dr. Sizemore's report and the testimony of Dr. Brown, the applicant cannot return to his former occupation. A vocational assessment is necessary. If retraining is necessary and a formal retraining program is devised, the defendant shall pay temporary total disability benefits during retraining as long as the applicant cooperates and maintains passing grades in his course work.

3. Sea-Land Services, Inc. and Travelers Insurance Company (Sea-Land) were permitted to appear as Amicus Curiae after oral argument.
4. Since this dispute requires construction of the workers' compensation statute, "we shall independently consider the meaning of the statute." *Wien Air Alaska v. Arant*, 592 P.2d 352, 356 (Alaska 1979), quoting *Hood v. State, Work-*

The Board further held that Wise could offset the \$6,000.00 permanent partial disability payment paid to Bignell in July 1979 against any additional temporary disability benefits. The Board awarded Bignell an attorney's fee of twenty-five percent of the first \$1,000.00 of compensation and ten percent thereafter. The attorney's fee was to be computed on compensation after the \$6,000.00 was offset.

Wise appealed the Workers' Compensation Board award to the superior court. Wise did not object to the findings regarding Bignell's inability to return to construction work, his reasonable action in connection with his retraining efforts and his best efforts to minimize his damage. Bignell cross-appealed the denial of attorney's fees on the \$6,000.00 offset. The superior court reversed the workers' compensation award, holding that temporary total disability benefits cease once the employee's condition becomes medically stable. At that point the employee should receive permanent disability compensation if he still has loss in earning capacity. The superior court did not reach the attorney's fee issue.

Bignell appealed the superior court's decision to this court. For the reasons given below, we reverse.³

II. THE DURATION OF TEMPORARY DISABILITY

The principal issue presented on appeal is whether the Board properly determined that temporary disability benefits would be available during that period that Bignell participated in an approved vocational rehabilitation program.⁴

The Workers' Compensation Act (Act), AS 23.30.005-.270, governs the award of benefits to workers who in the course of their employment suffer injury resulting in disability.⁵ The Act does not explicitly ad-

men's Compensation Bd., 574 P.2d 811, 813 (Alaska 1978).

5. We have previously noted that in accordance with the humanitarian purposes of the Act, the Act should be liberally construed in favor of the employees. See *Fluor Alaska, Inc. v. Mendoza*, 616 P.2d 25, 28 (Alaska 1980); *Hood v. State, Workmen's Compensation Bd.*, 574 P.2d 811,

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dress whether temporary disability benefits may be provided to an injured employee during the course of vocational rehabilitation. In contrast, where an applicant is determined to suffer either a permanent total or a permanent partial disability, two related statutory provisions govern the award of supplemental maintenance benefits. AS 23.30.191⁶ provides that an applicant not entitled to further temporary disability benefits who participates in an approved vocational rehabilitation program may be awarded up to thirty-three and one-third percent of his weekly wage as supplemental maintenance benefits. AS 23.30.040(e) provides that the Board may award up to an additional \$200.00 per month from the second injury fund for maintenance during the period of retraining and rehabilitation.

[1] The dispositive question in the present case is when should Bignell's disability be considered permanent, rather than temporary. Wise and Sea-Land submit that after Bignell's medical condition stabilized, Bignell was not entitled to temporary disability benefits. Instead, once further medical attention was not necessary, Bignell's permanent disability should have been rated.⁷ As a consequence, any entitlement to supplemental benefits for maintenance during the course of vocational rehabilitation would derive from AS 23.30.191 and AS 23.30.040(e). Rejecting the

focus on medical stabilization, Bignell argues that since permanent disability benefits are a function of impaired earning capacity, the statutory scheme does not contemplate that the Board set a permanent disability rating until vocational rehabilitation is completed. Bignell thus argues that he is entitled to continue to receive temporary disability benefits during the course of vocational rehabilitation training.

[2] The Act establishes four categories of disability—permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability.⁸ No category is separately defined. The categories merely reflect the character (total or partial) and quality (permanent or temporary) of the disability. However, "disability" is specifically defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." AS 23.30.265(10). Thus by definition, "disability" is a function of an injured employee's capacity to earn wages.

The Act also establishes benefits available for each type of disability.⁹ The distinction drawn between "scheduled" and "unscheduled" disabilities in the award of permanent partial disability benefits is relevant. For certain disabilities, such as the loss of vision, digits or body members, the Act sets a specific dollar award. AS 23.30.

813 (Alaska 1978); *S.L.W. v. Alaska Workmen's Compensation Bd.*, 490 P.2d 42, 43 (Alaska 1971).

6. AS 23.30.191 provides:

An employee, who, as a result of injury, is or may be expected to be totally or partially incapacitated for his normal occupation and who, under the direction of the department, is being rehabilitated to engage in a remunerative occupation and who is not entitled to further temporary total disability or temporary partial disability compensation, in addition to the amounts allowed under AS 23.30.040 for maintenance, may receive additional compensation necessary for his rehabilitation, not more than one-half of the compensation allowed under AS 23.30.185.

7. Based upon Dr. Ditrack's estimate that Bignell suffered a ten percent permanent partial disability, Wise discontinued Bignell's temporary disability benefits and tendered \$6,000.00

as a final disability award. Though Dr. Ditrack's estimate may well be considered by the Board, his estimate is hardly determinative of the impairment in Bignell's earning capacity. It is the responsibility of the Workers' Compensation Board to consider a wide array of information regarding an applicant's earning capacity, and then to determine an appropriate permanent disability rating.

8. AS 23.30.180, .185, .190 and .200. See *Hood v. State, Workmen's Compensation Bd.*, 574 P.2d 811, 814 (Alaska 1978); *London v. Fairbanks Mun. Utils., Employer Group*, 473 P.2d 639, 642 (Alaska 1970). As we stated in *London*, "[c]ompensation for each category of disability reflects a unique set of policy considerations." 473 P.2d at 642.

9. AS 23.30.180-200.

190(1)-(19). Here, loss of earning capacity is presumed.¹⁰ A permanent partial disability award for a disability not subject to a scheduled award is governed by AS 23.30-190(20). That provision provides that "in all other cases in this class of disability [permanent partial disability] the compensation is 66% per cent of the difference between his average weekly wages and his wage earning capacity after the injury in the same employment or otherwise" (Emphasis added.)

Hewing v. Alaska Workmen's Compensation Board firmly established that compensation for an unscheduled disability is a function of economic loss. We stated:

Serious conceptual differences exist between the "whole man" and "earning capacity" theories of disability. Under the whole man theory, the primary criteria governing disability awards are physiological and psychiatric. This theory challenges the concept, basic to Alaska's Workmen's Compensation law that *unscheduled partial disability awards should be made for economic loss, not for physical injury as such.*

512 P.2d 896, 900 (Alaska 1973) (*Hewing I*) (emphasis added) (footnotes omitted).

[3] We reiterated this principle in *Vetter v. Alaska Workman's Compensation Board*, where we stated that "[t]he concept of disability compensation rests on the premise that *the primary consideration is not medical impairment as such, but rather loss of earning capacity* related to that impairment." 524 P.2d 264 (Alaska 1974) (emphasis added). Wage earning capacity, the focal point of the *Hewing I/Vetter* inquiry, may be determined by reference to actual wages, or to the nature of the injury, de-

gree of physical impairment, usual employment and any other factors or circumstances which may affect capacity to earn wages in a disabled condition. AS 23.30.210. "Other factors" have been held to include age, education, industrial history, trainability and availability of suitable work in the community. *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182, 186 (Alaska 1978) (*Hewing II*); *Vetter v. Alaska Workman's Compensation Board*, 524 P.2d at 266; *Hewing v. Alaska Workman's Compensation Board*, 512 P.2d at 899 (*Hewing I*).

[4] We are guided by two considerations in concluding that the Board may award temporary total disability benefits to an employee with an unscheduled disability whose condition has stabilized medically, but who is pursuing an approved vocational rehabilitation program. First, the position advanced by Bignell is more consistent with the principles enunciated in *Hewing I* and *Vetter*. Clearly, the pursuit of vocational rehabilitation may directly influence an applicant's "wage earning capacity . . . in the same employment or otherwise." Vocational rehabilitation is a peculiarly appropriate "other factor" to be considered in determining the extent of an injured employee's loss of earning capacity. The Board will have a far stronger basis to ascertain the impact on an injured employee's wage earning capacity after completion of a vocational rehabilitation assessment and, in appropriate cases, a vocational rehabilitation program.

Second, we are mindful that in most cases the position advanced by Bignell, and adopted by the Board, will provide a stronger incentive for injured employees to pursue vocational rehabilitation.¹¹ The desirability

of this position, it may be difficult in practice to make rehabilitation effective. . . .

....
In most of the decided cases the resolution of this dilemma has not been consciously derived from an attempt to achieve the optimum result from the point of view of rehabilitation incentives. The cases have been decided on other grounds, often having to do with conceptual approaches to the idea of compensable disability.

10. See 2 A. Larson, *The Law of Workmen's Compensation* § 57.14, at 10-27 (1978).

11. Professor Larson notes:

The principal decisional issues affecting rehabilitation are those that, intentionally or unintentionally, have an incentive or disincentive effect on rehabilitation. What makes this area a hard one to handle by the judicial process is that usually a rule that forms an incentive for the employee forms a disincentive for the employer, and vice versa. Moreover, if one or the other is under a disincen-

of vocational rehabilitation is reflected in Professor Larson's seminal observation. "The conviction is gradually gaining ground that the compensation job is not done when the immediate wound has been dressed and healed. There remains the task of restoring the man himself to the maximum usefulness that he can attain under his physical impairment." 2 A. Larson, *The Law of Workmen's Compensation* § 61.21, at 10-759 (1978). We note that while some courts have suggested that temporary disability benefits are not available after medical stabilization,¹² no court to our knowledge has addressed this issue in the context of the effect of such a determination on the availability of vocational rehabilitation benefits. Vocational rehabilitation is but one way by which an injured employee mitigates the damages he suffers as a result of an industrial accident. It has been recognized by both case law¹³ and statute¹⁴ that an injured employee must submit to reasonable medical treatment. There is no reason why a similar rule should not apply to mitigation through vocational rehabilitation, particularly given our statutory scheme which awards compensation for unscheduled permanent partial disabilities by reference to the impairment of earning capacity.

Wise and Sea-Land argue that allowance of temporary disability benefits during a period of rehabilitation will render AS 23.30.191 superfluous. We disagree. To be

2 A. Larson, *supra* note 10, § 61.24, at 10-771 to 10-774.

12. We note, for example, the following passage from the District Court of the Territory of Alaska:

In determining compensation payments for temporary total disability, the fact that a condition can be diagnosed as partially permanent is not conclusive as to the termination of the period for which total temporary compensation must be paid to the claimant. A claimant is entitled to compensation for temporary total disability during the period of convalescence and during which time the claimant is unable to work, and the employer remains liable for total compensation until such time as the claimant is restored to the condition so far as his injury will permit. *Phillips Petroleum Co. v. Alaska Indus. Bd.*, 17 Alaska 658, 665-66 (D.Alaska 1958). See also *Bethlehem Steel Co., Shipbuilding Div. v. Tray-*

sure, our holding will limit the scope of section .191. But to limit the coverage of section .191 is not to abrogate its applicability. Where an employee is determined to have a permanent disability either by Board action or by settlement, section .191 will be applicable. Section .191 may well be applicable where an employee who suffers a scheduled disability seeks to participate in an approved vocational rehabilitation program. Indeed, section .191 will be applicable in certain instances where an employee pursuing vocational rehabilitation suffers an unscheduled disability. For instance, AS 23.30.200 limits temporary partial disability benefits to five years. A temporary partially disabled worker whose need for vocational rehabilitation only became apparent toward the end of the fifth year may require section .191 benefits to proceed through vocational rehabilitation.

[5] In sum, we conclude that an employee who suffers an unscheduled disability and who undertakes an approved vocational rehabilitation program may continue to receive temporary disability benefits.¹⁵

III. ATTORNEY'S FEES

[6] AS 23.30.145(a) provides that attorney's fees in workers' compensation cases "may be allowed only on the amount of compensation controverted and awarded." The Board awarded Bignell attorney's fees

nor, 239 F.Supp. 749 (D.Md.1965); *Mutual Liab. Ins. Co. of Wis. v. Contreras*, 109 Ariz. 383, 509 P.2d 1030 (1973) (en banc); *Gorman v. Atlantic Gulf & Pac. Co.*, 178 Md. 71, 12 A.2d 525 (1940).

13. *Phillips Petroleum Co. v. Alaska Indus. Bd.*, 17 Alaska 658, 663 (D.Alaska 1958).

14. AS 23.30.095(d); see *Fluor Alaska, Inc. v. Mendoza*, 616 P.2d 25 (Alaska 1980).

15. We note that even if an applicant is an appropriate candidate for vocational rehabilitation, he may still be gainfully employed and thus entitled to only temporary partial disability benefits. In the present case, the Board prematurely established that participation in a vocational rehabilitation program would necessarily render Bignell temporarily totally disabled.

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RABINO
THEWS, J

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on all compensation in excess of \$6,000.00, the amount tendered by Wise as a permanent partial disability award. Bignell submits that since Wise disputed the disability classification, the \$6,000 voluntarily tendered by Wise was "in controversy." There is no merit to Bignell's position. The statute unambiguously restricts the award of attorney's fees to amounts which are controverted. See *Wien Air Alaska v. Arant*, 592 P.2d 352, 364 (Alaska 1979); *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 840 (Alaska 1973); *J. B. Warrack Co. v. Roan*, 418 P.2d 986, 989-90 (Alaska 1966). Notwithstanding the dispute regarding the disability classification, the \$6,000.00 tendered by Wise was not controverted. Accordingly, we conclude that the Board calculated the award of attorney's fees in a proper fashion.

REVERSED and REMANDED for further proceedings consistent with this opinion.¹⁶

RABINOWITZ, J., with whom MATTHEWS, J., joins, dissenting.

16. In light of our determination that prior to development of a vocational rehabilitation program it is impossible to determine whether an applicant should receive total or partial temporary disability benefits, see *supra* note 15, the matter must be remanded to the Board with instructions to amend the order in an appropriate fashion.

1. See, e.g., *Speigner v. McGhee*, 55 Ala.App. 384, 316 So.2d 215, cert. denied, 294 Ala. 769, 316 So.2d 221 (1975); *Home Ins. Co. v. Industrial Comm'n*, 23 Ariz.App. 90, 530 P.2d 1123 (1975); *Kirkland v. Benedict & Jordan*, 120 So.2d 169 (Fla.1960); *Morrison Merchandising Corp. v. Rambeau*, 377 So.2d 234 (Fla.Ct.App. 1979), cert. denied, 386 S.J.2d 640 (Fla.1980); *Crabtree v. Beech Aircraft Co.*, 229 Kan. 440, 625 P.2d 453 (1981); *Azwell v. Franklin Assocs.*, 374 So.2d 766 (Miss.1979); *Anderson v. Carlsons Transport*, 178 Mont. 290, 583 P.2d 440 (1978); *Johnson v. State Accident Ins. Fund*, 18 Or.App. 152, 524 P.2d 559 (1974) (by statute); *Burns v. Joyner*, 264 S.C. 207, 213 S.F.2d 734 (1975); *Brown Shoe Co. v. Pipes*, 58 Tenn.2d 140 (Tenn.1979).

Larson acknowledges that the end of the "healing period" and consequent "stabilization" of one's physical condition "determines in most states when temporary benefits cease and when the extent of permanent disability can be appraised, for purposes of making either a per-

RABINOWITZ, Justice, with whom MATTHEWS, Justice joins, dissenting.

I would affirm the superior court's reversal of the Board's award of workers' compensation in this case. In my view, the superior court's ruling that temporary total disability benefits cease once the employee's condition becomes medically stable is more consonant with Alaska's workers' compensation statutes than is the majority's construction.

The majority's major legal premise is that temporary total benefits are available after the medical condition of the injured employee has stabilized. Case law from other jurisdictions overwhelmingly reflects the view that medical stabilization, or maximum physical recovery, marks the end of temporary disability.¹ The Alaska legislature has enacted provisions for temporary total disability benefits,² for permanent partial disability benefits,³ and for compensation during vocational rehabilitation.⁴ For the court to now hold that temporary benefits should extend through rehabilita-

ment partial or a permanent total award." 2 A. Larson, *The Law of Workmen's Compensation* § 57.12, at 10-9 (1981) (footnote omitted). He proposes the following test for distinguishing between a "temporary" and a "permanent" disability:

Once the physical condition is stabilized, the question becomes: is the inability to get work the result of the injury? If it is, the straightforward approach would then be to find the claimant permanently disabled by his residual impairment. If later the claimant gets steady employment, the case can be reopened. In the meantime, the claimant is definitely disabled in the compensation sense, because his physical impairment causes his unemployment; but at the same time the disability cannot accurately be characterized as temporary, since it has become stable and what remains is permanent. By the process of elimination, one comes to a total permanent award, subject of course to reopening.

Id. at 10-20 (footnotes omitted) (emphasis supplied).

2. AS 23.30.185.

3. AS 23.30.190.

4. AS 23.30.040(e), AS 23.30.191.

tion is to judicially fill a gap which there is no indication the legislature intended to fill.⁵

Further, in my view, the majority's conclusion that the Board may award temporary total disability benefits to an employee with an uncheduled disability whose condition has stabilized medically, but who is pursuing an approved vocational rehabilitation program, effectively writes out a portion of AS 23.30.191. This statute provides for supplemental payments during rehabilitation if an employee is no longer entitled to temporary total benefits.⁶ If as a matter of law, an employee who is participating in a vocational rehabilitation program is still temporarily disabled, there is no need for a statutory provision entitling the employee to maintenance payments on the ground that he is no longer eligible for temporary disability benefits. In short, I think AS 23.30.191 contemplates that an injured worker's condition may be permanent for the purpose of payment of benefits while the worker is participating in a vocational rehabilitation program.



A.B.M., Natural Mother, Appellant,

v.

M.H. & A.H., Prospective Adoptive
Parents, Appellees.

No. 6200.

Supreme Court of Alaska.

Sept. 24, 1982.

The Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, J., concluded

5. See *Douglass v. Gresen Mfg. Co.*, 300 Minn. 82, 217 N.W.2d 846, 847 (1974) (per curiam).

6. AS 23.30.191 provides in pertinent part that [a]n employee, who, as a result of injury, . . . is being rehabilitated . . . and who is not

ed that it was in best interests of Indian child to grant adoption by prospective adoptive parents and refused to allow child's natural mother to withdraw her consent, and mother appealed. The Supreme Court, Dimond, Senior Justice, held that: (1) prospective adoptive parents were bound by judicial admission that child was Indian child subject to provisions of Indian Child Welfare Act, and (2) child was required to be returned to natural mother unless such arrangements were proved to be contrary to child's best interests under standards established by such Act.

Reversed and remanded.

1. Indians ⇐6

In enacting Indian Child Welfare Act, Congress was concerned with protecting best interests of Indian children and promoting stability and security of Indian tribes and families. Indian Child Welfare Act of 1978, §§ 2-403, 25 U.S.C.A. §§ 1901-1963.

2. Indians ⇐6

Judicial exception to coverage of Indian Child Welfare Act could not be made solely on basis that application of Act in case at bar was not required to preserve child's ties to Indian cultural or social values. Indian Child Welfare Act of 1978, §§ 2-403, 2(4, 5), 25 U.S.C.A. §§ 1901-1963, 1901(4, 5).

3. Indians ⇐6

Intent of Indian Child Welfare Act was to provide procedural safeguards for parent or persons standing in parental role, evidenced by reference to its provisions as being applicable to "Indian parent or custodian" in the disjunctive. Indian Child Welfare Act of 1978, §§ 2-403, 102(a, b), 25 U.S.C.A. §§ 1901-1963, 1912(a, b).

entitled to further temporary total disability or temporary partial disability compensation . . . may receive additional compensation necessary for his rehabilitation . . .

4. Indians

Protective Act were prospective adoptive parent is prospective adoptive parent is "Indian Child Welfare Act" U.S.C.A. §

See p for other definitions

5. Evidence

Once admitted in an Indian Child Welfare Act of 1978, §

6. Adoption

When her child's such conservation has been to be applied withdrawal of

7. Adoption

Where for return was vacated turned to proved to ests under Child Welfare Act of 1978, §§ 1912(f),

Suzanne Legal Servant.

Thomas lees.

* Dimond, § made pursuant to Constitution 23(a).

1. AS 20.1

WIEN AIR ALASKA and Underwriters
Adjusting Company, Appellants,
Cross-Appellees,

v.

Joyce ARANT, Surviving Wife, and Jack
and Jay Arant, Minor Children of Wil-
liam Arant, Deceased, Appellees, Cross-
Appellants.

Nos. 3620, 3717.

Supreme Court of Alaska.

Feb. 9, 1979.

As Modified on Denial of Rehearing
April 6, 1979.

The Workmen's Compensation Board determined that wife and children of a deceased worker were entitled to an increase in death benefit payments, and the Superior Court, Third Judicial District, S. J. Buckalew, Jr., J., affirmed. The employer and carrier appealed, and the beneficiaries cross-appealed. The Supreme Court, Boochever, C. J., held that death benefit claims arising after May 22, 1975 are governed by increased rates in a maximum table in the statute, and thus dates in the left-hand column of the table serve timing function only, all claims arising after effective date of the amendatory statute being subject to new series of maximum limitations and being governed by increasing rates in that table.

Remanded with directions to remand to Board for determination of attorney fees.

1. Statutes ⇌ 219(1)

Where issue to be resolved turns on statutory interpretation rather than formulation of fundamental policies involving particularized expertise of administrative personnel, reviewing court will independently consider meaning of statute. AS 23.30.175, 23.30.175(a), 23.30.215(a), (a)(2)(C), (b, f, g).

2. Statutes ⇌ 205

Meaning of statutory provision is determined by language of particular provision construed in light of purpose of whole instrument. AS 23.30.175, 23.30.175(a), 23.30.215(a), (a)(2)(C), (b, f, g).

3. Workers' Compensation ⇌ 60

Workers' compensation death benefit claims arising after May 22, 1975 are governed by increased rates in maximum table in statute, and thus dates in left-hand column of table serve timing function only, all claims arising after effective date of amendatory statute being subject to new series of maximum limitations and being governed by increasing rates in that table. AS 23.30.172, Laws 1974, c. 51, 23.30.175, 23.30.175 (a-c), 23.30.215(a)(2)(C), (b, f, g).

4. Workers' Compensation ⇌ 11

Purpose of workers' compensation is to compensate victims of work-related injury for part of their economic loss, measured by wage loss to worker or surviving family. AS 23.30.145(a), 23.30.175, 23.30.175(a), 23.30.215, 23.30.215(a); AS 23.30.172, Laws 1974, c. 51; Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 6(b), (b)(1), as amended 33 U.S.C.A. §§ 901 et seq., 906(b), (b)(1); Occupational Safety and Health Act of 1970, §§ 2-33, 27(a)(1, 2), 29 U.S.C.A. §§ 651-678, 676(a)(1, 2); U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law ⇌ 154(3)

Workers' Compensation ⇌ 26

Important aspect of law of contracts is allocating risk of future change, and workers' compensation amendment prospectively phasing in increase, insofar as it did not grant increases to claimants injured before new maximum rates were passed, did not impair obligation of contract. AS 01.10.090, 23.30.175, 23.30.175(a); Const. art. 1, § 15; U.S.C.A. Const. art. 1, § 10, cl. 1.

6. Workers' Compensation ⇌ 1981

Though reasonable attorney fees were proper in workers' compensation case, Workmen's Compensation Board should have conducted hearing on question and requested evidence from parties or at least

should have indicated, in its order, how it arrived at determination of amount. AS 23.30.145(a, b).

7. Workers' Compensation ⇐1981

Employer's failure to file notice of controversy was not dispositive on question of attorney fees in workers' compensation case, and Workmen's Compensation Board was required by statute to find whether there was controversy in fact, and properly found such controversy where employer had consistently denied and litigated its obligation to pay increase sought and eventually received by death benefit claimants though employer agreed to pay compensation and only disputed amount. AS 23.30.145(a, b), 23.30.155.

8. Workers' Compensation ⇐1981

Workmen's compensation statute seeks to insure that attorney fee awards in compensation cases are sufficient to compensate counsel for work performed, so that workers will not have difficulty finding counsel willing to argue their claims. AS 23.30.145(a, b), 23.30.155, 23.30.155(d, e).

9. Workers' Compensation ⇐1983

High attorney fee awards for successful workers' compensation claims may be necessary for adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered. AS 23.30.145, 23.30.145(a, b), 23.30.155, 23.30.155(e).

10. Workers' Compensation ⇐1983

In fixing attorney fee award in workers' compensation case, superior court should consider fee award by Workmen's Compensation Board, and this is relevant where application of statutory formula has produced disproportionately large award for proceeding before Board. AS 23.30.145(a); Rules of Appellate Procedure, rule 29.

Alan Sherry of Merdes, Schaible, Staley & DeLisio, Anchorage, for appellants, cross-appellees.

1. Initially, there was a disagreement over the \$1,000.00 figure, but Wien no longer seems to contest it. The exact weekly salary of Mr. Arant is not material to resolution of this dispute.

Arden E. Page of Burr, Pease & Kurtz, Inc., Anchorage, for appellees, cross-appellants.

Randall J. Weddle, Faulkner, Banfield, Doogan & Holmes, Juneau, Alaska, for amicus curiae Alaska Trucking Assn., Inc.

OPINION

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

BOOCHEVER, Chief Justice.

This case involves a claim by the wife and two children of a deceased worker for an increase in death benefit payments. We affirm the determination of the Workmen's Compensation Board and the Superior Court's decision that claimants are entitled to an increase. We hold that the formula set forth in AS 23.30.145(a) governs the attorney fee award for the Board proceeding and remand to the Board for a new determination of attorney's fees. We instruct the Superior Court to redetermine reasonable attorney's fees for the appeal, taking into account the Board's fee award.

The facts are little in dispute. William Arant was employed as a pilot by Wien Air Alaska at an average weekly wage of about \$1,000.00.¹ On August 30, 1975, he died in a work-related plane crash. His wife, Joyce Arant, and his two dependent children (hereinafter the Arants) started receiving workers' compensation payments of \$198.40 a week eleven days after the accident.²

On February 13, 1976, the Workmen's Compensation Board received application for adjustment of claim from the Arants, requesting an increase in compensation payments to \$357.59 per week. Wien denied that such an increase was due. After a hearing, the Board, applying the table of maximum benefits in AS 23.30.175(a), ruled

2. Wien Air Alaska and Underwriters Adjusting Company are jointly contesting the Arants' claim. We refer to both these parties as Wien.

that Wien should increase payments to \$357.59 and awarded the then-successful Arant claimants \$500.00 partial reimbursement for claimed attorney's fees.³

Wien appealed the Board's decision to the Superior Court, urging that the increasing maximums in AS 23.30.175 did not apply to death benefits both as a matter of statutory construction and constitutional compulsion; Wien claimed impairment of contract and denial of due process and equal protection.⁴ Alaska Air Carriers, as amicus curiae, argued against the increase on statutory grounds only. The Arants cross-appealed the award of attorney's fees, arguing that the statutory minimum fee schedule in AS 23.30.145(a) applied because the employer had controverted the claim.

The Superior Court, relying on decisions interpreting the federal Longshoremen's and Harbor Workers' Compensation Act, ruled that Alaska's statute, consistent with the constitution, provided for the increase in payments from \$198.40 to \$357.59. The court referred the \$500.00 award of attorney's fees back to the Board "to conduct a hearing to establish reasonable attorney's fees" for the legal proceedings before it. Pursuant to Appellate Rule 29, the claimants made a motion for attorney's fees and costs for the appeal, and the court awarded \$750.00 for attorney's fees and \$33.37 for costs.

3. Plaintiffs requested \$6,033.75 in attorney's fees for 80.45 hours of legal work at \$75.00 per hour, which Wien objected to as excessive.
4. Wien also argued that if an increase was due, it should be paid by the general funds pursuant to AS 23.30.172. See note 41 *infra*. The Superior Court required Wien to pay the increase, and Wien has not reintroduced the special fund argument.
5. When we mention the injured worker's wage, we will generally mean his or her average weekly wage.
6. The death benefit rates at the time of Mr. Arant's death were:

Compensation for death. (a) If the injury causes death, the compensation is known as

Wien timely noticed appeal and, before this court, renews only the statutory and the contract clause arguments. The Arants' cross-appeal argues the inadequacy of both the \$500.00 award of attorney's fees for the Board proceeding and the \$750.00 award for the appeal to the Superior Court.

I. THE INCREASE IN COMPENSATION PAYMENTS

A description of the structure of Alaska's workers' compensation statute is essential in order to understand the Arants' claim for an increase in compensation payments. Alaska has a two-step process for calculating compensation payments. One, the statute specifies a per cent of the deceased or injured employee's average weekly wage⁵ to which claimants are entitled. Two, the statute specifies a maximum limitation on the weekly award. If the result of the step one calculation, the dollar amount which represents the per cent of the worker's wage, is greater than the maximum limitation, the claimant receives only the maximum limitation.

AS 23.30.215 lays out the basic structure for death benefits. AS 23.30.215(a) indicates the percentage of the deceased employee's wages which specified claimants receive; the statute in effect in 1975, when Arant was killed, provided for an award of 85 per cent of the deceased employee's average weekly wages to a widow and two children.⁶ AS 23.30.215(b) tells how to cal-

a death benefit and is payable in the following amounts to or for the benefit of the following persons:

(2) if there is a widow or widower or a child or children of the deceased, the following percentages of the average weekly wages of the deceased:

(A) 66 $\frac{2}{3}$ per cent for the widow or widower with no children;

(B) 50 per cent for the widow or widower with one child and 20 per cent for the child;

(C) 50 per cent for the widow or widower with two children and 35 per cent divided equally among the children;

(D) 50 per cent for the widow or widower with three or more children and 40 per cent divided equally among the children;

culate the maximum limitation. At the time of Arant's death in 1975, the statutory language provided:

In computing death benefits the average weekly wage of the deceased shall be . . . subject to the same weekly maximum limitation in the aggregate as temporary total disability compensation, but the total weekly compensation may not be less than \$45 for a widow or widower nor less than \$15 weekly to a child or \$30 for children.⁷

The maximum limitation on temporary total disability payments is found in AS 23.30.175, which provided at the time of Arant's death:

Rates of compensation. (a) The weekly rate of compensation for disability or death may not exceed the percentage of the state average weekly wage as determined by the table contained in this subsection and may not be less than \$65 a week. If the employee's average weekly

(E) 66 $\frac{2}{3}$ per cent for an only child when there is no widow or widower;

(F) 33 $\frac{1}{3}$ per cent for each child if there are two children and no widow or widower;

(G) 66 $\frac{2}{3}$ per cent, divided equally, if there are three or more children and no widow or widower;

(3) if the widow or widower remarries, she or he is entitled to two years compensation in one sum;

Ch. 83, §§ 7-12, SLA 1975 (emphasis added) (current version at AS 23.30.215(a)).

Amendments in 1977 decreased death benefits for a widow with two or more children to 66 $\frac{2}{3}$ per cent of the deceased employee's wage. Ch. 75, § 5, SLA 1977 (codified at AS 23.30.215(a)(2)(C)). These amendments included a new provision that, with a few exceptions, automatically phases out death benefits over ten years. Ch. 75, § 8, SLA 1977 (codified at AS 23.30.215(f)-(g)).

7. Ch. 83, § 12, SLA 1975 (emphasis added) (current version at AS 23.30.215(b)). AS 23.30.215(b) has undergone minor changes which we indicate at note 44 *infra*.

8. Ch. 83, § 2, SLA 1975 (emphasis added) (current version at AS 23.30.175(a)). The main difference between the maximum limitation in 1975 and the current version is the change:

wages, as computed under § 220 of this chapter, are less than \$65 a week, he shall receive as compensation for his disability his average weekly wages.

On	The Rate Shall Be
July 1, 1975	80 per cent of the state's average weekly wage
January 1, 1976	100 per cent of the state's average weekly wage
January 1, 1977	133.3 per cent of the state's average weekly wage
January 1, 1979	166.6 per cent of the state's average weekly wage
January 1, 1981	200 per cent of the state's average weekly wage. ⁹

AS 23.30.175 thus determines the maximum limitation on death and disability payments⁹ by reference to increasing percentages of the state's average weekly wage. The statute has specified this method of calculation since 1975. Before 1975, the maximum limitation was a flat dollar amount.¹⁰ This recent structural change in

The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage *in effect on the date of injury* as determined by the table contained in this subsection AS 23.30.175(a) (emphasis added). We discuss the implications of this change for the instant case in note 15 *infra*.

9. AS 23.30.175 contains the maximum limitation on death benefits because of two things: its own language ("the weekly rate of compensation for disability or death" (emphasis added)) and by the cross-reference from AS 23.30.215(b). Before 1975, AS 23.30.175 referred only to "[c]ompensation for temporary disability, permanent partial disability or permanent total disability . . ." making no mention of death benefits. Ch. 52, § 1, SLA 1974. Compare ch. 10, § 3, SLA 1972. The only way one knew that AS 23.30.175 was also the maximum for death benefits was by the cross-reference from AS 23.30.215(b).

10. In 1968, the maximum temporary total disability benefit in AS 23.30.175(a) increased from \$100.00 to \$113.00; in 1970, it increased to \$127.00; in 1972, it increased to \$175.00. Ch. 206, § 1, SLA 1968; ch. 228, § 1, SLA 1970; ch. 10, § 3, SLA 1972. The maximum payable death benefit increased by those same amounts

the maximum limitation on death benefits is the heart of this controversy.

Wien admits its obligation to pay weekly payments of \$198.40. This figure results from the calculation of the first figure in the AS 23.30.175(a) maximum rate table, 80 per cent of Alaska's average weekly wage. Wien contends that the 80 per cent figure is the maximum limitation for claims arising from July 1, 1975, to January 1, 1976. This would mean claims occurring between January 1, 1976, and January 1, 1977, are subject to a maximum limitation of 100 per cent of the state's average weekly wage; claims occurring between January 1, 1977, and January 1, 1979, are subject to a maximum limitation of 133.3 per cent of the state wage; and so forth. Since Mr. Arant died on August 30, 1975, Wien argues that the maximum limitation on the Arants' claim is fixed forever at 80 per cent of the state's average weekly wage.

The Arants' position implies that the entire table governs their claim, not just the first line. They claim entitlement to payments up to the maximum limitation in the right-hand column, as of the date indicated in the left-hand column. This means that as of January 1, 1976, the limitation on their death compensation payments would rise to 100 per cent of the state's average weekly wage; after January 1, 1977, the limitation would rise to 133.3 per cent of the state wage; and so forth.

since AS 23.30.215(b) tied the maximum for death benefits to the maximum for disability benefits.

11. *Accord, Union Oil Co. of Cal. v. Dept. of Revenue*, 560 P.2d 21, 23 (Alaska 1977); *Alaska Pub. Util. Comm'n v. Municipality of Anchorage*, 555 P.2d 262, 266 (Alaska 1976); *State v. Aleut Corp.*, 541 P.2d 730, 736-37 (Alaska 1975); *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 412 (Alaska 1973); *Swindel v. Kelly*, 499 P.2d 291, 298 (Alaska 1972); *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971); see 4 K. Davis, *Administrative Law* § 30.14, at 269 (1958).

12. *Hotel Employees Local 879 v. Thomas*, 551 P.2d 942, 942 (Alaska 1976); *State v. City of Anchorage*, 513 P.2d 1104, 1110 (Alaska 1973);

[1, 2] This dispute requires construction of the workers' compensation statute. The court in *Hood v. State, Workmen's Compensation Board*, 574 P.2d 811, 813 (Alaska 1978), enunciated the standard of review for such a question:

[Where] the issue to be resolved turns on statutory interpretation rather than formulation of fundamental policy involving particularized expertise of administrative personnel, . . . we shall independently consider the meaning of the statute.¹¹

The meaning of a statutory provision is determined by the language of the particular provision construed in light of the purpose of the whole instrument.¹²

[3] Wien's position requires that the dates in the left-hand column not only specify when the new rates will apply but also what claims the new rates shall apply to. The Arants' position requires that the dates in the left-hand column be construed to serve a timing function only and that the effective date of the act, May 22, 1975,¹³ be construed to indicate that all claims arising thereafter shall be subject to the new series of maximum limitations. The language of the provision, the purpose of workers' compensation, and the purpose of the new maximum rate table all coincide in favor of the Arants' position.¹⁴ We hold that all claims arising after May 22, 1975 are governed by the increasing rates in the maximum table in AS 23.30.175(a).¹⁵

State v. American Can Co., 362 P.2d 291, 296 (Alaska 1961); see 2A C. Sands, *Sutherland Statutory Construction* § 45.09 (4th ed. 1973).

13. Ch. 83, § 13, SLA 1975.

14. More difficult questions of statutory interpretation arise when the literal interpretation of a statutory provision is at odds with an interpretation that arguably furthers the statute's purpose.

15. Our holding is that the increasing percentages in AS 23.30.175(a) apply to all claims arising after May 22, 1975. The increasing percentage is computed on the basis of Alaska's average weekly wage. Since the average weekly wage will change with passage of time, this raises a question as to which year's aver-

The language of the section favors the all claimants. AS 23.30.175(a) does not have a third column, which might read as follows:

<u>On</u>	<u>The Rate Shall Be</u>	<u>For All Claims</u>
July 1, 1975	80 per cent of the state's average weekly wage	arising after July 1, 1975, and before January 1, 1976
January 1, 1976	100 percent of the state's average weekly wage	arising after January 1, 1976, and prior to January 1, 1977

Had the legislature intended Wien's construction, it is likely they would have expressly so indicated. The effective date of the act is the natural date for establishing when the new rates go into effect.

[4] The purpose of workers' compensation is to compensate the victims of work-rated injury for a part of their economic

age weekly wage controls the computation of the percentage. The percentage increases but does the base also?

The maximum limitation table in effect at the time of Mr. Arant's death stated:

The weekly rate of compensation for disability or death may not exceed the percentage of the state average weekly wage as determined by the table contained in this subsection

Ch. 83, § 2, SLA 1975. The legislature amended the statute, effective August 31, 1977, to read:

The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage *in effect on the date of injury* as determined by the table contained in this subsection

Ch. 75, § 3, SLA 1977 (emphasis added) (codified at AS 23.30.175(a)).

One position is that not only the *percentage* of the average weekly wage increases, but that the *average weekly wage* also changes, periodically until 1981, with fluctuations in the state's average weekly wage. Thus, if the state's average weekly wage for the first period of the maximum rate table was \$200.00, the maximum computation allowable for that period would be 80 per cent of \$200.00, or \$160.00. If the state's average weekly wage in 1976 were \$300.00, the maximum compensation for all claims would be the increased percentage allowed by the statute, 100 per cent of that increased average wage, or \$300.00 per week, etc. A person injured after 1977 could not claim this. The 1977 amendment still gives recipients an increasing percentage, but an increasing percentage relative to the same amount, *i. e.*, the weekly wage in effect at the date of injury. Thus, using the same hypotheti-

cal figures, the limitation would rise according to the new increasing percentage, 100 per cent, for all claims, but relative to the same average weekly wage, *i. e.*, 100 per cent of \$200.00, or \$200.00 for injuries occurring during the first period of the table.

Whether the 1977 amendment was intended to clarify or change the prior law is unclear. If it was intended as a clarification, it governs the maximum limitation on all awards. If it was a change in policy, it governs the limitation only for injuries occurring after August 31, 1977, the effective date of the amendment. This issue as to the base wage was not addressed by the parties, and we do not decide it.

The record indicates that the Workmen's Compensation Board assumed, for the Arants' award, that the base increases as well as the percentage. The Board apparently used \$248.00 as the base wage for the first payment period (\$198.40 is 80 per cent of \$248.00) and \$357.59 as the base wage for the second payment period. Despite this construction by the Board, Wien has never argued that the base wage should not increase above the state average wage as of the date of injury.

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16. *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 266 (Alaska 1974); *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896, 900 (Alaska 1973); 2 A. Larson, *Workmen's Compensation Law* § 57.10, at 10-1 to 10-2 (1976); Division of Research, Alaska Legislative Affairs Agency, *Workers' Compensation: The Feasibility of Establishing a State Fund I* (February 1977) [hereinafter cited as *Alaska Workers' Compensation Report*].

17. Pub.L.No.91-596, 84 Stat. 1590-1616, 29 U.S.C.A. §§ 651-78.

out of or in the course of employment." 18 The Commission's report in 1972 found that "[t]he inescapable conclusion is that State workmen's compensation laws in general are inadequate and inequitable." 19 It made eighty-four specific recommendations, nineteen of which were designated as "essential" for adequate compensation systems. 20 Although there was some sentiment that workers' compensation should be immediately federalized, 21 the Commission urged that the progress of the states in implementing the essential recommendations be evaluated on July 1, 1975; and if necessary, Congress should at that time guarantee

compliance with the essential recommendations. 22

The essential recommendations included an increase in the maximum limitation on death benefit to 200 per cent of the statewide average weekly wage achieved through a phase-in. 23 The Council of State Governments stated:

The limited benefits payable in the case of death under state workmen's compensation laws were an important consideration in causing the National Commission to find that generally workmen's compensation laws provided inadequate benefits. 24

18. Occupational Health and Safety Act § 27, 29 U.S.C.A. § 676(a)(2); see also *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 137 n.15, 545 F.2d 210, 215 n.15 (1976); Alaska Workers' Compensation Report, *supra* note 16, at 6; *Introductory Comments*, Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation and Rehabilitation Law* at ix (rev. ed. July 1974). The Congressional findings which motivated the establishment of the Commission were that:

(A) the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment . . . ; and

(B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of . . . increases in the general level of wages and the cost of living. Occupational Health and Safety Act § 27, 29 U.S.C.A. § 676(a)(1).

19. Alaska Workers' Compensation Report, *supra* note 16, at 6, quoting The Report of the National Commission on State Workmen's Compensation Laws (July 1972).

20. Alaska Workers' Compensation Report, *supra* note 16, at 6, referring to The Report of the National Commission on State Workmen's Compensation Laws (July 1972); *Introductory Comments*, Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation and Rehabilitation Law* at ix (rev. ed. July 1974).

21. Alaska Workers' Compensation Report, *supra* note 16, at 6; Cridfield, *Foreward to Advisory Committee on Workmen's Compensation Laws*, Council of State Governments, *Workmen's Compensation: A Challenge to the States* at vi (February 1973).

22. *Introductory Comments*, Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation and Rehabilitation Law* at ix (rev. ed. July 1974).

23. In *Director, Office of Workers' Comp. Programs v. O'Keefe*, 545 F.2d 337 (3d Cir. 1976), the court stated:

[T]he National Commission recognized that "the arguments . . . concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases." The Report of the National Commission on State Workmen's Compensation Laws 71 (1972). Therefore, the Commission recommended that death benefits, like disability benefits, be limited after a phase-in period to "at least 200 per cent of the State's average weekly wage." *Id.* at 72.

545 F.2d at 347 (emphasis added). The court in *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 545 F.2d 210 (1976), characterized the Commission's recommendations:

It is revealing, therefore, that the Commission not only recommended the same "Maximum Weekly Benefit"—phased in to 200% of the statewide average weekly wage—in death cases as in disability cases, but also noted that exactly the same arguments supported having such a maximum in both types of cases.

At 137 n.15, 545 F.2d at 215 n.15 (Skelly Wright, J.) (emphasis added, citation omitted). But see *Director, Office of Workers' Comp. Programs v. Rasmussen*, 567 F.2d 1385 (9th Cir. 1978).

24. Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation: A Challenge to the States* 13 (February 1973). The Court of Appeals for the District of Columbia termed the recommendations for a new phased-in maxi-

Alaska and other states enacted many of the Commission's recommendations, including the increases in maximum benefit limitations.²⁵ The impetus for action probably came both from the shortcomings revealed by the Commission's report and from the states' desire to avoid federal takeover of the program.²⁴

Alaska's situation illustrates why the Commission found workers' compensation "inadequate and inequitable." In 1975, before the new maximum rates went into effect, the maximum limitation on compensation payments was \$175.00,²⁷ but in Alaska, the average weekly wage was \$248.00.²⁸ Thus, prior to the 1975 amendments, the statute theoretically granted recipients of death benefits 85 per cent of the deceased worker's wage,²⁹ but most claimants instead received the maximum limitation. The maximum limitations on death benefits frustrated achievement of the purpose of workers' compensation to secure adequate compensation.

Wien's position would leave many workers inadequately compensated. Claimants

num limitation among "the most significant" of the Commission's recommendations. *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. at 137 n.15, 545 F.2d at 215 n.15.

25. By 1975, at least ten states based a maximum limitation on death benefits upon a percentage of the state's weekly wage. *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 135, 545 F.2d 210, 213 (1976). A February 1977 report of the Alaska Legislative Affairs Agency observed: "State legislation in recent years has been strongly influenced by the work of the 1971-72 National Commission on State Workmen's Compensation Laws." Alaska Workers' Compensation Report, *supra* note 16, at 6. That report also noted: "The development of workmen's compensation in Alaska has generally conformed to the trend which has prevailed in other states." *Id.* at 10.

26. As the Council of State Governments rather tactfully noted: "[I]t behooves the States to bend sincere efforts toward modernizing their workmen's compensation programs." Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation: A Challenge to the States I* (February 1973). It indicated that enactment of the nineteen essential recommen-

such as the Arants would be frozen at an amount that did not achieve the purposes of the statute. Really, no workers would receive a phased-in increase; each successive group of workers would be subject to different maximum rates. Wien's position makes the phase-in a device to *limit* the number of claimants who would have the benefit of an adequate maximum limitation.

The Arants' position accords with the origin of the new rate table and with the purpose of workers' compensation. In AS 23.30.175(a), the legislature adopted the Commission's recommendations for an increase, phasing in an adequate maximum rate for all workers. The large increase restores protection to the worker, while the phase-in protects the employer from the adverse impact that a large, one-step increase might cause.

In response to the National Commission's report, Congress in 1972 enacted amendments fixing new maximum limitations on death and disability payments in the Longshoremen's and Harbor Workers' Comp-

ensations was "the surest way to preserve and strengthen the state system of workmen's compensation." *Id.* at 2 (emphasis added).

27. See ch. 52, § 1, SLA 1974 and ch. 10, § 3, SLA 1972.

28. This was Alaska's average weekly wage from October 1974 to June 1975. Statistics from the Workmen's Compensation Division, Department of Labor, State of Alaska. The Arants' first weekly payment was \$198.40, which is 80 per cent of \$248.00. This is because the first maximum limitation in the AS 23.30.175 table provides for 80 per cent of the state's average weekly wage, but the average weekly wage for that calculation was measured as of October 1974 to June 1975. Ch. 83, § 2, SLA 1975 (current version at AS 23.30.175(b)).

29. The statute fixing death benefits for a surviving spouse with two children at 85 per cent of the deceased worker's average weekly wage was in effect for about one year, from May 4, 1974 to May 22, 1975. Ch. 56, § 1, SLA 1974. Prior to the effective date of the 1974 amendments, death benefits for a surviving spouse and two children were fixed at 65 per cent of the deceased worker's wage. Ch. 99, § 3, SLA 1966.

sation Act,³⁰ similar to the maximums in AS 23.30.175(a).³¹ The purpose of this legislation further supports the Arants' position. The House Committee Report states:

The basic requirement of the Act is for the injured worker to receive 66 $\frac{2}{3}$ % of his average weekly wage. Historically this $\frac{2}{3}$ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. As a result of the 12 year freeze on increasing benefits under this Act the present \$70 maximum results in few workers receiving $\frac{2}{3}$ of their average weekly wages and many workers receiving as low as 30% of their average weekly wage.

[These amendments] provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined

30. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 906(b), as amended by Pub.L.No.92-576, 86 Stat. 1252, 33 U.S.C.A. § 906(b)(1) (1970 & Supp. 1978). See *Director, Office of Workers' Comp. Programs v. O'Keefe*, 545 F.2d 337, 347 (3d Cir. 1976); *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 137 n.15, 545 F.2d 210, 215 n.15 (1976).

31. The maximum table in the federal Longshoremen's Act states:

[C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary [of Labor] under paragraph (3):

(A) 125 per centum or \$167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

33 U.S.C.A. § 906(b)(1) (Supp.1978) (emphasis added).

Unlike the Alaska statute, the maximum limitation table in the federal act does not explicitly apply to death benefits. In two cases, employees argued that death benefits under the federal act had no maximum limitation. *Director, Office of Workers' Comp. Programs v. O'Keefe*, 545 F.2d 337 (3d Cir. 1976); *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 545 F.2d 210 (1976). Both

annually by the Secretary of Labor. The expectation is that a 200% maximum will enable approximately 90% of the work force covered by this Act to receive $\frac{2}{3}$ of their average weekly wage. In order to ease the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps³²

Wien asserts that the intent of one legislature does not determine the intent of another. Both Congress and the Alaska legislature, however, were responding to a similar factual situation: maximum limitations which cut off most compensation claims.³³ Both statutes were enacted in response to the critique of the National Commission and embodied its recommendations. The intent of another legislature facing a simi-

courts found that Congress intended to limit death benefits in the same manner as disability payments. A contrary result was reached in *Director, Office of Workers' Comp. Programs v. Rasmussen*, 567 F.2d 1385, 1391 (9th Cir. 1978).

We have found no case in which a party argued that the maximum rate table in the Longshoremen's Act applies in the manner urged by Wien. This suggests the improbability of Wien's interpretation of this type of statutory table, since the federal maximum rates went into effect in 1972.

32. H.R.Rep.No.92-1441, 92d Cong., 2d Sess., reprinted in [1972] U.S.Code Cong. & Admin. News, pp. 4698, 4700. Committee reports are oft-used aids in statutory interpretation. E.g., *Halling v. Inlandboatmen's Union*, 585 P.2d 870, 874 (Alaska 1978); *Miller v. Monrean*, 507 P.2d 771, 776 & n.13 (Alaska 1973); C. Sands, 2A Sutherland Statutory Construction § 48.06 (4th ed. 1973); see *Starr v. Hagglund*, 374 P.2d 316, 319 & n.13 (Alaska 1962) (committee reports to constitutional convention used for constitutional interpretation).

33. Appellant argues that the situations are different because Congress did not enact any increase for 12 years prior to the 1972 Act. See text accompanying note 32 *infra*. The situations are essentially similar. Even though the Alaska legislature enacted periodic increases, the limitation still cut off most claims. The need for increased benefits was probably greater in Alaska than the need nationally because of dramatic pipeline-related wage increases in Alaska.

lar problem and enacting a similar statute is a long-accepted and helpful aid in statutory construction.³⁴ Further, in AS 23.30.175, the Alaska legislature has specifically utilized the federal Longshoremen's Act.³⁵ In a number of instances, this court has referred to federal decisions construing provisions of the Longshoremen's Act which are similar to the Alaska Workmen's Compensation Act.³⁶

Wien and amicus offer two alleged obstacles to the Arants' interpretation: AS 23.30.172 and the impairment of contract clauses of the federal and Alaska constitutions. The mainstay of their argument is an interpretation of AS 23.30.172, which stated:

Benefit adjustments. Benefits for temporary and permanent disability shall be calculated under this chapter according to currently existing benefit rates regardless of the benefit rates in existence at the time of the injury, unless this calculation would cause a decrease in the actual benefits receivable.³⁷

The scope of this section was decreased in 1976,³⁸ and the section was eliminated en-

tirely in 1977.³⁹ As originally drafted, one version of AS 23.30.172 read: "Benefits for temporary and permanent disability or death shall be calculated . . ." (emphasis added).⁴⁰ Wien argues that the elimination of the phrase "or death" from AS 23.30.172 means that AS 23.30.175 does not authorize the Arants' payments to rise beyond their initial level.

Wien's argument involves four analytical steps: the Arants' claim for increased death benefits is a claim for a retroactive increase in benefits; section 172 is the only section that provides for retroactive application of compensation rates; section 172 does not include death benefits; therefore, AS 23.30.172 precludes application of the increasing maximum limitations in AS 23.30.175 to the Arants' death benefit payments. This argument is seriously flawed.

First, and foremost, the Arants do not seek a retroactive increase in benefits. The statute enacting the maximum rate table was passed and became effective on May 22, 1975, fully three months before Mr. Arant's death. Assuming, as Wien maintains,

exclusive remedy). Other courts interpreting Alaska's worker compensation statute have also looked to the federal Longshoremen's Act. See, *Johnson v. Standard Oil Co. of Cal.*, 30 F.R.D. 329, 330 (D.Alaska 1962) (subrogation of claim by employer's assignment to insurance carrier).

34. See 2A C. Sands, *Sutherland Statutory Construction* §§ 52.01, 52.03 (4th ed. 1973). Such statutes are said to be "in pari materia," i. e., as cut from the same cloth.

35. In 1976, the legislature changed AS 23.30.175 so that a recipient of Alaska compensation payments who did not reside in Alaska would not receive percentages of Alaska's average weekly wage:

For the purposes of determining the average weekly wage of a state other than Alaska, the commissioner shall adopt the average weekly wage as computed and published by the state agency responsible for administering the workmen's compensation laws of that state. For those states in which no figure is published, the commissioner shall adopt the average weekly wage for that state as published by the United States Secretary of Labor for the purposes of the Longshoremen's and Harbor Workers' Compensation Act

Ch. 252, § 5, SLA 1976 (emphasis added) (codified at AS 23.30.175(c)).

36. See *Stafford v. Westchester Fire Ins. Co.*, 526 P.2d 37, 40 (Alaska 1974) (double recovery); *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896, 899 (Alaska 1973) (wage-earning capacity); *Barber v. New England Fish Co.*, 510 P.2d 806, 812 (Alaska 1973) (compensation is

37. Ch. 51, § 1, SLA 1974.

38. It was limited to temporary total disability cases which existed for more than two years and permanent total disability. The amendment made the section inapplicable to permanent partial disability. Ch. 252, § 3, SLA 1976.

39. Ch. 75, § 11, SLA 1977.

40. On February 20, 1974, two versions of this bill were introduced in the Senate and referred to the Labor and Management Committee. One version included death benefits, see S.B. 400, 8th Leg., 2d Sess. § 1 (1974). The other version did not, see S.B. 400 am., 8th Leg., 2d Sess. § 1 (1974). The reference library of the state legislature has, on microfilm, copies of all the bills which have been introduced.

that compensation rates irrevocably vest at the time of injury, the Arants' claim is that these increasing rates of compensation vest ed at the time of injury. We may assume that removal of death benefits from AS 23.30.172 meant that death benefits would not receive retroactive increases. Under this theory, all compensation claims from deaths which occurred before May 22, 1975, could not rise to the new maximums. Mr. Arant died after May 22, 1975.⁴¹

Second, Wien's interpretation of legislative intent is unreasonable. Neither Wien nor amicus point to any direct evidence for their interpretation of the rather exotic interplay between AS 23.30.172 and .175. Their inference of this relationship requires the following construction of events: in 1975, the legislature enacted a new method of calculating maximum limitations, explicitly used words applying the new limitation to death benefits, but, at the same time, intended that a 1974 amendment that doesn't even mention death benefits countermand the explicit language of the 1975 statute. Further, since AS 23.30.175 uses a new method for calculating maximum limitations, Wien credits the legislature with uncanny foresight to anticipate, in 1974, the

new type of rate table it would adopt in 1975.

The substantive intent attributed by Wien to the legislature is that disability payments should gradually increase but that death benefits should not. This interpretation is inconsistent with the specific events that spawned the new rate structure. The National Commission's critique of workers' compensation maximum limitations applied with equal force to death and disability payments⁴² and the legislature expressly included death benefits within the language of AS 23.30.175.

Finally, by Wien's logic, the increasing maximum rates in AS 23.30.175 no longer apply to disability payments. Wien and amicus maintain that any increase of a maximum limitation is a retroactive increase and that only AS 23.30.172 grants retroactive increases. AS 23.30.172, however, was repealed in 1977.⁴³ Wien's position means that the increasing maximum rates now do not even apply to disability payments since the necessary authority for the "retroactive" increases, AS 23.30.172, no longer exists.⁴⁴

41. A recent compensation claim decision, *Hood v. State, Workmen's Comp. Bd.*, 574 P.2d 811 (Alaska 1978), required interpretation of AS 23.30.172. A worker who had lost a leg in 1973 sought the benefit of a 1975 rate increase. We held that AS 23.30.172 applied to workers with permanent partial disability and granted Hood the increase. The issue before the court was narrowed to the scope of retroactivity:

[With respect to section 172.] it is clear that the legislature intended to give the act a retroactive effect so that we are concerned only with the scope of its retroactive provisions.

Id. at 815 (emphasis added). We termed Hood's claim retroactive: the injury was in 1973 and the increase occurred after his injury, in 1975. In *Hood*, we did not decide whether a retroactive increase in workers' compensation would impair obligation of contract because AS 23.30.172 (Ch. 51, § 2, SLA 1974) provided that "[f]unds needed to carry out the provisions of this section shall be appropriated from the general fund." 574 P.2d at 815-16 & 816 n.13. The employer did not have to pay any of the retroactive increase.

42. See page 358 and note 23 *supra*.

43. Ch. 75, § 11, SLA 1977.

44. While AS 23.30.172 certainly does not have the impact urged by Wien, neither does it have the rather unusual effect argued by the Arants. Their brief states:

Appellees additionally feel that AS § 23.30.172 . . . is applicable to this case and requires that not only the present increases in rates of compensation required by AS § 23.30.175, . . . but any further increases in the rate of compensation affected by amendment to AS § 23.30.175 be paid to appellees subject only to the maximum of 85% of William C. Arant's average weekly wage at the date of his death.

Appellee's Brief at 17. Section 172 has been repealed. The Arants therefore request that this court give effect to a repealed statute and hold that, in the future, they are entitled to increases that have not yet occurred.

Further, the Arants conclude that AS 23.30.172 was made applicable to death benefits by reading significance into inconsequential changes in AS 23.30.215(b). Compare ch. 99, § 3, SLA 1966 (death benefits shall be "subject to the same weekly maximum limitation in the aggregate as temporary total disability compensation under § 175(a) of this chapter") with ch. 83, § 12, SLA 1975 (deletion of the words "under

[5] Both the Alaska and the United States Constitutions forbid laws that impair obligation of contract.⁴⁵ Wien has an insurance policy whereby Wien pays premiums and the carrier agrees to pay the compensation awards of Wien's employees. Wien argues, on behalf of Underwriters Adjusting Company, that the maximum rate table impairs obligations under its insurance contract for two reasons. First, Wien argues that the table provides for retroactive increases. We have already discussed this argument. The maximum rate table prospectively phases in an increase. It has no retroactive effect because it does not grant increases to claimants injured *before* the new maximum rates were passed.⁴⁶ Wien and its insurance carrier were on notice that any injury resulting from Mr. Arant's employment would be subject to the increasing maximum rates in AS 23.30.175(a).⁴⁷

Second, Wien argues that the increasing maximums impair contract because they tie compensation payments to an unknown var-

iable, Alaska's future average weekly wage, changes in which "could not be fairly or accurately contemplated by appellant and its carrier at the time the policies were written." It is true that as between the employer and the insurance company, the insurance contract will now have to allocate the risk of changes in the statewide average weekly wage. An important aspect of all contracts, however, is allocating the risk of future change.⁴⁸

Wien's interpretation would mean that any maximum limitation other than a flat dollar amount would be unconstitutional; a percentage of anything would almost always be uncertain. The legislature, according to Wien, could not set maximum limitations that automatically adjust to the future economic situation. All Wien expresses is its understandable preference for the certainty of the dollar amount maximum limitations. The new method of calculating maximums represents a legislative judgment that the certainty provided by the dollar amounts was at the cost of inade-

§ 175(a) of this chapter"). The current version, enacted in 1977, is still slightly different, stating that death benefits shall be subject to the maximum limitation "as provided in § 175 of this chapter." AS 23.30.215(b).

The legislature specified what retroactive increases were appropriate in AS 23.30.172. It explicitly removed death benefits from the section. If the legislature in 1975 intended the retroactive provision it passed in 1974 to cover death benefits, it probably would have said so. Courts do not infer retroactive operation of statutes in such ambiguous circumstances. See *Hood v. State, Alaska Workmen's Comp. Bd.*, 574 P.2d 811, 813-14 (Alaska 1978); AS 01.10.090; 2 C. Sands, *Sutherland Statutory Construction* § 41.04 (4th ed. 1973).

45. U.S.Const. art. I, § 10; Alaska Const. art. I, § 15.

46. Wien's only case support is *Tennessee Coal & Iron Div. v. Hubbert*, 268 Ala. 674, 110 So.2d 260 (1959), and the cases cited therein. They are not on point. *Tennessee Coal* involved a compensation statute giving the wife of a deceased worker the right to any disability payments to which the deceased worker would have been entitled. The plaintiff's husband had died before enactment of the statute. The court held that the contract clause required application of the statute only to injuries which occurred after the statute's passage. All authority cited in *Tennessee Coal*, *id.* 110 So.2d at

262-66, simply stands for the proposition that the statute in effect at the time of the work-related accident determines compensation rights.

47. Wien's concept of retroactivity would mean that the contract clause prevents *phasing in* any increase in the maximum limitation. Faced with inadequate compensation levels, the legislature would have to do nothing, enact a small increase, or enact one very large increase. If the legislature could enact one large increase, this court will not withhold from the legislature the sensible alternative of spreading that increase over a number of years. See, e. g., *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 4 L.Ed. 579, 605 (1819). Under Wien's analysis, the only way the legislature could phase in an increase in maximum limitations would be to pay for it with public monies. The whole concept of workers' compensation, however, is that the work enterprise and the price of its products bear the cost of injuries occurring in the conduct of the enterprise. *Fruit v. Schreiner*, 502 P.2d 133, 140-41 (Alaska 1972); 1 A. Larson, *The Law of Workmen's Compensation* §§ 1.00, 2.20 (1978).

48. Consider the classic contract. A agrees to buy widgets from B at, say, \$10.00. If the price of the things necessary to make widgets goes up, A benefits from the contract. If their price goes down, B benefits from the contract.

quately compensating workers and their families.

II. ATTORNEY'S FEES

We will consider in turn the fee award for the Board proceeding and for the Superior Court appeal.

AS 23.30.145 provides for award of attorney's fees in workers' compensation cases. AS 23.30.145(a) specifies a formula:

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 per cent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 per cent 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. [emphasis added]

AS 23.30.145(b) grants a reasonable attorney fee:

If an employer fails to file timely notice of controversy or fails to pay com-

49. Four justices participated in *Haile*. The plurality opinion of the court found that the employer's delay in making payments due to circumstances beyond the employer's control did not constitute "controversion of the claim" and therefore a fee award under AS 23.30.145(a) was not proper. 505 P.2d at 839-41. Chief Justice Rabinowitz would have held that AS 23.30.145(a) prescribes a minimum fee award applicable to all compensation cases, regardless of whether the claim is controverted; the fact of controversion permits the Workmen's Compensation Board to require the employer to pay attorney's fees. *Id.* at 841-42 (concurring and dissenting opinion). Justice Erwin agreed that AS 23.30.145(a) required a finding of controversion by the employer but would have found it on the facts in *Haile*. *Id.* at 842-44 (concurring and dissenting opinion). See note 52 *infra*.

50. It is not clear whether the Arants raised this issue in the proceeding before the Board. The sole reference at the Board hearing to attorney's fees was at the beginning of the hearing by Wien's attorney:

... compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation . . . , the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. [emphasis added]

In *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838 (Alaska 1973), we held that the section 145(a) formula only applies to "controverted" claims and the section 145(b) grant of reasonable attorney fees applies to an employer who otherwise fails to make payment of compensation.⁴⁹ The Arants maintain that Wien controverted the claim. Wien maintains that while it "resisted" payment of the increased amount, it did not "controvert" the claim.

[6] The Board's decision makes no mention of the controversion issue. It simply concludes:

We find that the defendant resisted payment of compensation in excess of \$198.40 a week, and applicant retained an attorney in the successful prosecution of this case. Attorney fees in the amount of \$500 are awarded to applicant's attorney to be paid by the defendant.⁵⁰

Mr. Page: There are two questions that are raised aside from the question of penalties and attorney fees which will be taken care of normally(?). [as in the original]

The last word could be "orally." In any event, Wien does not argue that the Arants' request for attorney's fees was not timely raised in the proceedings below.

If reasonable attorney's fees under AS 23.30.145(b) were proper in this case, the Board still should have conducted a hearing on the question, requested evidence from the parties, or at least indicated in its order how it arrived at the \$500.00 determination. See *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 841 (Alaska 1973) (remanding for a hearing on attorney's fees and costs). The court in *Reeves v. Sierra Homes*, 29 Or.App. 441, 563 P.2d 1242, 1242 (1977), remanded a case where the record simply revealed the dollar amount granted by the Workmen's Compensation Board: "Without evidence or a stipulation there is no way we can measure the discretion exercised."

We hold that Wien controverted the Arants' claim and remand the case to the Board to compute attorney's fees according to the statutory formula in AS 23.30.145(a).

[7] Wien's reliance on *Haile* is misplaced. There, the employer never denied its obligation to pay compensation, it simply delayed payments, and prior to the hearing, the employer informed the Board that it was not contesting the claims. We held that the delay in payments did not constitute a controversion.⁵¹ Wien, however, has consistently denied and litigated its obligation to pay the increase sought, and eventually received by, the Arants.⁵²

Wien's failure to file a notice of controversion is not dispositive on the question of attorney's fees. AS 23.30.145(a) requires a finding by the Board of whether there has

been controversion in fact. If failure to file a notice of controversion made the employer liable for lower attorney's fees, the employer would benefit from noncompliance with the statute and few notices would be filed. This backward incentive contrasts with the working of AS 23.30.155, which requires the employer to file a notice of controversion and penalizes the employer who does not comply.⁵³ To hold that there is no controversion due solely to the failure to file the notice would be to place form above substance. We hold that a notice of controversion by the employer is not required for an award of attorney's fees under AS 23.30.145(a).⁵⁴

[8, 9] AS 23.30.145 seeks to insure that attorney's fee awards in compensation cases are sufficient to compensate counsel for

51. In *Haile*, the Workmen's Compensation Board found as a matter of fact that the employer's delay was due to conditions over which it had no control; the employee did not appeal that ruling and so the court did not examine the Board's conclusion that the delay was involuntary. 505 P.2d at 840-41. Justice Erwin would have found that the employer's delay, due to a six-month investigation of the worker's legal right to compensation, constituted controversion as a matter of law. 505 P.2d at 842-43 (concurring and dissenting opinion).

52. The fact that Wien agreed to pay compensation and only disputed the amount does not preclude a finding of controversion and an award of attorney's fees under AS 23.30.145(a). *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978). See *J. B. Warrack Co. v. Roan*, 418 P.2d 986, 990 (Alaska 1966); AS 23.30.145(a) (referring to controverting a claim "in whole or in part").

53. AS 23.30.155, "Payment of Compensation," provides, in part:

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid.

(d) If the employer controverts the right to compensation he shall file with the board on or before the 14th day after he has knowledge of the alleged injury or death, a notice

. . . stating that the right to compensation is controverted . . .

(e) If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 20 per cent of it, which shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which he had no control the installment could not be paid within the period prescribed for the payment. [emphasis added]

Thus, an employer must start compensation payments within 14 days of injury; a notice of controversion permits the employer, legally and without late penalty, not to begin payments. Although the opinion in *Haile* is somewhat unclear on this point, the reference to the employer's failure to file a notice of controversion was discussed in the context of AS 23.30.155(d). 505 P.2d at 839. In *Haile*, the Board did not levy the late penalty because it found the employer's delay "owing to conditions over which he had no control." AS 23.30.155(e). See note 51 *supra*.

54. *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978). The difficulty with interpreting AS 23.30.145(a) may arise from the somewhat awkward language, "When the board advises that a claim has been controverted . . ." (emphasis added). Our opinion in *Alaska Interstate* is to the effect that the word "advises" can be read as "finds."

work performed. Otherwise, workers will have difficulty finding counsel willing to argue their claims.⁵⁵ Also, high awards for successful claims may be necessary for an adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered. Taking into account these factors, however, we are still concerned that, in some cases, application of AS 23.30.145(a) results in a fee award that is "out of all proportion to the services performed." *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 840 (Alaska 1973). The remedy for this is statutory change by the legislature, not "interpretation" by the courts. The legislature may wish to examine whether the formula in AS 23.30.145(a) sometimes results in excessive fee award, awards higher than are necessary to attract counsel into the compensation area.

[10] For the appeal of the Board's decision, the Superior Court granted the Arants \$750.00 in attorney's fees. Before making this award, the court received a motion for \$6,033.75 in attorney's fees from the Arants and a supporting memorandum, stating that counsel had worked 80 plus hours at an hourly billing rate of \$75.00. The Arants appeal the \$750.00 award as an abuse of discretion.

An award of attorney's fees is subject to the broad discretion of the trial court.⁵⁶ "An abuse of discretion is established where it appears that the trial court's determination as to attorney's fees was manifestly unreasonable." *Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970). The Superior Court's fee award for the appeal should provide for

55. *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 844 (Alaska 1973) (Erwin, J., concurring and dissenting).

56. *State v. Alaska Int'l Air, Inc.*, 562 P.2d 1064, 1067 (Alaska 1977); *City of Valdez v. Valdez Dev. Co.*, 523 P.2d 177, 184 (Alaska 1974); *Cooper v. Carlson*, 511 P.2d 1305, 1309 (Alaska 1973); *State v. Abbott*, 498 P.2d 712, 731 (Alaska 1972); *Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970).

realistic compensation, taking into account the same factors that the Workmen's Compensation Board considers when it grants attorney's fees for non-controverted claims: "the nature, length and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries."⁵⁷ Additionally, though, the Superior Court should consider the Board's fee award. This is relevant where application of the formula in AS 23.30.145(a) has produced a disproportionately large award for the Board proceeding.⁵⁸

We remand to the Superior Court with directions that it remand to the Board for a determination of attorney's fees. The Superior Court shall make its determination of the fees to be granted because of the appeal after the Workmen's Compensation Board makes its fee award.

The Superior Court's decision upholding the Board's increase in compensation is AFFIRMED. The question of attorney's fees for the Board proceeding and the appeal is REMANDED for further proceedings consistent with this opinion.



57. AS 23.30.145(a). The Board takes these factors into account when "a claim has not been controverted, but . . . bona fide legal services have been rendered in respect to the claim . . ." *Id.* In these circumstances, the Board directs "payment of the fees out of the compensation awarded." *Id.*

58. AS 23.30.145(a) provides for a minimum fee. If application of the minimum fee formula yields a fee inadequate to compensate the attorneys, there is the right to appeal to the Superior Court.

These cases are generally about unscheduled PPD. Since 1977 there has been a \$60,000 (AS 23.30.190(b)) maximum limit. As far as I know this group isn't talking about this subject - yet.

ASHA staff.³³ The burden now shifts to appellees to show that the erroneous feasibility ratio did not materially affect the Board's decision.

The decision of the superior court is vacated and this case remanded for completion of the trial proceedings in accordance with the foregoing.³⁴

FITZGERALD, J., not participating.

①
Economic (Wage-loss) basis for computing UNSCHEDULED PPD



Virgil HEWING, Appellant,
v.
ALASKA WORKMEN'S COMPENSATION BOARD et al., Appellees.
No. 1625.
Supreme Court of Alaska.
July 27, 1973.

Proceeding in which workmen's compensation claimant sought injunction against award by the Workmen's Compensation Board for permanent partial disability. The Superior Court, Third Judicial District, Anchorage, Edward V. Davis, J., affirmed the Board's decision and denied claimant's request for attorney's fees, and claimant appealed. The Supreme Court, Rabinowitz, C. J., held that the Board's findings were inadequate to permit review, and case would be remanded to the Superior Court with directions to remand to the Board for further proceedings.

Remanded with directions.

33. The Board's minutes stated: The Board concurred in FIIA's recommendation and the ASHA staff's evaluation and recommendation of the best project development plan for the R-16 Eastchester Urban Renewal Low-Income Housing Project under Section 236 of the National Housing Act. The de-

1. Workmen's Compensation ⇨1939

Supreme Court will not vacate findings of the Workmen's Compensation Board if supported by substantial evidence, but the Court's scope of review is not so limited where the Board's decision rests on erroneous legal foundations.

2. Workmen's Compensation ⇨1964

Where point as to whether findings of the Workmen's Compensation Board were inadequate was manifest on face of record, Supreme Court would consider such point even though claimant appellant had not specifically argued it.

3. Workmen's Compensation ⇨1756

Where claimant's injuries came within purview of statute providing that in permanent partial disability cases other than cases involving scheduled injuries the compensation is to be determined by specified formula, award of Workmen's Compensation Board was required to be supported by ultimate finding that claimant had suffered a decrease in his wage-earning capacity. AS 23.30.190(1-20), 44.62.510(a), 44.62-570(b).

4. Workmen's Compensation ⇨803

Consideration of employee's age, education, industrial history, trainability and availability of suitable work in the community will ensure fair determination of wage-earning capacity in circumstances in which employee has no postinjury earnings or in which Workmen's Compensation Board determines that postinjury earnings do not accurately represent earning capacity. AS 23.30.210(a).

5. Workmen's Compensation ⇨1756, 1975

Where claimant had no postinjury earnings, and Workmen's Compensation Board implicitly rejected claimant's total lack of earnings as fairly representing his

veloper selected was J. L. Johnston of Indio, California.

34. In light of this disposition, we find it unnecessary to discuss appellants' contention that the superior court erred in denying their motion for a new trial.

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earning capacity, but failed to support its ultimate finding of decrease in wage-earning capacity with subsidiary findings relating to other factors and circumstances referred to in statute prescribing the determination of wage-earning capacity in cases of partial disability and instead stated that the Board felt claimant "has incurred permanent partial disability equal to 25 percent loss of use of the man as a whole," Board's findings were inadequate to permit review, and case would be remanded to superior court with directions to remand to the Board for further proceedings. AS 23.30.190(1-20), 23.30.210(a), 44.62.510(a), 44.62.570(b).

6. Workman's Compensation \Leftrightarrow 856

Unscheduled partial disability award should be made for economic loss and not for physical injury as such.

7. Workmen's Compensation \Leftrightarrow 803

Availability of work, in employee's community, which he can perform in his injured condition is important determinant of earning capacity. AS 23.30.210(a).

Ernest Z. Rehbock, Anchorage, for appellant.

Jesse C. Bell, Atkinson, Conway, Young, & Bell, Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, ERWIN and BOOCHEVER, JJ.

OPINION

RABINOWITZ, Chief Justice.

While working as a cement finisher for Peter Kiewit & Sons, Co. on August 5, 1969, appellant Virgil Hewing injured his back and left forearm when the platform on which he was working collapsed and fell to the ground. Hewing filed a timely application for adjustment of his claim with appellee Alaska Workmen's Compensa-

sation Board, seeking an award for permanent partial disability.

Thereafter, the Board conducted a hearing on Hewing's claim at which he and his wife were the only witnesses. At the time of the hearing, appellant was 56-years old and had only a first-grade education. Except for a few unskilled, heavy labor jobs, Hewing had worked exclusively as a cement finisher or mason since 1951, having had no special training for any other occupation. With the exception of performing a few household tasks, he had not worked since the accident because he continued to suffer pain as a result of his injuries. Appellant's physician evaluated his disability at 10 percent of "the whole man," but stated appellant would be unfit to continue his cement masonry profession. Hewing had applied for vocational rehabilitation under an Alaska Labor Department Program on-the-job training in agricultural work, but he had not been accepted for the program at the time of the hearing. Based on the record before it, the Board concluded Hewing had suffered a 25 percent "loss of use of the man as a whole" and directed that compensation be awarded in conformity with this conclusion.

Pursuant to AS 23.30.125(c),¹ Hewing sought an injunction against the Board's award, arguing that the award was not supported by substantial evidence nor based upon the proper criteria for determining the degree of disability. The superior court, however, concluded that substantial evidence supported the 25 percent disability award, affirmed the Board's decision, and denied appellant's request for an attorney's fee for legal services rendered in connection with his appeal. In his appeal to this court, Hewing argues that the superior court erred in affirming the Board's decision for the same reasons which make the Board's decision allegedly infirm. He also contends that the superior court abused its

1. AS 23.30.125(c) provides in part:

If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through in-

junction proceedings in the superior court brought by a party in interest against the board and all other parties to the proceedings before the board.

discretion in denying his request for attorney's fees relating to his appeal.

[1] This court has consistently maintained that while we will not vacate findings of the Workmen's Compensation Board if supported by substantial evidence,² our scope of review is not so limited where the Board's decision rests on erroneous legal foundations.³ Hewing's two-pronged attack on the Board's decision and the superior court's affirmance thereof fits within both of these categories of review. He urges that the Board did not rate his disability according to proper criteria and that the Board's 25 percent disability rating is not supported by substantial evidence.

[2] Our review of the record has convinced us that the findings of fact filed by the Board in regard to its disability determination do not permit us to intelligently review the two assertions advanced by appellant.⁴ We have often discussed the necessity for, and the character of, findings of fact which the Board is required to make under the Alaska Administrative Procedure Act.⁵ In *Manthey v. Collier*,⁶ a case based upon the forerunner of AS 44.62.510(a), we held:

The written decision of the Board contains no such findings. We interpret section 19 of the Administrative Proce-

2. *E. g.*, *Anderson v. Employers Liab. Assurance Corp.*, 408 P.2d 288, 289-290 (Alaska 1972); *Wilson v. Erickson*, 477 P.2d 998, 999 (Alaska 1970); *Keiner v. City of Anchorage*, 378 P.2d 406, 411 (Alaska 1963).
3. *E. g.*, *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501, 503 (Alaska 1973); *Laborers & Hod Carriers Union, Local 341 v. Groothuis*, 494 P.2d 808, 812 (Alaska 1972).
4. While appellant has not specifically argued that the Board's findings are inadequate, we consider this point because the error is manifest on the face of the record. See *Brown v. Northwest Airlines, Inc.*, 444 P.2d 520, 532 (Alaska 1968); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962); *Brown v. Alaska Indus. Bd.*, 15 Alaska 625, 629, 224 F.2d 680, 682 (9th Cir. 1955).

dure Act to require such findings. The Board abused its discretion in failing to follow the mandate of the act. The superior court should have, in the proper exercise of its review jurisdiction, set aside the Board's order and remanded the case for adequate findings. In not doing so, the court committed reversible error.⁷

In the instant case, the Board failed to make any specific findings of fact with respect to the degree of appellant's permanent partial disability, choosing instead to frame its rating in the written decision. We are unable to determine from the language of the Board's decision whether the Board employed the proper criteria in evaluating appellant's permanent partial disability.

[3-5] AS 23.30.190 governs compensation for permanent partial disability. Since Hewing's ailments are not "scheduled" injuries within AS 23.30.190(1)-(19), the formula for determining his disability is prescribed by paragraph (20):

[1] In all other cases in this class of disability the compensation is 65 percent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial disability

5. *E. g.*, *Brown v. Northwest Airlines, Inc.*, 444 P.2d 520 (Alaska 1968); *Fischback & Moore of Alaska, Inc. v. Lynn*, 430 P.2d 909, 912 (Alaska 1967); *Alaska Redi-Mix, Inc. v. Alaska Workmen's Compensation Bd.*, 417 P.2d 595, 597-598 (Alaska 1966); *Morrison-Knudsen Co. v. Vereen*, 414 P.2d 536, 539 (Alaska 1966). Findings of fact supporting compensation awards must be made pursuant to AS 44.62.510(a) and 44.62.570(b).
6. 367 P.2d 884 (Alaska 1962).
7. *Id.* at 880.
8. AS 23.30.205(10) defines "disability" as "incapacity" because of the injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

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And, as we hold in *Manthey v. Collier*,⁹ since Hewing's injuries come within the purview of the "other cases" provision, the Board's award

must be supported by an ultimate finding that the claimant has suffered . . . a decrease in his [wage-]earning capacity.

In turn, the determination of wage-earning capacity is prescribed by AS 23.30.210(a):

In a case of partial disability under § 190(20) . . . the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any *other factors* or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future. (Emphasis added.)

The wording of AS 23.30.210(a) is substantially identical with that of 33 U.S.C. § 908(h) of the Federal Longshoremen's and Harbor Workers' Compensation Act. Courts have applied 33 U.S.C. § 908(h) to require compensation boards to consider

9. 367 P.2d 888-889 (interpreting ACLA § 43-3-1(II), a similarly worded forerunner of AS 23.30.190(20)).

10. *E. g.*, *American Mut. Ins. Co. v. Jones*, 138 U.S.App.D.C. 269, 426 F.2d 1263, 1265-1266 (1970); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 653 (5th Cir. 1968), cert. denied, 394 U.S. 976, 80 S.Ct. 1471, 22 L.Ed.2d 755 (1969); *Army and Air Force Exch. Serv. v. Neuman*, 278 F.Supp. 865, 867 (W.D.La. 1967).

State cases applying these factors to determine the extent of permanent partial disability include *Surratt v. Gundersen Bros. Eng'r. Corp.*, 259 Ore. 65, 485

the employee's age, education, industrial history, trainability, and availability of suitable work in the community as being "other factors" affecting earning capacity.¹⁰ Consideration of these "other factors" will, in our view, ensure a fair determination of wage-earning capacity in those circumstances where the employee has no post-injury earnings or when the Board determines that post-injury earnings do not accurately represent earning capacity. Elaborating on *Manthey v. Collier*,¹¹ we hold that the Board in this case should have supported its ultimate finding of decrease in wage-earning capacity with subsidiary findings relating to the other factors and circumstances referred to in AS 23.30.210(a), since appellant had no post-injury earnings and since the Board implicitly rejected his total lack of earnings as fairly representing earning capacity.

[6] In the instant case, the Board failed to make adequate findings relating to the criteria in AS 23.30.190(20) and AS 23.30.210(a). A formal "finding of fact" on the extent of appellant's permanent partial disability was not made. Nor did the Board ever employ the statutory term "wage-earning capacity" in assessing disability. Instead, in the body of the Board's decision, it was stated:

[W]e feel [appellant] has incurred permanent partial disability equal to 25 percent *loss of use of the man as a whole*. (Emphasis added.)

P.2d 410, 415-417 (1971); *Benedict v. Fox*, 192 Pa.Super. 197, 159 A.2d 756, 758 (1969).

See also 2 A. Larson, *Workmen's Compensation Law* § 57.21 (1970).

11. With respect to subsidiary findings in permanent partial disability situations, we required in *Manthey* that:

This ultimate finding [of decrease in earning capacity] must, in turn, be based upon basic fact findings which relate to inability to earn wages, as evidenced by proof of a disparity between wages earned before and after the injury was sustained, and to the claimant's physical condition. 367 P.2d at 889.

Serious conceptual differences exist between the "whole man" and "earning capacity" theories of disability.¹² Under the whole man theory, the primary criteria governing disability awards are physiological and psychiatric. This theory challenges the concept, basic to Alaska's workmen's compensation law, that unscheduled partial disability awards should be made for economic loss, not for physical injury as such.

[7] The Board's inadequate consideration, under AS 23.30.210(a) of the availability of work which appellant could perform may indicate that its "whole man" terminology reflects an improper emphasis upon physical injury. The availability of work in the employee's community which he can perform in his injured condition is an important determinant of earning capacity.¹³ With regard to appellant's ability to work, the Board noted: (1) that he was a 56-year-old man with no special training and only a first-grade education; (2) that he had performed only cement masonry and heavy, manual labor for 20 years preceding his injuries; (3) that his physician found him unfit to perform cement masonry work; and (4) that his back

injury caused him pain even when performing housework. One permissible inference from these notations is that appellant was able to perform only light, unskilled work. No evidence was presented that work suited to appellant's capabilities was regularly and continuously available in his Anchorage community.¹⁴ Further, the Board failed to consider the availability of suitable work or to make a subsidiary finding on this factor.

In rating appellant's disability, the Board may have considered the availability of a Labor Department vocational rehabilitation position. Even if an injured employee's rehabilitation potential may be considered,¹⁵ the Board's oblique reference to rehabilitation prospects does not make clear what weight was given to this factor. Moreover, the Board's oblique reference to rehabilitation prospects do not make clear what weight was given to this factor.

Since we hold the Board's findings of fact inadequate to permit review, we must remand this case to the superior court with directions to remand to the Board for further proceedings in accordance with this opinion.¹⁶

FITZGERALD, J., not participating.

12. See 2 A. Larson, Workmen's Compensation Law § 57.10 (1970); Manthey v. Collier, 307 P.2d 884, 888-889 n. 15 (Alaska 1962). Compare, Saslow v. Rexford, 395 P.2d 36, 42-43 (Alaska 1964).

13. See, e. g., American Mut. Ins. Co. v. Jones, 138 U.S.App.D.C. 269, 426 F.2d 1263, 1265-1266 (1970); Flores v. Bay Ridge Operating Co., 131 F.2d 310 (2d Cir. 1942); Eastern S. S. Lines, Inc. v. Monahan, 110 F.2d 840, 842 (1st Cir. 1940); Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I.1969); United Fruit Co. v. Cardillo, 104 F.Supp. 81 (S.D.N.Y. 1952). See also J. B. Warrack Co. v. Ronn, 418 P.2d 980, 988 (Alaska 1966).

14. We do not decide in this case whether the burden of establishing the availability or unavailability of suitable employment rests upon the claimant or the employer. However, we note that while courts hesitate to impose inflexible burden-of-proof

rules on administrative agencies, the law rarely requires a party to prove a negative fact (i. e. the unavailability of suitable work). For contrasting views on this issue, see Flores v. Bay Ridge Operating Co., 131 F.2d 310, 311 (2d Cir. 1942); Eastern S. S. Lines, Inc. v. Monahan, 110 F.2d 840, 842 (1st Cir. 1940); Perini Corp. v. Heyde, 306 F. Supp. 1321, 1325-1326 (D.R.I.1969); Army and Air Force Exch. Serv. v. Neuman, 278 F.Supp. 805, 807 (E.D.La.1967); 2 A. Larson, Workmen's Compensation law § 57.61, at 88.16-17 (1970).

15. See 2 A. Larson, Workmen's Compensation Law § 57.33 (1970).

16. In light of our holding we also remand the case to the superior court for determination of a reasonable attorney's fee to be awarded appellant for legal services rendered in connection with his appeal to the superior court.

2

ECONOMIC (WAGE LOSS) BASIS FOR COMPUTING UNSCHEDULED PPD

Grace VETTER, Appellant,
v.

ALASKA WORKMEN'S COMPENSATION BOARD and Sue Wagner, dba Polar's Lunch, Appellees.

No. 1943.

Supreme Court of Alaska.

July 12, 1974.

Workmen's compensation case. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., affirmed a denial of compensation and claimant appealed. The Supreme Court, Erwin, J., held that disability compensation may be denied to claimant who does not desire to work but that evidence did not support finding that claimant was unwilling to find suitable employment, and thus not entitled to disability compensation, either because her husband opposed her working or because she did not desire to work.

Reversed and remanded with instructions.

Connor, J., dissented and filed opinion in which Fitzgerald, J., joined.

1. Workmen's Compensation ⇨948

Claimant's failure to go to doctor immediately does not permit dismissal of claim.

2. Workmen's Compensation ⇨1404

Feelings of claimant's husband concerning claimant's working are relevant to determining claimant's wish to work.

3. Workmen's Compensation ⇨803

Disability compensation claim may be dismissed on ground that claimant does not wish to work.

4. Workmen's Compensation ⇨803, 1756

Disability compensation rests not on medical impairment as such but on loss of earning capacity related to impairment and award must be supported by findings that claimant suffered compensable disability, a decrease in earning capacity due to work-connected injury or illness.

Workmen's Compensation ⇨803

Factors in determining whether claimant suffered compensable disability include not only extent of injury but also age, education, employment available in area, and intentions as to employment, with aim of making best possible estimate of future impairment of earnings considering any available clues.

6. Workmen's Compensation ⇨803

There is no compensable disability if claimant, through voluntary conduct unconnected with injury, takes himself out of labor market, or if, after resuming employment, he is fired for misconduct.

7. Workmen's Compensation ⇨1939.5

Board's decision need not be compelled under facts as only possible solution.

8. Workmen's Compensation ⇨1939.6

It is not function of court to reweigh evidence in compensation cases but only to determine whether evidence exists.

9. Workmen's Compensation ⇨1939.7

It is not important in compensation case whether particular situation is subject to more than one inference and it is not court's province to choose between competing inferences.

10. Workmen's Compensation ⇨1626

Evidence in compensation case did not support finding that claimant was unwilling to find suitable employment, and thus not entitled to disability compensation, either because her husband opposed her working or because she did not desire to work.

Joseph W. Sheehan of Rice, Hopper, Blair & Associates, Fairbanks, for appellant.

Thomas E. Fenton of Call, Haycraft & Fenton, Fairbanks, for appellees.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

OPINION

ERWIN, Justice.

This appeal arises from an Alaska Workmen's Compensation Board decision which denied appellant Grace Vetter's claim for disability compensation.

Grace Vetter was employed in Sue Wagner's restaurant, the Polaris Lunch, located in Fairbanks, Alaska. On April 24, 1970, while acting within the scope of her employment, she was injured when a customer physically attacked her. Sue, who did not carry workmen's compensation insurance at the time, agreed to pay for any medical expenses incurred by Grace as a result of her injuries. Sue paid at least some of the bills, maintaining that she paid all that were presented to her. Grace then filed a claim with the Alaska Workmen's Compensation Board, in which she requested both medical costs and a disability award. Sue denied the claim.

After a hearing in May, 1972, the Board awarded Grace \$947.20 to cover medical expenses incurred through the date of hearing, but dismissed the claim for disability compensation. The denial was affirmed by the superior court, which granted summary judgment in favor of Sue.

The appeal from this judgment centers about the denial of disability compensation. Appellant contends that: (1) the Board's failure to award compensation was based on an incorrect legal premise, more specifically, that it had considered matters inappropriate to a workmen's compensation proceeding; and (2) the Board's decision to deny disability compensation was not supported by substantial evidence.

1. 186 F.Supp. 938, 940-941 (D.D.C.1960), rev'd on other grounds, 110 U.S.App.D.C. 190, 290 F.2d 331 (1961), cert. denied, 308 U.S. 900, 82 S.Ct. 178, 7 L.Ed.2d 95 (1961).

This standard of review was adopted by this court in Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 543 (Alaska 1966), and followed in Beauchamp v. Employers Liab. Assurance Corp., 477 P.2d 993, 997 (Alaska 1970), and in Wilson v. Erickson, 477 P.2d 998, 999 (Alaska 1970).

The proper scope of review for this court is outlined in Great American Indemnity Co. v. Britton:

The only questions that the Court may consider are, first, whether the award is contrary to law; and second, whether the administrative findings of fact are supported by substantial evidence.¹

Was The Board's Decision Contrary To Law?

The dispute upon appeal centers primarily about the Board's third finding of fact, which appears to be the basis for the Board's dismissal of Grace Vetter's claim for disability compensation. The Board found:

That the applicant did not suffer disability from work as a result of injury on April 24, 1970. She was able to continue working for the remaining five to six hours of her shift and did not find need to see the doctor until the afternoon of a [sic] day when she was hurt at 2 a. m. The Board believes that applicant does not want to work and that her husband, who did not want her to work before the injury, probably keeps her from working now. We believe the fact that she gives a previous earning history of minimal employment during the three years previous to injury is indicative of this.

This finding is followed by the dismissal of the claim for compensation for disability.

[1-5] Appellant's claim could not be dismissed merely because she did not go immediately to a doctor.² However, the

2. See Alaska State Housing Authority v. Sullivan, 518 P.2d 759 (Alaska 1974). Compare Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 541 (Alaska 1966), where the fact that claimant did not know immediately of his disability and only acquired knowledge of it later when his back problems flared up was held to be unimportant as affecting the timeliness of his claim.

As there are many medical problems where the extent and duration of the symptoms

second portion of the finding introduced another ground for dismissal. The Board found that Grace Vetter did not want to work and supported this finding by reference to her husband's attitude toward her employment³ and her previous sporadic working history.⁴ A dismissal for this reason has a proper foundation in the law. The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability or, more precisely, a decrease in earning capacity due to a work-connected injury or illness.⁵ Factors to be considered in making this finding include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabil-

are not known at the outset, a denial of compensation merely because the claimant does not visit a doctor for several hours following injury would only thwart the beneficent purposes of the Alaska Workmen's Compensation Act.

3. Appellant argues that the Board's consideration of Mr. Vetter's desires and concern for his tax bracket constituted error on the theory that they are not pertinent to the question of Grace Vetter's disability. This would indeed present a serious problem if the Board merely looked at Mr. Vetter's income and his desires concerning his wife's employment and denied compensation on that basis, regardless of her intent. However, this does not appear to be what the Board did in this case. Rather, they found that she did not want to work. Her husband's feelings are relevant in a determination of what her desires might be.
4. Grace Vetter's work history generally consisted of jobs of short duration. Following the Vetter's move to Fairbanks in 1951 or 1952, Grace was employed as a bartender at a small restaurant. She testified that she worked at this job "for about a year." Between 1952 and late 1955 or early 1956, she worked at two local cafes, each for a period of several months. Around 1956 she went to Australia for a year to have an operation for the removal of a kidney. Shortly after she returned to Alaska in 1957 or 1958, she went to work at the Model Cafe. She testified that she "worked on and off

ities in question, and intentions as to employment in the future.⁶ The aim is to make the best possible estimate of future impairment of earnings considering any available clues:

. . . the purpose of the wage calculation is not to arrive at some theoretical concept of loss of earning capacity; rather it is to make a realistic judgment on what the claimant's future loss is in the light of all the factors that are known.⁷

[6] If a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability. If an employee, after injury, resumes employment and is fired for misconduct, his impairment playing no part in the discharge, there is no compensable disability.⁸ Total disability benefits have been denied when a partially

at the Model Cafe for years," working three, four, five or six months at a time:

It depends, you know. I mean if I felt as though I wanted to work or liked to work, or if I didn't have something else to do, I'd explain it to Steve [the owner of the cafe] and it was all right with him, and I could always go back.

It is unclear how long this arrangement lasted, but Grace took out a withdrawal card from her union in 1964 and apparently did not work in 1966. In 1967 she worked for "a month or six weeks" at the Sullivan Hotel in order "to help [the owner] out." She was unemployed in 1968. In 1969 she worked for the International Coffee Shop at the Fairbanks airport. Grace testified that she went to work for Sue Wagner at the Polaris Restaurant in February, 1970, and worked there approximately ten weeks before she was injured. Sue Wagner testified, however, that Grace had worked only seven days in the two-week period preceding her injury.

5. *Manthey v. Collier*, 367 P.2d 884, 888-889 (Alaska 1962); 2 A. Larson, *The Law of Workmen's Compensation* § 57.10, at 7-8 (1970).
6. *J. B. Warrack Co. v. Roan*, 418 P.2d 980, 987 (Alaska 1966); *Argonaut Ins. Co. v. Indus. Accident Comm'n*, 57 Cal.2d 589, 21 Cal.Rptr. 545, 371 P.2d 281, 284 (1962).
7. 2 A. Larson, *The Law of Workmen's Compensation* § 60.21, at 88.200 (1970).
8. *Id.* at § 57.64, at 88.26.

disabled claimant has made no bona fide effort to obtain suitable work when such work is available.⁹ And, a claimant has been held not entitled to temporary total disability benefits even though she had a compensable injury when she had terminated her employment because of pregnancy and thereafter underwent surgery for the injury. Since the compensable injury was not the reason she was no longer working, temporary disability benefits for current wage losses were denied.¹⁰

The Board in the instant case determined that Grace Vetter was no longer employed, not because of any injury but because of her own personal desires, and found no actual impairment of her earning capacity. If this determination is supported by substantial evidence, the claim for compensation was correctly denied.

*Was The Board's Finding Supported By Substantial Evidence?*¹¹

[7-9] Appellant sets forth numerous references to the record indicating the ex-

tent of her original injuries and the ongoing nature of her symptoms. But, as discussed above, the extent of her disability is not of consequence if it is determined that she had no intention of re-entering the labor market for reasons unconnected with her injuries.

[10] Upon reviewing the entire record we find no substantial evidence supporting the Board's finding that Grace was unwilling to find suitable employment, either because her husband was opposed to her working or because she did not desire to work. Indeed, almost all the evidence is to the contrary. Her husband's feelings were explored only indirectly.¹² At several points Grace testified that her husband had expressed a preference that she not work, primarily because the additional income placed them in a higher tax bracket, but nowhere is there any testimony that Grace's husband was opposed to her working¹³ and the answer to the only direct question on this issue was that he did not care. On the issue of her desire

9. Perry's Heating Serv. v. Cashman, 104 R.I. 75, 241 A.2d 823, 826 (1968).

10. Electronic Associates, Inc. v. Heisinger, 111 N.J.Super. 15, 266 A.2d 601 (1970).

11. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Keiner v. City of Anchorage, 378 P.2d 406, 411 (Alaska 1963). The Board's decision need not be compelled under the facts as the only possible solution to the problem, as it is not the function of this court to reweigh the evidence but only to determine whether such evidence exists. Laborers & Hod Carriers, Local 341 v. Groothuis, 494 P.2d 808, 811-812 (Alaska 1972); Wilson v. Erickson, 477 P.2d 998, 1002 (Alaska 1970). It is not important whether the particular situation is subject to more than one inference, Anderson v. Employers Linb. Assurance Corp., 498 P.2d 288, 290 (Alaska 1972), as it is not the court's province to choose between competing inferences, Cook v. Alaska Workmen's Compensation Bd., 476 P.2d 29, 32 (Alaska 1970); Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 543 (Alaska 1966).

12. Grace Vetter's husband was not called as a witness at the hearing, nor was his deposition taken.

13. Q. Did your husband want you to work?

A He didn't care, really, except that he, you know, didn't care whether I worked or not, but he did make a statement that he wasn't particular, you know, if I had worked or not.

Q Didn't you say earlier this morning that he didn't want you to work because it threw him in a higher income tax bracket?

A He didn't want me to, well, I would, he didn't want me to work on account of this, you mean?

Q On account of . . .

A Oh, he had that in mind, yes.

A . . . I had gone [to the Polaris Lunch] on several occasions, you know, to talk to Sue, and had coffee with her, and I knew most of the girls that worked there at that time, and I knew Sue had been having quite a bit of trouble over their help, and she had asked me to go to work, and one time my husband was with me, and he said "I don't particularly care for Grace to work." The fact remains, and it is a fact, that any income that I might receive would put him in a higher bracket. I can see his point now, but at the time he didn't particularly care for me to work.

to work, Grace testified that she considered her job at the Polaris Lunch a permanent one and intended to continue working there as long as they would have her. And her employer, Sue Wagner, testified that she came in frequently following the attack asking if she could return to work.¹⁴

There is also considerable evidence in the record that Grace was unable to return to work due to complications resulting from her injury. While Grace did state that her main reason for not returning to work was that she wanted no more fights or arguments with anyone, she also testified that because of the headaches and kidney problems she suffered as a result of her injury, she had limited her activities in public.¹⁵ She further testified that she had to decline an offer of a waitress job at another restaurant because she was physically unable to perform the work. Grace's physician for 15 years testified that it was his opinion that she was incapacitated as a result of her injury and was not malingering. No other medical testimony was presented.

In short, the focus of the hearing was not upon the defense that Grace was unwilling to work but rather upon the defense that her injuries resulted from a deliberate attack by her upon a customer. And whatever testimony reflected adversely upon her willingness to work was given incidentally in response to questions directed to this latter issue. Such testimony, even given its most favorable inference, does not support the finding of her unwillingness to work.

Q And why were you given a check instead of cash?

A Well, I don't know really how to answer that.

Q Well, was anything said?

A Well, in the first place my husband didn't particularly care for me to go to work, and I felt as though I was capable and able, you know, to work, and he felt as though that with my income that I would have put us in a higher bracket, and Sue was aware of this.

We thus find a lack of substantial evidence to support the finding of the Board that appellant Grace Vetter was unwilling to work and reverse the decision of the superior court affirming the Board's refusal to grant appellant disability compensation. We remand this case to the superior court with instructions to in turn remand the case to the Workmen's Compensation Board for further proceedings in conformity with this opinion.

CONNOR, Justice, with whom FITZGERALD, Justice, joins, dissenting.

My disagreement with the majority opinion stems not from any difference about the applicable principles but from a difference in interpreting the record.

The Board's finding of fact #3, upon which the denial of compensation is predicated, is as follows:

"That the applicant did not suffer disability from work as a result of injury on April 24, 1970. She was able to continue working for the remaining five to six hours of her shift and did not find need to see the doctor until the afternoon of a day when she was hurt at 2 a. m. The Board believes that applicant does not want to work and that her husband, who did not want her to work before the injury, probably keeps her from working now. We believe the fact that she gives a previous earning history of minimal employment during the three years previous to injury is indicative of this."

The Board found that Mrs. Vetter suffered no disability from work as a result

Q Well, is what you're saying then the cash was below the table or whatever you call it? Is that what you mean?

A Well, I was paid across the board, if that's the expression.

14. Sue Wagner also testified to the effect that Grace Vetter was a good worker who would be rehired any time.

15. As is pointed out in note 4 *supra*, Grace Vetter had already had one kidney removed before the attack.

of her injury. This can mean one of two things, or both, in the context of this case: she has no ongoing symptoms which are serious enough to prevent her from working, or, regardless of her condition, she does not care to work any longer. The sentence noting that Mrs. Vetter did not immediately seek out a doctor indicates the first, i. e., one can infer that the Board doubted the seriousness of her injury. A delay in seeking medical attention would not in itself be sufficient ground to deny compensation. However, there was other evidence which implied that Mrs. Vetter was capable of returning to work but had not sought to do so. At the hearing, she was asked whether she felt capable of returning to work:

"Q. How has it affected your daily living? I mean, do you feel you are capable of going back to work right today?"

A. No.

Q. Why not?"

A. In the first place, I just don't feel as though I'm capable, and could even be qualified to work in the public.

Q. Why do you say that?"

A. Because it could happen again.

Q. When you say 'it could happen again', what could happen again?"

A. I don't want any more arguments or to fight with nobody."

Mrs. Vetter also testified concerning a job solicitation, apparently instigated by Sue Wagner. She told the offeror that she was not looking for a waitress job, and when describing the interview with him, did not indicate that she did not want the job because of ill health.

A steady bingo player reported that she had seen Mrs. Vetter playing bingo, and said that she had seen Grace play about that same amount of cards that she did (12-15) without any apparent confusion and had seen her win. Sue Wagner re-

ported that Mrs. Vetter came in several times following the incident asking to be put back to work. In her deposition, Mrs. Vetter said that she had traveled to Australia in September of 1970 (her injury took place in April of 1970) for three months because her mother was seriously ill.

The doctors' reports would tend to indicate the ongoing nature of her symptoms. Dr. Ribar did not think she was malingering and did not think her capable of returning to work. Dr. Hanns said that physical examination revealed no distress, but the symptoms she complained of were characteristic of the type of injury she had suffered. The initial kidney problem was reported to have cleared up.

There was other evidence which indicated that Grace was not able to return to work. She described frequent, severe headaches, and said that her condition had limited her activities; she was not able to play bingo nearly as often as she had before, and generally was not as "social" as she used to be. She also said she could watch only 3 or 4 bingo cards. Her companion bingo player could not report as to how often she had seen Grace playing bingo in the months preceding the hearing. Grace said in her deposition that Sue Wagner had asked her to return to work, not that she had asked Sue:

"A. Oh yes, on several occasions I would ask—well, when she'd ask me when I was coming back, and I said, 'I hope I can come back pretty soon.'"

She also said that she felt that she was not physically able to work.

There were indications that Grace was not a serious member of the labor market. Her doctor, Dr. Ribar, was aware of her work to only a vague extent. Sue Wagner described Grace as only a temporary hire. Grace, in her deposition, revealed no real clear-cut plans as to employment.

"Q. Well, how long were you planning to work for Sue? If you had any plans.

A. Well, now that answer I couldn't give you any answer to that, because I don't know.

Q. Well, you didn't have any—

A. You don't know what happens.

Q. Well, what I'm thinking about, it wasn't anything like working for her for three months and then quitting and going some place or doing something else, you didn't have that plan in mind?

A. Oh, no, I did not have, no, no way."

There were several references to the Vetter's tax bracket and her husband's desires concerning her work.

"A. . . . and one time my husband was with me, and he said 'I don't particularly care for Grace to work.' The fact remains, and it is a fact, that any income that I might receive would put him in a higher bracket. I can see his point now, but at the time he didn't particularly care for me to work."

And later at the hearing:

"Q. Did your husband want you to work?

A. He didn't care really, except that he, you know, didn't care whether I worked or not, but he did make a statement that he wasn't particular, you know, if I had worked or not.

Q. Didn't you say earlier this morning that he didn't want you to work because it threw him in a higher income tax bracket?

A. He didn't want me to, well, I would, he didn't want me to work on account of this, you mean?

Q. On account of . . .

A. Oh, he had that in mind, yes. Yes."

And in the deposition:

"A. Well, in the first place my husband didn't particularly care for me to go to work, and I felt as though I was capable and able, you know, to work, and he felt as though that with my income that I would have received would put us in a higher bracket, and Sue was aware of this."

If the Board was tending to doubt the seriousness of Mrs. Vetter's injuries, the refusal of the waitress job offer following the incident with Hill would tend to support the inference that she was not seriously interested in obtaining a job. This, of course, is buttressed by her sporadic working history and her indefinite attitude towards work.

On the other hand, at the hearing, Grace testified that she didn't regard working at the Polaris as temporary, and that she had always thought that she would eventually return to work at the Polaris. Sue Wagner also reported that she was not ready to fire Grace following the incident, but instead indicated that she just wanted things to calm down a bit before taking her back.

Much of Grace Vetter's testimony was contradicted by that of other persons, indicating that perhaps she was not as seriously injured as she maintained, and that she was not altogether serious about any work plans. Another matter which is essentially unrelated to the compensation issues but which does relate to her credibility concerns whether she knew Jay Hill before the incident in the cafe. She steadfastly maintained that she did not. However, a sister to Sue Wagner and Jay Hill both maintained that Grace knew her assailant previous to the brawl, as did Sue Wagner. And the Board also had the benefit of the claimant's demeanor during the hearing which lasted for several hours.

Admittedly the record in this case is not altogether enlightening. But I think there

was enough for the Board to infer that Mrs. Vetter did not desire to resume work. I would, therefore, uphold the Board's denial of the claim.

reasonable probability that purchaser will be subjected to lawsuit.

3. Vendor and Purchaser ⇨78

Time is usually not of essence in land sale contract.

4. Contracts ⇨212(1)

When time is not essence of bargain, performance must still occur within reasonable period.

5. Specific Performance ⇨126(2)

Court ordering agreement performed need not enforce forfeiture, even though provision was product of hard bargaining.

6. Specific Performance ⇨121(3, 11)

Evidence in action by airline and subsidiary for specific performance of contract to purchase resort property from vendor supported findings that vendor breached in several respects, although it did not support finding that there was breach as to tender of marketable title, supported findings that purchasers did not breach in several claimed respects, but did not support findings of no breach in other respects, supported findings that time was not of essence, that provision for retention of deposit as rent should lease be reinstated was a penalty and that, therefore, vendor was equitably estopped, by retention of benefits, from relying on purchasers' delay, and that purchasers' failure to seek registration of escrowed shares was but a minor breach, so that purchasers were entitled to specific performance.

7. Trial ⇨53, 66

Record did not sustain vendor's claim that trial court, in purchasers' action for specific performance in which court sought first to dispose of specific performance claim before proceeding to vendor's damages claims, had not admitted certain of vendor's evidence on issue of unclean hands defense or that vendor, who sought to introduce his evidence at second stage of trial, had been foreclosed from showing that transaction evidenced unclean hands.

8. Specific Performance ⇨131

Vendor's claims for damages which allegedly arose from prior agreements which



C. Bruce FICKE, Appellant,

v.

ALASKA AIRLINES, INC., an Alaska corporation, and Alyeska Resort, Inc., Appellees.

No. 1698.

Supreme Court of Alaska.

July 12, 1974.

Action by airline and its subsidiary for specific performance of contract for sale of resort property. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., granted specific performance and vendor appealed. The Supreme Court, Erwin, J., held that, generally, evidence sustained findings adverse to vendor and favorable to purchasers, including finding that provision that deposit might be retained by vendor as advance rent should prior lease be reinstated was a penalty and that, accordingly, vendor's retention of deposit operated to estop vendor from relying on purchasers' delay in performance.

Affirmed.

Connor, Fitzgerald and Roochever, JJ., did not participate.

1. Attorney and Client ⇨81

Attorney retained to negotiate terms of agreement binds client to promises made within scope of that authority.

2. Vendor and Purchaser ⇨130(2)

Meaning of marketable title is not determined by title examining practices; marketable title is not a perfect one and test is whether conveyance carries with it

this aspect of Gonzales' appeal and defer ruling on its merits until we have decided the issues in Gonzales' appeal in Supreme Court No. 3348. In this latter case, Gonzales seeks to overturn his convictions of two separate sales of heroin for which he received two consecutive twenty year terms.¹⁶ Given the length of the sentences involved in the Gonzales cases and their close interrelationship, we conclude that it would be inappropriate to decide the sentence appeal in the case at bar at this time.

The judgment and conviction is Affirmed. Jurisdiction of the sentence appeal is retained for subsequent decision.

③
Economic Wage-Loss
Basis for computing
UNSCHEDULED PPD
KEY NUMBER SYSTEM
less important than
1st Hearing + letter
more an
application

Virgil HEWING, Appellant,

v.

PETER KIEWIT & SONS and Aetna
Casualty & Surety, Appellees.

No. 3511.

Supreme Court of Alaska.

Nov. 9, 1978.

Claimant appealed from decision of the Alaska Workmen's Compensation Board claiming that it inadequately compensated him for permanent disability sustained as a result of an industrial injury. The Superior Court, Third Judicial District, Anchorage, James K. Singleton, J., affirmed award, and claimant appealed. The Supreme Court, Boochever, C. J., held that Board did not consider proper factors in finding that claimant had no loss of earning capacity, and cause would be remanded.

Remanded.

Matthews, J., dissented with reasons in which Rabinowitz, J., joined.

1. Workers' Compensation ⇔ 1624, 1950

Workmen's Compensation Board erred in making determination that claimant had no loss of earning capacity after certain date and not considering certain factors, such as fact that postinjury income was from sales of junk and "barbeque" rather than from employment, that there was no breakdown between gross and net income, the difference in wage levels between the two time periods, and the state employment counselor's testimony as to lack of any suitable employment for claimant because of his work-related disability and, thus, case would be remanded to Board for determination of whether claimant was employable rather than totally disabled under the "odd-lot" doctrine and for determination of loss of earning capacity. AS 23.30.190(20), 23.30.210(a).

2. Workers' Compensation ⇔ 803

For lack of motivation to be significant in determining claimant's entitlement to workmen's compensation there must be showing that work is available within employee's capabilities. AS 23.30.190(20).

3. Workers' Compensation ⇔ 803

Workmen's Compensation Board was correct in attempting to determine claimant's loss of earning capacity rather than rating claimant purely on physical impairment alone. AS 23.30.190(20), 23.30.210(a).

4. Workers' Compensation ⇔ 840

In order to determine workmen's compensation claimant's award, where there is a substantial difference in preinjury and postinjury wage levels, postinjury earnings should be corrected to correspond with general wage level in force at time that preinjury earnings were calculated, or preinjury earnings should be recomputed at scale in effect at time of postinjury earnings. AS 23.30.190(20), 23.30.210(a).

5. Workers' Compensation ⇔ 11

One major purpose of Workmen's Compensation Act is to furnish a simple, speedy

15. See note 4, supra.

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remedy for injured workers whereby they may be compensated for injuries arising out of their employment. AS 23.30.005 et seq.

R. Samuel Pestinger, Pettyjohn & Pestinger, Anchorage, for appellant.

George M. Kapolchok, Atkinson, Conway, Young, Bell & Gagnon, Anchorage, for appellees.

OPINION

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, BURKE and MATTHEWS, Justices.

BOOCHEVER, Chief Justice.

This matter is before us on a second appeal by Hewing, contending that the Alaska Workmen's Compensation Board's award, affirmed by the superior court, inadequately compensates him for permanent disability sustained as a result of an August 5, 1969 industrial injury. Initially, the Board awarded Hewing compensation for 25 percent permanent partial disability based on a finding of "25% loss of the use of the man as a whole" and ordered a payment of \$4,250.00 as lump sum compensation. We remanded for findings by the Board based on a measure of lost earning capacity rather than a measure of the purely physical injury sustained. On remand, the Board found that between June 30, 1970 and August 20, 1973, Hewing's wage earning capacity was so minimal that it could be considered to be zero. The Board, however, found that his earnings after August 20, 1973 from sales of items including used furniture and from barbecuing meat were in excess \$5,000.00 per year and thus more than \$4,711.74, his highest earnings as a cement mason for any of the three years prior to his injury. The Board concluded that he had no loss of earning capacity after August 20, 1973. Hewing was therefore awarded compensation of \$9,617.52 for

the period to August 20, 1973. Deducted from this sum was the \$4,250.00 previously paid as compensation for partial permanent disability so that on remand, the award was an additional \$5,367.52.

Hewing appeals contending that he is totally permanently disabled and that his minimal earning capacity falls in the "odd lot" category not altering his 100 percent disability status.

[1] We have concluded that the Board erred in finding that Hewing had no loss of earning capacity after August 20, 1973.

For a better understanding of the issues, we shall outline the salient facts. On August 5, 1969, Virgil Hewing, who was then 55 years old, fell about 20 feet when the floor gave way as he and 3 others were finishing cement on a Peter Kiewit construction job near Fairbanks. Mr. Hewing injured his back and fractured 2 bones in his left wrist. He filed a timely claim with the Workmen's Compensation Board; and on November 24, 1970, the Workmen's Compensation Board determined that he had "incurred a permanent partial disability equal to 25 percent loss of use of the man as a whole." That finding was challenged by a complaint for an injunction in which Mr. Hewing claimed permanent total disability. The injunction was denied by the superior court, and an appeal was taken to this court. In *Hewing v. Alaska Workmen's Compensation Board*, 512 P.2d 896 (Alaska 1973), this court concluded that the Board's findings of fact were insufficient to permit an intelligent review of the case.¹ We were concerned primarily that the Board applied an incorrect standard for determining the award, noting that unscheduled partial disability awards should be made for economic loss, not physical injury as such. We also pointed out that the availability of work in the employee's community, which he is able to perform in his injured condition, is an important determinant in establishing earning capacity. The evidence at the first

1. The Board's decision considered whether or not a penalty should be assessed against the employer for failure to make timely payment for temporary total disability, as well as the

degree of permanent disability. A large portion of its decision was addressed to the penalty question.

hearing indicated that Mr. Hewing was capable of doing only light, unskilled work, and the Board was without evidence that work suited to his capabilities was regularly and continuously available in Anchorage. We remanded the case for further findings.

On August 20, 1974, prior to the determination by the Board, Mr. Hewing was driving his truck when he was hit by another motorist. He contacted his insurance company² to recover his medical costs and lost income as a result of the accident. In the course of two recorded interviews with the insurance adjuster, Mr. Hewing indicated that he made more than \$5,000.00 in the past year selling "junk" and "barbeque."³ He also indicated a loss of more than \$3,000.00 since the automobile accident.⁴

On February 13, 1975, the Workmen's Compensation Board reheard the Hewing case pursuant to this court's remand. In arriving at its decision, the Board examined the medical records in the case as well as the recorded interview with the insurance adjuster. A deposition from an employment counselor from the Department of Labor was also introduced. The Board rendered a detailed decision, the conclusions of which we have set forth above.⁵

The medical evidence presented clearly indicated that Hewing had suffered permanent damage as a result of his industrial injury. Prior to the first hearing, Dr. Voke rated the disability at 10 percent. The discharge summary for Providence Hospital of April 21, 1970 indicated marked degenerative arthritis at three levels of the cervical spine which was believed to be secondary to

2. The other motorist was uninsured, and Mr. Hewing carried uninsured motorist coverage.
3. The exact nature of this work is unclear. When questioned further at the 1975 hearing, Mr. Hewing explained that he bought used furniture at auctions and resold it. "Barbeque" was never defined.
4. The time lag between the interview and the accident is unclear, but it could not have exceeded 6 months because the accident occurred in August 1974, and the adjuster testified about his interview with Hewing at the February 1975 hearing.

the original injury, as well as tenderness in the left hand. Dr. Harrel on September 27, 1973 found that permanent disability was 50 percent or more and that Mr. Hewing would never be able to do his regular work. On May 20, 1974, Dr. Von Wichmann wrote: "I doubt that he will be able to work as a laborer in the future because of the symptoms that he has."

Joan C. Owens, an employment counselor with the Alaska Department of Labor, testified that she did not know of any job that Hewing could do. In answer to whether she could place him in any employment, she stated:

I don't believe that I could. I really don't. He is just really badly crippled and handicapped with his lack of education, and age is a handicap also, although we like to think it's not.

[2] The Board considered significant her testimony in answer to a question as to whether she believed that he was motivated to go back to work:

A No, I didn't. I felt that—that he himself felt that he was too—had been too badly injured to work, and also handicapped with his lack of education, and for twenty years, I believe it was, he worked in cement work—

Q Uh-hum.

A And obviously he couldn't do that any more.

The fact that one who is physically disabled from manual labor and is unqualified in other types of work is not motivated to seek work, is not, however, the equivalent of a physically competent person being unem-

5. The Board was aware that the doubt surrounding Mr. Hewing's earnings was due to the untrustworthiness of his own testimony. Before the Board, he downplayed his income, but he inflated it to the insurance adjuster. As the Board stated:

If applicant's testimony is to be accepted, he is permanently and totally disabled for workmen's compensation purposes but has sustained a loss of income of between \$5,200 and \$15,600 for the purposes of his claim for damages. Obviously both cannot be correct. We believe the truth lies somewhere in between.

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ployed due to lack of motivation. For lack of motivation to be significant, there must be a showing that work is available within the employee's capabilities.

The Board in its decision determined that Hewing "has some permanent partial disability but is not permanently and totally disabled." In not awarding any compensation for the period after August 20, 1973, the Board must have concluded that the partial disability did not affect Hewing's earning capability.

The Board found that Hewing had virtually no schooling except what he was exposed to in post-injury vocational rehabilitation efforts which proved largely unsuccessful. His prior history of employment was as a cement finisher since 1957, some truck driving and farming. All of these factual findings seem to be supported by substantial evidence.

This appeal involves two questions: whether a manual laborer, with practically no education, who is no longer able to enter the manual labor market because of an industrial injury, is entitled to no compensation for loss of earning capacity because he may engage in the sale of barbeque, used furniture and other items;⁶ and if he is entitled to compensation, the amount thereof.

AS 23.30.190(20), in effect at the time of Hewing's injury, provided for unscheduled permanent partial disability based on 65 percent of the difference between his pre-injury average weekly wages and his wage earning capacity after his injury in the same employment or otherwise.⁷ "Wage earning capacity" is defined in AS 23.30.-210(a) as follows:

In a case of partial disability under § 190(20) or 200 of this chapter the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or

his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

The Board found that Hewing had actual post-injury yearly earnings in excess of \$5,000.00, and, in effect, that those earnings fairly and reasonably represented his wage earning capacity. Since his earnings as a cement mason during the three years prior to the 1969 injury did not exceed \$4,711.74 per year, the Board concluded that he suffered no loss in earning capacity.

[3] The Board was correct in attempting to determine Hewing's loss of earning capacity rather than rating Hewing purely on physical impairment alone. It was to assure a rating based on loss of earning capacity that we remanded the case after the first appeal stating:

The availability of work in the employee's community which he can perform in his injured condition is an important determinant of earning capacity.

One permissible inference from these notations is that appellant was able to perform only light, unskilled work. No evidence was presented that work suited to appellant's capabilities was regularly and continuously available in his home community. Further, the Board failed to consider the availability of suitable work or to make a subsidiary finding on this factor. 512 P.2d at 900. (footnotes omitted)

Subsequently, in *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974), we discussed the applicable criteria as follows:

6. Mr. Hewing's testimony was to the effect that friends helped him load and unload his truck.

7. Ch. 193 § 7(3)(t), SLA 1959 (current version at AS 23.30.190(20)) (66²/₃ percent of the difference). The Board computed compensation based on 65 percent of Hewing's wage.

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability or, more precisely, a decrease in earning capacity due to a work-connected injury or illness. Factors to be considered in making this finding include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future. [footnotes omitted]

[4] What is necessary is to compare the earnings made prior to the injury with the earnings likely to be made in the future. Normally, the comparison of post-injury earnings and those prior to the injury involves a relatively brief span of time. In Hewing's case, we are comparing earnings of 1973-74 with those of 1966-69. Where there is a substantial difference in wage levels, as there is obviously here, the post-injury earnings should be corrected to correspond with the general wage level in force at the time that pre-injury earnings were calculated,⁸ or the pre-injury earnings should be recomputed at the scale in effect at the time of the post-injury earnings.

It is impossible, of course, to predict an employee's earnings in the future, but an award must nevertheless be made without waiting until the end of the employee's worklife.

The only possible solution is to make the best possible estimate of future impairment of earnings, on the strength not only of actual post-injury earnings but of any other available clues.

It is uniformly held, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is

evidence of some actual post-injury earnings equaling or exceeding those received before the accident. The position may be best summarized by saying that actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings.

The ultimate objective of the disability test is, by discounting these variables, to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured, taking wage levels, hours of work, and claimant's age and state of training as of exactly the same period used for calculating actual wages earned before the injury. [footnotes omitted]⁹

In Hewing's case, in part due to his inability to express himself clearly and in part possibly due to his own cupidity, the Board was confronted with a difficult task in ascertaining the amount of post-injury earnings and whether the presumption that those earnings represented his earning capacity was rebutted. The Board should have considered the increase in general wage levels since the accident, and the possibility that Hewing's post-injury earnings were of a temporary and unpredictable nature. The testimony hardly indicated the type of permanent business or employment from which one could conclude that Hewing

8. Larson, 2 Workmen's Compensation Law § 57.32 at 10-75 (Matthew Bender 1976); *Whyte v. Industrial Commission*, 71 Ariz. 338, 227 P.2d 230 (1951); *Maxey v. Major Mechanical Contractors*, 330 A.2d 156 (Del.1974).

9. Larson, Workmen's Compensation Law § 57-21 at 10-39 to 10-40.

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will be likely to continue earning as much or more than he could before his disabling injury. Moreover, in his testimony before the Board, Hewing indicated that his earnings from sales of items were maybe \$100.00 a week "gross," so that it is difficult to ascertain the amount of his net earnings.

In *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 61 So.2d 789 (1953), a somewhat similar situation was presented. At an initial hearing, an order was entered denying a partial permanent disability claim because the claimant had higher weekly earnings after injury than at the time of injury. On appeal, the state supreme court remanded for reconsideration in order to ascertain whether the higher post-injury earnings actually represented wage earning capacity when considering the general rise in wages and other factors discussed in Larson's Workmen's Compensation Law.

The Board erred in not considering such factors, including that the post-injury income was from sales of junk and barbeque rather than from employment, that there was no breakdown between gross and net income, the difference in wage levels between the two time periods and the state employment counselor's testimony as to lack of any suitable employment for Hewing because of his work-related disabilities. Thus, the Board's conclusion that there was no loss of wage earning capacity after August 20, 1973 cannot be upheld.

The "odd-lot" doctrine was applied in *J. B. Warrack Company v. Roan*, 418 P.2d 986 (Alaska 1966), where medical opinion revealed a physical impairment of between 40 and 45 percent. This court on appeal upheld a finding of total disability stating:

For workmen's compensation purposes total disability does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. The evidence here discloses that Roan is a carpenter but is unable physically to follow that trade.

He is not qualified by education or experience to do other than odd jobs provided they are not physically taxing. As the Supreme Court of Nebraska has pointed out, the "odd job" man is a nondescript in the labor market, with whom industry has little patience and rarely hires. Work, if appellee could find any that he could do, would most likely be casual and intermittent. In these circumstances we believe the Board was justified in finding that appellee was entitled to an award for permanent total disability under the Alaska Workmen's Compensation Act. [footnote omitted] *Id.* at 988.

From the testimony, the question is presented as to whether Hewing's post-injury earnings are in the category of "odd lot" employment, and thus do not preclude a finding of permanent total disability. The term is explained in Justice Cardozo's opinion in *Jordan v. Decorative Co.*, 230 N.Y. 522, 130 N.E. 634, 635-36 (1921):

He [the plaintiff] was an unskilled or common laborer. He coupled his request for employment with notice that the labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the "odd lot" man, the "nondescript in the labor market." Work, if he gets it, is likely to be casual and intermittent. . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt. [footnote and citations omitted]

[5] We are cognizant of the long delays encountered in disposing of this claim. The case has twice been appealed to us and involves a 1969 injury and a claimant now 65 years of age. One major purpose of Workmen's Compensation acts is to furnish a simple, speedy remedy for injured workers whereby they may be compensated for injuries arising out of their employment. *Johnson v. Ellamar Mining Company*, 5 Alaska 740, 741 (1917). We believe that, normally, the Alaska act works well to serve that purpose. In a case such as this,

further litigation will probably mitigate against the interests of both the insurance carrier and the employee.

Nevertheless, we find it necessary to order a remand to the Board once more for the purpose of rating Hewing's disability. Should the Board determine that Hewing is employable rather than totally disabled under the "odd-lot" doctrine, then the Board should determine his loss of earning capacity. The Board should consider all the factors outlined or referred to in this opinion on the question of Hewing's employability or wage earning capacity.¹⁰

We request that the Board's decision be expedited.¹¹

MATTHEWS, J., dissents, with whom RABINOWITZ, J., joins.

MATTHEWS, Justice, dissenting, with whom RABINOWITZ, Justice, joins.

For the reasons expressed in the opinion of the superior court, published here as an appendix, I believe that there is substantial evidence to support the Board's decision.

APPENDIX A

SUPERIOR COURT DECISION ON APPEAL

Claimant, Hewing, commenced this appeal from a decision of the Alaska Workmen's Compensation Board denying him permanent total disability compensation. The matter had previously been through this court to the Alaska Supreme Court and was sent back for further findings of fact. See *Hewing v. Alaska Workmen's Compensation Board*, 512 P.2d 896 (Alaska 1973). The Board found that Hewing had current earnings greatly in excess of those he had prior to his injury, and consequently had

10. Aside from possible evidence as to wage levels, no new testimony should be required as there is an ample record from which the Board may render its decision. To determine Hewing's post-injury wage level, the Board should consider Hewing's testimony that friends helped him load and unload his truck. If this is a critical part of his post-injury earnings, the Board must evaluate how Hewing could per-

not suffered a permanent earning impairment as a result of the injury.

Claimant makes two contentions on appeal. First, that given his age, education, background, and experience, he is in effect in the "odd lot" category and has no reasonable expectations of future earnings, and that consequently his occasional earnings do not bar a finding of total disability. The evidence on plaintiff's earning capacity came largely from his own statements which were substantially impeached. The Board could find, as it did, that Hewing's earnings from buying and selling used furniture and as a barbeque cook were not transient but were reasonably likely to continue at their present level in the future, and that consequently Hewing was not an "odd lot" employee. In reaching this conclusion the Board could consider the rehabilitation specialists' comments regarding Hewing's motivation to seek other work.

Claimant's second contention is that the Board's finding does not adequately take into account inflation since the time of his injury. The Board found that Hewing's earnings at the time of his injury from his occupation were roughly \$4,000. It further found that his earnings at the time of the hearing were in substantial doubt due to the untrustworthiness of Hewing's testimony. At the hearing he downplayed his income from his furniture business, but in response to questions from an insurance adjuster investigating an unrelated personal injury case, he had indicated a consistent income of from \$100 to \$300 per week. Consequently, after evaluating Hewing's testimony, the Board concluded that his true earning potential was mid-way between the two extremes, i. e., 0 and \$300 a week or roughly \$150 per week. One Hundred and Fifty Dollars per week times 52

form this function, either working for himself or others. If he worked for himself and would likely have to hire an assistant, this would affect his wage level.

11. The Board should issue its amended decision within 30 days from the date the matter is remanded to it, unless unusual circumstances prevent such expedition.

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weeks is roughly \$7,800, which when compared to Hewing's pre-accident earnings of \$4,000 would more than adequately cover any inflation.

The difficulty with this case lies in the fact that claimant is in the best position to testify truthfully regarding his current earnings and those activities which he can in fact perform. He has done so and given the Board reasonable grounds to doubt his credibility. Since claimant's out of court admissions are evidence which has been adequately verified, the Board could give it what weight they thought it deserved.

IT IS THEREFORE ORDERED, the decision of the Workmen's Compensation Board is affirmed.

/s/ JAMES K. SINGLETON, Jr.
JAMES K. SINGLETON, JR.
Judge of the Superior Court



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④ ECONOMIC (WAGE-LOSS)
BASIS FOR COMPUTING
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BAILEY v. LITWIN CORP.

Alaska 249

Cite as 713 P.2d 249 (Alaska 1986)

TEST FOR ENDING
TTD

HOW TO COMPUTE
William BAILEY, Jr., Appellant,
v.
UN SCHEDULED
PPD

LITWIN CORPORATION and Travelers
Insurance Company, Appellees.

No. S-378.

Supreme Court of Alaska.

Jan. 17, 1986.

Rehearing Granted in Part and Opinion
Amended April 7, 1986.

Pipe fitter who incurred work-related back injury filed for workers' compensation benefits. The Workers' Compensation Board awarded claimant temporary total disability benefits for eight-month period and \$6,000 lump-sum payment for permanent partial disability. Claimant appealed for additional temporary total disability compensation and different calculation of permanent partial disability award, as well as attorney fees and costs. The Superior Court, Third Judicial District, Anchorage, Brian Shortell, J., affirmed Board's decision, and claimant appealed. The Supreme Court, Burke, J., held that: (1) Board's failure to consider medical stability in determining cessation of temporary total benefits was not improper; (2) Board properly terminated claimant's temporary total disability benefits; (3) the use of *Absher* formula to calculate lump sum permanent partial disability award was improper; and (4) claimant's wage earning capacity was ten percent compared for purposes of determining permanent partial disability.

Affirmed in part, reversed in part, and remanded.

Matthews, J., filed concurring opinion, in which Rabinowitz, C.J., joined.

1. Workers' Compensation ⇐1939.4(4)

Court's review of Workers' Compensation Board's decision is subject to substantial evidence test only where Board has applied proper legal test in reaching its findings.

2. Workers' Compensation ⇐863

Workers' Compensation Board did not err in focusing on claimant's employment

and failing to explicitly address stability of his medical impairment in determining temporary disability, as claimant's ability to return to work, rather than medical stability, could be used to indicate cessation of temporary disability.

3. Workers' Compensation ⇐1375

Workers' compensation benefits claimant's return to work after doctors had released claimant for work without restrictions, was sufficient evidence to rebut presumption of continuing compensability for temporary total disability for his back injury, even though both doctors subsequently retracted releases.

4. Workers' Compensation ⇐1626

Sufficient evidence supported finding that gaps in workers' compensation claimant's employment as pipe fitter were due to economy and construction cycles rather than claimant's disability.

5. Workers' Compensation ⇐803

Workers' compensation benefits claimant whose average weekly wage during ten-month period was higher than preinjury average weekly wage, suffered no actual wage loss during ten-month period and was not entitled to temporary partial disability benefits.

6. Worker's Compensation ⇐1644

Determination that workers' compensation claimant had wage earning capacity loss of ten percent fairly represented claimant's future losses under permanent partial disability statute, AS 23.30.210, as Workers' Compensation Board could utilize factors other than actual earnings to fix wage earning capacity in interests of justice.

7. Workers' Compensation ⇐1005

Workers' compensation claimant's permanent partial disability lump-sum award could not be based solely on relationship between claimant's impaired earning capacity and statutory maximum award under AS 23.30.190(b), as it would violate purpose of statute providing that compensation be based on difference between employee's average weekly wages and his wage-earning

capacity after injury, AS 23.30.190(a)(20); overruling *Absher v. State, Department of Highways*, 500 P.2d 1004.

8. Workers' Compensation ⇨876

Workers' Compensation Board could not reduce permanent partial disability benefits of employee with unscheduled injuries so that he would not receive more than employee with more serious scheduled injury; overruling *Absher v. State, Department of Highways*, 500 P.2d 1004.

9. Workers' Compensation ⇨1013

In determining award for permanent partial disability for claimant who has requested lump sum, Workers' Compensation Board should first determine whether it is in interest of justice that lump sum be paid, and if so should project employee's total future loss up to \$6,000 limit, after which employee can receive present value of his total future loss in lump sum, under AS 23.30.190(a)(20); overruling *Absher v. State, Department of Highways*, 500 P.2d 1004.

10. Workers' Compensation ⇨1981

Workers' compensation benefits claimant was entitled to receive award for attorney's fee on amount of compensation controverted and awarded under AS 23.30.145(a), and for costs and proceedings, under AS 23.30.145(b), upon award of additional permanent partial disability benefits beyond those already paid by employer and its insurer.

Chancy Croft, Anchorage, for appellant.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

1. It should be noted, however, that Dr. Newman stated that it was his experience that if someone was sent back to the North Slope with written restrictions, they would generally not be accept-

OPINION

BURKE, Justice.

This case involves a claim for workers' compensation benefits by William Bailey, Jr. After incurring a work-related injury, Bailey received temporary total disability benefits from November 1980 until July 1981. In April 1982, he received a \$6000 lump-sum payment for permanent partial disability. Bailey now maintains that he was entitled to continue receiving temporary total disability compensation between July 1981 and May 1982. He also claims the Workers' Compensation Board (Board) erred in calculating his permanent partial disability award and in refusing to award him attorney's fees and costs.

I. FACTUAL BACKGROUND

Appellant Bailey is fifty-one years old and has been a pipefitter for the last twenty-eight years. He injured his back on August 14, 1980, while leaning over a pipe to pick up a tool box and a transmitter. At the time, he was working for Appellee Litwin Corporation (Litwin), on a construction project at the Tesoro plant in Kenai, Alaska.

After his injury, Bailey was examined by several doctors and chiropractors, who formed differing assessments of his condition. In August 1980, Dr. Bruce W. Teague, a chiropractor, examined Bailey and released him for work. Bailey immediately resumed work for Litwin as a pipefitter. Dr. William West, another chiropractor, examined Bailey the following September and October and released him for regular work on September 29, 1980. Bailey was laid off November 4, 1980 when Litwin reduced its workforce. On the same day, a third chiropractor, Dr. Gene Kremer, examined Bailey and took him off work through January 1981. Dr. Michael Newman, an orthopedic specialist, treated Bailey and released him for work, without restrictions, effective April 21, 1981.¹ In April, Dr. Kremer

ed for work. Thus, an employer would often give the person a modified job as long as he was released without restrictions. Later, Dr. Newman stated that he thought Bailey was restricted

again took B him for work July 6, 1981.²

Bailey resumed work with National from July 13 was terminated. On October 1 North Slope Professional Commissioned until Nov

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again took Bailey off work, but released him for work, without restrictions, as of July 6, 1981.²

Bailey resumed work as a hydro-tester with National-NANA on the North Slope from July 13 to August 16, 1981, when he was terminated due to a reduction in force. On October 1, 1981, he began work on the North Slope in "instrumentation"³ for Professional Contractors, Inc. (PCI) and continued until November 4, 1981.

Christopher W.M. Horton, M.D., conducted an independent medical examination of Bailey on November 25, 1981, and recommended that Bailey continue his work without any restrictions. He evaluated Bailey as medically stationary and rated him as having a ten percent whole body permanent physical impairment.

Ross Brudenell, M.D., an orthopedic surgeon, examined Bailey on February 23, 1982, and determined that he was not medically stationary and did not release him for work. Later, Dr. Brudenell stated that Bailey's condition was medically stationary as of March 3, 1982, but that he "will probably risk increasing symptoms if he tries to do heavy, manual labor ... [and that] his working activity which related to instrument controls, was much more appropriate than any attempts to try to get back his original occupation."

On March 8, 1982, Bailey returned to the North Slope to work for the F.J. Early Company, primarily in hydro-testing and instrumentation. He was terminated April 26, due to a reduction in forces, but hoped to be recalled.

in the sense that his back might hurt when he had to work with heavy equipment.

2. In a report dated February 25, 1982, Dr. Kremer qualified this release:

Initially he was released with no work restrictions on July 6, 1981. But in follow up reports after that date it was indicated that awkward bending and lifting positions would likely induce back spasms. Mr. Bailey still should not put that type of stress on his lower back nor should he in the future unless his low back weakness completely resolves. He can at this time and since 7-6-81 do "instrumentation" work which requires little more

Dr. Newman examined Bailey again on May 18, 1982, and considered his condition medically stationary and unchanged since April, 1981.

In sum, during the ten-month period from July 7, 1981 through May 7, 1982, Bailey worked a total of 1170 hours and earned \$36,807.85 (approximately \$876 per week). In 1977 his average weekly wage was also \$876. In 1978 and 1979 Bailey worked approximately 1138 and 1227 hours, with average weekly wages of \$517.88 and \$523.68, respectively. His average weekly wage in 1980 before he was injured was \$832.94.

Bailey received temporary total disability benefits from November 10, 1980, through July 6, 1981. While the payment date is unclear from the record, it is undisputed that the insurance carrier, Travelers Insurance Company (Travelers), awarded Bailey a lump sum payment of \$6,000, based on a ten percent loss of earning capacity and Dr. Horton's impairment rating.

In February 1982, Bailey filed a petition for adjustment of claim with the Workers' Compensation Board. In its second decision and order,⁴ the Board determined that Litwin and Travelers properly terminated Bailey's temporary total disability benefits in July 1981. The Board decided Bailey was entitled to \$6000 in permanent partial disability benefits. It arrived at this figure by multiplying his ten percent loss of earning capacity by \$60,000, the maximum benefits allowable under AS 23.30.190(b). Because Litwin and Travelers had already paid \$6000 to Bailey voluntarily, the Board

physical effort other than standing and walking.

3. "Instrumentation" is a specialty trade within the general trade of pipefitting. It involves the fitting of small, lightweight pipes. Instrumentation accounts for approximately ten percent of all pipefitting work. Of the members in Bailey's union, about ten percent are qualified in instrumentation.

4. The original decision and order was void. The Board reconsidered the matter and issued a different decision and order on January 24, 1983.

A. *The Test for Termination of Temporary Disability*

Bailey claims that he is entitled to additional temporary benefits after July 1981 because he was not considered medically stable until after November 1981. In concluding that his temporary benefits were properly discontinued in July 1981, the Board made no express findings of fact regarding Bailey's medical stability.¹⁰ Our first task is to determine if the Board erred in its apparent failure to consider medical stability in deciding when temporary total benefits should cease.

The Act defines "disability" generally as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." AS 23.30.265(10). The Alaska territorial court defined temporary total disability as "the healing period or the time during which the workman is wholly disabled and unable by reason of his injury to work." *Phillips Petroleum Co. v. Alaska Industrial Board*, 17 Alaska 658, 665 (D.Alaska 1958) (quoting *Gorman v. Atlantic Gulf & Pacific Co.*, 178 Md. 71, 12 A.2d 525, 529 (1940)). The *Phillips* court explained:

A claimant is entitled to compensation for temporary total disability during the period of convalescence and during which time the claimant is unable to work, and the employer remains liable for total compensation until such time as the

10. In its second decision and order, the Board stated, "We find the doctors' release and the employee's return to work overcame any presumption that the employee continued to be temporarily totally disabled...." This statement could imply that Bailey's medical condition had stabilized.

11. Some jurisdictions have determined that "medical stabilization or maximum physical recovery, marks the end of temporary disability." *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1169 (Alaska 1982) (Rabinowitz, J., & Matthews, J., dissenting) (footnote omitted). Professor Larson concurs, observing that in most states temporary benefits cease when the "healing period" has ended and "stabilization" has occurred. 2 A. Larson, *The Law of Workmen's Compensation*, § 57.12 at 10-9 (1983). Professor Larson states:

claimant is restored to the condition so far as his injury will permit. *The test is whether the claimant remains incapacitated to do work by reason of his injury, regardless of whether the injury at some time can be diagnosed as a permanent partial disability.*

17 Alaska at 666 (citations omitted) (emphasis added).

We reiterated this emphasis on earning capacity in *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264 (Alaska 1974), by stating:

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness.

524 P.2d at 266 (footnote omitted); see also *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 594 (Alaska 1979).¹¹

[2] Our previous cases stress the claimant's ability to return to work and indicate that medical stability is *not* necessarily the point at which temporary disability ceases. We hold, therefore, that the Board did not err in focusing on Bailey's employment and

The disability period is not automatically terminated merely because claimant obtains some employment, if maximum recovery had not been achieved at the time.

Id. at 10-17 to 10-18 (footnote omitted). Other jurisdictions, however, view restored earning capacity, rather than medical stability, as the end of temporary disability. The California Court of Appeals stated:

Temporary disability concerns the injured's inability to work.... Thus, an injured may be fully capable of working full time (and hence not be entitled to temporary disability) and his medical condition not yet permanent and stationary.

Harold v. Workers' Compensation Appeals Bd., 100 Cal.App.3d 772, 784, 785, 161 Cal.Rptr. 508, 514 (Cal.App.1980) (citations omitted).

in failing to explicitly address the stability of his medical impairment.

B. Substantial Evidence in the Record

[3] The Board found that both Dr. Newman and Dr. Kremer released Bailey for work without restrictions by July 16, 1981. Even though both doctors subsequently retracted these releases, the fact that Bailey returned to work on July 13, 1981, is sufficient evidence to rebut the presumption of continuing compensability for temporary total¹² disability.

[4] Bailey argues that his medical impairment prevented him from working full-time; thus, he was entitled to additional temporary compensation during the gaps in his employment between July 1981 and May 1982. The record supports the Board's finding that Bailey's periods of unemployment¹³ were due to the economy and construction cycles, and not due to his disability. The pipefitting trade involves gaps in employment, and Bailey's work history prior to his injury reflects this fact. Bailey's terminations from National-NANA on August 16, 1981, and from F.J. Early Company on April 26, 1982, were both due to a reduction in force, not because of his incapacity to work.

Bailey claims the gaps in employment were due to his disability. He states that he turned down a pipeline repair job in January or February 1982 because he was physically unable to perform the work. However, while the job did involve heavy work, there were other reasons presented

12. "Temporary disability may be total (incapable of performing any kind of work), or partial (capable of performing some kind of work)." *Huston v. Workers' Compensation Appeals Bd.*, 95 Cal.App.3d 856, 868, 157 Cal.Rptr. 355, 362 (Cal.App.1979) (emphasis in original).

13. August 16-September 30, 1981; November 4, 1981-March 8, 1982; April 26-May 27, 1982.

14. AS 23.30.200 provides in part:

Temporary Partial Disability. In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 66 $\frac{2}{3}$ per cent of the difference between the injured employee's average weekly wages before the injury and his wage earning

for Bailey's decision to not take the job, including uncomfortable working conditions, the short duration of the work, and the possibility of losing a favorable position on the union employment list. Bailey also indicated that he asked the foreman at PCI to give him a termination on a reduction in force because he did not want to continue the job when it changed from instrumentation to heavier haylon system pipe installation. However, Mr. Cable, the project superintendent for PCI, testified that Bailey was hired specifically to do instrumentation work, and he had no intention of hiring him as part of the haylon system.

[5] We conclude that the Board's finding that Bailey's gaps in employment were due to the economy and construction cycles, and not the result of his physical impairment, is supported by substantial evidence in light of the whole record. Moreover, we hold that Bailey suffered no actual wage loss during the ten-month period and was, therefore, not entitled to temporary *partial* disability benefits, much less compensation for temporary *total* impairment.¹⁴ During the ten-month period, from July 1981 to May 1982, Bailey earned an average of \$876 per week. The Board applied AS 23.30.220(2)¹⁵ and made an uncontested finding that Bailey's pre-injury average weekly wage was \$859.08. Even if Bailey could have earned more if he had been able to work as a pipefitter, AS 23.30.200 does not provide for a comparison between actual post-injury wages and what

capacity after the injury in the same or another employment....

See *supra* note 5 regarding amendment to this statute.

15. AS 23.30.220 was repealed and reenacted in 1983. Ch. 70, § 12, SLA 1983. At the time of the Board's decision, AS 23.30.220(2) provided: the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury; The Board properly used Bailey's 1977 earnings because they were higher than his earnings in 1978 or 1979.

wages would have been earned.

We affirm that Bailey's temporary disability benefits were properly denied in 1981. Even though the medical and statistical evidence in the record does not show that Bailey was earning wages

III. PEF

The Board found that Bailey's capacity to work was impaired, [that] his wages were less than the average weekly wage and [that] the phases of pipefitting

Litwin and Bailey \$6000 of advance on permanent disability. Board determined that the payments were due to the Board's incorrect

16. AS 23.30.190

Compensation

(a) In case of permanent disability the compensation shall be 66 $\frac{2}{3}$ per cent of the difference between the employee's average weekly wages before the injury and his wage earning

....
(20) in all cases the compensation shall be the difference between the employee's average weekly wages before the injury and his wage earning payable during the period of disability, ... that it is in the interest of the employee to be discharged as a result of the injury.

(b) Total compensation shall be the amount of this section plus the amount of any other benefits payable under any statute.
See *supra* note 15.

17. AS 23.30.210

Determination

of a case of permanent disability shall be 190(20) or 200(20) of an injured

wages would have been without the impairment.

We affirm the Board's determination that Bailey's temporary total disability benefits were properly terminated in July 1981. Even though he may not have been medically stationary, there is substantial evidence in the record that he was capable of earning wages.

III. PERMANENT PARTIAL DISABILITY

The Board found, and the parties do not dispute, that Bailey has a "loss of earning capacity because he has a permanent impairment, [that] his post-injury earnings are less than this pre-injury average weekly wage and [that] he cannot perform all phases of pipefitting."

Litwin and Travelers voluntarily paid Bailey \$6000 on April 29, 1982, as an advance on permanent partial disability. The Board determined that no further payments were due. Bailey contends that the Board incorrectly calculated loss of earning

capacity and that the Board erred in limiting his benefits to \$6000.

A. Loss of Wage Earning Capacity

AS 23.30.190(a)(20)¹⁶ provides that in case of an unscheduled disability, such as Bailey's back injury, compensation is 66⅔ percent of the difference between the claimant's average weekly wages and his post-injury wage-earning capacity. In determining Bailey's wage-earning capacity, the Board found that because of increases in hourly pay, and because pipefitting involves sporadic employment, Bailey's post-injury earnings were unreliable and could not be used. The Board then considered the other factors listed in AS 23.30.210¹⁷ and the applicable case law,¹⁸ but still could not quantify Bailey's loss of earning capacity.

Ultimately, the Board based its determination on the average number of days Bailey worked per month in 1978 and 1979, compared with the number he worked during the ten-month period between his return to work and the Board's hearing (July 13, 1981 to May 27, 1982). The Board

his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity the board may, in the interest of justice, fix the wage earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

A recent amendment substitutes "spendable weekly wage" for "earnings" throughout the section. Ch. 70, § 9, SLA 1983.

18. The Board may fix wage-earning capacity by considering these factors: (1) nature of injury, (2) degree of physical impairment, (3) usual employment, and (4) other factors, including (a) age, (b) education, (c) availability of suitable employment in the community, and (d) the employee's future employment intentions, trainability, and vocational rehabilitation assessment and training. *Bignell*, 651 P.2d at 1167; *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182, 186 (Alaska 1978); *Vetter*, 524 P.2d at 266; *Hewing*, 512 P.2d at 896.

16. AS 23.30.190 provides, in relevant part:

Compensation for Permanent Partial Disability.

(a) In case of disability partial in character but permanent in quality the compensation is 66⅔ per cent of the injured employee's average weekly wages . . . and shall be paid to the employee as follows:

(20) in all other cases in this class of disability the compensation is 66⅔ percent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of partial disability, . . . whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;

(b) Total compensation paid under (a)(20) of this section may not exceed \$60,000.

See *supra* note 5 regarding amendment to this statute.

17. AS 23.30.210 provides:

Determination of wage-earning capacity. In a case of partial disability under AS 23.30.190(20) or 23.30.200 the wage-earning capacity of an injured employee is determined by

found that he worked 148 days in 1978 (average of twelve days per month), 158 days in 1979 (average of thirteen days per month), and only 85 days in the preceding ten months (average of nine days per month). Thus, the difference in his wage earning capacity was three to four days per month.¹⁹ The Board then assumed "that he could work an additional average of two to three days more per month than he has."²⁰ The Board concluded that Bailey misses between one and two days of work per month because of his injury—a loss of between eight and twelve percent. The Board averaged his wage earning capacity loss at ten percent.

[6] While the Board's computations may not reflect *precisely* Bailey's lost earning capacity, we believe that they fairly represent his future losses. AS 23.30.210 allows the Board in the interests of justice to utilize factors other than actual earnings to fix a wage earning capacity.

We affirm the Board's calculation that Bailey's wage earning capacity is ten percent impaired for purposes of determining permanent partial disability.

B. Limitation on Amount of Permanent Disability Compensation

The Board calculated Bailey's weekly benefits to be \$57.27,²¹ but Bailey requested a lump sum. The Board multiplied Bail-

19. The Board used a five day week rather than a seven day week in making its calculations. Bailey argues that there was no evidence to support this choice. The Board's inference that Bailey worked five eight hour days per week was reasonable in light of the evidence in the record. In 1978 and 1979, Bailey worked approximately 1138 and 1227 hours, respectively. If Bailey worked seven days per week, (192 days in 1978 and 216 days in 1979) as he claims, he would only have worked an average of 5.7 to 5.9 hours per day. This contradicts Bailey's own testimony that his hours were 8:00-4:30 for at least six months in 1978, and approximately four months in 1979.

20. Bailey argues that this assumption is arbitrary and without basis. The Board supports its conclusion by the fact that Bailey has limited himself to instrumentation work even though

ey's impairment of ten percent by the \$60,000 limit of AS 23.30.190(b)²² and awarded him a lump sum of \$6000. In the Board's opinion, the payment of weekly benefits to Bailey up to the \$60,000 limit "would produce an unreasonable result considering the minimal loss of earning capacity and minimal impairment rating." In taking this action, the Board relied on *Foster v. Wright-Schuchart-Harbor*, 644 P.2d 221 (Alaska 1982),²³ where we stated:

In *Absher v. State, Department of Highways*, 500 P.2d 1004 (Alaska 1972), we discussed the purpose of the lump sum provision and determined that it should be used "when the use of the first part of AS 23.30.190(20) would produce an unreasonable result," i.e., a worker with an unscheduled injury would recover more than a worker with a more serious scheduled injury.

644 P.2d at 223-24.

Absher, is directly on point. At issue in *Absher* was the method of computing a lump sum award for an unscheduled permanent partial disability. We upheld an award of \$3,400 calculated by multiplying the twenty percent loss of earning capacity by \$17,000, the maximum amount payable at the time. We explained:

While the legislature did not adopt a formula for computing lump sum payments, it may reasonably be inferred that this was left to the discretion of the

not all instrumentation is light. The Board concluded that if he can do all instrumentation work, he could do some pipefitting as well. The Board also found that Bailey took a hunting trip in the fall of 1981 and adjusted for this period of unemployment because it was not due to the injury.

21. The Board used the formula in AS 23.30.190(a)(20): $(\$859.08 \times 10\% \times 66\frac{2}{3}\% = \$57.27)$.

22. See *supra* note 16.

23. In *Foster* the Board awarded a \$3,000 lump sum for an unscheduled back injury by multiplying a five percent rating by \$60,000. We reversed the Board's action only because the \$60,000 statutory limit of AS 23.30.190(b) was not in effect at the time of Foster's injury.

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500 P.2d at 100 ever, our recen *Washington Ins* P.2d 872 (Alaska doubt on the con

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of ten percent by the §60, 23.30.190(b)²² and awarded of \$6000. In the Board's ment of weekly benefits to \$60,000 limit "would pro- nable result considering of earning capacity and ent rating." In taking Board relied on *Foster v. rt-Harbor*, 644 P.2d 221 where we stated:

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board. There is no showing of an abuse of this discretion. The board's decision to base the lump sum award on the relationship between impaired earning capacity and the statutory maximum award is a reasonable one. *This method of computation is the same as that for a scheduled injury of comparable degree of impairment.*²⁴ In addition it avoids the unreasonable result of a disparity in awards between scheduled and unsche- duled injuries.

500 P.2d at 1006 (emphasis added). How- ever, our recent decision in *Providence Washington Insurance Co. v. Grant*, 693 P.2d 872 (Alaska 1985), places considerable doubt on the continuing viability of *Absher*.

In *Providence Washington*, the Board awarded lump sum benefits for Mr. Grant's injuries by multiplying the percentage im- pairments to his knee and foot by the maxi- mum amounts allowed for a knee and foot injury under AS 23.30.190(a)(2) and (4), re- spectively. The board chose this method over a weekly award, which would have resulted in greater total benefits. The board based its action on *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805 (Alaska 1963), where we approved compensating Cesar's loss of half a thumb by multiplying the maximum allowable re- covery by fifty percent impairment. In *Providence Washington* we overruled *Ce- sar* and stated:

We agree that the results compelled by *Cesar* are contrary to the plain meaning of and policies behind AS 23.30.190.... The plain language of this provision does not require that the maximum amount recoverable be multiplied by the percent- age impairment to the body member or function. Instead, it states the maxi- mum amount that is recoverable under the subsection without making reference to the percentage impairment.

....

24. This statement is no longer true, according to our recent decision in *Providence Washington*

Alaska Rep. 713-717 P.2d-2

... To follow *Cesar* and require that the maximum awards be pro-rated according to the employee's percentage impairment to the body member or function does not further the policy of placing absolute limits on an employer's liability under the act.

693 P.2d at 877-78.

Under *Absher*, the Board acted reason- ably in basing Bailey's lump sum award on the relationship between impaired earning capacity and the statutory maximum for unscheduled injuries. *Providence Wash- ington*, however, forbids the identical method for scheduled injuries. The same reasons that lead us to overrule *Cesar* in the area of scheduled injuries compel us to overrule *Absher* in the case of unscheduled injuries.

The result demanded by *Absher* is "con- trary to the plain meaning and policies be- hind AS 23.30.190." See *Providence Washington*, 693 P.2d at 877. While AS 23.30.190(a)-(20) states that a lump sum may be awarded in the "interests of jus- tice," the "plain language of [the] provision does not require that the maximum amount recoverable be multiplied by the percentage impairment to the body member or func- tion." *Id.* AS 23.30.190(b) states that \$60,- 000 is the maximum recoverable under (a)(20) "without referring to the percentage impairment." *Id.* As we stated in *London v. Fairbanks Municipal Utilities*, 473 P.2d 639 (Alaska 1970):

Where, as here, the statutory mandate is clear and would allow compensation, it is improper for the Workmen's Compensa- tion Board to inject its own views on the policies underlying the Workmen's Com- pensation Act by imposing additional re- strictions on the statutory language.

473 P.2d at 642.

[7] Overruling *Absher* is "consistent with the policies behind the Worker's Com-

Ins. Co. v. Grant, 693 P.2d 872 (Alaska 1985).

pensation Act." See *Providence Washington*, 693 P.2d at 877. By establishing a \$60,000 limit on permanent partial disability for unscheduled injuries, "the legislature intended to assure employers that their liability under [AS 23.30.190(a)(20)] would never exceed [\$60,000]." *Id.* To follow *Absher* and allow a maximum recovery based on percentage impairment "would not further the policy of placing absolute limits on an employer's liability under the Act." *Id.* at 878. Instead, this calculation could lead to arbitrary and inequitable results. For example, while Bailey has a minor unscheduled injury, he could very possibly lose more than \$6000 in wages during the years remaining before his retirement. Inequity could also result if two employees with ten percent impairment ratings both received a lump sum payment of \$6000, even though a large discrepancy exists in their pre-injury wages. This would be contrary to the statutory dictates of AS 23.30.190(a)(20) that compensation be based on the difference between the employee's average weekly wages and his wage-earning capacity after the injury.

[8] Furthermore, we now hold it to be improper for the Board to reduce the benefits of an employee with an unscheduled injury so that he will not receive more than an employee with a more serious scheduled injury, as we suggested might be reasonable in *Absher*, 500 P.2d at 1006, and in *Foster*, 644 P.2d at 224. See *London*, 473 P.2d 639, 642 (Alaska 1970) (improper for the Board to limit a partially disabled worker's recovery to the amount afforded someone totally disabled).

[9] Ordinarily, compensation is paid on unscheduled injuries according to the formula set forth in AS 23.30.190(a)(20) until the \$60,000 maximum is paid. Where, as here, the employee requests a lump sum, we hold that the Board should first determine whether it is in the interest of justice that a lump sum be paid. Should that determination be made, the Board should

project the employee's total future loss, up to the \$60,000 limit. The employee can then receive the present value of his total future loss in a lump sum. We reverse the Board's lump sum award of \$6000 to Bailey, and remand for redetermination of whether a lump sum is in the interest of justice in this case, and if so, for recalculation of the amount in light of this opinion.

IV. ATTORNEY'S FEES AND COSTS

The Board denied and dismissed Bailey's claim for costs and attorney's fees. Litwin and Travelers had already paid \$6000 to Bailey.

The award of attorney's fees is governed by AS 23.30.145 which provides in part:

(a) ... 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....

(b) If an employer fails to file timely notice of controversy or fails to pay compensation ... within 15 days after it becomes due or otherwise resists the payment of compensation ... 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 his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation ... ordered.

"[T]he award of the minimum statutory fees [under subsection (a)] applies only in cases where a claim has been controverted." *Haile v. Pan American World Airways*, 505 P.2d 838, 840 (Alaska 1973). An award for costs, including attorney's fees, is due under subsection (b) when the employer "resists the payment of compensation." *Id.*

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[10] Under our decision today, Bailey may be entitled to additional permanent partial disability benefits beyond those already paid by Litwin and Travelers. If so, Bailey, should receive an award for attorney's fees "on the amount of compensation controverted and awarded," AS 23.30.145(a), and for costs in the proceedings. AS 23.30.145(b). We remand this case to the Board for a determination of attorney's fees and costs.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, concurring.

I continue to believe that medical stabilization marks the end of temporary disability under the Alaska Worker's Compensation statute. *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1169 (Alaska 1982) (Rabinowitz, J., with whom Matthews, J. joins, dissenting). In this case, the Board implicitly found that Bailey's medical condition had stabilized as the majority opinion has recognized. *See supra* at 252-53 n. 10. This implicit finding is supported by substantial evidence and therefore I agree that Bailey's temporary total disability payments were properly ended.

In all other respects, I concur with the majority opinion.

James ROBISON, Commissioner of Labor; Robert Bacolas, Director, Division of Labor Standards and Safety; Donald Wilson, Deputy Director of the Division of Labor Standards and Safety; James R. Carr, Supervisor of the Wage and Hour Administration; the Department of Labor of the State of Alaska, and the State of Alaska, and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 751, Appellants,

v.

James N. FRANCIS, Appellee.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 751, Appellant,

v.

James N. FRANCIS, Appellee.

James N. FRANCIS, Appellant,

v.

James ROBISON, Commissioner of Labor; Robert Bacolas, Director, Division of Labor Standards and Safety; Donald Wilson, Deputy Director of the Division of Labor Standards and Safety; James R. Carr, Supervisor of the Wage and Hour Administration; the Department of Labor of the State of Alaska, and the State of Alaska, and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 751, Appellees.

Nos. S-493, S-510 and S-552.

Supreme Court of Alaska.

Jan. 17, 1986.



Nonresident who was discharged from job on public construction project after employer was warned by Department of Labor that it had a work force of more than five percent nonresidents on the project, in violation of local hire law, brought suit challenging constitutionality of the law. The Superior Court, Third Judicial District,

[10] A party may overcome the presumption of compensability either by presenting affirmative evidence that the injury is not work-connected or by eliminating all possibilities that the injury was work-connected. *Fireman's Fund American Insurance Cos. v. Gomes*, 544 P.2d 1013. Home contends that Veco was required to produce affirmative evidence to rebut the presumption of compensability and that Veco failed to produce such affirmative evidence. We disagree. There are two ways to overcome the presumption of compensability. One is by "negative evidence" eliminating all possibilities that an injury was work-connected. The other is by affirmative evidence. We believe that Veco's evidence is affirmative. Veco offered circumstantial evidence suggesting that Wolfer's December 1979 injury was the cause of his October 1980 disability. This evidence, if relied upon, tends to indicate that the October 1980 incident did not change the type of work Wolfer could do, or aggravate his original injury.⁹

[11] The evidence relied upon by Veco creates a reasonable inference that prior to 1981 Wolfer believed that the October 1980 incident was merely a flare-up of his old condition. Veco's evidence is not the same as the expert opinions found sufficient to rebut the presumption in *Miller v. ITT Arctic Services*, 577 P.2d 1044 or *Delaney v. Alaska Airlines*, 693 P.2d 859 (1985). However, it does indicate that Wolfer believed that the October 26, 1980 injury was merely a flare-up of his chronic back ailment. A reasonable mind might rely on that evidence to conclude that Wolfer's employment by Veco in October 1980 did not aggravate Wolfer's injury so as to cause disability. We conclude that Veco's evidence, standing alone, was sufficient to rebut the presumption of compensability.

Since the board relied on the presumption to find Veco liable for Wolfer's disability

9. In *Gomes*, we set out several examples of affirmative evidence. All of them involved an alternative explanation offered for the injury. (See 544 P.2d at 1016.) The employer in *Gomes* could offer no explanation for Gomes' death. Having offered no affirmative evidence, the em-

ty after November 1980, and since we have found that the evidence presented was sufficient to rebut the presumption of compensability, this case must be remanded to the board. On remand the board should weigh all of the evidence presented in order to make the ultimate factual determination whether Wolfer's employment by Veco in October of 1980 was a substantial factor in causing the disability from which he now suffers. If the board finds that this proposition is more likely so than not so, then Veco is liable. If the board finds that the evidence on this point is equally balanced or that it establishes that Wolfer's employment by Veco in October 1980 more likely than not was not a substantial factor in causing his current disability, then Home must be found liable.

REVERSED and REMANDED.



*Computing scheduled
PPD towards*

PROVIDENCE WASHINGTON INSURANCE COMPANY and Hamilton Painting, Appellants,

v.

Virgil F. GRANT and Alaska Workers' Compensation Board, Appellees.

Virgil F. GRANT, Cross-Appellant,

v.

PROVIDENCE WASHINGTON INSURANCE COMPANY and Hamilton Painting, Cross-Appellees.

Nos. 7903, S-7.

Supreme Court of Alaska.

Jan. 25, 1985.

Appeal and cross appeal were taken from an order of the Superior Court, Third

employer was obliged to eliminate every reasonable possibility that the injury was work connected. In the instant case, however, Veco's evidence points to the December 1979 event as an alternative explanation for Wolfer's October 1980 disability. Thus it is affirmative evidence.

Judicial District, Anchorage, Milton M. Souter, J., affirming an order of the Workers' Compensation Board computing the permanent partial disability benefits of claimant who had injured his knee, foot and back in a 30-foot fall from a ladder. The Supreme Court, Moore, J., held that: (1) Board properly found that claimant was entitled to permanent partial disability compensation award for the scheduled disabilities of his knee and foot as well as an award for the unscheduled injury of his back, and (2) in case of partial loss of scheduled body member or function, statutory formula based on weeks of compensation must be used, but maximum awards are not to be prorated according to the employee's percentage of impairment to the body member or function.

Affirmed in part, reversed in part, and remanded.

1. Workers' Compensation ⇌803

Workers' compensation claimant is not required to show loss-of-earning capacity resulting from a scheduled disability. AS 23.30.190, 23.30.190(a)(1-19).

2. Workers' Compensation ⇌803

Compensation for unscheduled injuries is based on workers' compensation claimant's loss of wage-earning capacity. AS 23.30.190(a)(20).

3. Workers' Compensation ⇌1653, 1656

Workers' Compensation Board properly found that claimant was entitled to permanent partial disability compensation for the scheduled disabilities of his knee and foot as well as to an award for the unscheduled injury of his back. AS 23.30.190(a)(2, 4, 20).

4. Workers' Compensation ⇌876

Although workers' compensation claimant who has suffered disabilities which were both scheduled and unscheduled was entitled to a separate award of permanent partial disability compensation for the scheduled disabilities as well as an award for the unscheduled injury, to avoid a double recovery, the Workers' Compensa-

tion Board must attempt to separate the loss-of-earning capacity resulting from scheduled disabilities from the loss-of-earning capacity resulting from the unscheduled injury when awarding the claimant for an unscheduled injury, and only if the Board finds that the claimant's loss-of-earning capacity resulting from scheduled disabilities cannot be severed from claimant's loss-of-earning capacity resulting from unscheduled injury would claimant be entitled to an award based on his total loss-of-earning capacity resulting from the accident plus an award for his scheduled injuries. AS 23.30.190(a)(1-20).

5. Workers' Compensation ⇌886

In the case of partial loss of scheduled body member or function, statutory formula based on weeks of compensation must be used, but maximum awards are not to be prorated according to employee's percentage of impairment to the body member or function; overruling *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805. AS 23.30.190(a)(1-20).

6. Workers' Compensation ⇌1982

Superior court properly granted additional attorney fees to workers' compensation claimant in the amount of \$1,937.50 for his successful appellate work notwithstanding award's alleged nonconformity with Appellate Rule. AS 23.30.145(a, c); Rules App.Proc., Rule 508.

7. Workers' Compensation ⇌1983

Workers' Compensation Board's April 1982 award of attorney fees pursuant to statutory minimum upon finding that employer had controverted claimant's claim was properly not reduced by Board's December 1981 attorney fee award of \$400 as the \$400 award was made for distinct purpose of restarting benefits that employer had stopped and was not merely a first installment on the latter award. AS 23.30.145(a, b).

Robert B. Mason, Anchorage, Mark A. Sandberg, Camarot, Sandberg & Hunter, Anchorage, for appellants/cross-appellees.

694

Chancy Croft, Anchorage, for appellee/cross-appellant.

Before BURKE, C.J., and RABINOWITZ, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MOORE, Justice.

This case involves a dispute over the method used by the Alaska Workers' Compensation Board [hereinafter "board"] to compute Virgil Grant's permanent partial disability benefits under the Alaska Workers' Compensation Act.¹ Virgil Grant has been a structural painter and sandblaster for the last thirty years. On February 23, 1980, while working for Hamilton Painting [hereinafter "employer"], Grant fell more than thirty feet from a ladder, injuring his back, knee, ankle and ribs. On May 5, 1981 Grant's physician, Dr. Linder, released Grant to return to work, provided that his work did not require lifting more than 30 pounds or require repeated bending or stooping. Aside from a short return to Hamilton Painting, the only employment Grant held between the date he was injured and April 23, 1982, the date of the board's second ruling on Grant's case, was a job as an indoor painter on an on-call basis.

The statute used to determine compensation for permanent partial disability is AS 23.30.190. When Grant's case went before the board² AS 23.30.190 provided in part:

Compensation for permanent partial disability. (a) In case of disability partial in character but permanent in quality the compensation is 66⅔ per cent of the injured employee's average weekly wages in addition to compensation for temporary total disability or temporary partial disability paid in accordance with

1. The Act is codified as AS 23.30.005-23.30.270. AS 23.30.045 provides that the employer is liable for the payment of benefits to employees for disabilities covered by the Act regardless of fault.
2. The statute was amended effective January 1, 1984 to increase *inter alia* the amounts of compensation payable. Chapter 70 § 7 SLA 1983.

AS 23.30.185 or 23.30.200, respectively, and shall be paid to the employee as follows:

- (2) leg lost, 248 weeks compensation, not to exceed \$40,320;
- (4) foot lost, 173 weeks compensation, not to exceed \$28,700;

(20) in all other cases in this class of disability the compensation is 66⅔ per cent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial disability, but subject to reconsideration of the degree of the impairment by the board on its own motion or upon application of a party in interest; whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;

- (b) Total compensation paid under (a)(20) of this section may not exceed \$60,000.

On December 11, 1981, the board issued an order determining Grant's entitlement under the Alaska Workers' Compensation Act. The board found that Grant could not return to his previous occupation and was entitled to permanent partial disability benefits beginning October 30, 1981.³ The board ordered the employer to pay Grant an interlocutory award of \$74.79 per week and invited the parties to petition for a modification of the order when information that more accurately determined Grant's loss of earning capacity became available.

These amendments do not affect the issues in this case.

3. The board found that prior to October 30, 1981, Grant had been temporarily totally disabled and awarded him benefits for this temporary disability pursuant to AS 23.30.185.

On December 17, 1981, Grant petitioned the board for a redetermination of the December 11, 1981 order of permanent partial disability. He argued that under the workers' compensation statute he was entitled to separate awards for his back, knee and foot injuries. The board agreed and ordered weekly payments of \$373.78 for Grant's knee disability and \$373.78 for his foot disability, until the respective sums of \$6,048 and \$2,870 had been paid. The award for the foot disability was to begin when the award for the knee disability ended. The knee and foot disability awards were based on Dr. Linder's November 20, 1981 report that Grant suffered a 10% impairment to his foot and a 15% impairment to his knee.⁴

The board found that Grant's back disability was an unscheduled disability compensable under AS 23.30.190(a)(20), which then provided that "in all other cases ... the compensation is 66% per cent of the difference between his average weekly wages and his wage-earning capacity after the injury...." The board found that Grant was employable but that he had not made all reasonable efforts to find employment, and stated that it could not evaluate Grant's loss of earning capacity until Grant

4. The board determined Grant's average weekly wage for purposes of the scheduled impairments of the knee and foot to be \$560.64. Following the guidance of AS 23.30.190(a), the board computed Grant's compensation rate to equal 66% of this amount, or \$373.78 weekly. To determine the amount Grant was entitled to for the knee injury under AS 23.30.190(a)(2), the board multiplied the compensation rate of \$373.78 by the 15% impairment of the knee by 248 weeks to arrive at \$13,904.62. The board then multiplied the 15% impairment of the knee by the maximum allowed under AS 23.30.190(a)(2) of \$40,320 to get \$6,048. The board then followed *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805 (Alaska 1963), in awarding the lesser of these two figures, awarding Grant \$6,048. In computing the compensation due Grant for the foot injury under AS 23.30.190(a)(4), the board multiplied the 10% impairment of the foot by the compensation rate of \$373.78 by 173 weeks and obtained a result of \$6,466.39. The board then found that the 10% impairment multiplied by the maximum recovery allowed under AS 23.30.190(a)(4) produced compensation of \$2,870. The court

had a more complete history of post-injury earnings.⁵ The board then multiplied Grant's compensation rate of \$373.78 weekly by the 15% impairment to Grant's back to compute an interlocutory award of \$56.07 weekly for the back injury.⁶ The parties were invited to request another hearing on the award for the back injury when more information on Grant's loss of earning capacity became available. Grant's employer appealed the board's order to the superior court and that court affirmed the order.

I. COMPENSATION FOR SCHEDULED OR UNSCHEDULED INJURIES

On appeal to this court, the employer argues that the approach taken by the board constitutes a double recovery for Grant. The basis of this argument is that Grant was separately awarded compensation for the scheduled disabilities of his knee and foot under AS 23.30.190(a)(2) and (4), respectively, and that his loss of earning capacity resulting from these scheduled injuries was also incorporated into the award for the unscheduled injury of his back, because that award is determined by the employee's loss of earning capacity un-

again followed *Cesar* and awarded Grant \$2,870 for his foot injury because this was the lesser of the two figures.

5. The board found it difficult to determine Grant's loss of wage-earning capacity because, since his fall, Grant had not held employment commensurate with his experience and training. In 1978 and 1979 Grant received training in petroleum technology; after his fall, he received training in painting estimating from Hamilton Painting. Grant had recently taken employment as an indoor painter, but it was unclear how long this job would continue, and Grant was making only four to five dollars an hour, which was far below his pre-injury wages as a union painter.

6. The board based its finding that Grant suffered a 15% impairment of his back on Dr. Linder's statement in his November 20, 1981 report that Grant suffered a "15% permanent partial impairment of the whole man based on chronic and permanent symptoms in his low back and legs as a result of aggravation of the pre-existing degenerative arthritis...."

der AS 23.30.190(a)(20). The employer argues that, if an employee has both an unscheduled disability and a scheduled disability, there should not be a separate award for the scheduled disability under AS 23.30.190(a)(1)-(19), but rather the scheduled disability should be compensated under AS 23.30.190(a)(20), because this section awards benefits according to the employee's loss of earning capacity resulting from all disabilities.

[1, 2] We disagree with the employer's interpretation of the statute. AS 23.30.190(a)(1)-(19) provides for specific amounts of compensation for specific disabilities, such as the loss of body members, digits, hearing and vision. An employee is not required to show loss of earning capacity resulting from a scheduled disability. *Big-nell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1167 (Alaska 1982). In contrast, an employee's compensation for unscheduled injuries under AS 23.30.190(a)(20) is based on the employee's loss of wage-earning capacity. This distinction is the result of a legislative judgment that when a scheduled injury occurs there is usually a corresponding loss of earning capacity,⁷ and that the objectives behind the Workers' Compensation Act are achieved more efficiently if the employee is not required to show this loss of earning capacity.⁸ It would abrogate this distinction to hold that whenever an employee has an unscheduled injury coupled with a scheduled injury, the claimant loses the entitlements of AS 23.30.190(a)(1)-(19) for the scheduled injury and is limited to those of AS 23.30.190(a)(20).

7. The loss of earning capacity for scheduled injuries is "conclusively presumed." 2 A. Larson, *The Law of Workmen's Compensation*, § 58.11, at 10-174 (1983).

8. "The purpose of the Workmen's Compensation Act ... is the provision of financial and medical benefits for victims of work-connected injuries in the most efficient, most dignified, and most certain form." *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979).

9. AS 23.30.210 provides in part:

[3, 4] We hold that the board properly found that Grant was entitled to compensation under AS 23.30.190(a)(2), (4) and (20) because of the disabilities to his knee, foot and back. We recognize that this approach could result in a double recovery if the loss of earning capacity resulting from the scheduled injuries were used to determine the employee's compensation for an unscheduled disability. To avoid this, when awarding the claimant for an unscheduled injury, the board must attempt to separate the loss of earning capacity resulting from scheduled disabilities from the loss of earning capacity resulting from the unscheduled injury.

In the case at bar, the board made an interlocutory award for the unscheduled disability because it did not have sufficient information at that time to accurately determine Grant's loss of wage-earning capacity. The board found that, based on Dr. Linder's ratings, Grant suffered a 15% impairment of his back. The board then based Grant's interlocutory award on the 15% impairment of his back. When the board makes its final determination of the compensation due Grant for his back injury, it should isolate his loss of earning capacity resulting from his back injury. Grant's award under AS 23.30.190(a)(20) should then be computed on the basis of the loss of earning capacity resulting from his back disability and not his foot or knee disabilities. The board may compensate Grant for his back injury based on the total loss of earning capacity resulting from his fall only if the board finds that his loss of earning capacity resulting from his foot or knee disabilities cannot be severed from his loss of earning capacity resulting from his back injury.⁹ Thus, in such a situation,

Determination of wage-earning capacity. In a case of partial disability under AS 23.30.190(20) ... the wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee....

When, as in this case, there is a scheduled disability and an unscheduled disability, the board should extrapolate what the claimant's

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Grant would be entitled to an award based on his total loss of earning capacity resulting from his fall plus an award for his scheduled injuries.

II. FORMULA FOR DETERMINING COMPENSATION

[5] In *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805 (Alaska 1963), the claimant lost one-half of his thumb in the course of his employment. The scheduled award for the loss of a thumb at that time was fifty-one weeks of compensation, not to exceed a total of \$1,800. The claimant argued that the formula that should be used to determine his compensation should be 65%¹⁰ of his average weekly wage multiplied by one-half of 51 weeks, not to exceed the \$1,800 limit imposed by statute. This court held that since the claimant lost half of his thumb he was entitled to only one-half of the compensation that an employee would receive for losing an entire thumb, and that the maximum amount that could be collected was one-half of what it would be for the loss of an entire thumb.¹¹ 383 P.2d at 805.

In awarding for Grant's knee and foot injuries the board took 66 $\frac{2}{3}$ % of Grant's average weekly wage of \$560.64 to arrive at a compensation rate of \$373.78 weekly. The board then multiplied this figure by the impairment percentages of 15% and 10% for the knee and foot, respectively, and by the number of weeks of compensation allowed for each injury under AS 23.30.190(a)(2) and (4). Under this formula Grant would be entitled to \$13,904.62 for his knee disability and \$6,466.39 for his foot disability. The board then multiplied the impairment percentages for Grant's knee and foot injuries by the maximum amounts of \$40,320 and \$28,700 allowed in

spendable weekly wage would be if the claimant suffered only from the unscheduled disability.

10. At that time the compensation rate of AS 23.30.190 was 65% of the employee's average weekly wages. When Grant's case was ruled on by the board the compensation rate for scheduled injuries was 66 $\frac{2}{3}$ % of the employee's average weekly wages.

AS 23.30.190(a)(2) and (4), respectively. This calculation yielded \$6,048 for Grant's leg injury and \$2,870 for his foot injury. Under the direction of *Cesar* the board awarded Grant compensation according to this latter formula because it produced the smallest award.

On cross-appeal Grant urges us to overrule *Cesar*. We agree that the results compelled by *Cesar* are contrary to the plain meaning of and policies behind AS 23.30.190. The provisions for scheduled disabilities dictate the number of weeks by which the compensation rate should be multiplied to compute the total compensation due an employee. These subsections also state the maximum amount that can be awarded for the scheduled injury. For example, AS 23.30.190(a)(2) provides: "leg lost, 248 weeks compensation, not to exceed \$40,320..." The plain language of this provision does not require that the maximum amount recoverable be multiplied by the percentage of impairment to the body member or function. Instead, it states the maximum amount recoverable under the subsection without referring to the percentage of impairment.

Overruling *Cesar* is consistent with the policies behind the Workers' Compensation Act. The purpose of the Act is to award benefits to the victims of work-related injuries regardless of fault. *Arctic Structures, inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979). Realizing that uncertainty and hardship would result from unlimited liability, the legislature established absolute limits on employers' liability under the Act. By establishing a maximum award of \$40,320 for a leg disability, the legislature intended to assure employers that their liability under AS 23.30.190(a)(2) would never exceed \$40,320. To follow *Cesar* and re-

11. *Cesar's* average weekly wage was \$115. Applying the formula without limiting the recovery by the statutory maximum, *Cesar* was entitled to \$1,906.25 for 65% of $\$115 \times \frac{1}{2} \times 51$. The statute at that time limited the recovery for a thumb to \$1,800 and the court agreed with the board that the maximum recovery for the loss of one-half of a thumb is one-half of this or \$900.

quire that the maximum awards be pro-rated according to the employee's percentage of impairment to the body member or function would not further the policy of placing absolute limits on an employer's liability under the Act. Instead, such a requirement undermines the legislative policy, embodied in AS 23.30.190(a)(1)-(19), to award no more than specific amounts for specific disabilities, because the *Cesar* approach frequently requires that a claimant's award be reduced.¹²

In overruling *Cesar*, we are aware that the legislature has not amended the statute to displace the construction *Cesar* gave to it. Although AS 23.30.190 has been amended several times,¹³ none of the amendments has addressed this problem. We do not, however, believe that the legislature's silence indicates approval of the *Cesar* rule. Nor are we faced with a comprehensive revision and re-enactment of the statute that might raise a presumption of legislative approval.

As Mr. Justice Frankfurter observed many years ago,

It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may

not have had its attention directed to an undesirable decision.... [W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 612-13 (1940) (footnotes omitted). We have found no references to the problem *Cesar* addressed in the legislative history of the statute's original enactment and its later amendments. Legislative inaction frequently indicates unawareness, preoccupation or paralysis.¹⁴ We decline to attribute significance to the legislature's mere inaction.¹⁵

The legislature has never undertaken a comprehensive revision of AS 23.30.190. Each time the statute has been amended, the amendments have been specific and limited, and the statute's general form has remained the same.¹⁶ No single amendment has constituted a "re-enactment" of AS 23.30.190. "Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present problem." *Helvering v. Hallock*, 309 U.S. 106 at 121 n. 8, 60 S.Ct. at 452 n. 8, 84 L.Ed. 604 at 613 (1940). Thus we hold that the legislature has not implicitly forbidden us to re-examine a decision we now believe erroneous.

12. Grant's award was based on an average weekly salary of \$560.64. While this is above the median income level, it is not so high as to make this case an aberration.

13. See n. 16 *infra*.

14. See *Zuber v. Allen*, 396 U.S. 168, 186 n. 21, 90 S.Ct. 314, 324 n. 21, 24 L.Ed.2d 345, 356 n. 21 (1969).

15. See *Bob Jones Univ. v. U.S.*, 461 U.S. 574, ———, 103 S.Ct. 2017, 2032-33, 76 L.Ed.2d 157, 178-79 (1983).

16. Since we decided *Cesar*, AS 23.30.190 has been amended ten times, as follows: Sections 5-10, ch. 46 SLA 1964 (raising the ceilings set out in what are now AS 23.30.190(a)(1)-(5) and (12)); § 1, ch. 24 SLA 1965 (elaborating on the "disfigurement" provisions); § 1, ch. 102 SLA 1965 (correcting a typographical error); § 1, ch.

174 SLA 1968 (allowing the board to award compensation for permanent partial disability in a lump sum); § 1, ch. 119 SLA 1970 (raising the ceilings set out in what are now AS 23.30.190(a)(1)-(12)); § 1, ch. 10 SLA 1972 (raising the ceilings set out in what are now AS 23.30.190(a)(1)-(12) and (19)); § 1, ch. 54 SLA 1974 (adding a catchall provision in subsection (19)); § 5, ch. 83 SLA 1975 (changing the basic compensation figure from 65% of an employee's "average weekly wage" to 2/3 of that wage, and raising the ceilings set out in what is now AS 23.30.190(a)(1)-(12)); § 4, ch. 75 SLA 1977 (setting a \$60,000 cap on compensation payable under AS 23.30.190(a)(2)); § 7, ch. 70 SLA 1983 (changing the basic compensation figure from 2/3 of an employee's "average weekly wage" to 1/2 of the "spendable weekly wage" and raising the ceilings set out in AS 23.30.190(a)(1)-(12)).

The last of these amendments occurred after Grant's injury and does not affect this case.

III. ATTORNEY'S FEES

In the first order of the board, issued December 1981, the employer was ordered to pay attorney's fees of \$400 in the permanent partial disability award pursuant to AS 23.30.145(b).¹⁷ In its April 1982 order the board found that the employer had controverted Grant's claim and ordered the payment of his attorney's fees pursuant to the statutory minimum of AS 23.30.145(a).¹⁸ In February 1982, the superior court entered an order granting additional attorney's fees to Grant in the amount of \$1,937.50 for his successful appellate work.¹⁹

[6] The employer mistakenly argues that the superior court's award of attorney's fees²⁰ should be overturned due to its alleged nonconformity with Appellate Rule 508. In *McShea v. State of Alaska*, 685 P.2d 1242 (Alaska 1984), we held that AS 23.30.145(c) controls the role of the superior court in determining attorney's fees in workers' compensation appeals. Accordingly, we affirm the superior court's award.

17. The employer was also ordered to pay attorney's fees pursuant to the minimum of AS 23.30.145(a) on the temporary total disability benefits paid from May 5, 1981 to July 24, 1981.

18. AS 23.30.145 provides in part:

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 per cent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 per cent 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.

[7] The employer further argues that the board's April 1982 award of attorney's fees under AS 23.30.145(a) was improper because it should have been reduced by the board's December 1981 award of \$400 in attorney's fees under AS 23.30.145(b). We disagree. The \$400 award under AS 23.30.145(b) was made for the distinct purpose of restarting benefits that the employer had stopped. It was not merely a first installment on the later award made under AS 23.30.145(a). Consequently, we also affirm on this issue.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.



(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 this claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

19. Although no statute was cited, it appears that the superior court made its award under AS 23.30.145(c), which provides in part:

(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.

20. Grant's attorney has since stipulated to a reduction of the superior court's award of \$1,937.50 to \$1,906.25, the amount actually sought.

ing/notice of the prohibited conduct. See generally *Dunn*, 422 U.S. at 112, 99 S.Ct. at 2197, 60 L.Ed.2d at 754 (to ensure the legislature speaks with clarity when defining criminal conduct, courts must decline to impose punishment for acts not plainly proscribed). Here, the Board has not notified the public that sport and commercial regulations apply to subsistence uses. A subsistence user cannot tell when it is legal to take game for subsistence uses. Therefore, the court should not penalize subsistence users when the Board has not clearly prohibited subsistence hunting.

I conclude that since the Board has failed to adopt specific subsistence regulations, AS 16.05.255(b) permits "unregulated" subsistence hunting. By rejecting the subsistence use defense, the court deprives subsistence users of a means to vindicate their statutory right.

health and welfare, legal fund and trust benefits, paid by employer on behalf of employee was not speculative, but was tied directly to number of hours worked by employee and, being readily identifiable and calculable, was to be included as "wages" for purpose of computing employee's average weekly wage.

Reversed and remanded.

1. Workers' Compensation §816

Definition of "wages" for purpose of computing an employee's average weekly wage should include all items of compensation or advantage agreed upon in a contract of hiring which are measurable in money whether in form of cash or as economic gain to employee. AS 23.30.220, 23.30.220(a)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Workers' Compensation §816

Value of vested union fringe benefits, including pension, health and welfare, legal fund and trust benefits, paid by employer on behalf of employee was not speculative, but was tied directly to number of hours worked by employee and, being readily identifiable and calculable, was to be included as "wages" for purpose of computing employee's average weekly wage.

Orval L. RAGLAND, Appellant,

v.

MORRISON-KNUDSEN CO., INC., Aetna Casualty and Surety Co., Crawford and Company, and Alaska Workers' Compensation Board, Appellees.

No. S-1333.

Supreme Court of Alaska.

Aug. 29, 1986.

Appeal was taken by employee of a decision of the Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., sustaining determination of the Workers' Compensation Board that only employer's contributions to vested pension benefits were includable in computing employee's average weekly wage. The Supreme Court, Compton, J., held that value of vested union fringe benefits, including pension,

Chancy Croft, Fairbanks, for appellant.

Dennis E. Cook, Schaible, Staley, DeLisio & Cook, Inc., Anchorage, for appellees.

Before RABINOWITZ, C.J., and MATTHEWS, BURKE, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

The sole issue in this workers' compensation case is whether the value of fringe benefits paid by the employer on the employee's behalf should be considered "wages" for the purpose of computing the



Inclusion of Fringe Benefits in Wage Basis for computing comp rate

Applies to me - 1984 § 220, 265(20)

725

employee's average weekly wage. We conclude that the readily identifiable and calculable value of fringe benefits should be included in the wage determination.

I. FACTS AND PROCEEDINGS

Orval Ragland was injured in the course of his employment with Morrison-Knudsen Co., Inc. (M-K) on July 30, 1982. It is undisputed that he is entitled to compensation, which he has received based on his 1981 income pursuant to AS 23.30.220(a)(2).¹ Also, it is undisputed that his union fringe benefits are vested.

Ragland sought to include in the calculation of his average weekly wage the value of his vested union fringe benefits, including pension, health and welfare, legal fund and training trust benefits. The Alaska Workers' Compensation Board (Board) increased Ragland's average weekly wage by the amount of M-K's contributions to vested pension benefits, but not to other benefit funds, reasoning that he had not "established a 'real economic loss' of other fringe benefits."

Ragland appealed to the superior court. Judge Mary E. Greene affirmed the Board's decision, relying on the U.S. Supreme Court's interpretation of comparable federal law in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) [Hilyer].

1. AS 23.30.220(2) provides in relevant part: *Determination of average weekly wage.* Except, as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation and is determined as follows:
 - (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury.
2. In 1983, the Alaska legislature amended the statute. AS 23.30.265(15) now provides:
 - (15) "gross earnings" means periodic payments, by an employer to an employee f

Ragland then appealed to this court. He asks that we order the Board to adjust his average weekly wage upward by the amount of his employer's 1981 contribution to the remaining vested union fringe benefits.

II. DISCUSSION

At the time of Ragland's injury, former AS 23.30.265(20) provided:

[W]ages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, and includes the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

AS 23.30.265(20), amended by AS 23.30.265(15) (1983).²

This court has not previously addressed the scope of the term "wages" under the Alaska Workers' Compensation Act. We may look for guidance to federal cases interpreting the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982), amended by 33 U.S.C. §§ 901-948a (Supp.1984), upon which the Alaska Act is modeled. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1048 n. 12 (1978).

Former 33 U.S.C. § 902(13) is virtually

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 taxable to the employee during the pay period; the value of room and board 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 earning above the Alaska average weekly wage at the time of injury may not be considered.

identical to former AS 23.30.265(20).³ In *Hilyer*, the Supreme Court held that fringe benefits were not included in the definition of wages under the federal statute. 461 U.S. at 637, 103 S.Ct. at 2052, 76 L.Ed.2d at 204.

The Court analyzed fringe benefits under the "similar advantage" clause and concluded that the present value of benefit trust funds cannot be converted easily into a cash equivalent. Therefore benefit trust funds are not "a similar advantage" to board, rent, housing or lodging. *Hilyer*, 461 U.S. at 630, 103 S.Ct. at 2048, 76 L.Ed.2d at 199. We think fringe benefits are better analyzed as part of "the money rate" at which an employee is paid, see *Harry v. M-K Rivers*, A.W.C.B. No. 81-010 (January 19, 1981); AS 23.30.265(20).

The Court also discussed various policy reasons why fringe benefits should not be included.⁴ It rejected the argument that the value could be calculated by reference to either the employer's costs or the value of the employee's expectations. *Hilyer*, 461 U.S. at 630, 103 S.Ct. at 2048, 76 L.Ed.2d at 200. It states that "the employer's cost is irrelevant in this context, it measures neither the employee's benefit nor his compensation." *Id.* It noted that an employee could not purchase private policies on the open market for the same amount the employer contributed to employee trust funds. *Id.*

However, the fact that an award based upon fringe benefits might not adequately compensate an injured employee is not a good reason to deny the award entirely. As Justice Marshall states in his dissent, "it is better to be roughly right than totally wrong." *Id.* at 642, 103 S.Ct. at 2055, 76 L.Ed.2d at 208 (Marshall, J. dissenting).

The *Hilyer* Court concludes that the employer's costs do not measure compensation because under the collective bargain-

ing agreement the employer's costs were not directly tied to any individual employee's labors. *Id.* at 630, 103 S.Ct. at 2048, 76 L.Ed.2d at 200. Further, the employees under that agreement had no control over the level of funding or the benefits provided. *Id.* at 631, 103 S.Ct. at 2049, 76 L.Ed.2d at 200.

That rationale does not apply to the case before us. Under M-K's collective bargaining agreement with Ragland's union, a total hourly wage rate is negotiated by the union and M-K. Union members vote to determine how the total wage is divided between cash payments and fringe benefits. The contribution to fringe benefits is thus not speculative, but rather is tied directly to the number of hours worked by the employee. We believe this total hourly wage, no matter how it is apportioned between cash payments and fringe benefits, is "the money rate at which the service rendered is recompensed." AS 23.30.265(20), amended by AS 23.30.265(15) (1983).

There is no principled distinction between cash payments and payments into a fringe benefit plan. Employees may bargain to receive cash only, or may agree to forego some cash in exchange for fringe benefits. However, their compensable earning power is the same in either case. See *Hilyer*, 461 U.S. at 641, 103 S.Ct. at 2054, 76 L.Ed.2d at 207 (Marshall, J. dissenting).

The Court in *Hilyer* also reasons that the value to the employee of each fund is speculative because it depends on factors which are unpredictable, such as whether the employee's interest vested⁵ and his "need for the services" which the fringe benefits provide. *Hilyer*, 461 U.S. at 631, 103 S.Ct. at 2049, 76 L.Ed.2d at 200; see also *Olivera v. Mat-Su/Stephan & Sons, J.V.*, A.W.C.B. No. 84-0327 (September 25, 1984). In *Still v. Industrial Commission*, 27 Ariz.App.

3. After the *Hilyer* decision, 33 U.S.C. § 902(13) was amended to explicitly exclude fringe benefits from the definition of wages. See 33 U.S.C. § 902(13) (Supp.1984). 33 U.S.C. §§ 945-47 were repealed.

4. The Court also relied on legislative history and agency interpretation, neither of which are applicable here.

5. As noted above, Ragland's interest in union fringe benefits has vested.

142, 551 P.2d 591, 592 (1976), the court has reasoned similarly that fringe benefits should be excluded because the employee is not actually receiving the contribution payments at the time of injury and might never receive them.

It is indeed speculative as to whether Ragland would have "needed" the benefits if he had continued to work for M-K, or whether he will "need" them in the future now that he is disabled. However, the facts are that at the time of the injury M-K was contributing to Union benefit trusts for Ragland as part of his compensation and that his injury prevented his continuing eligibility in these benefit programs. See *Hite v. Evert Products Co.*, 34 Mich.App. 247, 191 N.W.2d 136, 139 (1971).

It is in the nature of any health or legal insurance plan, whether provided by an employer or purchased in the marketplace, that the beneficiary might never need payments or services from the plan. It is the coverage itself which is the benefit, and which the disabled employee must now find some other way of providing.⁶

In holding against the inclusion of fringe benefits, the *Still* court reasoned that the employer is contributing to the union, which administers the trust funds, rather than to the employee. *Still*, 551 P.2d at 592.

However, it cannot seriously be maintained that the union is the beneficiary of the employer's contributions. "The beneficiaries are the employees. The funds are no more than a channel; they are merely a means by which the company provides life insurance, health insurance, retirement benefits, and career training for its employees." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 211 (D.C.Cir. 1981), *rev'd sub nom. Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461

U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

The *Still* court also compared benefit contributions to year end bonuses, which it said were the result of "collective" rather than "personal" effort. Since the benefits are obtained as the result of a union agreement, the court concluded that they are not attributable to the individual efforts of the employee. 551 P.2d at 594.

Under this reasoning, however, even wages would appear to be excluded when they are established by a collective bargaining agreement. The fact that compensation is provided through a union agreement rather than through individual contracts with each employee should not preclude employees from receiving that compensation when they are disabled. The benefits are compensation for an employee's services regardless of how they are negotiated. See *Hilyer*, 670 F.2d at 212 n. 7.

Fringe benefits are often an important part of an employee's earning power. When the goal is to compensate a disabled employee, it is "harsh simply to ignore part of an employee's earnings power when calculating benefits." *Hilyer*, 461 U.S. at 647, 103 S.Ct. at 2057, 76 L.Ed.2d at 210 (Marshall, J. dissenting).

[1, 2] We therefore hold that readily identifiable and calculable values received by an employee should be included in his wage determination. Given the goal of workers' compensation laws to assure compensation for actual loss, see 2 A. Larson, *The Law of Workmen's Compensation* § 60.12, at 10-564 (1983), and the policy of construing ambiguities in favor of the employee, *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 497 (Alaska 1982), we conclude that the definition of wages should "include all items of compensation or advantage agreed upon in a contract of hiring which are measurable in money,

6. We have held in a personal injury case that the plaintiff was entitled to the amount of actual contributions to union benefit funds that would have been made on his behalf by his employer. *Alaska Airlines v. Sweat*, 568 P.2d 916, 935 (Alas-

ka 1977). Even though the plaintiff had not purchased replacement coverage, he could recover for the *lost protection* over a period of years. *Id.*

FOSS ALASKA LINE, INC. v. NORTHLAND SERVICES Alaska 523

Cite as 724 P.2d 523 (Alaska 1986)

whether in the form of cash or as an economic gain to the employee." *Hite*, 191 N.W.2d at 138, quoting *Leslie v. Reynold*, 179 Kan. 422, 295 P.2d 1076, 1083 (Kan. 1956).

The decision of the superior court affirming the Alaska Workers' Compensation Board is REVERSED and the case REMANDED for proceedings consistent with this opinion.



FOSS ALASKA LINE, INC., Appellant,

v.

**NORTHLAND SERVICES, INC. and
Crowley Maritime Corporation,
Appellee.**

No. S-1275.

Supreme Court of Alaska.

Sept. 12, 1986.

In personal injury action, defendant filed amended third-party complaint against third-party defendants for statutory contribution. Following settlement by third-party defendants with plaintiff's representative, the Superior Court, Fourth Judicial District, Bethel, Christopher R. Cooke, J., entered summary judgment in favor of third-party defendants on the contribution claim and awarded third-party defendants their requested attorney fees and costs. Defendant appealed. The Supreme Court, Moore, J., held that: (1) settlement payments by third-party defendants to plaintiff's representative, which barred defendant's contribution claim against third-party defendants, precluded finding that either third-party defendant was a "prevailing party" entitled to recover costs and attorney fees from defendant; (2) third-party defendants' settlements precluded finding that defendant's contribution claim was as-

serted in bad faith so as to entitle third-party defendants to their attorney fees; and (3) third-party defendants were not entitled to costs incurred in their successful motions to strike the original third-party complaint.

Reversed.

1. Costs ⇄32(2), 172

"Prevailing party," who is entitled to costs and attorney fees, is one who prevails on the main issue of the case, provided the issue has been joined. Rules Civ.Proc., Rules 79(a), 82(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Costs ⇄32(2), 172

Ordinarily, determination of prevailing party status, for purposes of award of costs and attorney fees, rests in sound discretion of superior court. Rules Civ.Proc., Rules 79(a), 82(a)(1).

3. Appeal and Error ⇄841

Supreme Court may review application of legal doctrine to undisputed facts without usual deference to superior court.

4. Appeal and Error ⇄842(1)

Matters of public policy raise purely questions of law; in such circumstances, duty of Supreme Court is to adopt rule of law that is most persuasive in light of precedent, reason, and policy.

5. Contribution ⇄8

Policy underlying provision of Uniform Contribution Among Tortfeasors Act, providing that contribution defendant may escape liability for contribution by obtaining a release from the injured plaintiff, is to encourage settlements, insure finality, and reduce uncertainty. AS 09.16.040(2).

6. Contribution ⇄8

Settlement between contribution defendant and injured plaintiff is not made in bad faith when settlement is primarily motivated by contribution defendant's desire to escape contribution liability. AS 09.16.040(2).

① *Computing Compensation Rate 520*

JOHNSON v. RCA-OMS, INC.

Alaska 905

Cite as 681 P.2d 905 (Alaska 1984)

Robert E. JOHNSON, Appellant,

v.

RCA-OMS, INC., and Zurich-American Insurance Company, Alaska Workers' Compensation Board, Appellees.

No. 7327.

Supreme Court of Alaska.

May 11, 1984.

The Workers' Compensation Board computed average weekly wage of claimant for purpose of establishing his temporary total disability benefits, and the ruling was affirmed by the Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, Jr., J. On further appeal, the Supreme Court, Matthews, J., held that if there is only slight variance between wages at time of injury and average weekly wage arrived at by dividing 52 into total wages earned in any one of three calendar years immediately preceding injury, it would not be unfair to utilize the latter, but where apparent disparity between military salary and what claimant actually earned at time of disability was substantial, so that such method did not fairly reflect wage-earning capacity, average weekly wage should have been calculated with reference to usual wage for similar service rendered by paid employees under similar circumstances.

Reversed and remanded.

Compton, J., dissented and filed opinion.

1. Workers' Compensation ⇄813

Statute providing for the determination of average weekly wage was intended to formulate a fair approximation of claimant's probable future earning capacity during period in which compensation benefits were to be paid, and normally the formula in the first subsection, directing calculation by dividing 52 into total wages earned in any one of three years immediately preceding injury, will yield fair approximation of figure, but in cases in which it would not,

third subsection, calling for selection of the "usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board," is to be used. A.S. 23.30.220, 23.30.220(a)(2, 3).

2. Workers' Compensation ⇄818

If there is only slight variance between wages at time of injury and average weekly wage arrived at by dividing 52 into total wages earned in any one of three calendar years immediately preceding injury, it would not be unfair to utilize the latter, but where apparent disparity between military salary and what claimant actually earned at time of disability was substantial, so that such method did not fairly reflect wage-earning capacity, average weekly wage should have been calculated with reference to usual wage for similar service rendered by paid employees under similar circumstances. AS 23.30.220, 23.30.220(a)(2, 3).

3. Workers' Compensation ⇄820

Legislature by providing for calculation of workers' compensation, under specified circumstances, by using usual wage for similar service rendered by paid employees under similar circumstances recognized that goal of certainty must give way to that of fairness in case of conflict between methods of ascertaining average weekly wage. AS 23.30.220(a)(2, 3).

4. Workers' Compensation ⇄810

In statute providing method to be followed by Workers' Compensation Board if wages at time of injury cannot be fairly calculated by dividing 52 into total wages earned in any one of three calendar years immediately before injury "or cannot otherwise be ascertained without undue hardship to the employee," clauses are disjunctive. AS 23.30.220(a)(2, 3).

5. Workers' Compensation ⇄803, 813

Workers' compensation benefits are meant to compensate for wages lost regardless of other assets of injured worker, and, in determining average weekly wage, consideration of claimant's pension was im-

687

Wages

proper. AS 23.30.185, 23.30.210, 23.30.220, 23.30.220(a)(1-4).

Robert C. Blackford, Fairbanks, for appellant.

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for appellees.

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and CARLSON, Judge*.

OPINION

MATTHEWS, Justice.

The question in this case is whether the Alaska Workers' Compensation Board properly utilized subsection (2) of AS 23.30.220 rather than subsection (3) of that statute in computing Robert Johnson's average weekly wage for the purpose of establishing his temporary total disability benefits.¹ AS 23.30.220(2) and (3), as in effect at the time of Johnson's injury, provided:²

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is based for computing compensation, and is determined as follows:

(2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;

* Carlson, Superior Court Judge, sitting by assignment made pursuant to Article IV, section 16, of the Constitution of Alaska.

1. Under AS 23.30.185 a person entitled to receive temporary total disability benefits shall receive $\frac{2}{3}$ of his average weekly wage during the continuance of the disability.
2. AS 23.30.220(a)(1) and (2) were substantially amended effective January 1, 1984. The amended sections, which have no effect on this case read:

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

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

In November of 1979 Robert Johnson retired from the United States Air Force after 20 years of service. On March 13, 1980 he began working for RCA-OMS, Inc. He was injured on the job on June 12, 1980, but was able to return to work after a week of treatment. He continued to work until February 13, 1981 at which time he was hospitalized and spinal surgery was performed for a condition attributable to the June 12, 1980 injury.

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

Johnson appealed the Board's determination to the superior court which affirmed

employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:

(1) The gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.

(2) If the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history.

the Board's ruling. Johnson now appeals to this court. We reverse.

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

The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis.

2 A. Larson, *The Law of Workmen's Compensation* § 60.11(d), at 10-564 (1983) (footnote omitted).

Other provisions of our Alaska Workers' Compensation statutes demonstrate that the objective of average weekly wage calculation is to arrive at a fair approximation of probable future earning capacity. Thus AS 23.30.220(4) provides:

(4) if an employee is a minor or an apprentice, or a trainee, as determined by the board, when injured, and under normal conditions his wages would increase during the period of disability, this fact shall be considered in computing his average weekly wage; . . .

AS 23.30.210, dealing with partial disability provides in part:

[T]he wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his *wage-earn-*

ing capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his *wage-earning capacity*, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable. . . .

(Emphasis added).

[2] If there is only a slight variance between wages at the time of injury and the average weekly wage arrived at under the formula of subsection (2) it would not be unfair to utilize the formula prescribed by subsection (2). In the present case, however, the apparent disparity between Johnson's military salary and what he actually earned at the time of his disability is so substantial that application of the subsection (2) formula clearly does not fairly reflect his wage-earning capacity. The Board should, therefore, have calculated Johnson's average weekly wage under subsection (3).

In reaching this conclusion we are aware that a broad reading of our recent case of *State v. Dupree*, 664 P.2d 562 (Alaska 1983) would support the Board's decision made in this case. *Dupree* presented essentially the converse facts of those in the present case. *Dupree*'s average weekly wage computed pursuant to AS 23.30.220(2) exceeded her anticipated earnings as computed under subsection (3). Despite the fact that *Dupree* was not likely to return to work at her earlier higher wages, the majority opinion held that the formula in subsection (2) should be applied. *Id.* at 565. Without reconsidering the correctness of the result in *Dupree*, the present case is clearly distinguishable.

[3] The holding in *Dupree* was based on three reasons: (1) the administrative convenience of applying subsection (2), as opposed to subsection (3); (2) the perceived purpose of subsection (2) which was "to give the benefit of past earnings history to the employee," *id.* at 565; and (3) the "rule that ambiguous worker's compensation statutes should be construed in favor of the employee." *Id.* at 566. The second and third reasons are not present here, for

application of subsection (2) does not benefit Johnson and any ambiguity in the statute is not resolved in Johnson's favor when subsection (2) is employed. The first reason, administrative convenience, is a factor in the present case, but we regard it as insufficient to explain the result in *Dupree* or to require application of subsection (2) in this case. The structure of section 220 requires that the Board address and determine the fairness and undue hardship questions posed by subsection (3) in every case in which the points are raised. Although these questions do not have answers which can be arrived at with mathematical precision, the legislature, by enacting subsection (3), has recognized that the goal of certainty must give way to that of fairness whenever the two conflict.

[4,5] The Board also determined that its decision to apply subsection (2) would not cause undue hardship to Johnson because he would receive his military pension in addition to any compensation award. Since the unfair calculation and undue hardship clauses of subsection (3) are disjunctive, our conclusion that Johnson's wage at the time of injury could not be fairly calculated under subsection (2) is dispositive. We note, however, that in our view consideration of Johnson's pension was improper, since worker's compensation benefits are meant to compensate for wages lost regardless of the other assets of the injured worker.

We also note that our decision that subsection (3) should have been utilized makes it unnecessary to decide whether the phrase "time of injury" as used in AS 23.30.220 means, in effect, time of disability due to injury. There is authority on both sides of this question. See 2 A. Larson, *The Law of Workmen's Compensation* § 60.11(a), at 10-543, -544 n. 77.2 (1982). REVERSED and REMANDED.

1. 2 A. Larson, *The Law of Workmen's Compensation* § 60.11(d), at 10-564 (1983).

2. I think the conclusion inescapable that *Dupree* is being overruled by the court, despite its protestation to the contrary.

COMPTON, Justice, dissenting.

As noted by the court, it is the "rule that ambiguous workers' compensation statutes should be construed in favor of the employee." *State v. Dupree*, 664 P.2d 562, 566 (Alaska 1983). I do not disagree with this rule of construction. Despite the court's assertion that the rule is not being employed in this case, 681 P.2d at 907 (Alaska 1984), I believe that the contrary is true. Since I also believe the statutory language to be unambiguous on the point in issue, I dissent.

The court quotes Professor Larson's admonition that we not suppose that "compensation theory" is satisfied by use of a mechanical representation of a claimant's own earnings in some arbitrary past period as a wage basis.¹ It is this same quote that provides the launching pad for the dissent in *Dupree*.² I suggest that while this admonition is of interest to courts, it would be better addressed to legislatures which mandate the use of mechanical formulae in determining wage basis. In this case we are not applying compensation theory; we are applying an existing statute to particular facts.

The Alaska legislature has made a conscious decision to use the past to determine present and future benefits. The average weekly wage to be used in computing temporary total disability benefits is not the claimant's actual weekly wage at the time of injury. Rather, it is an artificial figure arrived at by the use of a mechanical formula applied to figures derived from reference to an arbitrary past period,³ a procedure apparently only conditionally acceptable to Professor Larson.

The court seeks refuge from the perceived ravages of applying a mechanical formula in exceptions contained in AS 23-

3. AS 23.30.220(4) does provide that future normal wage increases for minors, apprentices, or trainees should be taken into account in computing the average weekly wage. It makes no such exception for military personnel entering the private sector.

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30.220(3).⁴ It invents the following dichotomy:

If there is only a *slight variance* between wages at the time of injury and the average weekly wage arrived at under the formula of subsection (2) it would not be unfair to utilize the formula prescribed by subsection (2). In the present case, however, the apparent *disparity* between Johnson's military salary and what he actually earned at the time of his disability is *so substantial* that application of the subsection (2) formula clearly does not fairly reflect his wage-earning capacity. The Board should, therefore, have calculated Johnson's average weekly wage under subsection (3). (Emphasis added).

4. AS 23.30.220(3) provides:
[I]f the board determines that the wage at the time of injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage ... shall be the usual wage for similar service ...
5. The pertinent statutes provide:
AS 23.30.180. PERMANENT TOTAL DISABILITY. In case of total disability adjudged to be permanent 66 $\frac{2}{3}$ per cent of the injured employee's *average weekly wages* shall be paid to the employee during the continuance of the total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. (Emphasis added).
AS 23.30.185. COMPENSATION FOR TEMPORARY TOTAL DISABILITY. In case of disability total in character but temporary in quality, 66 $\frac{2}{3}$ per cent of the injured employee's *average weekly wages* shall be paid to the employee during the continuance of the disability. (Emphasis added).
AS 23.30.190. COMPENSATION FOR PERMANENT PARTIAL DISABILITY. (a) In case of disability partial in character but permanent in quality the compensation is 66 $\frac{2}{3}$ per cent of the injured employee's *average weekly wages* in addition to compensation for temporary total disability or temporary partial disability paid in accordance with AS 23.30.185 or 23.30.200, respectively, and shall be paid to the employee as follows:

....
(20) in all other cases in this class of disability the compensation is 66 $\frac{2}{3}$ percent of the difference between his *average weekly*

681 P.2d at 907 (Alaska 1984). I say "invent" because I can find nothing in the statute remotely suggesting the slight variance/substantial disparity test now to be applied in determining whether subsection (3) is to be utilized. Furthermore, there would have been no reason for the Alaska legislature to adopt a formula based on an arbitrary past period if it intended that reference to such period be utilized when the resulting artificial figure varies only *slightly* from actual wages at the time of injury.

The court strays, it seems to me, when it fails to keep separate the distinction between total and partial disability benefits.⁵ Indeed, the court's confusion is readily apparent from its reference to Johnson's "wage-earning capacity,"⁶ a term of art

wages and his *wage-earning capacity* after the injury in the same employment or otherwise, payable during the continuance of the partial disability, but subject to reconsideration of the degree of the impairment by the board on its own motion or upon application of a party in interest; whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum; (Emphasis added).

AS 23.30.200. TEMPORARY PARTIAL DISABILITY. In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 66 $\frac{2}{3}$ per cent of the difference between the injured employee's *average weekly wages* before the injury and his *wage earning capacity* after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. (Emphasis added).

6. The pertinent statute provides:
AS 23.30.210. DETERMINATION OF WAGE-EARNING CAPACITY. In a case of partial disability under AS 23.30.190(20) or 23.30.200 the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his ca-

that is not synonymous with average weekly wages. Wage earning capacity is irrelevant to determination of average weekly wages and temporary total disability benefits.⁷ Simply, the court is using average weekly wages and wage earning capacity interchangeably, even though they are separately defined.

Application of a mechanical formula has more than administrative convenience to recommend it. The point in time when the claimant is most likely to need an expeditious determination of benefits is during the period of temporary total disability. Presumably the claimant is then without income. The court now injects a slight variance/substantial disparity test into the equation, along with notions of fairness in general. I submit this will cause delay and

capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

7. Indeed, Professor Larson even acknowledges that it may be proper to treat temporary disabil-

in fact be counterproductive of expeditious determination of temporary total disability benefits.

If the exceptions had stated, as they easily could have, that the average weekly wage could be disregarded if it was not fairly and reasonably representative of actual wages, I would agree with the court. However, they did not. Johnson's wage can be "fairly calculated." He has shown no "undue hardship." I would affirm.



ity benefits as an exception to a rule regarding projection of future earnings loss for permanent disability extending into the indefinite future. 2 A. Larson, *The Law of Workmen's Compensation* § 60.22(b) (1983).

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legal foundation on which to hold the agency's actions an abuse of discretion.

I would adopt a rule that enforces the intent of the party. Correction of a bid error which results in an unintended bid should not result in an enforceable contract under traditional notions of offer and acceptance. This court has affirmatively approved this concept in the contract context. When a correction displaces an apparent low bidder—who has submitted an error free bid—the integrity of the bidding process is undermined. Furthermore, the errant bidder, having had an opportunity to review all bids, can determine after an item by item comparison whether its corrected bid will leave a sufficient margin of profit to make it worthwhile to accept, or whether to reject and take its chances in court, should the agency decide to seek bid bond forfeiture. Thus the errant bidder is given a competitive advantage by a process which now encourages bid manipulation.

I find little to recommend the "prevailing view," which appears to be the result of judicial accident rather than reason. I think the case at bar points out the absurdity of its application.

disability were suffered during the period in which claimant probably would have been serving as an acting district court judge, fact that job as acting district court judge might have lasted for only one year was not justification for discounting temporary disability payments to be received during such period, and therefore benefits should have been calculated under subsection calling for selection of the usual wage for similar service mandated by paid employees under similar circumstances, as determined by the Workers' Compensation Board, and (2) the Board erred in concluding, in making fairness determination, that it should ignore claimant's travel and resulting unemployment in first quarter of 1979 on grounds that his unemployment was voluntary, the real question being not voluntariness of unemployment but whether unemployment was likely to be repeated during the relevant future, and in view of facts that claimant's extended vacation was taken not long after he graduated from law school and that there was no evidence that he intended to repeat such experience in the foreseeable future, there was error in ignoring travel and unemployment.

Reversed and remanded.



② Computing Compensation
Rate \$220

Richard F. DEUSER, Appellant,

v.

STATE of Alaska, Appellee.

No. S-243.

Supreme Court of Alaska.

March 22, 1985.

In a workers' compensation case, claimant appealed from a decision of the Superior Court, State of Alaska, Third Judicial District, Anchorage, Mark C. Rowland, J. The Supreme Court, Matthews, J., held that: (1) where 25 weeks of temporary

1. Workers' Compensation §822

Where 25 weeks of temporary disability were suffered during the period in which claimant probably would have been serving as an acting district court judge, fact that job as acting district court judge might have lasted for only one year was not justification for discounting temporary disability payments to be received during such period, and therefore benefits should have been calculated under subsection calling for selection of the usual wage for similar service mandated by paid employees under similar circumstances, as determined by board. AS 23.31.220(2, 3).

2. Workers' Compensation §820

The Workers' Compensation Board erred in concluding, in making fairness determination, that it should ignore claim-

ant's travel and resulting unemployment in first quarter of 1979 on grounds that his unemployment was voluntary, the real question being not voluntariness of unemployment but whether unemployment was likely to be repeated during the relevant future, and in view of facts that claimant's extended vacation was taken not long after he graduated from law school, and that there was no evidence that he intended to repeat such experience in the foreseeable future, there was error in ignoring travel and unemployment. AS 23.30.185, 23.30.220, 23.30.220(2, 3).

Judith J. Bazeley and Richard F. Deuser, Anchorage, for appellant.

Elizabeth Page Kennedy, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Justice.

Under former AS 23.30.185, an injured worker was entitled to temporary total disability payments which were two thirds of his weekly wage.¹ AS 23.30.220 prescribed how average weekly wage was determined. It provided:

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows:

(2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;

1. This section and AS 23.30.220 were substantially changed in 1983. §§ 6, 12 ch 70 SLA

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

The question presented here is whether the board erred in calculating Richard Deuser's average weekly wage under subsection (2), rather than subsection (3) of this statute.

On March 23, 1981, Deuser was injured when a snow machine on which he was riding collided with another snow machine. Deuser was employed at the time in the Bethel Service Area as an acting district court judge with circuit riding responsibilities. He was traveling on circuit between villages when the accident occurred.

As a result of the accident, Deuser was seriously injured and was unable to continue to work. After twenty-five weeks of total disability he began working as an attorney in Anchorage.

Under AS 23.30.220, the first step in the calculation of average weekly wage is to look at the total wages earned in any one of the three calendar years preceding the injury. In 1978, Deuser, who graduated from law school in 1976, was employed until July 1 by an Anchorage law firm, earning \$2,000 per month. At that time, he terminated his employment in order to travel in Europe. His average weekly wage for 1978, using the formula required by § 220(2)(dividing total wages by fifty-two) was approximately \$283.

In 1979, Deuser returned from Europe in the middle of February and in late March began doing research for other attorneys. Deuser earned approximately \$15,600 doing contract research. In September, he began to work as an associate for an attorney in Bethel. His salary as an associate of the Bethel attorney was \$2,500 per

1983. These changes do not apply to this case.

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month. His total earnings for 1979 were \$24,357, yielding an average weekly wage of \$468.

During 1980, Deuser continued to serve as an associate of the Bethel attorney until July 1, 1980, at the monthly salary at which he was hired. Disappointed because his employer was not interested in forming a partnership, Deuser opened his own law practice in Bethel. In November, however, he accepted an offer of employment as a circuit riding acting district court judge to start February 2, 1981, and immediately began to wind down his practice. As a sole practitioner, Deuser earned about \$3,000 after expenses, which when added to his income as an associate, yielded a total income for the year 1980 of \$18,535.47. His average weekly wage for 1980 was therefore \$356.

Deuser's weekly wage as an acting district court judge was approximately \$970. The term of his appointment was six months. Deuser presented evidence that he would have been offered the position for an extended six month term but was unable to accept the offer because of his injury. He accepted employment with an Anchorage law firm on September 15, 1981, at a salary of \$769 per week.

The Board selected Deuser's 1979 earnings to establish his average weekly wage. The Board found that the subsection (2) calculation did not result in substantial unfairness. It reasoned that the fact that Deuser did not work during the first quarter of 1979 was a voluntary decision on his part that did not render the subsection (2) calculation of average weekly wage unfair. Acknowledging that Deuser had presented evidence tending to show that he would have completed two six month terms as an acting district court judge except for his injuries, the Board focused on the fact that it would be speculative to assume that he would have been appointed to a permanent position as district judge.

[1] "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 bene-

fits are to be paid." *Johnson v. RCA-OMS, Inc.*, 681 P.2d 905, 907 (Alaska 1984). Deuser's twenty-five weeks of temporary disability were suffered during the period in which he probably would have been serving as an acting district court judge. The disparity between Deuser's probable future earnings during the period of disability, \$970 per week, and the average weekly wage yielded by application of the subsection (2) formula, \$468 per week, is substantial.

In *Johnson*, we concluded that a discrepancy between average weekly wages computed under subsection (2) of \$387 and probable future weekly wages of \$1,000 was "so substantial that application of the subsection (2) formula clearly does not fairly reflect [the claimant's] wage-earning capacity. The Board should, therefore, have calculated [the claimant's] average weekly wage under subsection (3)." *Id.* at 907. We reach the same conclusion in this case.

The fact that Deuser's job as an acting district court judge may have lasted for only one year cannot be regarded as a justification for discounting the temporary disability payments to be received during this period.

An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum for a permanent award or the reverse. Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award. In making an award for temporary disability, the Commission will ordinarily be concerned with whether an applicant

would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading.

Argonaut Insurance Co. v. Industrial Accident Commission, 57 Cal.2d 589, 21 Cal. Rptr. 545, 548, 371 P.2d 281, 284 (1962). If permanent disability payments extending into the indefinite future were in question, the fairness question posed by subsection (3) might have a different answer.

[2] Further, when the Board made the fairness determination, it erred in concluding that it should ignore Deuser's travel and resulting unemployment in the first quarter of 1979 on the grounds that his unemployment was voluntary. The real question is not the voluntariness of the unemployment, but whether the unemployment is likely to be repeated during the relevant future.² Deuser's extended vacation was taken not long after he graduated from law school. There is no evidence that Deuser intended to repeat this experience in the foreseeable future.

REVERSED and REMANDED.



Artemie KALMAKOFF, Appellant,

v.

STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellee.

No. 7767.

Supreme Court of Alaska.

March 29, 1985.

Rehearing Denied April 26, 1985.

Applicant sought limited entry permit for salmon fishery. The Commercial Fish-

2. 2 A. Larson, *Workmen's Compensation Law* § 60.21(c), at 10-592 (1983) (If claimant's part-time relation to the labor market is "clear, and above all if there is no reason to suppose it will

eries Entry Commission denied the application, and he sought judicial review. The Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., affirmed, but the Supreme Court affirmed in part, reversed in part, and remanded for a new administrative hearing, 693 P.2d 844. The Commission, in accordance with a regulation, declined to issue an interim-use permit pending decision of the Supreme Court. The Supreme Court, Rabinowitz, J., held that: (1) in statute specifying terms and conditions of interim-use permits and providing that such a permit shall expire upon final determination of the holder's eligibility for entry permit, phrase "final determination" refers to determination by the final authority, which is the Supreme Court, and (2) final sentence of regulation, "an applicant unsuccessful in superior court will not be issued an interim-use permit on further appeal" is inconsistent with governing statutes and is invalid.

Order in accordance with opinion.

1. Fish ⇐10(1)

In statute specifying terms and conditions of interim-use permits for fishery and providing that interim-use permit shall expire upon final determination of the holder's eligibility for entry permit, phrase "final determination" refers to determination by the final authority, which is the Supreme Court. AS 16.43.220(a), 16.43.250(b), 16.43.270(a).

2. Fish ⇐10(1)

A central policy underlying the Limited Entry Act is to ensure that those applicants who would suffer significant hardship if excluded from the fishery be not excluded. AS 16.43.210, 16.43.220(a).

3. Fish ⇐11

The Commercial Fisheries Entry Commission does not have authority to issue

change in the future period into which disability extends, then it is unrealistic to turn a part-time able-bodied worker into a full-time disabled worker") (emphasis in original).

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801(d)(2)(C).¹ The fact that the reasons for firing Knight merely *concerned* her employment duties was sufficient. See *Rutherford v. State*, 605 P.2d 16, 24-25 (Alaska 1979) (investigators did not need specific authority to speak for the state on issue of driver's negligence).

[11] We disagree with the trial court that Knight must show the basis for Wheeler's statement. In *Rutherford*, we adopted the majority view that "an admission is not inadmissible because it is not based on firsthand knowledge or is made in the form of an otherwise inadmissible opinion." *Id.* at 24-25. Hence, a showing of how Wheeler obtained her information is not required because the evidence is admissible regardless of its basis, e.g., even if it is only her opinion. The fact that Wheeler was an employee making a statement about a matter within the scope of *her own* responsibilities provides the statement with enough credibility to go to the jury. This is the policy behind the majority view. See, *id.* at 25 n. 24. Admitting Wheeler's testimony does not, of course, establish its truthfulness. AGA is always free to argue to the jury that the statement is false.

[12] With respect to Alyeska, the statement is not admissible. According to Rule 801(d)(2)(D), the statement must have been made by the agent of the party against whom it is introduced. Wheeler was the personnel manager for AGA, not Alyeska. Because nothing else in the record or in the briefs establishes that Wheeler was acting as Alyeska's agent or servant, no basis exists for applying 801(d)(2)(D).

IV. Attorney's Fees

Alaska Civil Rule 54(d) states that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." We have held that this means a prevailing party may recover attorney's fees. *DeWitt v. Liberty Leasing Co. of Alaska*, 499 P.2d 599, 601 (Alaska 1972).

1. This rule provides that a statement is not hearsay if "[t]he statement is offered against a party and is ... (C) a statement by a person autho-

Because we hold that Knight's claim against AGA should not have been dismissed, AGA is no longer a "prevailing party." Hence, it is not entitled to attorney's fees.

[13-16] Alyeska is a prevailing party and is therefore entitled to attorney's fees. Knight argues that Alyeska should have itemized its fees instead of merely submitting an affidavit which listed only the hours worked and the total fees requested. We disagree. We have repeatedly stated that we will not interfere with a trial judge's fee award unless it is "a clear abuse of discretion." See, e.g., *North Star v. Fairbanks North Star Borough*, 621 P.2d 1329, 1335 (Alaska 1981). This rule also extends to a trial judge's decision to request, or not to request, an itemization. The amount awarded, \$15,000, is reasonable in light of the evident time and effort expended by counsel, including participating in two (because of a mistrial) truncated trials and considerable pre-trial discovery and motion practice. Hence, the trial court did not abuse its discretion by failing to request an itemization.

The judgment is AFFIRMED as to Alyeska and REVERSED as to AGA.



③ Computing Compensation Rate \$ 220

Gerald R. BRUNKE, Appellant,

v.

ROGERS & BABLER and Alaska Pacific Assurance/INA, Appellees.

No. S-680.

Supreme Court of Alaska.

Feb. 21, 1986.

Carpenter sought to recover benefits in connection with work-related accident.

... rized by him to make a statement concerning the subject."

The Workers' Compensation Board awarded temporary disability benefits, but denied permanent partial disability benefits for back injury, and the Superior Court, Third Judicial District, Anchorage, Karen Hunt, J., affirmed. Carpenter appealed. The Supreme Court, Burke, J., held that: (1) carpenter, who sustained back injury three months after he came to work for employer, was entitled to have wage loss calculated, for purpose of determining temporary total award, based on usual wage for carpenters in area, and (2) carpenter bore burden of proving lost earning capacity, for purpose of claim for permanent partial benefits.

Affirmed in part, reversed in part and remanded.

Compton, J., concurred and filed opinion.

1. Workers' Compensation ⇐1939.1

Supreme Court's review of decision of Workers' Compensation Board was not limited to substantial evidence test, where appeal involved proper construction of workers' compensation statute [AS 23.30.220].

2. Workers' Compensation ⇐818

Employee who sustained back injury in work-related accident three months after job change, and whose salary dramatically increased as result of change, was entitled to have wage loss calculated, for purpose of temporary total award, under statute providing that where reliance on employee's prior annual wages would result in undue hardship, wage loss could be calculated based on "usual wage for similar services" [AS 23.30.220(3)].

1. The Board's decision was affirmed by the superior court. This appeal arises from the superior court decision issued September 4, 1984.

2. AS 23.30 was substantially amended in 1983. See ch. 70, 1983 SLA. The sections cited below are all pre-1983 versions; they apply to this claim as it arose prior to the amendments. AS 23.30.220 provided in part:

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for

3. Workers' Compensation ⇐818

In calculating "usual wage for similar services," for purpose of determining temporary total disability benefits to which injured carpenter was entitled pursuant to AS 23.30.220, Workers' Compensation Board could consider amount earned by other carpenters working on same site during period carpenter was disabled, rather than relying on 60-hour work week which carpenter worked prior to injury.

4. Workers' Compensation ⇐1377

In suit for permanent partial disability benefits, injured employee bore burden of proving extent of lost earning capacity, by introducing evidence of postinjury earnings. AS 23.30.210.

Charles W. Coe, Smith, Coe & Patterson, Anchorage, for appellant.

James R. Slaybaugh, Pletcher & Slaybaugh, Anchorage, for appellees.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON, and MOORE, JJ.

OPINION

BURKE, Justice.

In this appeal of an Alaska Workers' Compensation Board ("Board") decision and order,¹ appellant Gerald Brunke contests both the Board's method of computation for a temporary total disability and its denial of permanent partial disability benefits for an unscheduled injury. AS 23.30.220; AS 23.30.185; AS 23.30.190(a)(20); AS 23.30.210.² Our recent decisions interpret-

computing compensation, and is determined as follows:

....

(2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury; (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

ing AS 23.30.220 compel a remand to the Board for computation of Brunke's average weekly wage under AS 23.30.220(3).

I. STATEMENT OF FACTS AND PROCEEDINGS BELOW

On October 29, 1982, appellant Brunke, a carpenter working for Rogers and Babler ("MAPCO"), lost his balance and fell approximately fifteen feet from the roof of a school under construction in Eagle River. Brunke sustained injuries to his back and shoulder as a result of the fall. Brunke was ultimately released for work on March 7, 1983.

Since his release for work in March 1983, Brunke has only held a few construction jobs. At the time of the Board hearing he was not working at all as there had been no calls from the union hall. The jobs he has worked have lasted approximately a month at a time, with a week or so off between jobs. He testified that when working, he experienced back pain whenever lifting or bending, but apparently had not lost any work due to the injury. He returned to work for MAPCO on light duty after his release, but only worked one week when he was laid off because of economic cutbacks.

to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board;

AS 23.30.185 provided:

In case of disability total in character but temporary in quality, 66½ percent of the injured employee's average weekly wages shall be paid to the employee during the continuance of the disability.

AS 23.30.190 provided, in part:

Compensation for permanent partial disability.

(a) In case of disability partial in character but permanent in quality the compensation is 66½ percent of the injured employee's average weekly wages . . . and shall be paid to the employee as follows:

(20) in all other cases in this class of disability the compensation is 66½ percent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial

At the time of the accident Brunke had been working for MAPCO for approximately three months. MAPCO paid him union scale wages of \$24.00 an hour. He had earned \$19,600 from MAPCO for a total 1982 income of approximately \$23,000. The normal work schedules called for six, ten hour days. This is apparently common in the construction industry.

Since Brunke arrived in Alaska in June 1977, he has supported his family by doing construction work. Because his work is mostly seasonal, Brunke has collected unemployment benefits for some part of every year since 1977. While Brunke maintains his name on the union roster and is available for union jobs, he supplements his income doing odd jobs for cash.

Brunke filed a workers' compensation claim for temporary total disability benefits, medical expenses, adjustment of his compensation rate and unscheduled permanent partial disability based on the October 1982 accident. MAPCO paid a scheduled permanent partial disability benefit for Brunke's shoulder injury, the medical expenses relating to that injury and temporary total disability benefits until Brunke's release for work by Dr. Cates on January

disability . . . whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;

(b) Total compensation paid under (a)(20) of this section may not exceed \$60,000.

AS 23.30.210 provided:

In a case of partial disability under AS 23.30.190(20) or 23.30.200 the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

917

16, 1983.³ MAPCO contested Brunke's claims for temporary total disability benefits, medical expenses and permanent partial disability benefits for his back injury.

The Alaska Workers' Compensation Board decided that MAPCO had failed to rebut the presumption of compensability for the back injury with substantial evidence as required by AS 23.30.120.⁴ The Board concluded "that employer is liable for compensation and medical benefits relating to [the back injury]." The Board required MAPCO to pay both temporary total disability benefits through March 6, 1983 and all of Dr. Teague's bills.⁵ The Board calculated Brunke's average weekly compensation rate pursuant to AS 23.30.220(2) based upon his 1979 earnings, the highest of the three previous calendar years. It rejected his claim for an adjustment. The Board also rejected Brunke's claim for permanent partial disability benefits for his unscheduled back injury because Brunke did not provide evidence of post-injury wages. The Board stated:

There is no evidence that employee's post-injury earning capacity is less than his pre-injury average weekly (sic) wage of \$8,343.42.

Brunke appealed to the superior court. The superior court affirmed the Board's decision and order, finding that the Board's decision was supported by substantial evidence in the record as a whole.

[1] Our review of a decision and order of the Board is limited to questions of law and the substantial evidence test. *Burgess v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981). Since this appeal involves the prop-

er construction of AS 23.30.220 and our recent decisions interpreting that section, our review extends beyond the substantial evidence test used by the superior court.

II. DISCUSSION

A. *The Board Should Have Applied Subsection (3) of AS 23.30.220 Rather than Subsection (2) in Computing Brunke's Average Weekly Compensation Rate for Temporary Total Disability Benefits*

The Board relied in part on our decision in *State v. Dupree*, 664 P.2d 562 (Alaska 1983), in refusing to adjust Brunke's compensation rate. The Board did not have the benefit of our decisions in *State v. Gronroos*, 697 P.2d 1047 (Alaska 1985); *Deuser v. State*, 697 P.2d 647 (Alaska 1985); or *Johnson v. RCA-OMS, Inc.*, 681 P.2d 905 (Alaska 1984) when issuing its decision on February 29, 1984. Those decisions have substantially altered *Dupree's* outline of the scope of the Board's discretion under subsection (5).

Dupree was the first case to determine under what circumstances the Board should use its discretion to calculate the appropriate average weekly wage. There the Board had utilized its discretion under subsection (3) to calculate a compensation rate closer to the claimant's earnings at the time of injury. *Dupree*, 664 P.2d at 564.

We held that the Board could not use its discretion to disregard the employee's documented past earnings merely because the Board felt that the employee was unlikely to match those earnings in the future. *Id.* at 566. We based much of our reasoning

3. Dr. Cates treated Brunke solely for his shoulder injury and released him for light duty on January 16, 1983.
4. AS 23.30.120 provides:
 - (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
 - (1) the claim comes within the provisions of this chapter;
 - (2) sufficient notice of the claim has been given;

- (3) the injury was not proximately caused by the intoxication of the injured employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
- (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

5. Brunke saw Dr. Teague, a licensed chiropractor, from December 22, 1982 through the summer of 1983 for both back and shoulder pain. Dr. Teague released Brunke for work on March 7, 1983.

in *Dupree* on the legislative history of the federal counterpart to subsection (3). 33 U.S.C. § 910. We stated:

Review of the legislative history of the federal analogue to subsection (3) indicates that the subsection was designed to permit discretionary computation *only* when the claimant was involved in seasonal, intermittent, or part time employment.

Id. at 566 n. 6 (emphasis in original). In *Dupree*, we also reviewed the legislative history of the 1977 amendments to the Alaska Workers' Compensation Act.⁶ We determined that in writing subsection (2), the legislature intended "to give the benefit of past earnings history to the employee." *Id.* at 565.

In *Johnson* we backed away from such a narrow interpretation of the Board's discretion under subsection (3). 681 P.2d 905. Johnson had retired after 20 years in the military, with a final preretirement salary of approximately \$20,000. *Id.* at 906. He then began working for RCA-OMS, Inc. at \$42,000 per year. He was injured while working for RCA. The Board used Johnson's military salary to compute his average weekly wage under subsection (2). *Id.*

We disapproved of the Board's use of subsection (2). We reasoned that "[t]he 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.*" *Id.* at 907 (emphasis added). We held that where subsection (2)'s application would not yield a fair calculation, the Board may use its discretion under subsection (3). *Id.*

In *Deuser*, we followed *Johnson*. Deuser, an acting district court judge, was injured driving a snow machine while travelling on circuit. Deuser was a recent admittee to the Alaska bar and had a sporadic work record prior to his appointment as acting district court judge. 697 P.2d 647. The Board applied subsection (2). It used Deuser's 1979 earnings to calculate

an average weekly compensation rate, reasoning that such a computation was not substantially unfair. *Id.* at 649. Applying the *Johnson* reasoning we reversed the Board's decision. We concluded that the Board should have calculated Deuser's average weekly wage under subsection (3). *Id.* We rejected the Board's reliance on the voluntariness of Deuser's absence from the job market and the temporary nature of his employment as a judge. *Id.* at 649-50. We stated:

The fact that Deuser's job as an acting district court judge may have lasted for only one year cannot be regarded as a justification for discounting the temporary disability payments to be received *during this period.*

Id. at 649 (emphasis added).

In *Gronroos*, we again reversed the Board and remanded for application of subsection (3) in determining the average weekly compensation rate. 697 P.2d 1047. Gronroos had retired from the National Park Service with a final annual salary of \$42,000. *Id.* at 1048. He subsequently took a permanent seasonal position with the State of Alaska, a job lasting approximately six months each year, at \$2,000 per month. *Id.* The Board calculated his temporary total disability benefits under subsection (2). It thus gave him the benefit of his full-time work history during the three previous calendar years. *Id.*

Relying on *Deuser* and *Johnson*, we held that subsection (3) should apply. Gronroos' part-time relationship to the labor market was clear; since there was "no reason to suppose it will change in the future period into which disability extends," it was unrealistic to turn a part time disabled worker into a full time disabled worker. *Gronroos*, 697 P.2d at 1049 (emphasis in original, quoting *Deuser*, 697 P.2d at 650 n. 2). In *Gronroos*, we had determined that application of subsection (2) would result in a compensation wage base of over twice Johnson's wage base at

6. The 1977 amendment of AS 23.30.220 shifted the emphasis from earnings at the time of inju-

ry to past earnings history. *Dupree*, 664 P.2d at 564-65.

the time of injury, a result that did not fairly reflect his probable future earning capacity. *Gronroos*, 697 P.2d at 1049 (discussing *Johnson*). In *Gronroos*, we concluded that "[i]t is entirely reasonable to focus upon probable future earnings during the period into which disability extends when the injured employee seeks temporary disability compensation." *Id.* (emphasis added).

[2, 3] Brunke argues that under our holdings in *Johnson*, *Deuser*, and *Gronroos*, he is entitled to an average weekly wage determination under subsection (3). We agree.⁷ Brunke's temporary disability has now ended. When he was released on March 6, 1983, he returned to his job at MAPCO. He worked at the same construction site, for the same hourly rate. But for the injury on October 29, 1982, Brunke would have worked for MAPCO at \$24.00 an hour through at least March 6, 1983. On remand the Board should calculate Brunke's average weekly compensation rate under subsection (3).⁸

B. *The Board Correctly Denied Brunke's Claim for Unscheduled Permanent Partial Disability Compensation as Unsupported by Evidence.*

In its February 1984 decision and order, the Board found that while MAPCO was liable for compensation for Brunke's back injury, Brunke had failed to produce evidence of his post-injury earnings. Therefore, the Board denied his claim for compensation. Brunke relies primarily on Dr. Teague's testimony to establish his disability. Teague testified that by applying the AMA disability guidelines he rated Brunke's permanent partial disability as 3% loss of the shoulder, 5% loss of the lower

back and 3% loss of the whole man. [Teague Depo 10] His best "guesstimate" of the possible effect of these figures was that Brunke could lose 5-10 days a year. Brunke argues, therefore, that he is entitled to \$2,400.00 per year for the rest of his work life (\$24.00 per hour/10 hour work day/10 days a year).

The decisions of this court make it clear that it is the loss of earning capacity and not physical disability per se that is measured when awarding compensation for future losses. As early as 1962 we held that the degree of permanent partial disability was to be calculated by determining loss of earning capacity. "Awards are not to be made for physical injury as such, but for 'disability' produced by such injury. A compensable 'disability' under this section is equated with an impairment of earning capacity." *Manthey v. Collier*, 367 P.2d 884, 888 (Alaska 1962) (footnote omitted). We have continued to apply this definition. See *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182, 185-86 (Alaska 1978); *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974). See generally 2 A. Larson, *Workmen's Compensation Law*, 10-1 to 10-164.173 (1983) (exhaustive discussion of the distinction).

AS 23.30.210⁹ allows the Board to fix a reasonable wage earning capacity if an employee has no actual earnings or if the earnings do not fairly and reasonably represent the wage earning capacity. The statute does not mandate such a determination, however. It states: "the board may, in the interest of justice," make such a determination. AS 23.30.210 (emphasis added).

Brunke maintains that the Board erred in not making that determination. Brunke argues that it was the Board's duty to solicit evidence of Brunke's post-injury

disabled. This approach would allow MAPCO to present evidence of the actual hours worked by carpenters during the period Brunke would have worked but for the injury, rather than relying on the 60 hour work week which Brunke worked prior to the injury.

7. In light of both our holding today and previous rulings in *Johnson*, *Deuser*, and *Gronroos*, we now explicitly overrule *Dupree*.

8. In making the "usual wage for similar services," calculation mandated by subsection (3), the Board may consider in its calculations the amount earned by other carpenters working on the same site during the period Brunke was

9. See *supra* note 2.

earnings. He admits that he submitted no such evidence. The Board found that since Brunke has only worked short calls since the accident, "[t]he effects, if any, of his back condition . . . are not yet known." The Board apparently placed the burden of producing evidence of loss of earning capacity on Brunke.

[4] The explicit language of AS 23.30.210 does not clarify who bears the burden of proof of lost earning capacity. We have not previously addressed this problem. We have, however, held that "[t]he burden of proof as to each element of the claim is on the claimant," once the employer rebuts the presumption of compensability.¹⁰ *DeLaney v. Alaska Airlines*, 693 P.2d 859, 862 (Alaska 1985); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978). Other states have interpreted their compensation statute to place the burden upon the claimant. Arizona squarely places the burden on the employee to show loss of earning capacity. *Fremont Indemnity v. Industrial Commission of Arizona*, 144 Ariz. 339, 697 P.2d 1089 (1985) (involving an unscheduled injury which occurred outside Arizona but became part of a subsequent claim). The Arizona court stated: "*the burden is on the injured employee to show a loss of earning capacity.*" 697 P.2d at 1095 (emphasis added); *see also Felker v. Industrial Commission of Arizona*, 134 Ariz. 19, 653 P.2d 369 (Ariz.App.1982).

Oregon has also placed the burden of proof on the employee. Recognizing that there was no specific statutory language dealing with the burden of proof, the Oregon court resolved the issue by relying on "traditional notions of burden of proof."

10. *See supra* note 4.

11. *See supra* note 9 and accompanying text.

12. Where the effects of an injury are unclear at the time of the hearing, the employee also has the opportunity to apply to the Board for a modification of an award due to change in conditions. Section 23.30.130(a) allows a modification up to one year after the rejection of a claim. It provides:

Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the pur-

Compensation of Harris v. SAIF Corp., 292 Or. 683, 642 P.2d 1147 (1982). Generally, the proponent of a position bears the burden of producing evidence to prove it. *Id.*

This approach is sensible. Since Alaska relies on earning capacity and not physical impairment, the impact of an unscheduled injury must be proven. The employee can best produce information of his post-injury earnings. It is not an unreasonable or unfair burden to place on the employee. The Board still retains the power to make a separate calculation if justice so requires, pursuant to the statute.¹¹

Lacking further evidence the Board correctly denied Brunke's claim. However, because the allocation of the burden of proof on this issue was unclear from the statute and prior case law, on remand Brunke may present any evidence of his loss of earning capacity.¹²

AFFIRMED IN PART, REVERSED IN PART and REMANDED for further proceedings consistent with this opinion.

COMPTON, Justice, concurring.

The doctrine of *stare decisis* requires me to concur in the court's interpretation of AS 23.30.220. However, it does not require me to agree with the analysis proffered to support that interpretation.

I will not belabor my earlier disagreement with the court's interpretation of AS 23.30.220, *see Johnson v. RCA-OMS, Inc.*, 681 P.2d 905, 908 (Alaska 1984) (Compton, Justice, dissenting), but believe a couple of remarks are appropriate.

poses 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, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in AS 23.30.110. In accordance with AS 23.30.110 the Board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

Neither *State v. Gronroos*, 697 P.2d 1047 (Alaska 1985), nor *Deuser v. State*, 697 P.2d 647 (Alaska 1985) explain, add to or expand upon the slight variance/substantial disparity analysis created to support the result in *Johnson*. They merely parrot it, as does the court in the case at bar. Though I must accept it, I remain unpersuaded by the *Johnson* analysis, which is used to justify the court's wholesale departure from a statutory framework in which the preference is to determine wage basis on some arbitrary past employment period.¹

The legislature is free to identify those changed employment circumstances which should receive exceptional treatment. If it chooses, it can return to actual weekly wages as the proper wage basis. It is not for this court to create exceptions, or in effect to resurrect repealed laws.



Wade K. PARKER, Appellant,

v.

STATE of Alaska, Appellee.

STATE of Alaska, Appellant,

v.

Thane R. HOLM, Appellee.

Nos. A-1138, A-1181.

Court of Appeals of Alaska.

Feb. 7, 1986.

Defendants were convicted in the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone and Rene Gonzalez, JJ., of first-degree burglary. Older defendant appealed from his sentence, and

1. The court declares that *State v. Dupree*, 664 P.2d 562 (Alaska 1983), is being now overruled. 714 P.2d 795 at 800, n. 7 (Alaska, 1986). Since neither *Gronroos* nor *Deuser* add anything to

State appealed from sentence imposed upon younger defendant. The Court of Appeals, Bryner, C.J., held that: (1) older defendant's sentence of five years imprisonment with two and one-half years suspended was not clearly mistaken and could be affirmed, and (2) younger defendant's sentence of five-year suspended term of imprisonment and five-year probation period on special condition of successful completion of residential alcoholism treatment program was not clearly mistaken as too lenient and was approved.

Sentence affirmed and sentence approved.

1. Burglary ⇨49

Term of five years in prison with two and one-half years suspended for conviction of first-degree burglary, a class B felony, was affirmed as not clearly mistaken; defendant and accomplice used violent means to break into occupied home during nighttime and caused considerable emotional trauma to occupant when they pounded and kicked on door of bathroom in which occupant had locked herself. AS 11.46.300(a)(1), (b), 12.55.125(d).

2. Criminal Law ⇨982.4(2)

Completely suspended five-year term of imprisonment and five-year term of probation under special condition that defendant successfully complete residential alcoholism treatment program was not clearly mistaken as too lenient and was approved, rather than affirmed, by the Court of Appeals pursuant to AS 12.55.120(b); because of rigorous supervision at treatment facility, sentence imposed placed substantial restraints on defendant's liberty and was appropriate to exceptionally serious burglary committed, which involved violent nighttime entry into an occupied house. AS 11.46.300(a)(1).

Johnson, I adhere to my dissent in *Johnson* in asserting that it overruled *Dupree*. The court's belated recognition of the consequences of a decision is curious.

I consider that this passage since
§172 has been repealed for
20 years - but it may also
be a warning of HOOD v. STATE, WORKMEN'S COMP. BD.
what may be done to
clarify any
regulator
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INTERPRETATION OF
AS 23.30.172 (REPEALED
8/31/77) - A BENEFITS ESCA
LATOR
PROVISE

HOOD v. STATE, WORKMEN'S COMP. BD.
Cite as, Alaska, 574 P.2d 811

Alaska 811

Adam HOOD, Appellant,

v.

STATE of Alaska WORKMEN'S COM-
PENSATION BOARD, Henson Masonry
and Employers Insurance of Wausau,
Appellees.

No. 3289.

Supreme Court of Alaska.

Feb. 3, 1978.

VI

[18-20] Finally, Hausam challenges the propriety of the trial court's award of attorney's fees to plaintiffs in the total amount of \$9,680.62. The trial court awarded \$1,180.62 to McCourt under Civil Rule 82(a)(1) and \$8,500 to the Wodriches under Civil Rule 82(a)(2). Correctly noting that the purpose of Rule 82 is to partially compensate a prevailing party,⁸ Hausam argues that the award of \$9,680.62 in fees should be set aside, as this figure represents 86 percent of the total bill submitted by plaintiffs' counsel. We agree that this figure is somewhat high; however, we will set aside an award of attorney's fees only where it is manifestly unreasonable. *Adoption of V.M.C.*, 528 P.2d 788 (Alaska 1974); *Cooper v. Carlson*, 511 P.2d 1305 (Alaska 1973). We cannot say that the instant award was manifestly unreasonable under the circumstances of this case.

AFFIRMED.

MATTHEWS, J., not participating.

8. AS 09.25.010(a)(8) provides as follows:
“(a) In the following cases and under the following conditions an agreement, promise, or undertaking is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or by his agent:
(8) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission; however, if the note or memorandum of the agreement is in writing, subscribed by the party to be charged or by his lawfully authorized agent,

Claimant sought workmen's compensation and Workmen's Compensation Board found that Act in effect on date of injury was applicable and awarded benefits accordingly, and claimant appealed. The Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., affirmed, and claimant appealed. The Supreme Court, Boochever, C. J., held that claimant was entitled to higher benefits under later Act.

Reversed and remanded.

1. Statutes ⇔ 219(9)

Where issue to be resolved in an action before Alaska Workmen's Compensation Board turned on statutory interpretation rather than formulation of fundamental policy involving particularized expertise of administrative personnel, reviewing court would independently consider the meaning of the statute rather than defer to administrative decision. AS 23.30.172, Laws 1976, c. 252; AS 23.30.190(2).

contains a description of the property sufficient for identification, authorizes or employs the agent or broker named in it to sell the property, and expresses with reasonable certainty the amount of the commission or compensation to be paid the agent or broker, the agreement of authorization or employment is not unenforceable for failure to state a consideration.”

9. *Irving v. Bullock*, 549 P.2d 1184 (Alaska 1976); *Malvo v. J. C. Penney Company, Inc.*, 512 P.2d 575 (Alaska 1973).

2. Workmen's Compensation ⇐52, 55

Workmen's Compensation Act should be liberally construed in favor of the employees, but statutes are presumed to operate prospectively and will not be given a retroactive effect, unless by express terms or necessary implication, it clearly appears that that was the legislative intent.

3. Workmen's Compensation ⇐60

Where workmen's compensation statute applicable at time of employee's injury provided for 248 weeks' compensation, not to exceed \$20,160 for loss of leg, and where statute in effect at time that employee's condition was rated as permanent partial disability doubled the maximum allowable compensation, act in effect at time of rating of condition would be applicable. AS 23.30.172, Laws 1976, c. 252; AS 23.30.190 (2).

4. Constitutional Law ⇐156

Workmen's Compensation ⇐26

Where workmen's compensation amendment in effect at time employee's condition was rated provided that funds needed to carry out provisions would be appropriated from general fund, ultimate burden of making additional payments was not imposed on either employer or its insurance carrier and, thus, none of their contractual rights were impaired. AS 23.30.190; AS 23.30.172, Laws 1976, c. 252; U.S. C.A.Const. art. 1, § 10.

M. Ashley Dickerson, Anchorage, for appellant.

Arden E. Page, Burr, Pease & Kurtz, Inc., Anchorage, for appellees Henson Masonry and Employers Ins. of Wausau.

Elizabeth R. Arnold, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellee State of Alaska, Workmen's Compensation Bd.

1. He also received a facial injury resulting in scarring, for which he was awarded \$2,500.00 for disfigurement. That portion of the award is not contested on this appeal.

2. AS 23.30.172, as enacted in 1974, provided:

Before BOOCHEVER, Chief Justice, and RABINOWITZ, CONNOR, BURKE and MATTHEWS, Justices.

BOOCHEVER, Chief Justice.

This appeal presents a question as to the applicable statute for awarding Adam Hood compensation for permanent partial disability. He received an injury to his left knee on September 6, 1973¹ while employed by Henson Masonry. On March 23, 1976, Mr. Hood was rated as suffering a forty percent permanent partial disability of the leg. In September 1973, AS 23.30.190(2) provided for 248 weeks compensation, not to exceed \$20,160.00 for loss of a leg. This section was amended by chap. 83, sec. 5, Session Laws of Alaska 1975, effective May 22, 1975, which doubled the maximum allowable compensation to \$40,320.00. Hood would be entitled to \$8,064.00 if the act in effect at the time of his injury applies, as opposed to \$16,128.00, if the act in effect at the time his condition was rated as a permanent partial disability is applicable. The Alaska Workmen's Compensation Board found that the act in effect on the date of injury was applicable, and the superior court affirmed. Although a very close question is presented, we have concluded that Mr. Hood is entitled to the higher benefits of the later act.

Mr. Hood's argument is based on two contentions. Firstly, he argues that AS 23.30.172,² which became effective in 1974, requires application of the benefit schedule existing at the time his condition was rated as permanent or at the time the award was computed. Secondly, it is his position that, regardless of whether AS 23.30.172 has such an effect, the applicable act for awarding compensation for a permanent partial disability is the one in effect at the time that the condition became fixed for rating rather than the act at the date of injury.

Benefits for temporary and permanent disability shall be calculated under this chapter according to currently existing benefit rates regardless of the benefit rates in existence at the time of the injury, unless this calculation would cause a decrease in the actual benefits receivable.

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5. Art
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At the outset, a question is presented as to whether we should give deference to the Alaska Workmen's Compensation Board's construction of the statute. The Board in its decision referred to the fact that at the time AS 23.30.172 became law, the benefit provided for loss of a leg was \$20,160.00. The decision also held that the section applied to rates of compensation only and not to single sum benefits payable for permanent disabilities.

In referring to an analogous situation in *Union Oil Co. of California v. Dept. of Revenue*, 560 P.2d 21, 23 (Alaska 1977), we stated:

In recent decisions, we have distinguished between two types of questions which may confront a court in judicial review of administrative action. Where the agency decision involves the formulation of fundamental policy or the particularized expertise and experience of administrative personnel, this court will defer to the administrative decision, inquiring only whether it has a reasonable basis. *State v. Aleut Corporation*, 541 P.2d 730, 736-37 (Alaska 1975). On the other hand, where, as here, the issues to be resolved turn on statutory interpretation, the knowledge and expertise of the agency is not conclusive of the intent of the legislature in passing a statute. Statutory interpretation is within the scope of the court's special competency, and it is our duty to consider the statute independently. *State v. Aleut Corporation, supra* at 736-37. (footnote omitted)

[1] While the Alaska Workmen's Compensation Board is a quasi-judicial agency, we believe that the same criteria should apply.³ Here the issue to be resolved turns

3. See *London v. Fairbanks Municipal Utilities' Employers Group*, 473 P.2d 639, 642 n. 2 (Alaska 1970).

4. AS 23.30.172 was amended by chap. 252, sec. 3, SLA 1976, effective September 22, 1976, so as not to apply to permanent partial disability, and then repealed in 1977. Chap. 75, sec. 11, SLA 1977.

5. Art. I, sec. 10 of the United States Constitution prohibits states from "impairing the obli-

on statutory interpretation rather than formulation of fundamental policy involving particularized expertise of administrative personnel, and we shall independently consider the meaning of the statute.

The first contention of Hood requires a construction of AS 23.30.172 as applicable in March 1976 when Mr. Hood's permanent partial disability condition was rated.⁴ That section specified:

Benefits for temporary and permanent disability shall be calculated under this chapter according to currently existing benefit rates regardless of the benefit rates in existence at the time of the injury, unless this calculation would cause a decrease in the actual benefits receivable.

Most of the arguments focus on whether this provision made applicable the 1975 amendment to AS 23.30.190 doubling the maximum compensation for loss of a leg. It is Hood's position that AS 23.30.172 applies to permanent partial disability, and that the benefits applicable in March 1976 when his condition was rated as a permanent partial disability should be regarded as those "currently existing."

The employer and the state, on behalf of the Workmen's Compensation Board, take the position that AS 23.30.172 does not apply to permanent partial disability benefits, and that to hold otherwise would impair contracts in violation of the federal and state constitutions.⁵

[2] There are two conflicting principles applicable to the construction of AS 23.30.172. Workmen's compensation acts should be liberally construed in favor of the employee,⁶ but statutes are presumed to operate prospectively and will not be given a

gation of contracts," and art. 1, sec. 15 of the Alaska Constitution similarly provides that no law impairing the obligation of contracts shall be passed.

6. *S.L.W. v. Alaska Workmen's Compensation Board*, 490 P.2d 42, 43 (Alaska 1971); *Libby, McNeill & Libby v. Alaska Industrial Board*, 191 F.2d 262, 264, 13 Alaska 396 (9th Cir. 1951), cert. denied, 342 U.S. 913, 72 S.Ct. 359, 96 L.Ed. 683 (1952).

retroactive effect, unless by express terms or necessary implication, it clearly appears that that was the legislative intent.⁷

The employer argues that the intent of AS 23.30.172 was to bring the benefits of permanently totally disabled persons up to those of employees whose injuries resulted in anything other than permanent total disability. Prior to the 1974 amendments to the act, a permanently totally disabled person's wages were to be considered as not exceeding \$175.00 per week. AS 23.30.175(b). Maximum compensation was sixty-five percent of the \$175.00. AS 23.30.180. Individuals with other types of disability, however, were subject only to a \$175.00-a-week maximum payment. AS 23.30.175(a). Since compensation was at the rate of sixty-five percent of average weekly wages, their maximum weekly rate for compensation purposes was \$269.23 per week as opposed to the \$175.00 maximum allowable in computing permanent total disability compensation. The 1974 amendments did have the effect of eliminating that discrepancy.⁸ But there is no indication that this was the sole purpose of the enactment.

Both the state and the employer argue that the 1974 act applies only to "rates of compensation" established by AS 23.30.175 and .180 and not to maximum benefits of sec. 190 which are payable as a lump sum and in addition to the on-going compensation based on a percentage of the weekly wage. We find this argument unpersuasive in view of the language that "benefits" were to be calculated at "currently existing benefit rates." We construe the provision to mean that the "benefits" for loss of a leg

would be calculated at the currently-existing benefit rate for such a permanent partial disability.

The state presents a complex argument based on the legislative history of AS 23.30.172 to the effect that partial disability was not intended to be covered. There are four basic types of disability compensation payable under the Alaska Workmen's Compensation Act: (1) temporary total disability, (2) temporary partial disability, (3) permanent total disability and (4) permanent partial disability.⁹ AS 23.30.172 referred to "benefits for temporary and permanent disability." The state would have us construe the "permanent disability" provision as applying only to "permanent total disability."

With reference to the legislative history of AS 23.30.172, the state points out that the Senate Finance Committee report for March 26, 1974 indicates the amount that the state might be required to pay for each employee entitled to increased permanent total disability compensation, and that the appropriations and fiscal notes¹⁰ accompanying the budget documents for the Division of Workmen's Compensation for fiscal years 1974 through 1977 were based solely on projected supplements to weekly rates of compensation paid for temporary and permanent total disability and death. No mention is made of maximum awards for permanent partial disability. Thus, the appropriation for fiscal year 1976 which doubled the benefit for permanent partial disability still was based solely on projected supplements to weekly rates of compensation paid for temporary and permanent total disability without reference to permanent partial

7. *Cropley v. Alaska Juneau Gold Mining Co.*, 131 F.Supp. 34, 36, 15 Alaska 531 (D.C.1955); *Stephens v. Rogers Const. Co.*, 411 P.2d 205, 208 (Alaska 1966); *Hill v. Moe*, 367 P.2d 739, 742 (Alaska 1961), cert. denied, 370 U.S. 916, 82 S.Ct. 1554, 8 L.Ed.2d 498 (1962). *Sands*, 2 Sutherland Statutory Construction, § 41.04 at 252 (4th ed. 1973).

8. Additional compensation for those previously injured was to be appropriated from the general fund rather than being payable by the employer or its insurance carrier. Chap. 51, sec. 2, SLA 1974.

9. *London v. Fairbanks Municipal Utilities' Employers Group*, 473 P.2d 639, 642 (Alaska 1970).

10. AS 24.30.035 provides in part:

Fiscal notes on bills. Before a bill which would require increased appropriations by the state is reported to the rules committee, there shall be attached to the bill an estimate of the probable amount of the appropriation increase for the succeeding fiscal years. The estimate or statement shall be prepared by the department or departments affected.

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disability. This history may give some indication that the legislature did not intend AS 23.30.172 to apply to permanent partial disability rates. However, this conclusion is weakened by the fact that one legislature passed the 1974 bill, and a different legislature considered the appropriations for fiscal year 1976.¹¹ Moreover, the Division of Workmen's Compensation of the Department of Labor knew how many employees had previously been rated as permanently totally disabled so that computations could be made as to the increased amounts they would receive. There was little basis, however, for predicting the number of employees previously injured who would subsequently be rated as having a permanent partial disability.

A further enactment to be fitted into the construction of this statutory jigsaw puzzle is the amendment to AS 23.30.172 which was passed in 1976. Chap. 252, Sec. 3, SLA 1976 altered the section so as to limit its provisions expressly to temporary total disability cases which have existed for more than two years and permanent total disability. There is thus no question but that the provision does not apply to permanent partial disability awards accruing after the effective date of the 1976 amendment—September 22, 1976.¹² That amendment could be construed either as conforming to the prior intention of the legislature or as effecting a change so as to eliminate coverage of permanent partial disability from its provisions.

In favor of the employee's construction of the section is the fact that the 1974 act referred to "benefits for temporary and permanent disability." There are two types of permanent disability—total and partial. Since neither was specified, the normal literal reading of the act would include both.

Still another consideration unargued by the parties seems significant. The 1974 act

referred to "currently existing benefit rates regardless of the benefit rates in existence at the time of the injury." "Currently existing rates" could have meant those in existence at the time of the enactment of the 1974 act, AS 23.30.172, or those currently existing at the time that the benefits became due and payable. Again, we are confronted with conflicting principles: one that workmen's compensation acts should be liberally construed in favor of the employee, and the other that statutes are presumed to operate prospectively. The latter principle in this case would dictate that the newly-enacted rates not be given a retroactive effect, so as to apply to injuries previously received, unless expressly indicated by the act. Here, however, it is clear that the legislature intended to give the act a retroactive effect so that we are concerned only with the scope of its retroactive provisions.

[3] We have concluded that the higher benefits prescribed by the 1975 amendment to AS 23.30.190 are applicable. Of the many conflicting policies and rules of construction, we find that the literal reading of the statute together with the liberal construction to be given workmen's compensation laws should control. AS 23.30.172 referred to "permanent disability" without limiting that term to a particular type of such disability. Thus, literally, it applied to permanent partial disability as well as to permanent total disability. If the uniformly-accepted legislative policy of benefitting the employee were enhanced by some other construction, we might be persuaded by various arguments presented. But here, the liberal construction to be given compensation acts is in accord with the literal terms of the statute.

[4] Both the employer and the state additionally contend that to make the 1975 amendment applicable impairs contractual

11. AS 23.30.172 was passed by the second session of the Eighth Legislature. The newly-elected Ninth Legislature increased the permanent partial disability benefits by amending AS 23.30.190(2), effective May 22, 1975.

12. It should be pointed out that this decision applies only to the limited number of cases involving permanent partial disability in which injury occurred prior to May 22, 1975 when permanent partial disability benefits were increased, and disability did not become fixed until after that date.

rights in violation of the state and federal constitutions. We find this argument inapplicable to the law in question as sec. 2 of chap. 51, SLA 1974 expressly provides that: "[f]unds needed to carry out the provisions of this section shall be appropriated from the general fund." Since the ultimate burden of making the additional payments is not imposed on either the employer or its insurance carrier, we fail to see where any of their contractual rights are impaired.¹³

REVERSED AND REMANDED.¹⁴



Kent C. WELTIN, Appellant,

v.

STATE of Alaska, Appellee.

No. 2932.

Supreme Court of Alaska.

Feb. 17, 1978.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fair-

13. We do not pass on whether the act would otherwise impair contract rights. The traditional analysis following *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 4 L.Ed. 629 (1819), would hold that the rights and obligations of the parties vested at the date of injury and could not be altered thereafter. *Mitchell v. United States Fidelity & Guaranty Co.*, 206 F.Supp. 489, 490 (E.D.Tenn. 1962); *McPhail v. Latouche Packing Co.*, 8 Alaska 297, 308 (D.C.Alaska 1931); *Phillips v. City of West Palm Beach*, 70 So.2d 345, 346 (Fla.1953); *Salmon v. Denhart Elevators*, 72 S.D. 110, 30 N.W.2d 644, 648 (1948); but see, *Price v. All American Engineering Co.*, 320 A.2d 336, 339-40 (Del.1974), which held that a statute increasing benefits to employees previously injured did not violate the contract clause because the Workmen's Compensation Act created a status-oriented relationship, not a contractual one. Moreover, somewhat like the Alaska act, the Delaware statute did not deprive insurance carriers of property without due process of law, as they had a right to reimbursement of the extra payments from the

banks, James R. Blair and Gerald J. Van Hoomissen, JJ., of possession of cocaine, and he appealed. The Supreme Court, Rabinowitz, J., held that: (1) it was reasonable under warrantless search for weapons incident to a lawful arrest exception to warrant requirement for police officer to conduct a warrantless search of defendant's shirtpocket and to seize a glass vial found therein; (2) opening of vial and testing of white powder contained therein were justified under "plain view" doctrine, and (3) sentence in form of a fine of \$500 was not excessive in view of fact that defendant had been carrying a gun and needed to be impressed with seriousness of offense.

Affirmed.

1. Arrest ⇐ 71.1(6)

Where, in face of a truculent defendant and a potentially hostile crowd of bystanders, officer attempted to conduct a pat-down search for weapons after arresting defendant on an outstanding traffic warrant, during course of which officer's hand hit something hard in defendant's shirt pocket, it was reasonable under warrantless search for weapons incident to a lawful arrest exception to warrant requirement

state. See also, *McAllister v. Board of Education*, 79 N.J.Super. 249, 191 A.2d 212, 217-18 (1963).

14. Based on the result reached, we do not consider Hood's second argument that, without considering AS 23.30.172, he would be entitled to the higher award due to the amendment of AS 23.30.190 before his partial disability became permanent. It is his contention that the compensation for permanent partial disability became due as of the date his condition could be rated, which was March 1976, rather than the date of injury in 1973. Although a few states hold this position, *Peters v. Chrysler Corp.*, 295 A.2d 702, 704 (Del.1972); *LeBrun v. Woonsocket Spinning Co.*, 106 R.I. 253, 258 A.2d 562, 564-65 (1969); *Allen v. Kalamazoo Paraffine Co.*, 312 Mich. 575, 20 N.W.2d 731, 732 (1945), in the absence of legislation, we would find it difficult to adopt in view of what we believe to be the consistent contrary construction by the Alaska's Workmen's Compensation Board.