

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5394 SLAB SB 322 (file 14)

906

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

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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 1308 JUNEAU AK 99802
720	FRED HEYER SHOPPING CTR 14300 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 5TH 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 133 SOUTH SEWARD STREET JUNEAU AK 99801 907 535 5250	G.A.B. BUSINESS SERVICES P.O. BOX 5559 JUNEAU AK 99803 907 759 4377

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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

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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

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738	SEARS ROEBUCK & COMPANY SEARS TOWER *EFF 010187 **NO HOT 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

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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 156 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** SOLUDINA 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

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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

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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 IL 60630	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE 907 338 7484

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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

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782	PHILLIPS PETROLEUM COMP INSURANCE 3 C4 PHILLIPS BLDG WARTLESVILLE 913 661 5306	NORTHERN ADJUSTERS, INC. 1401 RUDAKOF CIRCLE ANCHORAGE AK 99508 907 336 7484
783	MABORS ALASKA DRILLING ATTN: WORK COMP DEPT. 4300 13 th STREET ANCHORAGE AK 99503 907 561 4440	ADJUSTCO INC. 510 "L" STREET SUITE 200 ANCHORAGE AK 99503 907 275 2010
784	NANA REGIONAL CORP. ATTN: WORK COMP. 4706 HARDING DRIVE ANCHORAGE AK 99502 907 248 3030	ALASKA NATIONAL INSURANCE COMPANY 7001 JEWEL LAKE ROAD ANCHORAGE AK 99502 907 248 2642
85	CONTINENTAL BAKING CO. P.O. BOX 4-1353 ANCHORAGE AK 99509 907 277 3548	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222
86	CONSOLIDATED FREIGHTWAYS P.O. BOX 4670 PORTLAND OR 97208	CRAWFORD & COMPANY 3501 DENALI SUITE 101 ANCHORAGE AK 99503 907 561 5222
87	NORTH SLOPE SDRUGH ATTN: WORK COMP INS. P. O. BOX 69 BARRUW AK 99723	ALASKA NATIONAL INSURANCE COMPANY 7001 JEWEL LAKE ROAD ANCHORAGE AK 99502 907 248 2642
88	CHEVRON CORPORATION P.O. BOX 7137 SAN FRANCISCO CA 94120 415 394 0157	CHEVRON U.S.A. ATTN: T.O. 110 P.O. BOX 101580 ANCHORAGE AK 99510 907 780 6676

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.
% ALPAC: ATTN D. SEVER 1401 RUDAKOF CIRCLE
P.O. BOX 196620 ANCHORAGE AK 99508
ANCHORAGE AK 99519 907 338 7484
907 263 0200

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 66⅓% 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 66⅓ 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 66⅓ 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

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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.

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-

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:

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).

decedent, an assistant manager at a grocery store, was having lunch with a female co-employee. Her husband saw them together. When the decedent 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-Res-
pondents,**

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 Hornissen, 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

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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 statutory proof has been successful. 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 mind would accept conclusion at issue.

See public definitions for other job definitions.

6. Workers' Compensation

Once presumption has been raised in proceeding, it is not the presumption with substantiality of not work related.

7. Workers' Compensation

There are no presumptions of compensability of worker's compensation; affirmative proof of not work related is reasonable possibility of connected. AS

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-

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.



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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. (we're having about one a month lately)

ALASCOM, INC., Appellee.
No. S-482.
Supreme Court of Alaska
May 9, 1986.

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., *Sloss 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

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

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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 pursuit 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,

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

16. In light
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1. See, e.g.
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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.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-

tion, "permanent 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" U.S.C.A. §

See p for other definitions

5. Evidence

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

6. Adoption

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7. Adoption

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* 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.