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

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

The Superior Court, relying on decisions interpreting the federal Longshoremen's and Harbor Workers' Compensation Act, ruled that Alaska's statute, consistent with the constitution, provided for the increase in payments from $198.40 to $357.59. The court referred the $500.00 award of attorney's fees back to the Board "to conduct a hearing to establish reasonable attorney's fees" for the legal proceedings before it. Pursuant to Appellate Rule 29, the claimants made a motion for attorney's fees and costs for the appeal, and the court awarded $750.00 for attorney's fees and $33.37 for costs.

Wien timely noticed appeal and, before this court, renews only the statutory and the contract clause arguments. The Arants' cross-appeal argues the inadequacy of both the $500.00 award of attorney's fees for the Board proceeding and the $750.00 award for the appeal to the Superior Court.

I. THE INCREASE IN COMPENSATION PAYMENTS

A description of the structure of Alaska's workers' compensation statute is essential in order to understand the Arants' claim for an increase in compensation payments. Alaska has a two-step process for calculating compensation payments. One, the statute specifies a per cent of the deceased or injured employee's average weekly wage[5] to which claimants are entitled. Two, the statute specifies a maximum limitation on the weekly award. If the result of the step one calculation, the dollar amount which represents the per cent of the worker's wage, is greater than the maximum limitation, the claimant receives only the maximum limitation.

AS 23.30.215 lays out the basic structure for death benefits. AS 23.30.215(a) indicates the percentage of the deceased employee's wages which specified claimants receive; the statute in effect in 1975, when Arant was killed, provided for an award of 85 per cent of the deceased employee's average weekly wages to a widow and two children.[6] AS 23.30.215(b) tells how to cal-

3. Plaintiffs requested $6,033.75 in attorney's fees for 80.45 hours of legal work at $75.00 per hour, which Wien objected to as excessive.

4. Wien also argued that if an increase was due, it should be paid by the general funds pursuant to AS 23.30.172. *See* note 41 *infra*. The Superior Court required Wien to pay the increase, and Wien has not reintroduced the special fund argument.

5. When we mention the injured worker's wage, we will generally mean his or her average weekly wage.

6. The death benefit rates at the time of Mr. Arant's death were:

Compensation for death. (a) If the injury causes death, the compensation is known as a death benefit and is payable in the following amounts to or for the benefit of the following persons:

. . . . .

(2) if there is a widow or widower or a child or children of the deceased, the following percentages of the average weekly wages of the deceased:

(A) 66⅔ per cent for the widow or widower with no children;

(B) 50 per cent for the widow or widower with one child and 20 per cent for the child;

(C) 50 per cent for the widow or widower with two children and 35 per cent divided equally among the children;

(D) 50 per cent for the widow or widower with three or more children and 40 per cent divided equally among the children;

culate the maximum limitation. At the time of Arant's death in 1975, the statutory language provided:

> *In computing death benefits the average weekly wage of the deceased shall be . . . subject to the same weekly maximum limitation in the aggregate as temporary total disability compensation,* but the total weekly compensation may not be less than $45 for a widow or widower nor less than $15 weekly to a child or $30 for children.[7]

The maximum limitation on temporary total disability payments is found in AS 23.30.175, which provided at the time of Arant's death:

> *Rates of compensation.* (a) *The weekly rate of compensation for disability or death may not exceed the percentage of the state average weekly wage as determined by the table contained in this subsection* and may not be less than $65 a week. If the employee's average weekly wages, as computed under § 220 of this chapter, are less than $65 a week, he shall receive as compensation for his disability his average weekly wages.
>
> | On | The Rate Shall Be |
> |---|---|
> | July 1, 1975 | 80 per cent of the state's average weekly wage |
> | January 1, 1976 | 100 per cent of the state's average weekly wage |
> | January 1, 1977 | 133.3 per cent of the state's average weekly wage |
> | January 1, 1979 | 166.6 per cent of the state's average weekly wage |
> | January 1, 1981 | 200 per cent of the state's average weekly wage.[8] |

AS 23.30.175 thus determines the maximum limitation on death and disability payments[9] by reference to increasing percentages of the state's average weekly wage. The statute has specified this method of calculation since 1975. Before 1975, the maximum limitation was a flat dollar amount.[10] This recent structural change in

> (E) 66⅔ per cent for an only child when there is no widow or widower;
>
> (F) 33⅓ per cent for each child if there are two children and no widow or widower;
>
> (G) 66⅔ per cent, divided equally, if there are three or more children and no widow or widower;
>
> (3) if the widow or widower remarries, she or he is entitled to two years compensation in one sum;
>
> . . . . . .
>
> Ch. 83, §§ 7–12, SLA 1975 (emphasis added) (current version at AS 23.30.215(a)).

Amendments in 1977 decreased death benefits for a widow with two or more children to 66⅔ per cent of the deceased employee's wage. Ch. 75, § 5, SLA 1977 (codified at AS 23.30.215(a)(2)(C)). These amendments included a new provision that, with a few exceptions, automatically phases out death benefits over ten years. Ch. 75, § 8, SLA 1977 (codified at AS 23.30.215(f)–(g)).

7. Ch. 83, § 12, SLA 1975 (emphasis added) (current version at AS 23.30.215(b)). AS 23.30.215(b) has undergone minor changes which we indicate at note 44 *infra*.

8. Ch. 83, § 2, SLA 1975 (emphasis added) (current version at AS 23.30.175(a)). The main difference between the maximum limitation in 1975 and the current version is the change:

> The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage *in effect on the date of injury* as determined by the table contained in this subsection . . . .
>
> AS 23.30.175(a) (emphasis added).

We discuss the implications of this change for the instant case in note 15 *infra*.

9. AS 23.30.175 contains the maximum limitation on death benefits because of two things: its own language ("the weekly rate of compensation for disability *or death* (emphasis added)) and by the cross-reference from AS 23.30.215(b). Before 1975, AS 23.30.175 referred only to "[c]ompensation for temporary disability, permanent partial disability or permanent total disability . . .," making no mention of death benefits. Ch. 52, § 1, SLA 1974. *Compare* ch. 10, § 3, SLA 1972. The only way one knew that AS 23.30.175 was also the maximum for death benefits was by the cross-reference from AS 23.30.215(b).

10. In 1968, the maximum temporary total disability benefit in AS 23.30.175(a) increased from $100.00 to $113.00; in 1970, it increased to $127.00; in 1972, it increased to $175.00. Ch. 206, § 1, SLA 1968; ch. 228, § 1, SLA 1970; ch. 10, § 3, SLA 1972. The maximum payable death benefit increased by those same amounts

the maximum limitation on death benefits is the heart of this controversy.

Wien admits its obligation to pay weekly payments of $198.40. This figure results from the calculation of the first figure in the AS 23.30.175(a) maximum rate table, 80 per cent of Alaska's average weekly wage. Wien contends that the 80 per cent figure is the maximum limitation for claims arising from July 1, 1975, to January 1, 1976. This would mean claims occurring between January 1, 1976, and January 1, 1977, are subject to a maximum limitation of 100 per cent of the state's average weekly wage; claims occurring between January 1, 1977, and January 1, 1979, are subject to a maximum limitation of 133.3 per cent of the state wage; and so forth. Since Mr. Arant died on August 30, 1975, Wien argues that the maximum limitation on the Arants' claim is fixed forever at 80 per cent of the state's average weekly wage.

The Arants' position implies that the entire table governs their claim, not just the first line. They claim entitlement to payments up to the maximum limitation in the right-hand column, as of the date indicated in the left-hand column. This means that as of January 1, 1976, the limitation on their death compensation payments would rise to 100 per cent of the state's average weekly wage; after January 1, 1977, the limitation would rise to 133.3 per cent of the state wage; and so forth.

[1, 2] This dispute requires construction of the workers' compensation statute. The court in *Hood v. State, Workmen's Compensation Board*, 574 P.2d 811, 813 (Alaska 1978), enunciated the standard of review for such a question:

> [Where] the issue to be resolved turns on statutory interpretation rather than formulation of fundamental policy involving particularized expertise of administrative personnel, . . . we shall independently consider the meaning of the statute.[11]

The meaning of a statutory provision is determined by the language of the particular provision construed in light of the purpose of the whole instrument.[12]

[3] Wien's position requires that the dates in the left-hand column not only specify when the new rates will apply but also what claims the new rates shall apply to. The Arants' position requires that the dates in the left-hand column be construed to serve a timing function only and that the effective date of the act, May 22, 1975,[13] be construed to indicate that all claims arising thereafter shall be subject to the new series of maximum limitations. The language of the provision, the purpose of workers' compensation, and the purpose of the new maximum rate table all coincide in favor of the Arants' position.[14] We hold that all claims arising after May 22, 1975 are governed by the increasing rates in the maximum table in AS 23.30.175(a).[15]

since AS 23.30.215(b) tied the maximum for death benefits to the maximum for disability benefits.

11. *Accord, Union Oil Co. of Cal. v. Dept. of Revenue*, 560 P.2d 21, 23 (Alaska 1977); *Alaska Pub. Util. Comm'n v. Municipality of Anchorage*, 555 P.2d 262, 266 (Alaska 1976); *State v. Aleut Corp.*, 541 P.2d 730, 736–37 (Alaska 1975); *Mukluk Freight Lines, Inc. v. Nabors Alaska Drilling, Inc.*, 516 P.2d 408, 412 (Alaska 1973); *Swindel v. Kelly*, 499 P.2d 291, 298 (Alaska 1972); *Kelly v. Zamarello*, 486 P.2d 906, 916 (Alaska 1971); *see* 4 K. Davis, Administrative Law § 30.14, at 269 (1958).

12. *Hotel Employees Local 879 v. Thomas*, 551 P.2d 942, 944 (Alaska 1976); *State v. City of Anchorage*, 513 P.2d 1104, 1110 (Alaska 1973); *State v. American Can Co.*, 362 P.2d 291, 296 (Alaska 1961); *see* 2A C. Sands, Sutherland Statutory Construction § 45.09 (4th ed. 1973).

13. Ch. 83, § 13, SLA 1975.

14. More difficult questions of statutory interpretation arise when the literal interpretation of a statutory provision is at odds with an interpretation that arguably furthers the statute's purpose.

15. Our holding is that the increasing percentages in AS 23.30.175(a) apply to all claims arising after May 22, 1975. The increasing percentage is computed on the basis of Alaska's average weekly wage. Since the average weekly wage will change with passage of time, this raises a question as to *which* year's aver-

The language of the section favors the Arants' position. The maximum table seems to phase in a new maximum rate for all claimants. AS 23.30.175(a) does *not* have a third column, which might read as follows:

On	The Rate Shall Be	For All Claims
July 1, 1975	80 per cent of the state's average weekly wage	arising after July 1, 1975, and before January 1, 1976
January 1, 1976	100 percent of the state's average weekly wage	arising after January 1, 1976, and prior to January 1, 1977

Had the legislature intended Wien's construction, it is likely they would have expressly so indicated. The effective date of the act is the natural date for establishing when the new rates go into effect.

[4] The purpose of workers' compensation is to compensate the victims of work-rated injury for a part of their economic loss, measured by the wage loss to the worker or the surviving family.[16] Congress, as part of the Occupational Safety and Health Act,[17] created the National Commission on State Workmen's Compensation Laws "to determine if such laws provide an adequate, prompt, and equitable system of compensation for injury or death arising

age weekly wage controls the computation of the percentage. The percentage increases but does the base also?

The maximum limitation table in effect at the time of Mr. Arant's death stated:

> The weekly rate of compensation for disability or death may not exceed the percentage of the state average weekly wage as determined by the table contained in this subsection . . . .

Ch. 83, § 2, SLA 1975. The legislature amended the statute, effective August 31, 1977, to read:

> The weekly rate of compensation for disability or death for a recipient residing in Alaska may not exceed the percentage of the Alaska average weekly wage *in effect on the date of injury* as determined by the table contained in this subsection . . . .

Ch. 75, § 3, SLA 1977 (emphasis added) (codified at AS 23.30.175(a)).

One position is that not only the *percentage* of the average weekly wage increases, but that the *average weekly wage* also changes, periodically until 1981, with fluctuations in the state's average weekly wage. Thus, if the state's average weekly wage for the first period of the maximum rate table was $200.00, the maximum computation allowable for that period would be 80 per cent of $200.00, or $160.00. If the state's average weekly wage in 1976 were $300.00, the maximum compensation for all claims would be the increased percentage allowed by the statute, 100 per cent of that increased average wage, or $300.00 per week, etc. A person injured after 1977 could not claim this. The 1977 amendment still gives recipients an increasing percentage, but an increasing percentage relative to the same amount, *i. e.*, the weekly wage in effect at the date of injury. Thus, using the same hypothetical figures, the limitation would rise according to the new increasing percentage, 100 per cent, for all claims, but relative to the same average weekly wage, *i. e.*, 100 per cent of $200.00, or $200.00 for injuries occurring during the first period of the table.

Whether the 1977 amendment was intended to clarify or change the prior law is unclear. If it was intended as a clarification, it governs the maximum limitation on all awards. If it was a change in policy, it governs the limitation only for injuries occurring after August 31, 1977, the effective date of the amendment. This issue as to the base wage was not addressed by the parties, and we do not decide it.

The record indicates that the Workmen's Compensation Board assumed, for the Arants' award, that the base increases as well as the percentage. The Board apparently used $248.00 as the base wage for the first payment period ($198.40 is 80 per cent of $248.00) and $357.59 as the base wage for the second payment period. Despite this construction by the Board, Wien has never argued that the base wage should not increase above the state average wage as of the date of injury.

16. *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 266 (Alaska 1974); *Hewing v. Alaska Workmen's Comp. Bd.*, 512 P.2d 896, 900 (Alaska 1973); 2 A. Larson, Workmen's Compensation Law § 57.10, at 10–1 to 10–2 (1976); Division of Research, Alaska Legislative Affairs Agency, Workers' Compensation: The Feasibility of Establishing a State Fund 1 (February 1977) [hereinafter cited as Alaska Workers' Compensation Report].

17. Pub.L.No.91–596, 84 Stat. 1590–1616, 29 U.S.C.A. §§ 651–78.

out of or in the course of employment." [18] The Commission's report in 1972 found that "[t]he inescapable conclusion is that State workmen's compensation laws in general are inadequate and inequitable." [19] It made eighty-four specific recommendations, nineteen of which were designated as "essential" for adequate compensation systems.[20] Although there was some sentiment that workers' compensation should be immediately federalized,[21] the Commission urged that the progress of the states in implementing the essential recommendations be evaluated on July 1, 1975; and if necessary, Congress should at that time guarantee compliance with the essential recommendations.[22]

The essential recommendations included an increase in the maximum limitation on death benefit to 200 per cent of the statewide average weekly wage achieved through a phase-in.[23] The Council of State Governments stated:

> The limited benefits payable in the case of death under state workmen's compensation laws were an important consideration in causing the National Commission to find that generally workmen's compensation laws provided inadequate benefits.[24]

18. Occupational Health and Safety Act § 27, 29 U.S.C.A. § 676(a)(2); *see also Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 137 n.15, 545 F.2d 210, 215 n.15 (1976); Alaska Workers' Compensation Report, *supra* note 16, at 6; *Introductory Comments,* Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation and Rehabilitation Law* at ix (rev. ed. July 1974). The Congressional findings which motivated the establishment of the Commission were that:

> (A) the vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment . . . ; and
>
> (B) in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of . . . increases in the general level of wages and the cost of living.

Occupational Health and Safety Act § 27, 29 U.S.C.A. § 676(a)(1).

19. Alaska Workers' Compensation Report, *supra* note 16, at 6, *quoting* The Report of the National Commission on State Workmen's Compensation Laws (July 1972).

20. Alaska Workers' Compensation Report, *supra* note 16, at 6, *referring to* The Report of the National Commission on State Workmen's Compensation Laws (July 1972); *Introductory Comments,* Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation and Rehabilitation Law* at ix (rev. ed. July 1974).

21. Alaska Workers' Compensation Report, *supra* note 16, at 6; Crihfield, *Foreward* to Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation: A Challenge to the States* at vi (February 1973).

22. *Introductory Comments,* Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation and Rehabilitation Law* at ix (rev. ed. July 1974).

23. In *Director, Office of Workers' Comp. Programs v. O'Keefe*, 545 F.2d 337 (3d Cir. 1976), the court stated:

> [T]he National Commission recognized that "the arguments . . . concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases." The Report of the National Commission on State Workmen's Compensation Laws 71 (1972). Therefore, *the Commission recommended that death benefits, like disability benefits, be limited after a phase-in period to "at least 200 per cent of the State's average weekly wage."* *Id.* at 72.

545 F.2d at 347 (emphasis added). The court in *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 545 F.2d 210 (1976), characterized the Commission's recommendations:

> It is revealing, therefore, that the Commission not only recommended the same "Maximum Weekly Benefit"—*phased in to 200% of the statewide average weekly wage*—in death cases as in disability cases, but also noted that exactly the same arguments supported having such a maximum in both types of cases.

At 137 n.15, 545 F.2d at 215 n.15 (Skelly Wright, J.) (emphasis added, citation omitted). *But see Director, Office of Workers' Comp. Programs v. Rasmussen*, 567 F.2d 1385 (9th Cir. 1978).

24. Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation: A Challenge to the States* 13 (February 1973). The Court of Appeals for the District of Columbia termed the recommendations for a new phased-in maxi-

Alaska and other states enacted many of the Commission's recommendations, including the increases in maximum benefit limitations.[25] The impetus for action probably came both from the shortcomings revealed by the Commission's report and from the states' desire to avoid federal takeover of the program.[26]

Alaska's situation illustrates why the Commission found workers' compensation "inadequate and inequitable." In 1975, before the new maximum rates went into effect, the maximum limitation on compensation payments was $175.00,[27] but in Alaska, the average weekly wage was $248.00.[28] Thus, prior to the 1975 amendments, the statute theoretically granted recipients of death benefits 85 per cent of the deceased worker's wage,[29] but most claimants instead received the maximum limitation. The maximum limitations on death benefits frustrated achievement of the purpose of workers' compensation to secure adequate compensation.

Wien's position would leave many workers inadequately compensated. Claimants such as the Arants would be frozen at an amount that did not achieve the purposes of the statute. Really, no workers would receive a phased-in increase; each successive group of workers would be subject to different maximum rates. Wien's position makes the phase-in a device to *limit* the number of claimants who would have the benefit of an adequate maximum limitation.

The Arants' position accords with the origin of the new rate table and with the purpose of workers' compensation. In AS 23.30.175(a), the legislature adopted the Commission's recommendations for an increase, phasing in an adequate maximum rate for all workers. The large increase restores protection to the worker, while the phase-in protects the employer from the adverse impact that a large, one-step increase might cause.

In response to the National Commission's report, Congress in 1972 enacted amendments fixing new maximum limitations on death and disability payments in the Longshoremen's and Harbor Workers' Compen-

mum limitation among "the most significant" of the Commission's recommendations. *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. at 137 n.15, 545 F.2d at 215 n.15.

25. By 1975, at least ten states based a maximum limitation on death benefits upon a percentage of the state's weekly wage. *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 135, 545 F.2d 210, 213 (1976). A February 1977 report of the Alaska Legislative Affairs Agency observed: "State legislation in recent years has been strongly influenced by the work of the 1971–72 National Commission on State Workmen's Compensation Laws." Alaska Workers' Compensation Report, *supra* note 16, at 6. That report also noted: "The development of workmen's compensation in Alaska has generally conformed to the trend which has prevailed in other states." *Id.* at 10.

26. As the Council of State Governments rather tactfully noted: "[I]t behooves the States to bend sincere efforts toward modernizing their workmen's compensation programs." Advisory Committee on Workmen's Compensation Laws, Council of State Governments, *Workmen's Compensation: A Challenge to the States* 1 (February 1973). It indicated that enactment of the nineteen essential recommendations was "the surest way to preserve and strengthen the *state* system of workmen's compensation." *Id.* at 2 (emphasis added).

27. *See* ch. 52, § 1, SLA 1974 and ch. 10, § 3, SLA 1972.

28. This was Alaska's average weekly wage from October 1974 to June 1975. Statistics from the Workmen's Compensation Division, Department of Labor, State of Alaska. The Arants' first weekly payment was $198.40, which is 80 per cent of $248.00. This is because the first maximum limitation in the AS 23.30.175 table provides for 80 per cent of the state's average weekly wage, but the average weekly wage for that calculation was measured as of October 1974 to June 1975. Ch. 83, § 2, SLA 1975 (current version at AS 23.30.175(b)).

29. The statute fixing death benefits for a surviving spouse with two children at 85 per cent of the deceased worker's average weekly wage was in effect for about one year, from May 4, 1974 to May 22, 1975. Ch. 56, § 1, SLA 1974. Prior to the effective date of the 1974 amendments, death benefits for a surviving spouse and two children were fixed at 65 per cent of the deceased worker's wage. Ch. 99, § 3, SLA 1966.

sation Act,[30] similar to the maximums in AS 23.30.175(a).[31] The purpose of this legislation further supports the Arants' position. The House Committee Report states:

> The basic requirement of the Act is for the injured worker to receive 66⅔% of his average weekly wage. Historically this ⅔ requirement has been subject to an arbitrary limitation in order to protect against a high compensation payment for injuries to highly paid workers. As a result of the 12 year freeze on increasing benefits under this Act the present $70 maximum results in few workers receiving ⅔ of their average weekly wages and many workers receiving as low as 30% of their average weekly wage.
>
> [These amendments] provide that the maximum compensation for disability shall not exceed 200% of the national average weekly wage to be determined annually by the Secretary of Labor. The expectation is that a 200% maximum will enable approximately 90% of the work force covered by this Act to receive ⅔ of their average weekly wage. In order to ease the adjustment of these benefits which at a minimum will result in doubling the compensation payment for most covered workers, the bill provides a phase-in in four steps . . . .[32]

Wien asserts that the intent of one legislature does not determine the intent of another. Both Congress and the Alaska legislature, however, were responding to a similar factual situation: maximum limitations which cut off most compensation claims.[33] Both statutes were enacted in response to the critique of the National Commission and embodied its recommendations. The intent of another legislature facing a simi-

30. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 906(b), *as amended by* Pub.L.No.92-576, 86 Stat. 1252, 33 U.S.C.A. § 906(b)(1) (1970 & Supp.1978). *See Director, Office of Workers' Comp. Programs v. O'Keefe*, 545 F.2d 337, 347 (3d Cir. 1976); *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 137 n.15, 545 F.2d 210, 215 n.15 (1976).

31. The maximum table in the federal Longshoremen's Act states:

> [C]ompensation *for disability* shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary [of Labor] under paragraph (3):
>
> (A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.
>
> (B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.
>
> (C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.
>
> (D) 200 per centum beginning October 1, 1975.

33 U.S.C.A. § 906(b)(1) (Supp.1978) (emphasis added).

Unlike the Alaska statute, the maximum limitation table in the federal act does not explicitly apply to death benefits. In two cases, employees argued that death benefits under the federal act had *no* maximum limitation. *Director, Office of Workers' Comp. Programs v. O'Keefe*, 545 F.2d 337 (3d Cir. 1976); *Director, Office of Workers' Comp. Programs v. Boughman*, 178 U.S.App.D.C. 132, 545 F.2d 210 (1976). Both courts found that Congress intended to limit death benefits in the same manner as disability payments. A contrary result was reached in *Director, Office of Workers' Comp. Programs v. Rasmussen*, 567 F.2d 1385, 1391 (9th Cir. 1978).

We have found no case in which a party argued that the maximum rate table in the Longshoremen's Act applies in the manner urged by Wien. This suggests the improbability of Wien's interpretation of this type of statutory table, since the federal maximum rates went into effect in 1972.

32. H.R.Rep.No.92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin. News, pp. 4698, 4700. Committee reports are oft-used aids in statutory interpretation. *E. g., Halling v. Inlandboatmen's Union*, 585 P.2d 870, 874 (Alaska 1978); *Miller v. Monrean*, 507 P.2d 771, 776 & n.13 (Alaska 1973); C. Sands, 2A Sutherland Statutory Construction § 48.06 (4th ed. 1973); *see Starr v. Hagglund*, 374 P.2d 316, 319 & n.13 (Alaska 1962) (committee reports to constitutional convention used for constitutional interpretation).

33. Appellant argues that the situations are different because Congress did not enact any increase for 12 years prior to the 1972 Act. *See* text accompanying note 32 *infra*. The situations are essentially similar. Even though the Alaska legislature enacted periodic increases, the limitation still cut off most claims. The need for increased benefits was probably greater in Alaska than the need nationally because of dramatic pipeline-related wage increases in Alaska.

lar problem and enacting a similar statute is a long-accepted and helpful aid in statutory construction.[34] Further, in AS 23.30.175, the Alaska legislature has specifically utilized the federal Longshoremen's Act.[35] In a number of instances, this court has referred to federal decisions construing provisions of the Longshoremen's Act which are similar to the Alaska Workmen's Compensation Act.[36]

Wien and amicus offer two alleged obstacles to the Arants' interpretation: AS 23.30.172 and the impairment of contract clauses of the federal and Alaska constitutions. The mainstay of their argument is an interpretation of AS 23.30.172, which stated:

> *Benefit adjustments.* Benefits for temporary and permanent disability shall be calculated under this chapter according to currently existing benefit rates regardless of the benefit rates in existence at the time of the injury, unless this calculation would cause a decrease in the actual benefits receivable.[37]

The scope of this section was decreased in 1976,[38] and the section was eliminated entirely in 1977.[39] As originally drafted, one version of AS 23.30.172 read: "Benefits for temporary and permanent disability *or death* shall be calculated . . ." (emphasis added).[40] Wien argues that the elimination of the phrase "or death" from AS 23.30.172 means that AS 23.30.175 does not authorize the Arants' payments to rise beyond their initial level.

Wien's argument involves four analytical steps: the Arants' claim for increased death benefits is a claim for a retroactive increase in benefits; section 172 is the only section that provides for retroactive application of compensation rates; section 172 does not include death benefits; *therefore,* AS 23.30.172 precludes application of the increasing maximum limitations in AS 23.30.175 to the Arants' death benefit payments. This argument is seriously flawed.

First, and foremost, the Arants do not seek a retroactive increase in benefits. The statute enacting the maximum rate table was passed and became effective on May 22, 1975, fully three months before Mr. Arant's death. Assuming, as Wien maintains,

34. *See* 2A C. Sands, Sutherland Statutory Construction §§ 52.01, 52.03 (4th ed. 1973). Such statutes are said to be "in pari materia," *i. e.,* as cut from the same cloth.

35. In 1976, the legislature changed AS 23.30.175 so that a recipient of Alaska compensation payments who did not reside in Alaska would not receive percentages of *Alaska's* average weekly wage:

> For the purposes of determining the average weekly wage of a state other than Alaska, the commissioner shall adopt the average weekly wage as computed and published by the state agency responsible for administering the workmen's compensation laws of that state. *For those states in which no figure is published, the commissioner shall adopt the average weekly wage for that state as published by the United States Secretary of Labor for the purposes of the Longshoremen's and Harbor Workers' Compensation Act* . . . .

Ch. 252, § 5, SLA 1976 (emphasis added) (codified at AS 23.30.175(c)).

36. *See Stafford v. Westchester Fire Ins. Co.,* 526 P.2d 37, 40 (Alaska 1974) (double recovery); *Hewing v. Alaska Workmen's Comp. Bd.,* 512 P.2d 896, 899 (Alaska 1973) (wage-earning capacity); *Barber v. New England Fish Co.,* 510 P.2d 806, 812 (Alaska 1973) (compensation is exclusive remedy). Other courts interpreting Alaska's worker compensation statute have also looked to the federal Longshoremen's Act. *See, Johnson v. Standard Oil Co. of Cal.,* 30 F.R.D. 329, 330 (D.Alaska 1962) (subrogation of claim by employer's assignment to insurance carrier).

37. Ch. 51, § 1, SLA 1974.

38. It was limited to temporary total disability cases which existed for more than two years and permanent total disability. The amendment made the section inapplicable to permanent partial disability. Ch. 252, § 3, SLA 1976.

39. Ch. 75, § 11, SLA 1977.

40. On February 20, 1974, two versions of this bill were introduced in the Senate and referred to the Labor and Management Committee. One version included death benefits, *see* S.B. 400, 8th Leg., 2d Sess. § 1 (1974). The other version did not, *see* S.B. 400 am., 8th Leg., 2d Sess. § 1 (1974). The reference library of the state legislature has, on microfilm, copies of all the bills which have been introduced.

that compensation rates irrevocably vest at the time of injury, the Arants' claim is that these increasing rates of compensation vested at the time of injury. We may assume that removal of death benefits from AS 23.30.172 meant that death benefits would not receive retroactive increases. Under this theory, all compensation claims from deaths which occurred before May 22, 1975, could not rise to the new maximums. Mr. Arant died after May 22, 1975.[41]

Second, Wien's interpretation of legislative intent is unreasonable. Neither Wien nor amicus point to any direct evidence for their interpretation of the rather exotic interplay between AS 23.30.172 and .175. Their inference of this relationship requires the following construction of events: in 1975, the legislature enacted a new method of calculating maximum limitations, explicitly used words applying the new limitation to death benefits, but, at the same time, intended that a 1974 amendment that doesn't even mention death benefits countermand the explicit language of the 1975 statute. Further, since AS 23.30.175 uses a new method for calculating maximum limitations, Wien credits the legislature with uncanny foresight to anticipate, in 1974, the new type of rate table it would adopt in 1975.

The substantive intent attributed by Wien to the legislature is that disability payments should gradually increase but that death benefits should not. This interpretation is inconsistent with the specific events that spawned the new rate structure. The National Commission's critique of workers' compensation maximum limitations applied with equal force to death and disability payments[42] and the legislature expressly included death benefits within the language of AS 23.30.175.

Finally, by Wien's logic, the increasing maximum rates in AS 23.30.175 no longer apply to disability payments. Wien and amicus maintain that any increase of a maximum limitation is a retroactive increase and that only AS 23.30.172 grants retroactive increases. AS 23.30.172, however, was repealed in 1977.[43] Wien's position means that the increasing maximum rates now do not even apply to disability payments since the necessary authority for the "retroactive" increases, AS 23.30.172, no longer exists.[44]

41. A recent compensation claim decision, *Hood v. State, Workmen's Comp. Bd.*, 574 P.2d 811 (Alaska 1978), required interpretation of AS 23.30.172. A worker who had lost a leg in 1973 sought the benefit of a 1975 rate increase. We held that AS 23.30.172 applied to workers with permanent partial disability and granted Hood the increase. The issue before the court was narrowed to the scope of retroactivity:

> [With respect to section 172,] it is clear that the legislature intended to give the act *a retroactive effect* so that we are concerned only with *the scope of its retroactive provisions.*

Id. at 815 (emphasis added). We termed Hood's claim retroactive: the injury was in 1973 and the increase occurred after his injury, in 1975. In *Hood*, we did not decide whether a retroactive increase in workers' compensation would impair obligation of contract because AS 23.30.172 (Ch. 51, § 2, SLA 1974) provided that "[f]unds needed to carry out the provisions of this section shall be appropriated from the general fund." 574 P.2d at 815–16 & 816 n.13. The employer did not have to pay any of the retroactive increase.

42. *See* page 358 and note 23 *supra*.

43. Ch. 75, § 11, SLA 1977.

44. While AS 23.30.172 certainly does not have the impact urged by Wien, neither does it have the rather unusual effect argued by the Arants. Their brief states:

> Appellees additionally feel that AS § 23.30.172 . . . is applicable to this case and requires that not only the present increases in rates of compensation required by AS § 23.30.175, . . . but any further increases in the rate of compensation affected by amendment to AS § 23.30.175 be paid to appellees subject only to the maximum of 85% of William C. Arant's average weekly wage at the date of his death.

Appellee's Brief at 17. Section 172 has been repealed. The Arants therefore request that this court give effect to a repealed statute and hold that, in the future, they are entitled to increases that have not yet occurred.

Further, the Arants conclude that AS 23.30.172 was made applicable to death benefits by reading significance into inconsequential changes in AS 23.30.215(b). *Compare* ch. 99, § 3, SLA 1966 (death benefits shall be "subject to the same weekly maximum limitation in the aggregate as temporary total disability compensation under § 175(a) of this chapter") *with* ch. 83, § 12, SLA 1975 (deletion of the words "under

[5] Both the Alaska and the United States Constitutions forbid laws that impair obligation of contract.[45] Wien has an insurance policy whereby Wien pays premiums and the carrier agrees to pay the compensation awards of Wien's employees. Wien argues, on behalf of Underwriters Adjusting Company, that the maximum rate table impairs obligations under its insurance contract for two reasons. First, Wien argues that the table provides for retroactive increases. We have already discussed this argument. The maximum rate table prospectively phases in an increase. It has no retroactive effect because it does not grant increases to claimants injured *before* the new maximum rates were passed.[46] Wien and its insurance carrier were on notice that any injury resulting from Mr. Arant's employment would be subject to the increasing maximum rates in AS 23.30.175(a).[47]

Second, Wien argues that the increasing maximums impair contract because they tie compensation payments to an unknown variable, Alaska's future average weekly wage, changes in which "could not be fairly or accurately contemplated by appellant and its carrier at the time the policies were written." It is true that as between the employer and the insurance company, the insurance contract will now have to allocate the risk of changes in the statewide average weekly wage. An important aspect of all contracts, however, is allocating the risk of future change.[48]

Wien's interpretation would mean that any maximum limitation other than a flat dollar amount would be unconstitutional; a percentage of anything would almost always be uncertain. The legislature, according to Wien, could not set maximum limitations that automatically adjust to the future economic situation. All Wien expresses is its understandable preference for the certainty of the dollar amount maximum limitations. The new method of calculating maximums represents a legislative judgment that the certainty provided by the dollar amounts was at the cost of inade-

§ 175(a) of this chapter"). The current version, enacted in 1977, is still slightly different, stating that death benefits shall be subject to the maximum limitation "as provided in § 175 of this chapter." AS 23.30.215(b).
The legislature specified what retroactive increases were appropriate in AS 23.30.172. It explicitly removed death benefits from the section. If the legislature in 1975 intended the retroactive provision it passed in 1974 to cover death benefits, it probably would have said so. Courts do not infer retroactive operation of statutes in such ambiguous circumstances. *See Hood v. State, Alaska Workmen's Comp. Bd.*, 574 P.2d 811, 813–14 (Alaska 1978); AS 01.10.090; 2 C. Sands, Sutherland Statutory Construction § 41.04 (4th ed. 1973).

45. U.S.Const. art. I, § 10; Alaska Const. art. I, § 15.

46. Wien's only case support is *Tennessee Coal & Iron Div. v. Hubbert*, 268 Ala. 674, 110 So.2d 260 (1959), and the cases cited therein. They are not on point. *Tennessee Coal* involved a compensation statute giving the wife of a deceased worker the right to any disability payments to which the deceased worker would have been entitled. The plaintiff's husband had died before enactment of the statute. The court held that the contract clause required application of the statute only to injuries which occurred after the statute's passage. All authority cited in *Tennessee Coal, id.* 110 So.2d at 262–66, simply stands for the proposition that the statute in effect at the time of the work-related accident determines compensation rights.

47. Wien's concept of retroactivity would mean that the contract clause prevents *phasing in* any increase in the maximum limitation. Faced with inadequate compensation levels, the legislature would have to do nothing, enact a small increase, or enact one very large increase. If the legislature could enact one large increase, this court will not withhold from the legislature the sensible alternative of spreading that increase over a number of years. *See, e. g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420–21, 4 L.Ed. 579, 605 (1819). Under Wien's analysis, the only way the legislature could phase in an increase in maximum limitations would be to pay for it with public monies. The whole concept of workers' compensation, however, it that the work enterprise and the price of its products bear the cost of injuries occurring in the conduct of the enterprise. *Fruit v. Schreiner*, 502 P.2d 133, 140–41 (Alaska 1972); 1 A. Larson, The Law of Workmen's Compensation §§ 1.00, 2.20 (1978).

48. Consider the classic contract. *A* agrees to buy widgets from *B* at, say, $10.00. If the price of the things necessary to make widgets goes up, *A* benefits from the contract. If their price goes down, *B* benefits from the contract.

quately compensating workers and their families.

II. ATTORNEY'S FEES

We will consider in turn the fee award for the Board proceeding and for the Superior Court appeal.

AS 23.30.145 provides for award of attorney's fees in workers' compensation cases. AS 23.30.145(a) specifies a formula:

> Fees for legal services rendered in respect to a claim are not valid unless approved by the board, *and the fees may not be less than 25 per cent on the first $1,000 of compensation or part of the first $1,000 of compensation. and 10 per cent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted,* in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; *the fees may be allowed only on the amount of compensation controverted and awarded.* [emphasis added]

AS 23.30.145(b) grants a reasonable attorney fee:

> *If an employer* fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it become dues or *otherwise resists the payment of compensation . . . , the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee.* [emphasis added]

In *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838 (Alaska 1973), we held that the section 145(a) formula only applies to "controverted" claims and the section 145(b) grant of reasonable attorney fees applies to an employer who otherwise fails to make payment of compensation.[49] The Arants maintain that Wien controverted the claim. Wien maintains that while it "resisted" payment of the increased amount, it did not "controvert" the claim.

[6] The Board's decision makes no mention of the controversion issue. It simply concludes:

> We find that the defendant resisted payment of compensation in excess of $198.40 a week, and applicant retained an attorney in the successful prosecution of this case. Attorney fees in the amount of $500 are awarded to applicant's attorney to be paid by the defendant.[50]

49. Four justices participated in *Haile*. The plurality opinion of the court found that the employer's delay in making payments due to circumstances beyond the employer's control did not constitute "controversion of the claim" and therefore a fee award under AS 23.30.145(a) was not proper. 505 P.2d at 839–41. Chief Justice Rabinowitz would have held that AS 23.30.145(a) prescribes a minimum fee award applicable to all compensation cases, regardless of whether the claim is controverted; the fact of controversion permits the Workmen's Compensation Board to require the employer to pay attorney's fees. *Id.* at 841–42 (concurring and dissenting opinion). Justice Erwin agreed that AS 23.30.145(a) required a finding of controversion by the employer but would have found it on the facts in *Haile*. *Id.* at 842–44 (concurring and dissenting opinion). *See* note 52 *infra*.

50. It is not clear whether the Arants raised this issue in the proceeding before the Board. The sole reference at the Board hearing to attorney's fees was at the beginning of the hearing by Wien's attorney:

> Mr. Page: There are two questions that are raised aside from the question of penalties and attorney fees which will be taken care of *normally(?)*. [as in the original]

The last word could be "orally." In any event, Wien does not argue that the Arants' request for attorney's fees was not timely raised in the proceedings below.

If reasonable attorney's fees under AS 23.30.145(b) were proper in this case, the Board still should have conducted a hearing on the question, requested evidence from the parties, or at least indicated in its order how it arrived at the $500.00 determination. *See Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 841 (Alaska 1973) (remanding for a hearing on attorney's fees and costs). The court in *Reeves v. Sierra Homes*, 29 Or.App. 441, 563 P.2d 1242, 1242 (1977), remanded a case where the record simply revealed the dollar amount granted by the Workmen's Compensation Board: "Without evidence or a stipulation there is no way we can measure the discretion exercised."

We hold that Wien controverted the Arants' claim and remand the case to the Board to compute attorney's fees according to the statutory formula in AS 23.30.145(a).

[7] Wien's reliance on *Haile* is misplaced. There, the employer never denied its obligation to pay compensation, it simply delayed payments, and prior to the hearing, the employer informed the Board that it was not contesting the claims. We held that the delay in payments did not constitute a controversion.[51] Wien, however, has consistently denied and litigated its obligation to pay the increase sought, and eventually received by, the Arants.[52]

Wien's failure to file a notice of controversion is not dispositive on the question of attorney's fees. AS 23.30.145(a) requires a finding by the Board of whether there has been controversion in fact. If failure to file a notice of controversion made the employer liable for *lower* attorney's fees, the employer would benefit from noncompliance with the statute and few notices would be filed. This backward incentive contrasts with the working of AS 23.30.155, which requires the employer to file a notice of controversion and penalizes the employer who does not comply.[53] To hold that there is no controversion due solely to the failure to file the notice would be to place form above substance. We hold that a notice of controversion by the employer is not required for an award of attorney's fees under AS 23.30.145(a).[54]

[8, 9] AS 23.30.145 seeks to insure that attorney's fee awards in compensation cases are sufficient to compensate counsel for

51. In *Haile*, the Workmen's Compensation Board found as a matter of fact that the employer's delay was due to conditions over which it had no control; the employee did not appeal that ruling and so the court did not examine the Board's conclusion that the delay was involuntary. 505 P.2d at 840–41. Justice Erwin would have found that the employer's delay, due to a six-month investigation of the worker's legal right to compensation, constituted controversion as a matter of law. 505 P.2d at 842–43 (concurring and dissenting opinion).

52. The fact that Wien agreed to pay compensation and only disputed the amount does not preclude a finding of controversion and an award of attorney's fees under AS 23.30.145(a). *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978). *See J. B. Warrack Co. v. Roan*, 418 P.2d 986, 990 (Alaska 1966); AS 23.30.-145(a) (referring to controverting a claim "in whole or in part").

53. AS 23.30.155, "Payment of Compensation," provides, in part:

> (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer.
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. . . .
>
> . . . . . .
>
> (d) If the employer controverts the right to compensation he shall file with the board on or before the 14th day after he has knowledge of the alleged injury or death, a notice . . . stating that the right to compensation is controverted . . . .
>
> (e) If any installment of compensation payable without an award is not paid within 14 days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 20 per cent of it, which shall be paid at the same time as, and in addition to, the installment, *unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which he had no control the installment could not be paid within the period prescribed for the payment.* [emphasis added]

Thus, an employer must start compensation payments within 14 days of injury; a notice of controversion permits the employer, legally and without late penalty, not to begin payments. Although the opinion in *Haile* is somewhat unclear on this point, the reference to the employer's failure to file a notice of controversion was discussed in the context of AS 23.30.-155(d). 505 P.2d at 839. In *Haile*, the Board did not levy the late penalty because it found the employer's delay "owing to conditions over which he had no control." AS 23.30.155(e). *See* note 51 *supra*.

54. *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978). The difficulty with interpreting AS 23.30.145(a) may arise from the somewhat awkward language, "When the board *advises* that a claim has been controverted . . ." (emphasis added). Our opinion in *Alaska Interstate* is to the effect that the word "advises" can be read as "finds."

work performed. Otherwise, workers will have difficulty finding counsel willing to argue their claims.[55] Also, high awards for successful claims may be necessary for an adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered. Taking into account these factors, however, we are still concerned that, in some cases, application of AS 23.30.145(a) results in a fee award that is "out of all proportion to the services performed." *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 840 (Alaska 1973). The remedy for this is statutory change by the legislature, not "interpretation" by the courts. The legislature may wish to examine whether the formula in AS 23.30.145(a) sometimes results in excessive fee awards, awards higher than are necessary to attract counsel into the compensation area.

[10] For the appeal of the Board's decision, the Superior Court granted the Arants $750.00 in attorney's fees. Before making this award, the court received a motion for $6,033.75 in attorney's fees from the Arants and a supporting memorandum, stating that counsel had worked 80 plus hours at an hourly billing rate of $75.00. The Arants appeal the $750.00 award as an abuse of discretion.

An award of attorney's fees is subject to the broad discretion of the trial court.[56] "An abuse of discretion is established where it appears that the trial court's determination as to attorney's fees was manifestly unreasonable." *Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970). The Superior Court's fee award for the appeal should provide for realistic compensation, taking into account the same factors that the Workmen's Compensation Board considers when it grants attorney's fees for non-controverted claims: "the nature, length and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries."[57] Additionally, though, the Superior Court should consider the Board's fee award. This is relevant where application of the formula in AS 23.30.145(a) has produced a disproportionately large award for the Board proceeding.[58]

We remand to the Superior Court with directions that it remand to the Board for a determination of attorney's fees. The Superior Court shall make its determination of the fees to be granted because of the appeal after the Workmen's Compensation Board makes its fee award.

The Superior Court's decision upholding the Board's increase in compensation is AFFIRMED. The question of attorney's fees for the Board proceeding and the appeal is REMANDED for further proceedings consistent with this opinion.

55. *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 844 (Alaska 1973) (Erwin, J., concurring and dissenting).

56. *State v. Alaska Int'l Air, Inc.*, 562 P.2d 1064, 1067 (Alaska 1977); *City of Valdez v. Valdez Dev. Co.*, 523 P.2d 177, 184 (Alaska 1974); *Cooper v. Carlson*, 511 P.2d 1305, 1309 (Alaska 1973); *State v. Abbott*, 498 P.2d 712, 731 (Alaska 1972); *Palfy v. Rice*, 473 P.2d 606, 613 (Alaska 1970).

57. AS 23.30.145(a). The Board takes these factors into account when "a claim has not been controverted, but . . . bona fide legal services have been rendered in respect to the claim . . . ." *Id.* In these circumstances, the Board directs "payment of the fees out of the compensation awarded." *Id.*

58. AS 23.30.145(a) provides for a minimum fee. If application of the minimum fee formula yields a fee inadequate to compensate the attorneys, there is the right to appeal to the Superior Court.

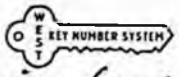
These cases are generally about unscheduled PPD. Since 1977 there has been a $60,000 (AS 23.30.190(b)) maximum limit. As far as I know this group is not talking about this subject — yet.

ASHA staff.[33] The burden now shifts to appellees to show that the erroneous feasibility ratio did not materially affect the Board's decision.

The decision of the superior court is vacated and this case remanded for completion of the trial proceedings in accordance with the foregoing.[34]

FITZGERALD, J., not participating.

(1)



Economic (wage-loss) basis for computing unscheduled PPD

Virgil HEWING, Appellant,

v.

ALASKA WORKMEN'S COMPENSATION BOARD et al., Appellees.

No. 1625.

Supreme Court of Alaska.

July 27, 1973.

Proceeding in which workmen's compensation claimant sought injunction against award by the Workmen's Compensation Board for permanent partial disability. The Superior Court, Third Judicial District, Anchorage, Edward V. Davis, J., affirmed the Board's decision and denied claimant's request for attorney's fees, and claimant appealed. The Supreme Court, Rabinowitz, C. J., held that the Board's findings were inadequate to permit review, and case would be remanded to the Superior Court with directions to remand to the Board for further proceedings.

Remanded with directions.

1. Workmen's Compensation ⇐1939

Supreme Court will not vacate findings of the Workmen's Compensation Board if supported by substantial evidence, but the Court's scope of review is not so limited where the Board's decision rests on erroneous legal foundations.

2. Workmen's Compensation ⇐1964

Where point as to whether findings of the Workmen's Compensation Board were inadequate was manifest on face of record, Supreme Court would consider such point even though claimant appellant had not specifically argued it.

3. Workmen's Compensation ⇐1756

Where claimant's injuries came within purview of statute providing that in permanent partial disability cases other than cases involving scheduled injuries the compensation is to be determined by specified formula, award of Workmen's Compensation Board was required to be supported by ultimate finding that claimant had suffered a decrease in his wage-earning capacity. AS 23.30.190(1-20), 44.62.510(a), 44.62.570(b).

4. Workmen's Compensation ⇐803

Consideration of employee's age, education, industrial history, trainability and availability of suitable work in the community will ensure fair determination of wage-earning capacity in circumstances in which employee has no postinjury earnings or in which Workmen's Compensation Board determines that postinjury earnings do not accurately represent earning capacity. AS 23.30.210(a).

5. Workmen's Compensation ⇐1756, 1975

Where claimant had no postinjury earnings, and Workmen's Compensation Board implicitly rejected claimant's total lack of earnings as fairly representing his

33. The Board's minutes stated:
The Board concurred in FHA's recommendation and the ASHA staff's evaluation and recommendation of the best project development plan for the R-16 Eastchester Urban Renewal Low-Income Housing Project under Section 236 of the National Housing Act. The developer selected was J. L. Johnston of Indio, California.

34. In light of this disposition, we find it unnecessary to discuss appellants' contention that the superior court erred in denying their motion for a new trial.

earning capacity, but failed to support its ultimate finding of decrease in wage-earning capacity with subsidiary findings relating to other factors and circumstances referred to in statute prescribing the determination of wage-earning capacity in cases of partial disability and instead stated that the Board felt claimant "has incurred permanent partial disability equal to 25 percent loss of use of the man as a whole," Board's findings were inadequate to permit review, and case would be remanded to superior court with directions to remand to the Board for further proceedings. AS 23.30.190(1-20), 23.30.210(a), 44.62.510(a), 44.62.570(b).

6. Workmen's Compensation ⇐856

Unscheduled partial disability award should be made for economic loss and not for physical injury as such.

7. Workmen's Compensation ⇐803

Availability of work, in employee's community, which he can perform in his injured condition is important determinant of earning capacity. AS 23.30.210(a).

Ernest Z. Rehbock, Anchorage, for appellant.

Jesse C. Bell, Atkinson, Conway, Young, & Bell, Anchorage, for appellees.

Before RABINOWITZ, C. J., and CONNOR, ERWIN and BOOCHEVER, JJ.

OPINION

RABINOWITZ, Chief Justice.

While working as a cement finisher for Peter Kiewit & Sons, Co. on August 5, 1969, appellant Virgil Hewing injured his back and left forearm when the platform on which he was working collapsed and fell to the ground. Hewing filed a timely application for adjustment of his claim with appellee Alaska Workmen's Compensation Board, seeking an award for permanent partial disability.

Thereafter, the Board conducted a hearing on Hewing's claim at which he and his wife were the only witnesses. At the time of the hearing, appellant was 56-years old and had only a first-grade education. Except for a few unskilled, heavy labor jobs, Hewing had worked exclusively as a cement finisher or mason since 1951, having had no special training for any other occupation. With the exception of performing a few household tasks, he had not worked since the accident because he continued to suffer pain as a result of his injuries. Appellant's physician evaluated his disability at 10 percent of "the whole man," but stated appellant would be unfit to continue his cement masonry profession. Hewing had applied for vocational rehabilitation under an Alaska Labor Department Program on-the-job training in agricultural work, but he had not been accepted for the program at the time of the hearing. Based on the record before it, the Board concluded Hewing had suffered a 25 percent "loss of use of the man as a whole" and directed that compensation be awarded in conformity with this conclusion.

Pursuant to AS 23.30.125(c),[1] Hewing sought an injunction against the Board's award, arguing that the award was not supported by substantial evidence nor based upon the proper criteria for determining the degree of disability. The superior court, however, concluded that substantial evidence supported the 25 percent disability award, affirmed the Board's decision, and denied appellant's request for an attorney's fee for legal services rendered in connection with his appeal. In his appeal to this court, Hewing argues that the superior court erred in affirming the Board's decision for the same reasons which make the Board's decision allegedly infirm. He also contends that the superior court abused its

1. AS 23.30.125(c) provides in part:
If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings in the superior court brought by a party in interest against the board and all other parties to the proceedings before the board.

discretion in denying his request for attorney's fees relating to his appeal.

[1] This court has consistently maintained that while we will not vacate findings of the Workmen's Compensation Board if supported by substantial evidence,[2] our scope of review is not so limited where the Board's decision rests on erroneous legal foundations.[3] Hewing's two-pronged attack on the Board's decision and the superior court's affirmance thereof fits within both of these categories of review. He urges that the Board did not rate his disability according to proper criteria and that the Board's 25 percent disability rating is not supported by substantial evidence.

[2] Our review of the record has convinced us that the findings of fact filed by the Board in regard to its disability determination do not permit us to intelligently review the two assertions advanced by appellant.[4] We have often discussed the necessity for, and the character of, findings of fact which the Board is required to make under the Alaska Administrative Procedure Act.[5] In Manthey v. Collier,[6] a case based upon the forerunner of AS 44.-62.510(a), we held:

> The written decision of the Board contains no such findings. We interpret section 19 of the Administrative Procedure Act to require such findings. The Board abused its discretion in failing to follow the mandate of the act. The superior court should have, in the proper exercise of its review jurisdiction, set aside the Board's order and remanded the case for adequate findings. In not doing so, the court committed reversible error.[7]

In the instant case, the Board failed to make any specific findings of fact with respect to the degree of appellant's permanent partial disability, choosing instead to frame its rating in the written decision. We are unable to determine from the language of the Board's decision whether the Board employed the proper criteria in evaluating appellant's permanent partial disability.

[3-5] AS 23.30.190 governs compensation for permanent partial disability. Since Hewing's ailments are not "scheduled" injuries within AS 23.30.190(1)–(19), the formula for determining his disability is prescribed by paragraph (20):

> [I]n all other cases in this class of disability the compensation is 65 percent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial disability . . . .[8]

2. *E. g.*, Anderson v. Employers Liab. Assurance Corp., 498 P.2d 288, 289–290 (Alaska 1972); Wilson v. Erickson, 477 P.2d 998, 999 (Alaska 1970); Keiner v. City of Anchorage, 378 P.2d 406, 411 (Alaska 1963).

3. *E. g.*, Anchorage Roofing Co., Inc. v. Gonzales, 507 P.2d 501, 503 (Alaska 1973); Laborers & Hod Carriers Union, Local 341 v. Groothius, 494 P.2d 808, 812 (Alaska 1972).

4. While appellant has not specifically argued that the Board's findings are inadequate, we consider this point because the error is manifest on the face of the record. *See* Brown v. Northwest Airlines, Inc., 444 P.2d 529, 532 (Alaska 1968); Manthey v. Collier, 367 P.2d 884, 889 (Alaska 1962); Brown v. Alaska Indus. Bd., 15 Alaska 625, 629, 224 F.2d 680, 682 (9th Cir. 1955).

5. *E. g.*, Brown v. Northwest Airlines, Inc., 444 P.2d 529 (Alaska 1968); Fischback & Moore of Alaska, Inc. v. Lynn, 430 P.2d 909, 912 (Alaska 1967); Alaska Redi-Mix, Inc. v. Alaska Workmen's Compensation Bd., 417 P.2d 595, 597–598 (Alaska 1966); Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 539 (Alaska 1966). Findings of fact supporting compensation awards must be made pursuant to AS 44.62.510(a) and 44.62.570(b).

6. 367 P.2d 884 (Alaska 1962).

7. *Id.* at 889.

8. AS 23.30.265(10) defines "disability" as "incapacity" because of the injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

And, as we held in Manthey v. Collier,[9] since Hewing's injuries come within the purview of the "other cases" provision, the Board's award

> must be supported by an ultimate finding that the claimant has suffered . . . a decrease in his [wage-]earning capacity.

In turn, the determination of wage-earning capacity is prescribed by AS 23.30.210(a):

> In a case of partial disability under § 190(20) . . . the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any *other factors* or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future. (Emphasis added.)

The wording of AS 23.30.210(a) is substantially identical with that of 33 U.S.C. § 908(h) of the Federal Longshoremen's and Harbor Workers' Compensation Act. Courts have applied 33 U.S.C. § 908(h) to require compensation boards to consider the employee's age, education, industrial history, trainability, and availability of suitable work in the community as being "other factors" affecting earning capacity.[10] Consideration of these "other factors" will, in our view, ensure a fair determination of wage-earning capacity in those circumstances where the employee has no post-injury earnings or when the Board determines that post-injury earnings do not accurately represent earning capacity. Elaborating on Manthey v. Collier,[11] we hold that the Board in this case should have supported its ultimate finding of decrease in wage-earning capacity with subsidiary findings relating to the other factors and circumstances referred to in AS 23.30.210 (a), since appellant had no post-injury earnings and since the Board implicitly rejected his total lack of earnings as fairly representing earning capacity.

[6] In the instant case, the Board failed to make adequate findings relating to the criteria in AS 23.30.190(20) and AS 23.30.210(a). A formal "finding of fact" on the extent of appellant's permanent partial disability was not made. Nor did the Board ever employ the statutory term "wage-earning capacity" in assessing disability. Instead, in the body of the Board's decision, it was stated:

> [W]e feel [appellant] has incurred permanent partial disability equal to 25 percent *loss of use of the man as a whole.* (Emphasis added.)

9. 367 P.2d 888–889 (interpreting ACLA § 43–3–1(H), a similarly worded forerunner of AS 23.30.190(20)).

10. *E. g.*, American Mut. Ins. Co. v. Jones, 138 U.S.App.D.C. 269, 426 F.2d 1263, 1265–1266 (1970); Watson v. Gulf Stevedore Corp., 400 F.2d 649, 653 (5th Cir. 1968), cert. denied, 394 U.S. 976, 89 S.Ct. 1471, 22 L.Ed.2d 755 (1969); Army and Air Force Exch. Serv. v. Neuman, 278 F.Supp. 865, 867 (W.D.La. 1967).

State cases applying these factors to determine the extent of permanent partial disability include Surratt v. Gunderson Bros. Eng'r. Corp., 259 Ore. 65, 485 P.2d 410, 415–417 (1971); Benedict v. Fox, 192 Pa.Super. 197, 159 A.2d 756, 758 (1960).

See also 2 A. Larson, Workmen's Compensation Law § 57.21 (1970).

11. With respect to subsidiary findings in permanent partial disability situations, we required in *Manthey* that:

> This ultimate finding [of decrease in earning capacity] must, in turn, be based upon basic fact findings which relate to inability to earn wages, as evidenced by proof of a disparity between wages earned before and after the injury was sustained, and to the claimant's physical condition. 367 P.2d at 889.

Serious conceptual differences exist between the "whole man" and "earning capacity" theories of disability.[12] Under the whole man theory, the primary criteria governing disability awards are physiological and psychiatric. This theory challenges the concept, basic to Alaska's workmen's compensation law, that unscheduled partial disability awards should be made for economic loss, not for physical injury as such.

[7] The Board's inadequate consideration, under AS 23.30.210(a) of the availability of work which appellant could perform may indicate that its "whole man" terminology reflects an improper emphasis upon physical injury. The availability of work in the employee's community which he can perform in his injured condition is an important determinant of earning capacity.[13] With regard to appellant's ability to work, the Board noted: (1) that he was a 56-year-old man with no special training and only a first-grade education; (2) that he had performed only cement masonry and heavy, manual labor for 20 years preceding his injuries; (3) that his physician found him unfit to perform cement masonry work; and (4) that his back injury caused him pain even when performing housework. One permissible inference from these notations is that appellant was able to perform only light, unskilled work. No evidence was presented that work suited to appellant's capabilities was regularly and continuously available in his Anchorage community.[14] Further, the Board failed to consider the availability of suitable work or to make a subsidiary finding on this factor.

In rating appellant's disability, the Board may have considered the availability of a Labor Department vocational rehabilitation position. Even if an injured employee's rehabilitation potential may be considered,[15] the Board's oblique reference to rehabilitation prospects does not make clear what weight was given to this factor. Moreover, the Board's oblique reference to rehabilitation prospects do not make clear what weight was given to this factor.

Since we hold the Board's findings of fact inadequate to permit review, we must remand this case to the superior court with directions to remand to the Board for further proceedings in accordance with this opinion.[16]

FITZGERALD, J., not participating.

12. *See* 2 A. Larson, Workmen's Compensation Law § 57.10 (1970); Manthey v. Collier, 367 P.2d 884, 888–889 n. 15 (Alaska 1962). *Compare*, Saslow v. Rexford, 395 P.2d 36, 42–43 (Alaska 1964).

13. *See, e. g.*, American Mut. Ins. Co. v. Jones, 138 U.S.App.D.C. 269, 426 F.2d 1263, 1265–1266 (1970); Flores v. Bay Ridge Operating Co., 131 F.2d 310 (2d Cir. 1942); Eastern S. S. Lines, Inc. v. Monahan, 110 F.2d 840, 842 (1st Cir. 1940); Perini Corp. v. Heyde, 306 F. Supp. 1321 (D.R.I.1969); United Fruit Co. v. Cardillo, 104 F.Supp. 81 (S.D.N.Y. 1952). *See also* J. B. Warnack Co. v. Roan, 418 P.2d 986, 988 (Alaska 1966).

14. We do not decide in this case whether the burden of establishing the availability or unavailability of suitable employment rests upon the claimant or the employer. However, we note that while courts hesitate to impose inflexible burden-of-proof rules on administrative agencies, the law rarely requires a party to prove a negative fact (i. e. the *unavailability* of suitable work). For contrasting views on this issue, see Flores v. Bay Ridge Operating Co., 131 F.2d 310, 311 (2d Cir. 1942); Eastern S. S. Lines, Inc. v. Monahan, 110 F.2d 840, 842 (1st Cir. 1940); Perini Corp. v. Heyde, 306 F. Supp. 1321, 1325–1326 (D.R.I.1969); Army and Air Force Exch. Serv. v. Neuman, 278 F.Supp. 865, 867 (E.D.La.1967); 2 A. Larson, Workmen's Compensation law § 57.61, at 88.16–17 (1970).

15. *See* 2 A. Larson, Workmen's Compensation Law § 57.33 (1970).

16. In light of our holding we also remand the case to the superior court for determination of a reasonable attorney's fee to be awarded appellant for legal services rendered in connection with his appeal to the superior court.

Grace VETTER, Appellant,

v.

ALASKA WORKMEN'S COMPENSATION BOARD and Sue Wagner, dba Polaris Lunch, Appellees.

No. 1943.

Supreme Court of Alaska.

July 12, 1974.

Workmen's compensation case. The Superior Court, Fourth Judicial District, Fairbanks, Warren W. Taylor, J., affirmed a denial of compensation and claimant appealed. The Supreme Court, Erwin, J., held that disability compensation may be denied to claimant who does not desire to work but that evidence did not support finding that claimant was unwilling to find suitable employment, and thus not entitled to disability compensation, either because her husband opposed her working or because she did not desire to work.

Reversed and remanded with instructions.

Connor, J., dissented and filed opinion in which Fitzgerald, J., joined.

1. Workmen's Compensation ⇐948

Claimant's failure to go to doctor immediately does not permit dismissal of claim.

2. Workmen's Compensation ⇐1404

Feelings of claimant's husband concerning claimant's working are relevant to determining claimant's wish to work.

3. Workmen's Compensation ⇐803

Disability compensation claim may be dismissed on ground that claimant does not wish to work.

4. Workmen's Compensation ⇐803, 1756

Disability compensation rests not on medical impairment as such but on loss of earning capacity related to impairment and award must be supported by findings that claimant suffered compensable disability, a decrease in earning capacity due to work-connected injury or illness.

5. Workmen's Compensation ⇐803

Factors in determining whether claimant suffered compensable disability include not only extent of injury but also age, education, employment available in area, and intentions as to employment, with aim of making best possible estimate of future impairment of earnings considering any available clues.

6. Workmen's Compensation ⇐803

There is no compensable disability if claimant, through voluntary conduct unconnected with injury, takes himself out of labor market, or if, after resuming employment, he is fired for misconduct.

7. Workmen's Compensation ⇐1939.5

Board's decision need not be compelled under facts as only possible solution.

8. Workmen's Compensation ⇐1939.6

It is not function of court to reweigh evidence in compensation cases but only to determine whether evidence exists.

9. Workmen's Compensation ⇐1939.7

It is not important in compensation case whether particular situation is subject to more than one inference and it is not court's province to choose between competing inferences.

10. Workmen's Compensation ⇐1626

Evidence in compensation case did not support finding that claimant was unwilling to find suitable employment, and thus not entitled to disability compensation, either because her husband opposed her working or because she did not desire to work.

Joseph W. Sheehan of Rice, Hoppner, Blair & Associates, Fairbanks, for appellant.

Thomas E. Fenton of Call, Haycraft & Fenton, Fairbanks, for appellees.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

OPINION

ERWIN, Justice.

This appeal arises from an Alaska Workmen's Compensation Board decision which denied appellant Grace Vetter's claim for disability compensation.

Grace Vetter was employed in Sue Wagner's restaurant, the Polaris Lunch, located in Fairbanks, Alaska. On April 24, 1970, while acting within the scope of her employment, she was injured when a customer physically attacked her. Sue, who did not carry workmen's compensation insurance at the time, agreed to pay for any medical expenses incurred by Grace as a result of her injuries. Sue paid at least some of the bills, maintaining that she paid all that were presented to her. Grace then filed a claim with the Alaska Workmen's Compensation Board, in which she requested both medical costs and a disability award. Sue denied the claim.

After a hearing in May, 1972, the Board awarded Grace $947.20 to cover medical expenses incurred through the date of hearing, but dismissed the claim for disability compensation. The denial was affirmed by the superior court, which granted summary judgment in favor of Sue.

The appeal from this judgment centers about the denial of disability compensation. Appellant contends that: (1) the Board's failure to award compensation was based on an incorrect legal premise, more specifically, that it had considered matters inappropriate to a workmen's compensation proceeding; and (2) the Board's decision to deny disability compensation was not supported by substantial evidence.

The proper scope of review for this court is outlined in Great American Indemnity Co. v. Britton:

> The only questions that the Court may consider are, first, whether the award is contrary to law; and second, whether the administrative findings of fact are supported by substantial evidence.[1]

Was The Board's Decision Contrary To Law?

The dispute upon appeal centers primarily about the Board's third finding of fact, which appears to be the basis for the Board's dismissal of Grace Vetter's claim for disability compensation. The Board found:

> That the applicant did not suffer disability from work as a result of injury on April 24, 1970. She was able to continue working for the remaining five to six hours of her shift and did not find need to see the doctor until the afternoon of a [sic] day when she was hurt at 2 a. m. The Board believes that applicant does not want to work and that her husband, who did not want her to work before the injury, probably keeps her from working now. We believe the fact that she gives a previous earning history of minimal employment during the three years previous to injury is indicative of this.

This finding is followed by the dismissal of the claim for compensation for disability.

[1–5] Appellant's claim could not be dismissed merely because she did not go immediately to a doctor.[2] However, the

1. 186 F.Supp. 938, 940–941 (D.D.C.1960), rev'd on other grounds, 110 U.S.App.D.C. 190, 290 F.2d 381 (1961), cert. denied, 368 U.S. 900, 82 S.Ct. 178, 7 L.Ed.2d 95 (1961). This standard of review was adopted by this court in Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 543 (Alaska 1966), and followed in Beauchamp v. Employers Liab. Assurance Corp., 477 P.2d 993, 997 (Alaska 1970), and in Wilson v. Erickson, 477 P.2d 998, 999 (Alaska 1970).

2. *See* Alaska State Housing Authority v. Sullivan, 518 P.2d 759 (Alaska 1974). *Compare* Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 541 (Alaska 1966), where the fact that claimant did not know immediately of his disability and only acquired knowledge of it later when his back problems flared up was held to be unimportant as affecting the timeliness of his claim.
As there are many medical problems where the extent and duration of the symptoms

second portion of the finding introduced another ground for dismissal. The Board found that Grace Vetter did not want to work and supported this finding by reference to her husband's attitude toward her employment[3] and her previous sporadic working history.[4] A dismissal for this reason has a proper foundation in the law. The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability or, more precisely, a decrease in earning capacity due to a work-connected injury or illness.[5] Factors to be considered in making this finding include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future.[6] The aim is to make the best possible estimate of future impairment of earnings considering any available clues:

> . . . the purpose of the wage calculation is not to arrive at some theoretical concept of loss of earning capacity; rather it is to make a realistic judgment on what the claimant's future loss is in the light of all the factors that are known.[7]

[6] If a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability. If an employee, after injury, resumes employment and is fired for misconduct, his impairment playing no part in the discharge, there is no compensable disability.[8] Total disability benefits have been denied when a partially

are not known at the outset, a denial of compensation merely because the claimant does not visit a doctor for several hours following injury would only thwart the beneficent purposes of the Alaska Workmen's Compensation Act.

3. Appellant argues that the Board's consideration of Mr. Vetter's desires and concern for his tax bracket constituted error on the theory that they are not pertinent to the question of Grace Vetter's disability. This would indeed present a serious problem if the Board merely looked at Mr. Vetter's income and his desires concerning his wife's employment and denied compensation on that basis, regardless of her intent. However, this does not appear to be what the Board did in this case. Rather, they found that she did not want to work. Her husband's feelings are relevant in a determination of what her desires might be.

4. Grace Vetter's work history generally consisted of jobs of short duration. Following the Vetters' move to Fairbanks in 1951 or 1952, Grace was employed as a bartender at a small restaurant. She testified that she worked at this job "for about a year." Between 1952 and late 1955 or early 1956, she worked at two local cafes, each for a period of several months. Around 1956 she went to Australia for a year to have an operation for the removal of a kidney. Shortly after she returned to Alaska in 1957 or 1958, she went to work at the Model Cafe. She testified that she "worked on and off at the Model Cafe for years," working three, four, five or six months at a time:

> It depends, you know. I mean if I felt as though I wanted to work or liked to work, or if I didn't have something else to do, I'd explain it to Steve [the owner of the cafe] and it was all right with him, and I could always go back.

It is unclear how long this arrangement lasted, but Grace took out a withdrawal card from her union in 1964 and apparently did not work in 1966. In 1967 she worked for "a month or six weeks" at the Sullivan Hotel in order "to help [the owner] out." She was unemployed in 1968. In 1969 she worked for the International Coffee Shop at the Fairbanks airport. Grace testified that she went to work for Sue Wagner at the Polaris Restaurant in February, 1970, and worked there approximately ten weeks before she was injured. Sue Wagner testified, however, that Grace had worked only seven days in the two-week period preceding her injury.

5. Manthey v. Collier, 367 P.2d 884, 888–889 (Alaska 1962); 2 A. Larson, The Law of Workmen's Compensation § 57.10, at 7–8 (1970).

6. J. B. Warrack Co. v. Roan, 418 P.2d 986, 987 (Alaska 1966); Argonaut Ins. Co. v. Indus. Accident Comm'n, 57 Cal.2d 589, 21 Cal.Rptr. 545, 371 P.2d 281, 284 (1962).

7. 2 A. Larson, The Law of Workmen's Compensation § 60.21, at 88.200 (1970).

8. *Id.* at § 57.64, at 88.26.

disabled claimant has made no bona fide effort to obtain suitable work when such work is available.[9] And, a claimant has been held not entitled to temporary total disability benefits even though she had a compensable injury when she had terminated her employment because of pregnancy and thereafter underwent surgery for the injury. Since the compensable injury was not the reason she was no longer working, temporary disability benefits for current wage losses were denied.[10]

The Board in the instant case determined that Grace Vetter was no longer employed, not because of any injury but because of her own personal desires, and found no actual impairment of her earning capacity. If this determination is supported by substantial evidence, the claim for compensation was correctly denied.

Was The Board's Finding Supported By Substantial Evidence? [11]

[7-9] Appellant sets forth numerous references to the record indicating the extent of her original injuries and the ongoing nature of her symptoms. But, as discussed above, the extent of her disability is not of consequence if it is determined that she had no intention of re-entering the labor market for reasons unconnected with her injuries.

[10] Upon reviewing the entire record we find no substantial evidence supporting the Board's finding that Grace was unwilling to find suitable employment, either because her husband was opposed to her working or because she did not desire to work. Indeed, almost all the evidence is to the contrary. Her husband's feelings were explored only indirectly.[12] At several points Grace testified that her husband had expressed a preference that she not work, primarily because the additional income placed them in a higher tax bracket, but nowhere is there any testimony that Grace's husband was opposed to her working [13] and the answer to the only direct question on this issue was that he did not care. On the issue of her desire

9. Perry's Heating Serv. v. Cashman, 104 R.I. 75, 241 A.2d 823, 826 (1968).

10. Electronic Associates, Inc. v. Heisinger, 111 N.J.Super. 15, 266 A.2d 601 (1970).

11. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Keiner v. City of Anchorage, 378 P.2d 406, 411 (Alaska 1963). The Board's decision need not be compelled under the facts as the only possible solution to the problem, as it is not the function of this court to reweigh the evidence but only to determine whether such evidence exists. Laborers & Hod Carriers, Local 341 v. Groothuis, 494 P.2d 808, 811-812 (Alaska 1972); Wilson v. Erickson, 477 P.2d 998, 1002 (Alaska 1970). It is not important whether the particular situation is subject to more than one inference, Anderson v. Employers Liab. Assurance Corp., 498 P.2d 288, 290 (Alaska 1972), as it is not the court's province to choose between competing inferences, Cook v. Alaska Workmen's Compensation Bd., 476 P.2d 29, 32 (Alaska 1970); Morrison-Knudsen Co. v. Vereen, 414 P.2d 536, 543 (Alaska 1966).

12. Grace Vetter's husband was not called as a witness at the hearing, nor was his deposition taken.

13. Q. Did your husband want you to work?
A He didn't care, really, except that he, you know, didn't care whether I worked or not, but he did make a statement that he wasn't particular, you know, if I had worked or not.
Q Didn't you say earlier this morning that he didn't want you to work because it threw him in a higher income tax bracket?
A He didn't want me to, well, I would, he didn't want me to work on account of this, you mean?
Q On account of . . .
A Oh, he had that in mind, yes.

. . . . . .

A . . . I had gone [to the Polaris Lunch] on several occasions, you know, to talk to Sue, and had coffee with her, and I knew most of the girls that worked there at that time, and I knew Sue had been having quite a bit of trouble over their help, and she had asked me to go to work, and one time my husband was with me, and he said "I don't particularly care for Grace to work." The fact remains, and it is a fact, that any income that I might receive would put him in a higher bracket. I can see his point now, but at the time he didn't particularly care for me to work.

. . . . . .

to work, Grace testified that she considered her job at the Polaris Lunch a permanent one and intended to continue working there as long as they would have her. And her employer, Sue Wagner, testified that she came in frequently following the attack asking if she could return to work.[14]

There is also considerable evidence in the record that Grace was unable to return to work due to complications resulting from her injury. While Grace did state that her main reason for not returning to work was that she wanted no more fights or arguments with anyone, she also testified that because of the headaches and kidney problems she suffered as a result of her injury, she had limited her activities in public.[15] She further testified that she had to decline an offer of a waitress job at another restaurant because she was physically unable to perform the work. Grace's physician for 15 years testified that it was his opinion that she was incapacitated as a result of her injury and was not malingering. No other medical testimony was presented.

In short, the focus of the hearing was not upon the defense that Grace was unwilling to work but rather upon the defense that her injuries resulted from a deliberate attack by her upon a customer. And whatever testimony reflected adversely upon her willingness to work was given incidentally in response to questions directed to this latter issue. Such testimony, even given its most favorable inference, does not support the finding of her unwillingness to work.

We thus find a lack of substantial evidence to support the finding of the Board that appellant Grace Vetter was unwilling to work and reverse the decision of the superior court affirming the Board's refusal to grant appellant disability compensation. We remand this case to the superior court with instructions to in turn remand the case to the Workmen's Compensation Board for further proceedings in conformity with this opinion.

CONNOR, Justice, with whom FITZGERALD, Justice, joins, dissenting.

My disagreement with the majority opinion stems not from any difference about the applicable principles but from a difference in interpreting the record.

The Board's finding of fact #3, upon which the denial of compensation is predicated, is as follows:

> "That the applicant did not suffer disability from work as a result of injury on April 24, 1970. She was able to continue working for the remaining five to six hours of her shift and did not find need to see the doctor until the afternoon of a day when she was hurt at 2 a. m. The Board believes that applicant does not want to work and that her husband, who did not want her to work before the injury, probably keeps her from working now. We believe the fact that she gives a previous earning history of minimal employment during the three years previous to injury is indicative of this."

The Board found that Mrs. Vetter suffered no disability from work as a result

Q And why were you given a check instead of cash?
A Well, I don't know really how to answer that.
Q Well, was anything said?
A Well, in the first place my husband didn't particularly care for me to go to work, and I felt as though I was capable and able, you know, to work, and he felt as though that with my income that I would have put us in a higher bracket, and Sue was aware of this.
Q Well, is what you're saying then the cash was below the table or whatever you call it? Is that what you mean?
A Well, I was paid across the board, if that's the expression.

14. Sue Wagner also testified to the effect that Grace Vetter was a good worker who would be rehired any time.

15. As is pointed out in note 4 *supra*, Grace Vetter had already had one kidney removed before the attack.

of her injury. This can mean one of two things, or both, in the context of this case: she has no ongoing symptoms which are serious enough to prevent her from working, or, regardless of her condition, she does not care to work any longer. The sentence noting that Mrs. Vetter did not immediately seek out a doctor indicates the first, i. e., one can infer that the Board doubted the seriousness of her injury. A delay in seeking medical attention would not in itself be sufficient ground to deny compensation. However, there was other evidence which implied that Mrs. Vetter was capable of returning to work but had not sought to do so. At the hearing, she was asked whether she felt capable of returning to work:

"Q. How has it affected your daily living? I mean, do you feel you are capable of going back to work right today?

A. No.

Q. Why not?

A. In the first place, I just don't feel as though I'm capable, and could even be qualified to work in the public.

Q. Why do you say that?

A. Because it could happen again.

Q. When you say 'it could happen again', what could happen again?

A. I don't want any more arguments or to fight with nobody."

Mrs. Vetter also testified concerning a job solicitation, apparently instigated by Sue Wagner. She told the offeror that she was not looking for a waitress job, and when describing the interview with him, did not indicate that she did not want the job because of ill health.

A steady bingo player reported that she had seen Mrs. Vetter playing bingo, and said that she had seen Grace play about that same amount of cards that she did (12–15) without any apparent confusion and had seen her win. Sue Wagner reported that Mrs. Vetter came in several times following the incident asking to be put back to work. In her deposition, Mrs. Vetter said that she had traveled to Australia in September of 1970 (her injury took place in April of 1970) for three months because her mother was seriously ill.

The doctors' reports would tend to indicate the ongoing nature of her symptoms. Dr. Ribar did not think she was malingering and did not think her capable of returning to work. Dr. Hanns said that physical examination revealed no distress, but the symptoms she complained of were characteristic of the type of injury she had suffered. The initial kidney problem was reported to have cleared up.

There was other evidence which indicated that Grace was not able to return to work. She described frequent, severe headaches, and said that her condition had limited her activities; she was not able to play bingo nearly as often as she had before, and generally was not as "social" as she used to be. She also said she could watch only 3 or 4 bingo cards. Her companion bingo player could not report as to how often she had seen Grace playing bingo in the months preceding the hearing. Grace said in her deposition that Sue Wagner had asked her to return to work, not that she had asked Sue:

"A. Oh yes, on several occasions I would ask—well, when she'd ask me when I was coming back, and I said, 'I hope I can come back pretty soon.'"

She also said that she felt that she was not physically able to work.

There were indications that Grace was not a serious member of the labor market. Her doctor, Dr. Ribar, was aware of her work to only a vague extent. Sue Wagner described Grace as only a temporary hire. Grace, in her deposition, revealed no real clear-cut plans as to employment.

"Q. Well, how long were you planning to work for Sue? If you had any plans.

A. Well, now that answer I couldn't give you any answer to that, because I don't know.

Q. Well, you didn't have any—

A. You don't know what happens.

Q. Well, what I'm thinking about, it wasn't anything like working for her for three months and then quitting and going some place or doing something else, you didn't have that plan in mind?

A. Oh, no, I did not have, no, no way."

There were several references to the Vetters' tax bracket and her husband's desires concerning her work.

"A. . . . and one time my husband was with me, and he said 'I don't particularly care for Grace to work.' The fact remains, and it is a fact, that any income that I might receive would put him in a higher bracket. I can see his point now, but at the time he didn't particularly care for me to work."

And later at the hearing:

"Q. Did your husband want you to work?

A. He didn't care really, except that he, you know, didn't care whether I worked or not, but he did make a statement that he wasn't particular, you know, if I had worked or not.

Q. Didn't you say earlier this morning that he didn't want you to work because it threw him in a higher income tax bracket?

A. He didn't want me to, well, I would, he didn't want me to work on account of this, you mean?

Q. On account of . . .

A. Oh, he had that in mind, yes. Yes."

And in the deposition:

"A. Well, in the first place my husband didn't particularly care for me to go to work, and I felt as though I was capable and able, you know, to work, and he felt as though that with my income that I would have received would put us in a higher bracket, and Sue was aware of this."

If the Board was tending to doubt the seriousness of Mrs. Vetter's injuries, the refusal of the waitress job offer following the incident with Hill would tend to support the inference that she was not seriously interested in obtaining a job. This, of course, is buttressed by her sporadic working history and her indefinite attitude towards work.

On the other hand, at the hearing, Grace testified that she didn't regard working at the Polaris as temporary, and that she had always thought that she would eventually return to work at the Polaris. Sue Wagner also reported that she was not ready to fire Grace following the incident, but instead indicated that she just wanted things to calm down a bit before taking her back.

Much of Grace Vetter's testimony was contradicted by that of other persons, indicating that perhaps she was not as seriously injured as she maintained, and that she was not altogether serious about any work plans. Another matter which is essentially unrelated to the compensation issues but which does relate to her credibility concerns whether she knew Jay Hill before the incident in the cafe. She steadfastly maintained that she did not. However, a sister to Sue Wagner and Jay Hill both maintained that Grace knew her assailant previous to the brawl, as did Sue Wagner. And the Board also had the benefit of the claimant's demeanor during the hearing which lasted for several hours.

Admittedly the record in this case is not altogether enlightening. But I think there

was enough for the Board to infer that Mrs. Vetter did not desire to resume work. I would, therefore, uphold the Board's denial of the claim.

C. Bruce FICKE, Appellant,

v.

ALASKA AIRLINES, INC., an Alaska corporation, and Alyeska Resort, Inc., Appellees.

No. 1698.

Supreme Court of Alaska.

July 12, 1974.

Action by airline and its subsidiary for specific performance of contract for sale of resort property. The Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., granted specific performance and vendor appealed. The Supreme Court, Erwin, J., held that, generally, evidence sustained findings adverse to vendor and favorable to purchasers, including finding that provision that deposit might be retained by vendor as advance rent should prior lease be reinstated was a penalty and that, accordingly, vendor's retention of deposit operated to estop vendor from relying on purchasers' delay in performance.

Affirmed.

Connor, Fitzgerald and Boochever, JJ., did not participate.

1. Attorney and Client ⇐81

Attorney retained to negotiate terms of agreement binds client to promises made within scope of that authority.

2. Vendor and Purchaser ⇐130(2)

Meaning of marketable title is not determined by title examining practices; marketable title is not a perfect one and test is whether conveyance carries with it reasonable probability that purchaser will be subjected to lawsuit.

3. Vendor and Purchaser ⇐78

Time is usually not of essence in land sale contract.

4. Contracts ⇐212(1)

When time is not essence of bargain, performance must still occur within reasonable period.

5. Specific Performance ⇐126(2)

Court ordering agreement performed need not enforce forfeiture, even though provision was product of hard bargaining.

6. Specific Performance ⇐121(3, 11)

Evidence in action by airline and subsidiary for specific performance of contract to purchase resort property from vendor supported findings that vendor breached in several respects, although it did not support finding that there was breach as to tender of marketable title, supported findings that purchasers did not breach in several claimed respects, but did not support findings of no breach in other respects, supported findings that time was not of essence, that provision for retention of deposit as rent should lease be reinstated was a penalty and that, therefore, vendor was equitably estopped, by retention of benefits, from relying on purchasers' delay, and that purchasers' failure to seek registration of escrowed shares was but a minor breach, so that purchasers were entitled to specific performance.

7. Trial ⇐53, 66

Record did not sustain vendor's claim that trial court, in purchasers' action for specific performance in which court sought first to dispose of specific performance claim before proceeding to vendor's damages claims, had not admitted certain of vendor's evidence on issue of unclean hands defense or that vendor, who sought to introduce his evidence at second stage of trial, had been foreclosed from showing that transaction evidenced unclean hands.

8. Specific Performance ⇐131

Vendor's claims for damages which allegedly arose from prior agreements which

this aspect of Gonzales' appeal and defer ruling on its merits until we have decided the issues in Gonzales' appeal in Supreme Court No. 3348. In this latter case, Gonzales seeks to overturn his convictions of two separate sales of heroin for which he received two consecutive twenty year terms.[15] Given the length of the sentences involved in the Gonzales cases and their close interrelationship, we conclude that it would be inappropriate to decide the sentence appeal in the case at bar at this time.

The judgment and conviction is Affirmed. Jurisdiction of the sentence appeal is retained for subsequent decision.

Less important than 1st Hewing + Vetter more an application

(3) Economic wage-loss Basis for computing UNSCHEDULED PPD

Virgil HEWING, Appeliant,

v.

PETER KIEWIT & SONS and Aetna Casualty & Surety, Appellees.

No. 3511.

Supreme Court of Alaska.

Nov. 9, 1978.

Claimant appealed from decision of the Alaska Workmen's Compensation Board claiming that it inadequately compensated him for permanent disability sustained as a result of an industrial injury. The Superior Court, Third Judicial District, Anchorage, James K. Singleton, J., affirmed award, and claimant appealed. The Supreme Court, Boochever, C. J., held that Board did not consider proper factors in finding that claimant had no loss of earning capacity, and cause would be remanded.

Remanded.

Matthews, J., dissented with reasons in which Rabinowitz, J., joined.

1. Workers' Compensation ⚩1624, 1950

Workmen's Compensation Board erred in making determination that claimant had no loss of earning capacity after certain date and not considering certain factors, such as fact that postinjury income was from sales of junk and "barbeque" rather than from employment, that there was no breakdown between gross and net income, the difference in wage levels between the two time periods, and the state employment counselor's testimony as to lack of any suitable employment for claimant because of his work-related disability and, thus, case would be remanded to Board for determination of whether claimant was employable rather than totally disabled under the "odd-lot" doctrine and for determination of loss of earning capacity. AS 23.30.190(20), 23.30.210(a).

2. Workers' Compensation ⚩803

For lack of motivation to be significant in determining claimant's entitlement to workmen's compensation there must be showing that work is available within employee's capabilities. AS 23.30.190(20).

3. Workers' Compensation ⚩803

Workmen's Compensation Board was correct in attempting to determine claimant's loss of earning capacity rather than rating claimant purely on physical impairment alone. AS 23.30.190(20), 23.30.210(a).

4. Workers' Compensation ⚩840

In order to determine workmen's compensation claimant's award, where there is a substantial difference in preinjury and postinjury wage levels, postinjury earnings should be corrected to correspond with general wage level in force at time that preinjury earnings were calculated, or preinjury earnings should be recomputed at scale in effect at time of postinjury earnings. AS 23.30.190(20), 23.30.210(a).

5. Workers' Compensation ⚩11

One major purpose of Workmen's Compensation Act is to furnish a simple, speedy

15. *See* note 4, *supra*.

remedy for injured workers whereby they may be compensated for injuries arising out of their employment. AS 23.30.005 et seq.

R. Samuel Pestinger, Pettyjohn & Pestinger, Anchorage, for appellant.

George M. Kapolchok, Atkinson, Conway, Young, Bell & Gagnon, Anchorage, for appellees.

OPINION

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

BOOCHEVER, Chief Justice.

This matter is before us on a second appeal by Hewing, contending that the Alaska Workmen's Compensation Board's award, affirmed by the superior court, inadequately compensates him for permanent disability sustained as a result of an August 5, 1969 industrial injury. Initially, the Board awarded Hewing compensation for 25 percent permanent partial disability based on a finding of "25% loss of the use of the man as a whole" and ordered a payment of $4,250.00 as lump sum compensation. We remanded for findings by the Board based on a measure of lost earning capacity rather than a measure of the purely physical injury sustained. On remand, the Board found that between June 30, 1970 and August 20, 1973, Hewing's wage earning capacity was so minimal that it could be considered to be zero. The Board, however, found that his earnings after August 20, 1973 from sales of items including used furniture and from barbecuing meat were in excess $5,000.00 per year and thus more than $4,711.74, his highest earnings as a cement mason for any of the three years prior to his injury. The Board concluded that he had no loss of earning capacity after August 20, 1973. Hewing was therefore awarded compensation of $9,617.52 for the period to August 20, 1973. Deducted from this sum was the $4,250.00 previously paid as compensation for partial permanent disability so that on remand, the award was an additional $5,367.52.

Hewing appeals contending that he is totally permanently disabled and that his minimal earning capacity falls in the "odd lot" category not altering his 100 percent disability status.

[1] We have concluded that the Board erred in finding that Hewing had no loss of earning capacity after August 20, 1973.

For a better understanding of the issues, we shall outline the salient facts. On August 5, 1969, Virgil Hewing, who was then 55 years old, fell about 20 feet when the floor gave way as he and 3 others were finishing cement on a Peter Kiewit construction job near Fairbanks. Mr. Hewing injured his back and fractured 2 bones in his left wrist. He filed a timely claim with the Workmen's Compensation Board; and on November 24, 1970, the Workmen's Compensation Board determined that he had "incurred a permanent partial disability equal to 25 percent loss of use of the man as a whole." That finding was challenged by a complaint for an injunction in which Mr. Hewing claimed permanent total disability. The injunction was denied by the superior court, and an appeal was taken to this court. In *Hewing v. Alaska Workmen's Compensation Board*, 512 P.2d 896 (Alaska 1973), this court concluded that the Board's findings of fact were insufficient to permit an intelligent review of the case.[1] We were concerned primarily that the Board applied an incorrect standard for determining the award, noting that unscheduled partial disability awards should be made for economic loss, not physical injury as such. We also pointed out that the availability of work in the employee's community, which he is able to perform in his injured condition, is an important determinant in establishing earning capacity. The evidence at the first

1. The Board's decision considered whether or not a penalty should be assessed against the employer for failure to make timely payment for temporary total disability, as well as the degree of permanent disability. A large portion of its decision was addressed to the penalty question.

hearing indicated that Mr. Hewing was capable of doing only light, unskilled work, and the Board was without evidence that work suited to his capabilities was regularly and continuously available in Anchorage. We remanded the case for further findings.

On August 20, 1974, prior to the determination by the Board, Mr. Hewing was driving his truck when he was hit by another motorist. He contacted his insurance company [2] to recover his medical costs and lost income as a result of the accident. In the course of two recorded interviews with the insurance adjuster, Mr. Hewing indicated that he made more than $5,000.00 in the past year selling "junk" and "barbeque." [3] He also indicated a loss of more than $3,000.00 since the automobile accident.[4]

On February 13, 1975, the Workmen's Compensation Board reheard the Hewing case pursuant to this court's remand. In arriving at its decision, the Board examined the medical records in the case as well as the recorded interview with the insurance adjuster. A deposition from an employment counselor from the Department of Labor was also introduced. The Board rendered a detailed decision, the conclusions of which we have set forth above.[5]

The medical evidence presented clearly indicated that Hewing had suffered permanent damage as a result of his industrial injury. Prior to the first hearing, Dr. Voke rated the disability at 10 percent. The discharge summary for Providence Hospital of April 21, 1970 indicated marked degenerative arthritis at three levels of the cervical spine which was believed to be secondary to the original injury, as well as tenderness in the left hand. Dr. Harrel on September 27, 1973 found that permanent disability was 50 percent or more and that Mr. Hewing would never be able to do his regular work. On May 20, 1974, Dr. Von Wichmann wrote: "I doubt that he will be able to work as a laborer in the future because of the symptoms that he has."

Joan C. Owens, an employment counselor with the Alaska Department of Labor, testified that she did not know of any job that Hewing could do. In answer to whether she could place him in any employment, she stated:

> I don't believe that I could. I really don't. He is just really badly crippled and handicapped with his lack of education, and age is a handicap also, although we like to think it's not.

[2] The Board considered significant her testimony in answer to a question as to whether she believed that he was motivated to go back to work:

> A No, I didn't. I felt that—that he himself felt that he was too—had been too badly injured to work, and also handicapped with his lack of education, and for twenty years, I believe it was, he worked in cement work—
>
> Q Uh-hum.
>
> A And obviously he couldn't do that any more.

The fact that one who is physically disabled from manual labor and is unqualified in other types of work is not motivated to seek work, is not, however, the equivalent of a physically competent person being unem-

2. The other motorist was uninsured, and Mr. Hewing carried uninsured motorist coverage.

3. The exact nature of this work is unclear. When questioned further at the 1975 hearing, Mr. Hewing explained that he bought used furniture at auctions and resold it. "Barbeque" was never defined.

4. The time lag between the interview and the accident is unclear, but it could not have exceeded 6 months because the accident occurred in August 1974, and the adjuster testified about his interview with Hewing at the February 1975 hearing.

5. The Board was aware that the doubt surrounding Mr. Hewing's earnings was due to the untrustworthiness of his own testimony. Before the Board, he downplayed his income, but he inflated it to the insurance adjuster. As the Board stated:

> If applicant's testimony is to be accepted, he is permanently and totally disabled for workmen's compensation purposes but has sustained a loss of income of between $5,200 and $15,600 for the purposes of his claim for damages. Obviously both cannot be correct. We believe the truth lies somewhere in between.

ployed due to lack of motivation. For lack of motivation to be significant, there must be a showing that work is available within the employee's capabilities.

The Board in its decision determined that Hewing "has some permanent partial disability but is not permanently and totally disabled." In not awarding any compensation for the period after August 20, 1973, the Board must have concluded that the partial disability did not affect Hewing's earning capability.

The Board found that Hewing had virtually no schooling except what he was exposed to in post-injury vocational rehabilitation efforts which proved largely unsuccessful. His prior history of employment was as a cement finisher since 1957, some truck driving and farming. All of these factual findings seem to be supported by substantial evidence.

This appeal involves two questions: whether a manual laborer, with practically no education, who is no longer able to enter the manual labor market because of an industrial injury, is entitled to no compensation for loss of earning capacity because he may engage in the sale of barbeque, used furniture and other items;[6] and if he is entitled to compensation, the amount thereof.

AS 23.30.190(20), in effect at the time of Hewing's injury, provided for unscheduled permanent partial disability based on 65 percent of the difference between his pre-injury average weekly wages and his wage earning capacity after his injury in the same employment or otherwise.[7] "Wage earning capacity" is defined in AS 23.30.-210(a) as follows:

> In a case of partial disability under § 190(20) or 200 of this chapter the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

The Board found that Hewing had actual post-injury yearly earnings in excess of $5,000.00, and, in effect, that those earnings fairly and reasonably represented his wage earning capacity. Since his earnings as a cement mason during the three years prior to the 1969 injury did not exceed $4,711.74 per year, the Board concluded that he suffered no loss in earning capacity.

[3] The Board was correct in attempting to determine Hewing's loss of earning capacity rather than rating Hewing purely on physical impairment alone. It was to assure a rating based on loss of earning capacity that we remanded the case after the first appeal stating:

> The availability of work in the employee's community which he can perform in his injured condition is an important determinant of earning capacity. . . . One permissible inference from these notations is that appellant was able to perform only light, unskilled work. No evidence was presented that work suited to appellant's capabilities was regularly and continuously available in his area community. Further, the Board failed to consider the availability of suitable work or to make a subsidiary finding on this factor. 512 P.2d at 900. (footnotes omitted)

Subsequently, in *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974), we discussed the applicable criteria as follows:

6. Mr. Hewing's testimony was to the effect that friends helped him load and unload his truck.

7. Ch. 193 § 7(3)(t), SLA 1959 (current version at AS 23.30.190(20)) (66⅔ percent of the difference). The Board computed compensation based on 65 percent of Hewing's wage.

> The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability or, more precisely, a decrease in earning capacity due to a work-connected injury or illness. Factors to be considered in making this finding include not only the extent of the injury, but also age, education, employment available in the area for persons with the capabilities in question, and intentions as to employment in the future. [footnotes omitted]

[4] What is necessary is to compare the earnings made prior to the injury with the earnings likely to be made in the future. Normally, the comparison of post-injury earnings and those prior to the injury involves a relatively brief span of time. In Hewing's case, we are comparing earnings of 1973–74 with those of 1966–69. Where there is a substantial difference in wage levels, as there is obviously here, the post-injury earnings should be corrected to correspond with the general wage level in force at the time that pre-injury earnings were calculated,[8] or the pre-injury earnings should be recomputed at the scale in effect at the time of the post-injury earnings.

It is impossible, of course, to predict an employee's earnings in the future, but an award must nevertheless be made without waiting until the end of the employee's worklife.

> The only possible solution is to make the best possible estimate of future impairment of earnings, on the strength not only of actual post-injury earnings but of any other available clues.
>
> It is uniformly held, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident. The position may be best summarized by saying that actual post-injury earnings will create a presumption of earning capacity commensurate with them, but the presumption may be rebutted by evidence independently showing incapacity or explaining away the post-injury earnings as an unreliable basis for estimating capacity. Unreliability of post-injury earnings may be due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant; and the temporary and unpredictable character of post-injury earnings.
>
> The ultimate objective of the disability test is, by discounting these variables, to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured, taking wage levels, hours of work, and claimant's age and state of training as of exactly the same period used for calculating actual wages earned before the injury. [footnotes omitted][9]

In Hewing's case, in part due to his inability to express himself clearly and in part possibly due to his own cupidity, the Board was confronted with a difficult task in ascertaining the amount of post-injury earnings and whether the presumption that those earnings represented his earning capacity was rebutted. The Board should have considered the increase in general wage levels since the accident, and the possibility that Hewing's post-injury earnings were of a temporary and unpredictable nature. The testimony hardly indicated the type of permanent business or employment from which one could conclude that Hewing

8. Larson, 2 Workmen's Compensation Law § 57.32 at 10–75 (Matthew Bender 1976); *Whyte v. Industrial Commission*, 71 Ariz. 338, 227 P.2d 230 (1951); *Maxey v. Major Mechanical Contractors*, 330 A.2d 156 (Del.1974).

9. Larson, Workmen's Compensation Law § 57.21 at 10–39 to 10–40.

will be likely to continue earning as much or more than he could before his disabling injury. Moreover, in his testimony before the Board, Hewing indicated that his earnings from sales of items were maybe $100.00 a week "gross," so that it is difficult to ascertain the amount of his net earnings.

In *Karr v. Armstrong Tire & Rubber Co.*, 216 Miss. 132, 61 So.2d 789 (1953), a somewhat similar situation was presented. At an initial hearing, an order was entered denying a partial permanent disability claim because the claimant had higher weekly earnings after injury than at the time of injury. On appeal, the state supreme court remanded for reconsideration in order to ascertain whether the higher post-injury earnings actually represented wage earning capacity when considering the general rise in wages and other factors discussed in Larson's Workmen's Compensation Law.

The Board erred in not considering such factors, including that the post-injury income was from sales of junk and barbeque rather than from employment, that there was no breakdown between gross and net income, the difference in wage levels between the two time periods and the state employment counselor's testimony as to lack of any suitable employment for Hewing because of his work-related disabilities. Thus, the Board's conclusion that there was no loss of wage earning capacity after August 20, 1973 cannot be upheld.

The "odd-lot" doctrine was applied in *J. B. Warrack Company v. Roan*, 418 P.2d 986 (Alaska 1966), where medical opinion revealed a physical impairment of between 40 and 45 percent. This court on appeal upheld a finding of total disability stating:

> For workmen's compensation purposes total disability does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. The evidence here discloses that Roan is a carpenter but is unable physically to follow that trade. He is not qualified by education or experience to do other than odd jobs provided they are not physically taxing. As the Supreme Court of Nebraska has pointed out, the "odd job" man is a nondescript in the labor market, with whom industry has little patience and rarely hires. Work, if appellee could find any that he could do, would most likely be casual and intermittent. In these circumstances we believe the Board was justified in finding that appellee was entitled to an award for permanent total disability under the Alaska Workmen's Compensation Act. [footnote omitted] *Id.* at 988.

From the testimony, the question is presented as to whether Hewing's post-injury earnings are in the category of "odd lot" employment, and thus do not preclude a finding of permanent total disability. The term is explained in Justice Cardozo's opinion in *Jordan v. Decorative Co.*, 230 N.Y. 522, 130 N.E. 634, 635–36 (1921):

> He [the plaintiff] was an unskilled or common laborer. He coupled his request for employment with notice that the labor must be light. The applicant imposing such conditions is quickly put aside for more versatile competitors. Business has little patience with the suitor for ease and favor. He is the "odd lot" man, the "nondescript in the labor market." Work, if he gets it, is likely to be casual and intermittent. . . . Rebuff, if suffered, might reasonably be ascribed to the narrow opportunities that await the sick and halt. [footnote and citations omitted]

[5] We are cognizant of the long delays encountered in disposing of this claim. The case has twice been appealed to us and involves a 1969 injury and a claimant now 65 years of age. One major purpose of Workmen's Compensation acts is to furnish a simple, speedy remedy for injured workers whereby they may be compensated for injuries arising out of their employment. *Johnson v. Ellamar Mining Company*, 5 Alaska 740, 741 (1917). We believe that, normally, the Alaska act works well to serve that purpose. In a case such as this,

further litigation will probably mitigate against the interests of both the insurance carrier and the employee.

Nevertheless, we find it necessary to order a remand to the Board once more for the purpose of rating Hewing's disability. Should the Board determine that Hewing is employable rather than totally disabled under the "odd-lot" doctrine, then the Board should determine his loss of earning capacity. The Board should consider all the factors outlined or referred to in this opinion on the question of Hewing's employability or wage earning capacity.[10]

We request that the Board's decision be expedited.[11]

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

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

For the reasons expressed in the opinion of the superior court, published here as an appendix, I believe that there is substantial evidence to support the Board's decision.

APPENDIX A

SUPERIOR COURT DECISION ON APPEAL

Claimant, Hewing, commenced this appeal from a decision of the Alaska Workmen's Compensation Board denying him permanent total disability compensation. The matter had previously been through this court to the Alaska Supreme Court and was sent back for further findings of fact. *See Hewing v. Alaska Workmen's Compensation Board*, 512 P.2d 896 (Alaska 1973). The Board found that Hewing had current earnings greatly in excess of those he had prior to his injury, and consequently had not suffered a permanent earning impairment as a result of the injury.

Claimant makes two contentions on appeal. First, that given his age, education, background, and experience, he is in effect in the "odd lot" category and has no reasonable expectations of future earnings, and that consequently his occasional earnings do not bar a finding of total disability. The evidence on plaintiff's earning capacity came largely from his own statements which were substantially impeached. The Board could find, as it did, that Hewing's earnings from buying and selling used furniture and as a barbeque cook were not transient but were reasonably likely to continue at their present level in the future, and that consequently Hewing was not an "odd lot" employee. In reaching this conclusion the Board could consider the rehabilitation specialists' comments regarding Hewing's motivation to seek other work.

Claimant's second contention is that the Board's finding does not adequately take into account inflation since the time of his injury. The Board found that Hewing's earnings at the time of his injury from his occupation were roughly $4,000. It further found that his earnings at the time of the hearing were in substantial doubt due to the untrustworthiness of Hewing's testimony. At the hearing he downplayed his income from his furniture business, but in response to questions from an insurance adjuster investigating an unrelated personal injury case, he had indicated a consistent income of from $100 to $300 per week. Consequently, after evaluating Hewing's testimony, the Board concluded that his true earning potential was mid-way between the two extremes, i. e., 0 and $300 a week or roughly $150 per week. One Hundred and Fifty Dollars per week times 52

10. Aside from possible evidence as to wage levels, no new testimony should be required as there is an ample record from which the Board may render its decision. To determine Hewing's post-injury wage level, the Board should consider Hewing's testimony that friends helped him load and unload his truck. If this is a critical part of his post-injury earnings, the Board must evaluate how Hewing could perform this function, either working for himself or others. If he worked for himself and would likely have to hire an assistant, this would affect his wage level.

11. The Board should issue its amended decision within 30 days from the date the matter is remanded to it, unless unusual circumstances prevent such expedition.

weeks is roughly $7,800, which when compared to Hewing's pre-accident earnings of $4,000 would more than adequately cover any inflation.

The difficulty with this case lies in the fact that claimant is in the best position to testify truthfully regarding his current earnings and those activities which he can in fact perform. He has done so and given the Board reasonable grounds to doubt his credibility. Since claimant's out of court admissions are evidence which has been adequately verified, the Board could give it what weight they thought it deserved.

IT IS THEREFORE ORDERED, the decision of the Workmen's Compensation Board is affirmed.

/s/ JAMES K. SINGLETON, Jr.
JAMES K. SINGLETON, JR.
Judge of the Superior Court

William BAILEY, Jr., Appellant,

v.

LITWIN CORPORATION and Travelers Insurance Company, Appellees.

No. S-378.

Supreme Court of Alaska.

Jan. 17, 1986.

Rehearing Granted in Part and Opinion Amended April 7, 1986.

Pipe fitter who incurred work-related back injury filed for workers' compensation benefits. The Workers' Compensation Board awarded claimant temporary total disability benefits for eight-month period and $6,000 lump-sum payment for permanent partial disability. Claimant appealed for additional temporary total disability compensation and different calculation of permanent partial disability award, as well as attorney fees and costs. The Superior Court, Third Judicial District, Anchorage, Brian Shortell, J., affirmed Board's decision, and claimant appealed. The Supreme Court, Burke, J., held that: (1) Board's failure to consider medical stability in determining cessation of temporary total benefits was not improper; (2) Board properly terminated claimant's temporary total disability benefits; (3) the use of *Absher* formula to calculate lump sum permanent partial disability award was improper; and (4) claimant's wage earning capacity was ten percent compared for purposes of determining permanent partial disability.

Affirmed in part, reversed in part, and remanded.

Matthews, J., filed concurring opinion, in which Rabinowitz, C.J., joined.

1. Workers' Compensation ⇐1939.4(4)

Court's review of Workers' Compensation Board's decision is subject to substantial evidence test only where Board has applied proper legal test in reaching its findings.

2. Workers' Compensation ⇐863

Workers' Compensation Board did not err in focusing on claimant's employment and failing to explicitly address stability of his medical impairment in determining temporary disability, as claimant's ability to return to work, rather than medical stability, could be used to indicate cessation of temporary disability.

3. Workers' Compensation ⇐1375

Workers' compensation benefits claimant's return to work after doctors had released claimant for work without restrictions, was sufficient evidence to rebut presumption of continuing compensability for temporary total disability for his back injury, even though both doctors subsequently retracted releases.

4. Workers' Compensation ⇐1626

Sufficient evidence supported finding that gaps in workers' compensation claimant's employment as pipe fitter were due to economy and construction cycles rather than claimant's disability.

5. Workers' Compensation ⇐803

Workers' compensation benefits claimant whose average weekly wage during ten-month period was higher than preinjury average weekly wage, suffered no actual wage loss during ten-month period and was not entitled to temporary partial disability benefits.

6. Worker's Compensation ⇐1644

Determination that workers' compensation claimant had wage earning capacity loss of ten percent fairly represented claimant's future losses under permanent partial disability statute, AS 23.30.210, as Workers' Compensation Board could utilize factors other than actual earnings to fix wage earning capacity in interests of justice.

7. Workers' Compensation ⇐1005

Workers' compensation claimant's permanent partial disability lump-sum award could not be based solely on relationship between claimant's impaired earning capacity and statutory maximum award under AS 23.30.190(b), as it would violate purpose of statute providing that compensation be based on difference between employee's average weekly wages and his wage-earning

capacity after injury, AS 23.30.190(a)(20); overruling *Absher v. State, Department of Highways*, 500 P.2d 1004.

8. Workers' Compensation ⇐876

Workers' Compensation Board could not reduce permanent partial disability benefits of employee with unscheduled injuries so that he would not receive more than employee with more serious scheduled injury; overruling *Absher v. State, Department of Highways*, 500 P.2d 1004.

9. Workers' Compensation ⇐1013

In determining award for permanent partial disability for claimant who has requested lump sum, Workers' Compensation Board should first determine whether it is in interest of justice that lump sum be paid, and if so should project employee's total future loss up to $6,000 limit, after which employee can receive present value of his total future loss in lump sum, under AS 23.30.190(a)(20); overruling *Absher v. State, Department of Highways*, 500 P.2d 1004.

10. Workers' Compensation ⇐1981

Workers' compensation benefits claimant was entitled to receive award for attorney's fee on amount of compensation controverted and awarded under AS 23.30.145(a), and for costs and proceedings, under AS 23.30.145(b), upon award of additional permanent partial disability benefits beyond those already paid by employer and its insurer.

Chancy Croft, Anchorage, for appellant.

Kenneth P. Jacobus, Hughes, Thorsness, Gantz, Powell & Brundin, Anchorage, for appellees.

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

OPINION

BURKE, Justice.

This case involves a claim for workers' compensation benefits by William Bailey, Jr. After incurring a work-related injury, Bailey received temporary total disability benefits from November 1980 until July 1981. In April 1982, he received a $6000 lump-sum payment for permanent partial disability. Bailey now maintains that he was entitled to continue receiving temporary total disability compensation between July 1981 and May 1982. He also claims the Workers' Compensation Board (Board) erred in calculating his permanent partial disability award and in refusing to award him attorney's fees and costs.

I. FACTUAL BACKGROUND

Appellant Bailey is fifty-one years old and has been a pipefitter for the last twenty-eight years. He injured his back on August 14, 1980, while leaning over a pipe to pick up a tool box and a transmitter. At the time, he was working for Appellee Litwin Corporation (Litwin), on a construction project at the Tesoro plant in Kenai, Alaska.

After his injury, Bailey was examined by several doctors and chiropractors, who formed differing assessments of his condition. In August 1980, Dr. Bruce W. Teague, a chiropractor, examined Bailey and released him for work. Bailey immediately resumed work for Litwin as a pipefitter. Dr. William West, another chiropractor, examined Bailey the following September and October and released him for regular work on September 29, 1980. Bailey was laid off November 4, 1980 when Litwin reduced its workforce. On the same day, a third chiropractor, Dr. Gene Kremer, examined Bailey and took him off work through January 1981. Dr. Michael Newman, an orthopedic specialist, treated Bailey and released him for work, without restrictions, effective April 21, 1981.[1] In April, Dr. Kremer

1. It should be noted, however, that Dr. Newman stated that it was his experience that if someone was sent back to the North Slope with written restrictions, they would generally not be accepted for work. Thus, an employer would often give the person a modified job as long as he was released without restrictions. Later, Dr. Newman stated that he thought Bailey was restricted

again took Bailey off work, but released him for work, without restrictions, as of July 6, 1981.[2]

Bailey resumed work as a hydro-tester with National–NANA on the North Slope from July 13 to August 16, 1981, when he was terminated due to a reduction in force. On October 1, 1981, he began work on the North Slope in "instrumentation" [3] for Professional Contractors, Inc. (PCI) and continued until November 4, 1981.

Christopher W.M. Horton, M.D., conducted an independent medical examination of Bailey on November 25, 1981, and recommended that Bailey continue his work without any restrictions. He evaluated Bailey as medically stationary and rated him as having a ten percent whole body permanent physical impairment.

Ross Brudenell, M.D., an orthopedic surgeon, examined Bailey on February 23, 1982, and determined that he was not medically stationary and did not release him for work. Later, Dr. Brudenell stated that Bailey's condition was medically stationary as of March 3, 1982, but that he "will probably risk increasing symptoms if he tries to do heavy, manual labor ... [and that] his working activity which related to instrument controls, was much more appropriate than any attempts to try to get back his original occupation."

On March 8, 1982, Bailey returned to the North Slope to work for the F.J. Early Company, primarily in hydro-testing and instrumentation. He was terminated April 26, due to a reduction in forces, but hoped to be recalled.

Dr. Newman examined Bailey again on May 18, 1982, and considered his condition medically stationary and unchanged since April, 1981.

In sum, during the ten-month period from July 7, 1981 through May 7, 1982, Bailey worked a total of 1170 hours and earned $36,807.85 (approximately $876 per week). In 1977 his average weekly wage was also $876. In 1978 and 1979 Bailey worked approximately 1138 and 1227 hours, with average weekly wages of $517.88 and $523.68, respectively. His average weekly wage in 1980 before he was injured was $832.94.

Bailey received temporary total disability benefits from November 10, 1980, through July 6, 1981. While the payment date is unclear from the record, it is undisputed that the insurance carrier, Travelers Insurance Company (Travelers), awarded Bailey a lump sum payment of $6,000, based on a ten percent loss of earning capacity and Dr. Horton's impairment rating.

In February 1982, Bailey filed a petition for adjustment of claim with the Workers' Compensation Board. In its second decision and order,[4] the Board determined that Litwin and Travelers properly terminated Bailey's temporary total disability benefits in July 1981. The Board decided Bailey was entitled to $6000 in permanent partial disability benefits. It arrived at this figure by multiplying his ten percent loss of earning capacity by $60,000, the maximum benefits allowable under AS 23.30.190(b). Because Litwin and Travelers had already paid $6000 to Bailey voluntarily, the Board

in the sense that his back might hurt when he had to work with heavy equipment.

2. In a report dated February 25, 1982, Dr. Kremer qualified this release:

> Initially he was released with no work restrictions on July 6, 1981. But in follow up reports after that date it was indicated that awkward bending and lifting positions would likely induce back spasms. Mr. Bailey still should not put that type of stress on his lower back nor should he in the future unless his low back weakness completely resolves. He can at this time and since 7–6–81 do "instrumentation" work which requires little more physical effort other than standing and walking.

3. "Instrumentation" is a specialty trade within the general trade of pipefitting. It involves the fitting of small, lightweight pipes. Instrumentation accounts for approximately ten percent of all pipefitting work. Of the members in Bailey's union, about ten percent are qualified in instrumentation.

4. The original decision and order was void. The Board reconsidered the matter and issued a different decision and order on January 24, 1983.

denied Bailey's claim for costs and attorney's fees. The superior court affirmed the Board's decision and order.

II. TEMPORARY TOTAL DISABILITY [5]

The Board found that by July 16, 1981, both Dr. Newman and Dr. Kremer had released Bailey for work without restriction, and that he had in fact returned to work on July 13. In the Board's opinion, these facts overcame any presumption that Bailey continued to be temporarily totally disabled; thus, the Board concluded that Litwin and Travelers properly terminated his temporary benefits. The Board found also that any periods of unemployment Bailey experienced between July 1981 and May 1982 were "due to the economy and construction cycles and not to the employee's injury."

Bailey argues that he is entitled to temporary total disability benefits from July 1981 through May 1982 because he was not medically stable as of July 1981, his medical condition prevented him from working full-time, and he was being retrained in instrumentation.[6]

The Alaska Workers' Compensation Act (Act), AS 23.30.005–.270, creates a presumption of compensability. AS 23.30.120(1). If, however, substantial evidence [7] is introduced to the contrary, the presumption is rebutted and "drops out." The claimant then bears the burden of proving all elements of the claim. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 870 (Alaska 1985); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The Board's written decision and order explicitly states that evidence introduced by Litwin and Travelers was sufficient to overcome the presumption. Although the Board did not expressly so state, we assume this same evidence lead it to conclude that Bailey had failed to prove the necessary elements of his claim.

[1] In reviewing the Board's decision, our task is to determine if its findings of fact and conclusions of law are supported by "substantial evidence in light of the whole record." *Delaney v. Alaska Airlines*, 693 P.2d 859, 863 (Alaska 1985); *Beauchamp v. Employers Liability Assurance Corp.*, 477 P.2d 993, 997 (Alaska 1970). Under this standard, we may not reweigh the evidence or choose between competing reasonable inferences. *Delaney*, 693 P.2d at 863; *Beauchamp*, 477 P.2d at 997.[8] The substantial evidence test, however, is applicable "only where the Board has applied the proper legal test in reaching its findings." *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981) (quoting *Riddle v. Broad Crane Engineering Co.*, 53 Mich.App. 257, 218 N.W.2d 845, 846–47 (Mich.App.1974)).[9]

5. AS 23.30.185 provides:

> *Compensation for Temporary Total Disability.* In case of disability total in character but temporary in quality, 66⅔ percent of the injured employee's average weekly wages shall be paid to the employee during the continuance of the disability.

A recent amendment substitutes "80 percent" for "66⅔ percent," and "spendable weekly wages" for "average weekly wages." It applies to injuries sustained on or after January 1984 only. Ch. 70, § 6, SLA 1983.

6. Bailey's last argument is without merit. While Bailey learned new skills in instrumentation, there is no evidence that he had undertaken an "approved vocational rehabilitation program." *Cf. Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163 (Alaska 1982) (temporary benefits continue while employee is enrolled in an approved vocational rehabilitation program).

7. "Substantial evidence" has consistently been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978). *See also Veco, Inc. v. Wolfer*, 693 P.2d 865, 869 (Alaska 1985); *Delaney v. Alaska Airlines*, 693 P.2d 859, 862–63 (Alaska 1985).

8. *See also Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981); *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 593 n. 8 (Alaska 1979); *Miller*, 577 P.2d at 1049; *Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264, 265 (Alaska 1974).

9. *See also Hewing v. Alaska Workmen's Compensation Bd.*, 512 P.2d 896, 898 (Alaska 1973) (scope of review not limited to substantial evidence test where Board's decision rests on erroneous legal foundations); *Vetter*, 524 P.2d at 265 (court may consider whether an award is contrary to law).

A. *The Test for Termination of Temporary Disability*

Bailey claims that he is entitled to additional temporary benefits after July 1981 because he was not considered medically stable until after November 1981. In concluding that his temporary benefits were properly discontinued in July 1981, the Board made no express findings of fact regarding Bailey's medical stability.[10] Our first task is to determine if the Board erred in its apparent failure to consider medical stability in deciding when temporary total benefits should cease.

The Act defines "disability" generally as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." AS 23.30.265(10). The Alaska territorial court defined temporary total disability as "the healing period or the time during which the workman is wholly disabled and unable by reason of his injury to work." *Phillips Petroleum Co. v. Alaska Industrial Board*, 17 Alaska 658, 665 (D.Alaska 1958) (quoting *Gorman v. Atlantic Gulf & Pacific Co.*, 178 Md. 71, 12 A.2d 525, 529 (1940)). The *Phillips* court explained:

> A claimant is entitled to compensation for temporary total disability during the period of convalescence and during which time the claimant is unable to work, and the employer remains liable for total compensation until such time as the claimant is restored to the condition so far as his injury will permit. *The test is whether the claimant remains incapacitated to do work by reason of his injury, regardless of whether the injury at some time can be diagnosed as a permanent partial disability.*

17 Alaska at 666 (citations om..ted) (emphasis added).

We reiterated this emphasis on earning capacity in *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264 (Alaska 1974), by stating:

> The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness.

524 P.2d at 266 (footnote omitted); *see also Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 594 (Alaska 1979).[11]

[2] Our previous cases stress the claimant's ability to return to work and indicate that medical stability is *not* necessarily the point at which temporary disability ceases. We hold, therefore, that the Board did not err in focusing on Bailey's employment and

10. In its second decision and order, the Board stated, "We find the doctors' release and the employee's return to work overcame any presumption that the employee continued to be temporarily totally disabled...." This statement could imply that Bailey's medical condition had stabilized.

11. Some jurisdictions have determined that "medical stabilization or maximum physical recovery, marks the end of temporary disability." *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1169 (Alaska 1982) (Rabinowitz, J., & Matthews, J., dissenting) (footnote omitted). Professor Larson concurs, observing that in most states temporary benefits cease when the "healing period" has ended and "stabilization" has occurred. 2 A. Larson, The Law of Workmen's Compensation, § 57.12 at 10–9 (1983). Professor Larson states:

> The disability period is not automatically terminated merely because claimant obtains some employment, if maximum recovery had not been achieved at the time.

Id. at 10–17 to 10–18 (footnote omitted). Other jurisdictions, however, view restored earning capacity, rather than medical stability, as the end of temporary disability. The California Court of Appeals stated:

> Temporary disability concerns the injured's inability to work.... Thus, an injured may be fully capable of working full time (and hence not be entitled to temporary disability) and his medical condition not yet permanent and stationary.

Harold v. Workers' Compensation Appeals Bd., 100 Cal.App.3d 772, 784, 785, 161 Cal.Rptr. 508, 514 (Cal.App.1980) (citations omitted).

in failing to explicitly address the stability of his medical impairment.

B. *Substantial Evidence in the Record*

[3] The Board found that both Dr. Newman and Dr. Kremer released Bailey for work without restrictions by July 16, 1981. Even though both doctors subsequently retracted these releases, the fact that Bailey returned to work on July 13, 1981, is sufficient evidence to rebut the presumption of continuing compensability for temporary total [12] disability.

[4] Bailey argues that his medical impairment prevented him from working full-time; thus, he was entitled to additional temporary compensation during the gaps in his employment between July 1981 and May 1982. The record supports the Board's finding that Bailey's periods of unemployment [13] were due to the economy and construction cycles, and not due to his disability. The pipefitting trade involves gaps in employment, and Bailey's work history prior to his injury reflects this fact. Bailey's terminations from National-NANA on August 16, 1981, and from F.J. Early Company on April 26, 1982, were both due to a reduction in force, not because of his incapacity to work.

Bailey claims the gaps in employment were due to his disability. He states that he turned down a pipeline repair job in January or February 1982 because he was physically unable to perform the work. However, while the job did involve heavy work, there were other reasons presented for Bailey's decision to not take the job, including uncomfortable working conditions, the short duration of the work, and the possibility of losing a favorable position on the union employment list. Bailey also indicated that he asked the foreman at PCI to give him a termination on a reduction in force because he did not want to continue the job when it changed from instrumentation to heavier haylon system pipe installation. However, Mr. Cable, the project superintendent for PCI, testified that Bailey was hired specifically to do instrumentation work, and he had no intention of hiring him as part of the haylon system.

[5] We conclude that the Board's finding that Bailey's gaps in employment were due to the economy and construction cycles, and not the result of his physical impairment, is supported by substantial evidence in light of the whole record. Moreover, we hold that Bailey suffered no actual wage loss during the ten-month period and was, therefore, not entitled to temporary *partial* disability benefits, much less compensation for temporary *total* impairment.[14] During the ten-month period, from July 1981 to May 1982, Bailey earned an average of $876 per week. The Board applied AS 23.30.220(2) [15] and made an uncontested finding that Bailey's pre-injury average weekly wage was $859.08. Even if Bailey could have earned more if he had been able to work as a pipefitter, AS 23.30.200 does not provide for a comparison between actual post-injury wages and what

12. "Temporary disability may be total (incapable of performing *any* kind of work), or *partial* (capable of performing *some* kind of work)." *Huston v. Workers' Compensation Appeals Bd.*, 95 Cal.App.3d 856, 868, 157 Cal.Rptr. 355, 362 (Cal.App.1979) (emphasis in original).

13. August 16–September 30, 1981; November 4, 1981–March 8, 1982; April 26–May 27, 1982.

14. AS 23.30.200 provides in part:

> *Temporary Partial Disability.* In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 66⅔ per cent of the difference between the injured employee's average weekly wages before the injury and his wage earning capacity after the injury in the same or another employment....

See supra note 5 regarding amendment to this statute.

15. AS 23.30.220 was repealed and reenacted in 1983. Ch. 70, § 12, SLA 1983. At the time of the Board's decision, AS 23.30.220(2) provided:

> the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;

The Board properly used Bailey's 1977 earnings because they were higher than his earnings in 1978 or 1979.

wages would have been without the impairment.

We affirm the Board's determination that Bailey's temporary total disability benefits were properly terminated in July 1981. Even though he may not have been medically stationary, there is substantial evidence in the record that he was capable of earning wages.

III. PERMANENT PARTIAL DISABILITY

The Board found, and the parties do not dispute, that Bailey has a "loss of earning capacity because he has a permanent impairment, [that] his post-injury earnings are less than this pre-injury average weekly wage and [that] he cannot perform all phases of pipefitting."

Litwin and Travelers voluntarily paid Bailey $6000 on April 29, 1982, as an advance on permanent partial disability. The Board determined that no further payments were due. Bailey contends that the Board incorrectly calculated loss of earning capacity and that the Board erred in limiting his benefits to $6000.

A. *Loss of Wage Earning Capacity*

AS 23.30.190(a)(20) [16] provides that in case of an unscheduled disability, such as Bailey's back injury, compensation is 66⅔ percent of the difference between the claimant's average weekly wages and his post-injury wage-earning capacity. In determining Bailey's wage-earning capacity, the Board found that because of increases in hourly pay, and because pipefitting involves sporadic employment, Bailey's post-injury earnings were unreliable and could not be used. The Board then considered the other factors listed in AS 23.30.210 [17] and the applicable case law,[18] but still could not quantify Bailey's loss of earning capacity.

Ultimately, the Board based its determination on the average number of days Bailey worked per month in 1978 and 1979, compared with the number he worked during the ten-month period between his return to work and the Board's hearing (July 13, 1981 to May 27, 1982). The Board

16. AS 23.30.190 provides, in relevant part:

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

....

(20) in all other cases in this class of disability the compensation is 66⅔ percent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of partial disability, ... whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;

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

See supra note 5 regarding amendment to this statute.

17. AS 23.30.210 provides:

Determination of wage-earning capacity. In a case of partial disability under AS 23.30.190(20) or 23.30.200 the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity the board may, in the interest of justice, fix the wage earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

A recent amendment substitutes "spendable weekly wage" for "earnings" throughout the section. Ch. 70, § 9, SLA 1983.

18. The Board may fix wage-earning capacity by considering these factors: (1) nature of injury, (2) degree of physical impairment, (3) usual employment, and (4) other factors, including (a) age, (b) education, (c) availability of suitable employment in the community, and (d) the employee's future employment intentions, trainability, and vocational rehabilitation assessment and training. *Bignell*, 651 P.2d at 1167; *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182, 186 (Alaska 1978); *Vetter*, 524 P.2d at 266; *Hewing*, 512 P.2d at 896.

found that he worked 148 days in 1978 (average of twelve days per month), 158 days in 1979 (average of thirteen days per month), and only 85 days in the preceding ten months (average of nine days per month). Thus, the difference in his wage earning capacity was three to four days per month.[19] The Board then assumed "that he could work an additional average of two to three days more per month than he has." [20] The Board concluded that Bailey misses between one and two days of work per month because of his injury—a loss of between eight and twelve percent. The Board averaged his wage earning capacity loss at ten percent.

[6] While the Board's computations may not reflect *precisely* Bailey's lost earning capacity, we believe that they fairly represent his future losses. AS 23.30.210 allows the Board in the interests of justice to utilize factors other than actual earnings to fix a wage earning capacity.

We affirm the Board's calculation that Bailey's wage earning capacity is ten percent impaired for purposes of determining permanent partial disability.

B. *Limitation on Amount of Permanent Disability Compensation*

The Board calculated Bailey's weekly benefits to be $57.27,[21] but Bailey requested a lump sum. The Board multiplied Bailey's impairment of ten percent by the $60,000 limit of AS 23.30.190(b) [22] and awarded him a lump sum of $6000. In the Board's opinion, the payment of weekly benefits to Bailey up to the $60,000 limit "would produce an unreasonable result considering the minimal loss of earning capacity and minimal impairment rating." In taking this action, the Board relied on *Foster v. Wright-Schuchart-Harbor*, 644 P.2d 221 (Alaska 1982),[23] where we stated:

> In *Absher v. State, Department of Highways*, 500 P.2d 1004 (Alaska 1972), we discussed the purpose of the lump sum provision and determined that it should be used "when the use of the first part of AS 23.30.190(20) would produce an unreasonable result," i.e., a worker with an unscheduled injury would recover more than a worker with a more serious scheduled injury.

644 P.2d at 223–24.

Absher, is directly on point. At issue in *Absher* was the method of computing a lump sum award for an unscheduled permanent partial disability. We upheld an award of $3,400 calculated by multiplying the twenty percent loss of earning capacity by $17,000, the maximum amount payable at the time. We explained:

> While the legislature did not adopt a formula for computing lump sum payments, it may reasonably be inferred that this was left to the discretion of the

19. The Board used a five day week rather than a seven day week in making its calculations. Bailey argues that there was no evidence to support this choice. The Board's inference that Bailey worked five eight hour days per week was reasonable in light of the evidence in the record. In 1978 and 1979, Bailey worked approximately 1138 and 1227 hours, respectively. If Bailey worked seven days per week, (192 days in 1978 and 216 days in 1979) as he claims, he would only have worked an average of 5.7 to 5.9 hours per day. This contradicts Bailey's own testimony that his hours were 8:00–4:30 for at least six months in 1978, and approximately four months in 1979.

20. Bailey argues that this assumption is arbitrary and without basis. The Board supports its conclusion by the fact that Bailey has limited himself to instrumentation work even though not all instrumentation is light. The Board concluded that if he can do all instrumentation work, he could do some pipefitting as well. The Board also found that Bailey took a hunting trip in the fall of 1981 and adjusted for this period of unemployment because it was not due to the injury.

21. The Board used the formula in AS 23.30.190(a)(20): ($859.08 × 10% × 66⅔% = $57.27).

22. *See supra* note 16.

23. In *Foster* the Board awarded a $3,000 lump sum for an unscheduled back injury by multiplying a five percent rating by $60,000. We reversed the Board's action only because the $60,000 statutory limit of AS 23.30.190(b) was not in effect at the time of Foster's injury.

board. There is no showing of an abuse of this discretion. The board's decision to base the lump sum award on the relationship between impaired earning capacity and the statutory maximum award is a reasonable one. *This method of computation is the same as that for a scheduled injury of comparable degree of impairment.*[24] In addition it avoids the unreasonable result of a disparity in awards between scheduled and unscheduled injuries.

500 P.2d at 1006 (emphasis added). However, our recent decision in *Providence Washington Insurance Co. v. Grant*, 693 P.2d 872 (Alaska 1985), places considerable doubt on the continuing viability of *Absher*.

In *Providence Washington*, the Board awarded lump sum benefits for Mr. Grant's injuries by multiplying the percentage impairments to his knee and foot by the maximum amounts allowed for a knee and foot injury under AS 23.30.190(a)(2) and (4), respectively. The board chose this method over a weekly award, which would have resulted in greater total benefits. The board based its action on *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805 (Alaska 1963), where we approved compensating Cesar's loss of half a thumb by multiplying the maximum allowable recovery by fifty percent impairment. In *Providence Washington* we overruled *Cesar* and stated:

> We agree that the results compelled by *Cesar* are contrary to the plain meaning of and policies behind AS 23.30.190.... The plain language of this provision does not require that the maximum amount recoverable be multiplied by the percentage impairment to the body member or function. Instead, it states the maximum amount that is recoverable under the subsection without making reference to the percentage impairment.
>
> ....
>
> ... To follow *Cesar* and require that the maximum awards be pro-rated according to the employee's percentage impairment to the body member or function does not further the policy of placing absolute limits on an employer's liability under the act.

693 P.2d at 877–78.

Under *Absher*, the Board acted reasonably in basing Bailey's lump sum award on the relationship between impaired earning capacity and the statutory maximum for unscheduled injuries. *Providence Washington*, however, forbids the identical method for scheduled injuries. The same reasons that lead us to overrule *Cesar* in the area of scheduled injuries compel us to overrule *Absher* in the case of unscheduled injuries.

The result demanded by *Absher* is "contrary to the plain meaning and policies behind AS 23.30.190." *See Providence Washington*, 693 P.2d at 877. While AS 23.30.190(a)–(20) states that a lump sum may be awarded in the "interests of justice," the "plain language of [the] provision does not require that the maximum amount recoverable be multiplied by the percentage impairment to the body member or function." *Id.* AS 23.30.190(b) states that $60,000 is the maximum recoverable under (a)(20) "without referring to the percentage impairment." *Id.* As we stated in *London v. Fairbanks Municipal Utilities*, 473 P.2d 639 (Alaska 1970):

> Where, as here, the statutory mandate is clear and would allow compensation, it is improper for the Workmen's Compensation Board to inject its own views on the policies underlying the Workmen's Compensation Act by imposing additional restrictions on the statutory language.

473 P.2d at 642.

[7] Overruling *Absher* is "consistent with the policies behind the Worker's Com-

24. This statement is no longer true, according to our recent decision in *Providence Washington Ins. Co. v. Grant*, 693 P.2d 872 (Alaska 1985).

pensation Act." *See Providence Washington*, 693 P.2d at 877. By establishing a $60,000 limit on permanent partial disability for unscheduled injuries, "the legislature intended to assure employers that their liability under [AS 23.30.190(a)(20)] would never exceed [$60,000]." *Id.* To follow *Absher* and allow a maximum recovery based on percentage impairment "would not further the policy of placing absolute limits on an employer's liability under the Act." *Id.* at 878. Instead, this calculation could lead to arbitrary and inequitable results. For example, while Bailey has a minor unscheduled injury, he could very possibly lose more than $6000 in wages during the years remaining before his retirement. Inequity could also result if two employees with ten percent impairment ratings both received a lump sum payment of $6000, even though a large discrepancy exists in their pre-injury wages. This would be contrary to the statutory dictates of AS 23.30.190(a)(20) that compensation be based on the difference between the employee's average weekly wages and his wage-earning capacity after the injury.

[8] Furthermore, we now hold it to be improper for the Board to reduce the benefits of an employee with an unscheduled injury so that he will not receive more than an employee with a more serious scheduled injury, as we suggested might be reasonable in *Absher*, 500 P.2d at 1006, and in *Foster*, 644 P.2d at 224. *See London*, 473 P.2d 639, 642 (Alaska 1970) (improper for the Board to limit a partially disabled worker's recovery to the amount afforded someone totally disabled).

[9] Ordinarily, compensation is paid on unscheduled injuries according to the formula set forth in AS 23.30.190(a)(20) until the $60,000 maximum is paid. Where, as here, the employee requests a lump sum, we hold that the Board should first determine whether it is in the interest of justice that a lump sum be paid. Should that determination be made, the Board should project the employee's total future loss, up to the $60,000 limit. The employee can then receive the present value of his total future loss in a lump sum. We reverse the Board's lump sum award of $6000 to Bailey, and remand for redetermination of whether a lump sum is in the interest of justice in this case, and if so, for recalculation of the amount in light of this opinion.

IV. ATTORNEY'S FEES AND COSTS

The Board denied and dismissed Bailey's claim for costs and attorney's fees. Litwin and Travelers had already paid $6000 to Bailey.

The award of attorney's fees is governed by AS 23.30.145 which provides in part:

> (a) ... When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded....
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation ... within 15 days after it becomes due or otherwise resists the payment of compensation ... and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation ... ordered.

"[T]he award of the minimum statutory fees [under subsection (a)] applies only in cases where a claim has been controverted." *Haile v. Pan American World Airways*, 505 P.2d 838, 840 (Alaska 1973). An award for costs, including attorney's fees, is due under subsection (b) when the employer "resists the payment of compensation." *Id.*

[10] Under our decision today, Bailey may be entitled to additional permanent partial disability benefits beyond those already paid by Litwin and Travelers. If so, Bailey, should receive an award for attorney's fees "on the amount of compensation controverted and awarded," AS 23.30.145(a), and for costs in the proceedings. AS 23.30.145(b). We remand this case to the Board for a determination of attorney's fees and costs.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

MATTHEWS, Justice, joined by RABINOWITZ, Chief Justice, concurring.

I continue to believe that medical stabilization marks the end of temporary disability under the Alaska Worker's Compensation statute. *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1169 (Alaska 1982) (Rabinowitz, J., with whom Matthews, J. joins, dissenting). In this case, the Board implicitly found that Bailey's medical condition had stabilized as the majority opinion has recognized. *See supra* at 252–53 n. 10. This implicit finding is supported by substantial evidence and therefore I agree that Bailey's temporary total disability payments were properly ended.

In all other respects, I concur with the majority opinion.

James ROBISON, Commissioner of Labor; Robert Bacolas, Director, Division of Labor Standards and Safety; Donald Wilson, Deputy Director of the Division of Labor Standards and Safety; James R. Carr, Supervisor of the Wage and Hour Administration; the Department of Labor of the State of Alaska, and the State of Alaska, and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 751, Appellants,

v.

James N. FRANCIS, Appellee.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL 751, Appellant,

v.

James N. FRANCIS, Appellee.

James N. FRANCIS, Appellant,

v.

James ROBISON, Commissioner of Labor; Robert Bacolas, Director, Division of Labor Standards and Safety; Donald Wilson, Deputy Director of the Division of Labor Standards and Safety; James R. Carr, Supervisor of the Wage and Hour Administration; the Department of Labor of the State of Alaska, and the State of Alaska, and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 751, Appellees.

Nos. S–493, S–510 and S–552.

Supreme Court of Alaska.

Jan. 17, 1986.

Nonresident who was discharged from job on public construction project after employer was warned by Department of Labor that it had a work force of more than five percent nonresidents on the project, in violation of local hire law, brought suit challenging constitutionality of the law. The Superior Court, Third Judicial District,

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

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

Since the board relied on the presumption to find Veco liable for Wolfer's disability 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.

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

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

Judicial District, Anchorage, Milton M. Souter, J., affirming an order of the Workers' Compensation Board computing the permanent partial disability benefits of claimant who had injured his knee, foot and back in a 30–foot fall from a ladder. The Supreme Court, Moore, J., held that: (1) Board properly found that claimant was entitled to permanent partial disability compensation award for the scheduled disabilities of his knee and foot as well as an award for the unscheduled injury of his back, and (2) in case of partial loss of scheduled body member or function, statutory formula based on weeks of compensation must be used, but maximum awards are not to be prorated according to the employee's percentage of impairment to the body member or function.

Affirmed in part, reversed in part, and remanded.

1. Workers' Compensation ⇐803

Workers' compensation claimant is not required to show loss-of-earning capacity resulting from a scheduled disability. AS 23.30.190, 23.30.190(a)(1–19).

2. Workers' Compensation ⇐803

Compensation for unscheduled injuries is based on workers' compensation claimant's loss of wage-earning capacity. AS 23.30.190(a)(20).

3. Workers' Compensation ⇐1653, 1656

Workers' Compensation Board properly found that claimant was entitled to permanent partial disability compensation for the scheduled disabilities of his knee and foot as well as to an award for the unscheduled injury of his back. AS 23.30.190(a)(2, 4, 20).

4. Workers' Compensation ⇐876

Although workers' compensation claimant who has suffered disabilities which were both scheduled and unscheduled was entitled to a separate award of permanent partial disability compensation for the scheduled disabilities as well as an award for the unscheduled injury, to avoid a double recovery, the Workers' Compensation Board must attempt to separate the loss-of-earning capacity resulting from scheduled disabilities from the loss-of-earning capacity resulting from the unscheduled injury when awarding the claimant for an unscheduled injury, and only if the Board finds that the claimant's loss-of-earning capacity resulting from scheduled disabilities cannot be severed from claimant's loss-of-earning capacity resulting from unscheduled injury would claimant be entitled to an award based on his total loss-of-earning capacity resulting from the accident plus an award for his scheduled injuries. AS 23.30.190(a)(1–20).

5. Workers' Compensation ⇐886

In the case of partial loss of scheduled body member or function, statutory formula based on weeks of compensation must be used, but maximum awards are not to be prorated according to employee's percentage of impairment to the body member or function; overruling *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805. AS 23.30.190(a)(1–20).

6. Workers' Compensation ⇐1982

Superior court properly granted additional attorney fees to workers' compensation claimant in the amount of $1,937.50 for his successful appellate work notwithstanding award's alleged nonconformity with Appellate Rule. AS 23.30.145(a, c); Rules App.Proc., Rule 508.

7. Workers' Compensation ⇐1983

Workers' Compensation Board's April 1982 award of attorney fees pursuant to statutory minimum upon finding that employer had controverted claimant's claim was properly not reduced by Board's December 1981 attorney fee award of $400 as the $400 award was made for distinct purpose of restarting benefits that employer had stopped and was not merely a first installment on the latter award. AS 23.30.145(a, b).

Robert B. Mason, Anchorage, Mark A. Sandberg, Camarot, Sandberg & Hunter, Anchorage, for appellants/cross-appellees.

Chancy Croft, Anchorage, for appellee/cross-appellant.

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

OPINION

MOORE, Justice.

This case involves a dispute over the method used by the Alaska Workers' Compensation Board [hereinafter "board"] to compute Virgil Grant's permanent partial disability benefits under the Alaska Workers' Compensation Act.[1] Virgil Grant has been a structural painter and sandblaster for the last thirty years. On February 23, 1980, while working for Hamilton Painting [hereinafter "employer"], Grant fell more than thirty feet from a ladder, injuring his back, knee, ankle and ribs. On May 5, 1981 Grant's physician, Dr. Linder, released Grant to return to work, provided that his work did not require lifting more than 30 pounds or require repeated bending or stooping. Aside from a short return to Hamilton Painting, the only employment Grant held between the date he was injured and April 23, 1982, the date of the board's second ruling on Grant's case, was a job as an indoor painter on an on-call basis.

The statute used to determine compensation for permanent partial disability is AS 23.30.190. When Grant's case went before the board[2] AS 23.30.190 provided in part:

> *Compensation for permanent partial disability.* (a) In case of disability partial in character but permanent in quality the compensation is 66⅔ per cent of the injured employee's average weekly wages in addition to compensation for temporary total disability or temporary partial disability paid in accordance with AS 23.30.185 or 23.30.200, respectively, and shall be paid to the employee as follows:
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> . . . . . .
>
> (2) leg lost, 248 weeks compensation, not to exceed $40,320;
>
> . . . . . .
>
> (4) foot lost, 173 weeks compensation, not to exceed $28,700;
>
> . . . . . .
>
> (20) in all other cases in this class of disability the compensation is 66⅔ per cent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial disability, but subject to reconsideration of the degree of the impairment by the board on its own motion or upon application of a party in interest; whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;
>
> . . . . . .
>
> (b) Total compensation paid under (a)(20) of this section may not exceed $60,000.

On December 11, 1981, the board issued an order determining Grant's entitlement under the Alaska Workers' Compensation Act. The board found that Grant could not return to his previous occupation and was entitled to permanent partial disability benefits beginning October 30, 1981.[3] The board ordered the employer to pay Grant an interlocutory award of $74.79 per week and invited the parties to petition for a modification of the order when information that more accurately determined Grant's loss of earning capacity became available.

1. The Act is codified as AS 23.30.005–23.30.270. AS 23.30.045 provides that the employer is liable for the payment of benefits to employees for disabilities covered by the Act regardless of fault.

2. The statute was amended effective January 1, 1984 to increase *inter alia* the amounts of compensation payable. Chapter 70 § 7 SLA 1983. These amendments do not affect the issues in this case.

3. The board found that prior to October 30, 1981, Grant had been temporarily totally disabled and awarded him benefits for this temporary disability pursuant to AS 23.30.185.

On December 17, 1981, Grant petitioned the board for a redetermination of the December 11, 1981 order of permanent partial disability. He argued that under the workers' compensation statute he was entitled to separate awards for his back, knee and foot injuries. The board agreed and ordered weekly payments of $373.78 for Grant's knee disability and $373.78 for his foot disability, until the respective sums of $6,048 and $2,870 had been paid. The award for the foot disability was to begin when the award for the knee disability ended. The knee and foot disability awards were based on Dr. Linder's November 20, 1981 report that Grant suffered a 10% impairment to his foot and a 15% impairment to his knee.[4]

The board found that Grant's back disability was an unscheduled disability compensable under AS 23.30.190(a)(20), which then provided that "in all other cases ... the compensation is 66⅔ per cent of the difference between his average weekly wages and his wage-earning capacity after the injury...." The board found that Grant was employable but that he had not made all reasonable efforts to find employment, and stated that it could not evaluate Grant's loss of earning capacity until Grant had a more complete history of post-injury earnings.[5] The board then multiplied Grant's compensation rate of $373.78 weekly by the 15% impairment to Grant's back to compute an interlocutory award of $56.07 weekly for the back injury.[6] The parties were invited to request another hearing on the award for the back injury when more information on Grant's loss of earning capacity became available. Grant's employer appealed the board's order to the superior court and that court affirmed the order.

I. COMPENSATION FOR SCHEDULED OR UNSCHEDULED INJURIES

On appeal to this court, the employer argues that the approach taken by the board constitutes a double recovery for Grant. The basis of this argument is that Grant was separately awarded compensation for the scheduled disabilities of his knee and foot under AS 23.30.190(a)(2) and (4), respectively, and that his loss of earning capacity resulting from these scheduled injuries was also incorporated into the award for the unscheduled injury of his back, because that award is determined by the employee's loss of earning capacity un-

4. The board determined Grant's average weekly wage for purposes of the scheduled impairments of the knee and foot to be $560.64. Following the guidance of AS 23.30.190(a), the board computed Grant's compensation rate to equal 66⅔% of this amount, or $373.78 weekly. To determine the amount Grant was entitled to for the knee injury under AS 23.30.190(a)(2), the board multiplied the compensation rate of $373.78 by the 15% impairment of the knee by 248 weeks to arrive at $13,904.62. The board then multiplied the 15% impairment of the knee by the maximum allowed under AS 23.30.190(a)(2) of $40,320 to get $6,048. The board then followed *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805 (Alaska 1963), in awarding the lesser of these two figures, awarding Grant $6,048. In computing the compensation due Grant for the foot injury under AS 23.30.190(a)(4), the board multiplied the 10% impairment of the foot by the compensation rate of $373.78 by 173 weeks and obtained a result of $6,466.39. The board then found that the 10% impairment multiplied by the maximum recovery allowed under AS 23.30.190(a)(4) produced compensation of $2,870. The court again followed *Cesar* and awarded Grant $2,870 for his foot injury because this was the lesser of the two figures.

5. The board found it difficult to determine Grant's loss of wage-earning capacity because, since his fall, Grant had not held employment commensurate with his experience and training. In 1978 and 1979 Grant received training in petroleum technology; after his fall, he received training in painting estimating from Hamilton Painting. Grant had recently taken employment as an indoor painter, but it was unclear how long this job would continue, and Grant was making only four to five dollars an hour, which was far below his pre-injury wages as a union painter.

6. The board based its finding that Grant suffered a 15% impairment of his back on Dr. Linder's statement in his November 20, 1981 report that Grant suffered a "15% permanent partial impairment of the whole man based on chronic and permanent symptoms in his low back and legs as a result of aggravation of the pre-existing degenerative arthritis...."

der AS 23.30.190(a)(20). The employer argues that, if an employee has both an unscheduled disability and a scheduled disability, there should not be a separate award for the scheduled disability under AS 23.30.190(a)(1)–(19), but rather the scheduled disability should be compensated under AS 23.30.190(a)(20), because this section awards benefits according to the employee's loss of earning capacity resulting from all disabilities.

[1, 2] We disagree with the employer's interpretation of the statute. AS 23.30.190(a)(1)–(19) provides for specific amounts of compensation for specific disabilities, such as the loss of body members, digits, hearing and vision. An employee is not required to show loss of earning capacity resulting from a scheduled disability. *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163, 1167 (Alaska 1982). In contrast, an employee's compensation for unscheduled injuries under AS 23.30.190(a)(20) is based on the employee's loss of wage-earning capacity. This distinction is the result of a legislative judgment that when a scheduled injury occurs there is usually a corresponding loss of earning capacity,[7] and that the objectives behind the Workers' Compensation Act are achieved more efficiently if the employee is not required to show this loss of earning capacity.[8] It would abrogate this distinction to hold that whenever an employee has an unscheduled injury coupled with a scheduled injury, the claimant loses the entitlements of AS 23.30.190(a)(1)–(19) for the scheduled injury and is limited to those of AS 23.30.190(a)(20).

[3, 4] We hold that the board properly found that Grant was entitled to compensation under AS 23.30.190(a)(2), (4) and (20) because of the disabilities to his knee, foot and back. We recognize that this approach could result in a double recovery if the loss of earning capacity resulting from the scheduled injuries were used to determine the employee's compensation for an unscheduled disability. To avoid this, when awarding the claimant for an unscheduled injury, the board must attempt to separate the loss of earning capacity resulting from scheduled disabilities from the loss of earning capacity resulting from the unscheduled injury.

In the case at bar, the board made an interlocutory award for the unscheduled disability because it did not have sufficient information at that time to accurately determine Grant's loss of wage-earning capacity. The board found that, based on Dr. Linder's ratings, Grant suffered a 15% impairment of his back. The board then based Grant's interlocutory award on the 15% impairment of his back. When the board makes its final determination of the compensation due Grant for his back injury, it should isolate his loss of earning capacity resulting from his back injury. Grant's award under AS 23.30.190(a)(20) should then be computed on the basis of the loss of earning capacity resulting from his back disability and not his foot or knee disabilities. The board may compensate Grant for his back injury based on the total loss of earning capacity resulting from his fall only if the board finds that his loss of earning capacity resulting from his foot or knee disabilities cannot be severed from his loss of earning capacity resulting from his back injury.[9] Thus, in such a situation,

7. The loss of earning capacity for scheduled injuries is "conclusively presumed." 2 A. Larson, The Law of Workmen's Compensation, § 58.11, at 10–174 (1983).

8. "The purpose of the Workmen's Compensation Act ... is the provision of financial and medical benefits for victims of work-connected injuries in the most efficient, most dignified, and most certain form." *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979).

9. AS 23.30.210 provides in part:

> *Determination of wage-earning capacity.* In a case of partial disability under AS 23.30.190(20) ... the wage-earning capacity of an injured employee is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee....

When, as in this case, there is a scheduled disability and an unscheduled disability, the board should extrapolate what the claimant's

Grant would be entitled to an award based on his total loss of earning capacity resulting from his fall plus an award for his scheduled injuries.

II. FORMULA FOR DETERMINING COMPENSATION

[5] In *Cesar v. Alaska Workmen's Compensation Board*, 383 P.2d 805 (Alaska 1963), the claimant lost one-half of his thumb in the course of his employment. The scheduled award for the loss of a thumb at that time was fifty-one weeks of compensation, not to exceed a total of $1,800. The claimant argued that the formula that should be used to determine his compensation should be 65% [10] of his average weekly wage multiplied by one-half of 51 weeks, not to exceed the $1,800 limit imposed by statute. This court held that since the claimant lost half of his thumb he was entitled to only one-half of the compensation that an employee would receive for losing an entire thumb, and that the maximum amount that could be collected was one-half of what it would be for the loss of an entire thumb.[11] 383 P.2d at 805.

In awarding for Grant's knee and foot injuries the board took 66⅔% of Grant's average weekly wage of $560.64 to arrive at a compensation rate of $373.78 weekly. The board then multiplied this figure by the impairment percentages of 15% and 10% for the knee and foot, respectively, and by the number of weeks of compensation allowed for each injury under AS 23.30.190(a)(2) and (4). Under this formula Grant would be entitled to $13,904.62 for his knee disability and $6,466.39 for his foot disability. The board then multiplied the impairment percentages for Grant's knee and foot injuries by the maximum amounts of $40,320 and $28,700 allowed in AS 23.30.190(a)(2) and (4), respectively. This calculation yielded $6,048 for Grant's leg injury and $2,870 for his foot injury. Under the direction of *Cesar* the board awarded Grant compensation according to this latter formula because it produced the smallest award.

On cross-appeal Grant urges us to overrule *Cesar*. We agree that the results compelled by *Cesar* are contrary to the plain meaning of and policies behind AS 23.30.190. The provisions for scheduled disabilities dictate the number of weeks by which the compensation rate should be multiplied to compute the total compensation due an employee. These subsections also state the maximum amount that can be awarded for the scheduled injury. For example, AS 23.30.190(a)(2) provides: "leg lost, 248 weeks compensation, not to exceed $40,320...." The plain language of this provision does not require that the maximum amount recoverable be multiplied by the percentage of impairment to the body member or function. Instead, it states the maximum amount recoverable under the subsection without referring to the percentage of impairment.

Overruling *Cesar* is consistent with the policies behind the Workers' Compensation Act. The purpose of the Act is to award benefits to the victims of work-related injuries regardless of fault. *Arctic Structures, Inc. v. Wedmore*, 605 P.2d 426 (Alaska 1979). Realizing that uncertainty and hardship would result from unlimited liability, the legislature established absolute limits on employers' liability under the Act. By establishing a maximum award of $40,320 for a leg disability, the legislature intended to assure employers that their liability under AS 23.30.190(a)(2) would never exceed $40,320. To follow *Cesar* and re-

spendable weekly wage would be if the claimant suffered only from the unscheduled disability.

10. At that time the compensation rate of AS 23.30.190 was 65% of the employee's average weekly wages. When Grant's case was ruled on by the board the compensation rate for scheduled injuries was 66⅔% of the employee's average weekly wages.

11. Cesar's average weekly wage was $115. Applying the formula without limiting the recovery by the statutory maximum, Cesar was entitled to $1,906.25 for 65% of $115 × ½ × 51. The statute at that time limited the recovery for a thumb to $1,800 and the court agreed with the board that the maximum recovery for the loss of one-half of a thumb is one-half of this or $900.

quire that the maximum awards be pro-rated according to the employee's percentage of impairment to the body member or function would not further the policy of placing absolute limits on an employer's liability under the Act. Instead, such a requirement undermines the legislative policy, embodied in AS 23.30.190(a)(1)–(19), to award no more than specific amounts for specific disabilities, because the *Cesar* approach frequently requires that a claimant's award be reduced.[12]

In overruling *Cesar*, we are aware that the legislature has not amended the statute to displace the construction *Cesar* gave to it. Although AS 23.30.190 has been amended several times,[13] none of the amendments has addressed this problem. We do not, however, believe that the legislature's silence indicates approval of the *Cesar* rule. Nor are we faced with a comprehensive revision and re-enactment of the statute that might raise a presumption of legislative approval.

As Mr. Justice Frankfurter observed many years ago,

> It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision.... [W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.

Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 612–13 (1940) (footnotes omitted). We have found no references to the problem *Cesar* addressed in the legislative history of the statute's original enactment and its later amendments. Legislative inaction frequently indicates unawareness, preoccupation or paralysis.[14] We decline to attribute significance to the legislature's mere inaction.[15]

The legislature has never undertaken a comprehensive revision of AS 23.30.190. Each time the statute has been amended, the amendments have been specific and limited, and the statute's general form has remained the same.[16] No single amendment has constituted a "re-enactment" of AS 23.30.190. "Whatever may be the scope of the doctrine that re-enactment of a statute impliedly enacts a settled judicial construction placed upon the re-enacted statute, that doctrine has no relevance to the present problem." *Helvering v. Hallock*, 309 U.S. 106 at 121 n. 8, 60 S.Ct. at 452 n. 8, 84 L.Ed. 604 at 613 (1940). Thus we hold that the legislature has not implicitly forbidden us to re-examine a decision we now believe erroneous.

12. Grant's award was based on an average weekly salary of $560.64. While this is above the median income level, it is not so high as to make this case an aberration.

13. *See* n. 16 *infra*.

14. *See Zuber v. Allen*, 396 U.S. 168, 186 n. 21, 90 S.Ct. 314, 324 n. 21, 24 L.Ed.2d 345, 356 n. 21 (1969).

15. *See Bob Jones Univ. v. U.S.*, 461 U.S. 574, ——, 103 S.Ct. 2017, 2032–33, 76 L.Ed.2d 157, 178–79 (1983).

16. Since we decided *Cesar*, AS 23.30.190 has been amended ten times, as follows: Sections 5–10, ch. 46 SLA 1964 (raising the ceilings set out in what are now AS 23.30.190(a)(1)–(5) and (12); § 1, ch. 24 SLA 1965 (elaborating on the "disfigurement" provisions); § 1, ch. 102 SLA 1965 (correcting a typographical error); § 1, ch. 174 SLA 1968 (allowing the board to award compensation for permanent partial disability in a lump sum); § 1, ch. 119 SLA 1970 (raising the ceilings set out in what are now AS 23.30.190(a)(1)–(12)); § 1, ch. 10 SLA 1972 (raising the ceilings set out in what are now AS 23.30.190(a)(1)–(12) and (19)); § 1, ch. 54 SLA 1974 (adding a catchall provision in subsection (19)); § 5, ch. 83 SLA 1975 (changing the basic compensation figure from 65% of an employee's "average weekly wage" to ⅔ of that wage, and raising the ceilings set out in what is now AS 23.30.190(a)(1)–(12)); § 4, ch. 75 SLA 1977 (setting a $60,000 cap on compensation payable under AS 23.30.190(a)(2)); § 7, ch. 70 SLA 1983 (changing the basic compensation figure from ⅔ of an employee's "average weekly wage" to ⅘ of the "spendable weekly wage" and raising the ceilings set out in AS 23.30.190(a)(1)–(12)).

The last of these amendments occurred after Grant's injury and does not affect this case.

III. ATTORNEY'S FEES

In the first order of the board, issued December 1981, the employer was ordered to pay attorney's fees of $400 in the permanent partial disability award pursuant to AS 23.30.145(b).[17] In its April 1982 order the board found that the employer had controverted Grant's claim and ordered the payment of his attorney's fees pursuant to the statutory minimum of AS 23.30.-145(a).[18] In February 1982, the superior court entered an order granting additional attorney's fees to Grant in the amount of $1,937.50 for his successful appellate work.[19]

[6] The employer mistakenly argues that the superior court's award of attorney's fees[20] should be overturned due to its alleged nonconformity with Appellate Rule 508. In *McShea v. State of Alaska*, 685 P.2d 1242 (Alaska 1984), we held that AS 23.30.145(c) controls the role of the superior court in determining attorney's fees in workers' compensation appeals. Accordingly, we affirm the superior court's award.

[7] The employer further argues that the board's April 1982 award of attorney's fees under AS 23.30.145(a) was improper because it should have been reduced by the board's December 1981 award of $400 in attorney's fees under AS 23.30.145(b). We disagree. The $400 award under AS 23.30.-145(b) was made for the distinct purpose of restarting benefits that the employer had stopped. It was not merely a first installment on the later award made under AS 23.30.145(a). Consequently, we also affirm on this issue.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

17. The employer was also ordered to pay attorney's fees pursuant to the minimum of AS 23.-30.145(a) on the temporary total disability benefits paid from May 5, 1981 to July 24, 1981.

18. AS 23.30.145 provides in part:

Attorney fees. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 per cent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 per cent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of this claim, the board shall make an award to reimburse the claimant for his costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

19. Although no statute was cited, it appears that the superior court made its award under AS 23.30.145(c), which provides in part:

(c) If proceedings are had for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

20. Grant's attorney has since stipulated to a reduction of the superior court's award of $1,937.50 to $1,906.25, the amount actually sought.

ing/notice of the prohibited conduct. *See generally Dunn*, 422 U.S. at 112, 99 S.Ct. at 2197, 60 L.Ed.2d at 754 (to ensure the legislature speaks with clarity when defining criminal conduct, courts must decline to impose punishment for acts not plainly proscribed). Here, the Board has not notified the public that sport and commercial regulations apply to subsistence uses. A subsistence user cannot tell when it is legal to take game for subsistence uses. Therefore, the court should not penalize subsistence users when the Board has not clearly prohibited subsistence hunting.

I conclude that since the Board has failed to adopt specific subsistence regulations, AS 16.05.255(b) permits "unregulated" subsistence hunting. By rejecting the subsistence use defense, the court deprives subsistence users of a means to vindicate their statutory right.

Inclusion of Fringe Benefits in Wage Basis for computing comp rate

~~[illegible]~~ applies to me- 1984 § 220, 265(20)

Orval L. RAGLAND, Appellant,

v.

MORRISON-KNUDSEN CO., INC., Aetna Casualty and Surety Co., Crawford and Company, and Alaska Workers' Compensation Board, Appellees.

No. S-1333.

Supreme Court of Alaska.

Aug. 29, 1986.

Appeal was taken by employee of a decision of the Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., sustaining determination of the Workers' Compensation Board that only employer's contributions to vested pension benefits were includable in computing employee's average weekly wage. The Supreme Court, Compton, J., held that value of vested union fringe benefits, including pension, health and welfare, legal fund and trust benefits, paid by employer on behalf of employee was not speculative, but was tied directly to number of hours worked by employee and, being readily identifiable and calculable, was to be included as "wages" for purpose of computing employee's average weekly wage.

Reversed and remanded.

1. Workers' Compensation ⇐816

Definition of "wages" for purpose of computing an employee's average weekly wage should include all items of compensation or advantage agreed upon in a contract of hiring which are measurable in money whether in form of cash or as economic gain to employee. AS 23.30.220, 23.30.220(a)(2).

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

2. Workers' Compensation ⇐816

Value of vested union fringe benefits, including pension, health and welfare, legal fund and trust benefits, paid by employer on behalf of employee was not speculative, but was tied directly to number of hours worked by employee and, being readily identifiable and calculable, was to be included as "wages" for purpose of computing employee's average weekly wage.

Chancy Croft, Fairbanks, for appellant.

Dennis E. Cook, Schaible, Staley, DeLisio & Cook, Inc., Anchorage, for appellees.

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

OPINION

COMPTON, Justice.

The sole issue in this workers' compensation case is whether the value of fringe benefits paid by the employer on the employee's behalf should be considered "wages" for the purpose of computing the

employee's average weekly wage. We conclude that the readily identifiable and calculable value of fringe benefits should be included in the wage determination.

I. FACTS AND PROCEEDINGS

Orval Ragland was injured in the course of his employment with Morrison-Knudsen Co., Inc. (M-K) on July 30, 1982. It is undisputed that he is entitled to compensation, which he has received based on his 1981 income pursuant to AS 23.30.220(a)(2).[1] Also, it is undisputed that his union fringe benefits are vested.

Ragland sought to include in the calculation of his average weekly wage the value of his vested union fringe benefits, including pension, health and welfare, legal fund and training trust benefits. The Alaska Workers' Compensation Board (Board) increased Ragland's average weekly wage by the amount of M-K's contributions to vested pension benefits, but not to other benefit funds, reasoning that he had not "established a 'real economic loss' of other fringe benefits."

Ragland appealed to the superior court. Judge Mary E. Greene affirmed the Board's decision, relying on the U.S. Supreme Court's interpretation of comparable federal law in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983) [*Hilyer*].

Ragland then appealed to this court. He asks that we order the Board to adjust his average weekly wage upward by the amount of his employer's 1981 contribution to the remaining vested union fringe benefits.

II. DISCUSSION

At the time of Ragland's injury, former AS 23.30.265(20) provided:

> [W]ages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, and includes the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

AS 23.30.265(20), *amended by* AS 23.30.265(15) (1983).[2]

This court has not previously addressed the scope of the term "wages" under the Alaska Workers' Compensation Act. We may look for guidance to federal cases interpreting the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982), *amended by* 33 U.S.C. §§ 901-948a (Supp.1984), upon which the Alaska Act is modeled. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1048 n. 12 (1978).

Former 33 U.S.C. § 902(13) is virtually

1. AS 23.30.220(2) provides in relevant part:
   Determination of average weekly wage. Except, as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation and is determined as follows:
   (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury.

2. In 1983, the Alaska legislature amended the statute. AS 23.30.265(15) now provides:
   (15) "gross earnings" means periodic payments, by an employer to an employee for employment before any authorized or lawfully required deduction or withholding of money by the employer, including compensation that is deferred at the option of the employee, and excluding irregular bonuses, reimbursement of expenses, expense allowances, and any benefit or payment to the employee that is not taxable to the employee during the pay period; the value of room and board to the employee may be considered in determining gross earnings; however, the value of room and board that would raise an employee's gross weekly earning above the Alaska average weekly wage at the time of injury may not be considered.

identical to former AS 23.30.265(20).[3] In *Hilyer*, the Supreme Court held that fringe benefits were not included in the definition of wages under the federal statute. 461 U.S. at 637, 103 S.Ct. at 2052, 76 L.Ed.2d at 204.

The Court analyzed fringe benefits under the "similar advantage" clause and concluded that the present value of benefit trust funds cannot be converted easily into a cash equivalent. Therefore benefit trust funds are not "a similar advantage" to board, rent, housing or lodging. *Hilyer*, 461 U.S. at 630, 103 S.Ct. at 2048, 76 L.Ed.2d at 199. We think fringe benefits are better analyzed as part of "the money rate" at which an employee is paid, *see* Harry v. M-K Rivers, A.W.C.B. No. 81-010 (January 19, 1981); AS 23.30.265(20).

The Court also discussed various policy reasons why fringe benefits should not be included.[4] It rejected the argument that the value could be calculated by reference to either the employer's costs or the value of the employee's expectations. *Hilyer*, 461 U.S. at 630, 103 S.Ct. at 2048, 76 L.Ed.2d at 200. It states that "the employer's cost is irrelevant in this context, it measures neither the employee's benefit nor his compensation." *Id.* It noted that an employee could not purchase private policies on the open market for the same amount the employer contributed to employee trust funds. *Id.*

However, the fact that an award based upon fringe benefits might not adequately compensate an injured employee is not a good reason to deny the award entirely. As Justice Marshall states in his dissent, "it is better to be roughly right than totally wrong." *Id.* at 642, 103 S.Ct. at 2055, 76 L.Ed.2d at 208 (Marshall, J. dissenting).

The *Hilyer* Court concludes that the employer's costs do not measure compensation because under the collective bargaining agreement the employer's costs were not directly tied to any individual employee's labors. *Id.* at 630, 103 S.Ct. at 2048, 76 L.Ed.2d at 200. Further, the employees under that agreement had no control over the level of funding or the benefits provided. *Id.* at 631, 103 S.Ct. at 2049, 76 L.Ed.2d at 200.

That rationale does not apply to the case before us. Under M-K's collective bargaining agreement with Ragland's union, a total hourly wage rate is negotiated by the union and M-K. Union members vote to determine how the total wage is divided between cash payments and fringe benefits. The contribution to fringe benefits is thus not speculative, but rather is tied directly to the number of hours worked by the employee. We believe this total hourly wage, no matter how it is apportioned between cash payments and fringe benefits, is "the money rate at which the service rendered is recompensed." AS 23.30.265(20), *amended by* AS 23.30.265(15) (1983).

There is no principled distinction between cash payments and payments into a fringe benefit plan. Employees may bargain to receive cash only, or may agree to forego some cash in exchange for fringe benefits. However, their compensable earning power is the same in either case. *See Hilyer*, 461 U.S. at 641, 103 S.Ct. at 2054, 76 L.Ed.2d at 207 (Marshall, J. dissenting).

The Court in *Hilyer* also reasons that the value to the employee of each fund is speculative because it depends on factors which are unpredictable, such as whether the employee's interest vested[5] and his "need for the services" which the fringe benefits provide. *Hilyer*, 461 U.S. at 631, 103 S.Ct. at 2049, 76 L.Ed.2d at 200; *see also Olivera v. Mat-Su/Stephan & Sons, J.V.*, A.W.C.B. No. 84-0327 (September 25, 1984). In *Still v. Industrial Commission*, 27 Ariz.App.

3. After the *Hilyer* decision, 33 U.S.C. § 902(13) was amended to explicitly exclude fringe benefits from the definition of wages. *See* 33 U.S.C. § 902(13) (Supp.1984). 33 U.S.C. §§ 945-47 were repealed.

4. The Court also relied on legislative history and agency interpretation, neither of which are applicable here.

5. As noted above, Ragland's interest in union fringe benefits has vested.

142, 551 P.2d 591, 592 (1976), the court has reasoned similarly that fringe benefits should be excluded because the employee is not actually receiving the contribution payments at the time of injury and might never receive them.

It is indeed speculative as to whether Ragland would have "needed" the benefits if he had continued to work for M–K, or whether he will "need" them in the future now that he is disabled. However, the *facts* are that at the time of the injury M–K was contributing to Union benefit trusts for Ragland as part of his compensation and that his injury prevented his continuing eligibility in these benefit programs. *See Hite v. Evart Products Co.*, 34 Mich.App. 247, 191 N.W.2d 136, 139 (1971).

It is in the nature of any health or legal insurance plan, whether provided by an employer or purchased in the marketplace, that the beneficiary might never need payments or services from the plan. It is the coverage itself which is the benefit, and which the disabled employee must now find some other way of providing.[6]

In holding against the inclusion of fringe benefits, the *Still* court reasoned that the employer is contributing to the union, which administers the trust funds, rather than to the employee. *Still*, 551 P.2d at 592.

However, it cannot seriously be maintained that the union is the beneficiary of the employer's contributions. "The beneficiaries are the employees. The funds are no more than a conduit; they are merely a means by which the company provides life insurance, health insurance, retirement benefits, and career training for its employees." *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 211 (D.C.Cir. 1981), *rev'd sub nom, Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 103 S.Ct. 2045, 76 L.Ed.2d 194 (1983).

The *Still* court also compared benefit contributions to year end bonuses, which it said were the result of "collective" rather than "personal" effort. Since the benefits are obtained as the result of a union agreement, the court concluded that they are not attributable to the individual efforts of the employee. 551 P.2d at 594.

Under this reasoning, however, even wages would appear to be excluded when they are established by a collective bargaining agreement. The fact that compensation is provided through a union agreement rather than through individual contracts with each employee should not preclude employees from receiving that compensation when they are disabled. The benefits are compensation for an employee's services regardless of how they are negotiated. *See Hilyer*, 670 F.2d at 212 n. 7.

Fringe benefits are often an important part of an employee's earning power. When the goal is to compensate a disabled employee, it is "harsh simply to ignore part of an employee's earnings power when calculating benefits." *Hilyer*, 461 U.S. at 647, 103 S.Ct. at 2057, 76 L.Ed.2d at 210 (Marshall, J. dissenting).

[1, 2] We therefore hold that readily identifiable and calculable values received by an employee should be included in his wage determination. Given the goal of workers' compensation laws to assure compensation for actual loss, *see* 2 A. Larson, The Law of Workmen's Compensation § 60.12, at 10–564 (1983), and the policy of construing ambiguities in favor of the employee, *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 497 (Alaska 1982), we conclude that the definition of wages should "include all items of compensation or advantage agreed upon in a contract of hiring which are measurable in money,

6. We have held in a personal injury case that the plaintiff was entitled to the amount of actual contributions to union benefit funds that would have been made on his behalf by his employer. *Alaska Airlines v. Sweat*, 568 P.2d 916, 935 (Alaska 1977). Even though the plaintiff had not purchased replacement coverage, he could recover for the *lost protection* over a period of years. *Id.*

whether in the form of cash or as an economic gain to the employee." *Hite,* 191 N.W.2d at 138, *quoting Leslie v. Reynold,* 179 Kan. 422, 295 P.2d 1076, 1083 (Kan. 1956).

The decision of the superior court affirming the Alaska Workers' Compensation Board is REVERSED and the case REMANDED for proceedings consistent with this opinion.

FOSS ALASKA LINE, INC., Appellant,

v.

NORTHLAND SERVICES, INC. and Crowley Maritime Corporation, Appellee.

No. S–1275.

Supreme Court of Alaska.

Sept. 12, 1986.

In personal injury action, defendant filed amended third-party complaint against third-party defendants for statutory contribution. Following settlement by third-party defendants with plaintiff's representative, the Superior Court, Fourth Judicial District, Bethel, Christopher R. Cooke, J., entered summary judgment in favor of third-party defendants on the contribution claim and awarded third-party defendants their requested attorney fees and costs. Defendant appealed. The Supreme Court, Moore, J., held that: (1) settlement payments by third-party defendants to plaintiff's representative, which barred defendant's contribution claim against third-party defendants, precluded finding that either third-party defendant was a "prevailing party" entitled to recover costs and attorney fees from defendant; (2) third-party defendants' settlements precluded finding that defendant's contribution claim was asserted in bad faith so as to entitle third-party defendants to their attorney fees; and (3) third-party defendants were not entitled to costs incurred in their successful motions to strike the original third-party complaint.

Reversed.

1. Costs ⇐32(2), 172

"Prevailing party," who is entitled to costs and attorney fees, is one who prevails on the main issue of the case, provided the issue has been joined. Rules Civ.Proc., Rules 79(a), 82(a)(1).

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

2. Costs ⇐32(2), 172

Ordinarily, determination of prevailing party status, for purposes of award of costs and attorney fees, rests in sound discretion of superior court. Rules Civ.Proc., Rules 79(a), 82(a)(1).

3. Appeal and Error ⇐841

Supreme Court may review application of legal doctrine to undisputed facts without usual deference to superior court.

4. Appeal and Error ⇐842(1)

Matters of public policy raise purely questions of law; in such circumstances, duty of Supreme Court is to adopt rule of law that is most persuasive in light of precedent, reason, and policy.

5. Contribution ⇐8

Policy underlying provision of Uniform Contribution Among Tortfeasors Act, providing that contribution defendant may escape liability for contribution by obtaining a release from the injured plaintiff, is to encourage settlements, insure finality, and reduce uncertainty. AS 09.16.040(2).

6. Contribution ⇐8

Settlement between contribution defendant and injured plaintiff is not made in bad faith when settlement is primarily motivated by contribution defendant's desire to escape contribution liability. AS 09.16.040(2).

(1) Computing Compensation Rate §820

Robert E. JOHNSON, Appellant,

v.

RCA-OMS, INC., and Zurich-American Insurance Company, Alaska Workers' Compensation Board, Appellees.

No. 7327.

Supreme Court of Alaska.

May 11, 1984.

The Workers' Compensation Board computed average weekly wage of claimant for purpose of establishing his temporary total disability benefits, and the ruling was affirmed by the Superior Court, Fourth Judicial District, Fairbanks, Jay Hodges, Jr., J. On further appeal, the Supreme Court, Matthews, J., held that if there is only slight variance between wages at time of injury and average weekly wage arrived at by dividing 52 into total wages earned in any one of three calendar years immediately preceding injury, it would not be unfair to utilize the latter, but where apparent disparity between military salary and what claimant actually earned at time of disability was substantial, so that such method did not fairly reflect wage-earning capacity, average weekly wage should have been calculated with reference to usual wage for similar service rendered by paid employees under similar circumstances.

Reversed and remanded.

Compton, J., dissented and filed opinion.

1. Workers' Compensation ⇐813

Statute providing for the determination of average weekly wage was intended to formulate a fair approximation of claimant's probable future earning capacity during period in which compensation benefits were to be paid, and normally the formula in the first subsection, directing calculation by dividing 52 into total wages earned in any one of three years immediately preceding injury, will yield fair approximation of figure, but in cases in which it would not, third subsection, calling for selection of the "usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board," is to be used. A.S. 23.30.220, 23.30.220(a)(2, 3).

2. Workers' Compensation ⇐818

If there is only slight variance between wages at time of injury and average weekly wage arrived at by dividing 52 into total wages earned in any one of three calendar years immediately preceding injury, it would not be unfair to utilize the latter, but where apparent disparity between military salary and what claimant actually earned at time of disability was substantial, so that such method did not fairly reflect wage-earning capacity, average weekly wage should have been calculated with reference to usual wage for similar service rendered by paid employees under similar circumstances. AS 23.30.220, 23.30.-220(a)(2, 3).

3. Workers' Compensation ⇐820

Legislature by providing for calculation of workers' compensation, under specified circumstances, by using usual wage for similar service rendered by paid employees under similar circumstances recognized that goal of certainty must give way to that of fairness in case of conflict between methods of ascertaining average weekly wage. AS 23.30.220(a)(2, 3).

4. Workers' Compensation ⇐810

In statute providing method to be followed by Workers' Compensation Board if wages at time of injury cannot be fairly calculated by dividing 52 into total wages earned in any one of three calendar years immediately before injury "or cannot otherwise be ascertained without undue hardship to the employee," clauses are disjunctive. AS 23.30.220(a)(2, 3).

5. Workers' Compensation ⇐803, 813

Workers' compensation benefits are meant to compensate for wages lost regardless of other assets of injured worker, and, in determining average weekly wage, consideration of claimant's pension was im-

proper. AS 23.30.185, 23.30.210, 23.30.220, 23.30.220(a)(1–4).

Robert C. Blackford, Fairbanks, for appellant.

Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for appellees.

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and CARLSON, Judge *.

OPINION

MATTHEWS, Justice.

The question in this case is whether the Alaska Workers' Compensation Board properly utilized subsection (2) of AS 23.30.220 rather than subsection (3) of that statute in computing Robert Johnson's average weekly wage for the purpose of establishing his temporary total disability benefits.[1] AS 23.30.220(2) and (3), as in effect at the time of Johnson's injury, provided: [2]

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is based for computing compensation, and is determined as follows:
>
> (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;
>
> (3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board; ...

In November of 1979 Robert Johnson retired from the United States Air Force after 20 years of service. On March 13, 1980 he began working for RCA-OMS, Inc. He was injured on the job on June 12, 1980, but was able to return to work after a week of treatment. He continued to work until February 13, 1981 at which time he was hospitalized and spinal surgery was performed for a condition attributable to the June 12, 1980 injury.

Johnson's salary for the final year of his military service, 1979, was $20,166.12. He asserted that his salary for the approximately 40 weeks that he worked for RCA–OMS was some $42,000.00, most of it earned after his injury. The Board, using subsection (2) of AS 23.30.220, determined Johnson's average weekly wage according to his military rather than civilian salary. So computed, his average weekly wage was $387.81, resulting in benefits of $258.54 per week. By contrast, if subsection (3) had been used, his average weekly wage would apparently have been approximately $1,000.00 with benefits two-thirds of that.

Johnson appealed the Board's determination to the superior court which affirmed

* Carlson, Superior Court Judge, sitting by assignment made pursuant to Article IV, section 16, of the Constitution of Alaska.

1. Under AS 23.30.185 a person entitled to receive temporary total disability benefits shall receive ⅔ of his average weekly wage during the continuance of the disability.

2. AS 23.30.220(a)(1) and (2) were substantially amended effective January 1, 1984. The amended sections, which have no effect on this case read:

> (a) The spendable weekly wage of an injured employee at the time of an injury is the basis for computing compensation. It is the employee's gross weekly earnings minus payroll tax deductions. The gross weekly earnings shall be calculated as follows:
>
> (1) The gross weekly earnings are computed by dividing by 100 the gross earnings of the employee in the two calendar years immediately preceding the injury.
>
> (2) If the board determines that the gross weekly earnings at the time of the injury cannot be fairly calculated under (1) of this subsection, the board may determine the employee's gross weekly earnings for calculating compensation by considering the nature of the employee's work and work history.

the Board's ruling. Johnson now appeals to this court. We reverse.

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

> The entire objective of wage calculation is to arrive at a fair approximation of claimant's probable future earning capacity. His disability reaches into the future, not the past; his loss as a result of injury must be thought of in terms of the impact of probable future earnings, perhaps for the rest of his life. This may sound like belaboring the obvious; but unless the elementary guiding principle is kept constantly in mind while dealing with wage calculation, there may be a temptation to lapse into the fallacy of supposing that compensation theory is necessarily satisfied when a mechanical representation of this claimant's own earnings in some arbitrary past period has been used as a wage basis.

2 A. Larson, The Law of Workmen's Compensation § 60.11(d), at 10-564 (1983) (footnote omitted).

Other provisions of our Alaska Workers' Compensation statutes demonstrate that the objective of average weekly wage calculation is to arrive at a fair approximation of probable future earning capacity. Thus AS 23.30.220(4) provides:

> (4) if an employee is a minor or an apprentice, or a trainee, as determined by the board, when injured, and under normal conditions his wages would increase during the period of disability, this fact shall be considered in computing his average weekly wage; ...

AS 23.30.210, dealing with partial disability provides in part:

> [T]he wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his *wage-earning capacity*. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his *wage-earning capacity*, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable....

(Emphasis added).

[2] If there is only a slight variance between wages at the time of injury and the average weekly wage arrived at under the formula of subsection (2) it would not be unfair to utilize the formula prescribed by subsection (2). In the present case, however, the apparent disparity between Johnson's military salary and what he actually earned at the time of his disability is so substantial that application of the subsection (2) formula clearly does not fairly reflect his wage-earning capacity. The Board should, therefore, have calculated Johnson's average weekly wage under subsection (3).

In reaching this conclusion we are aware that a broad reading of our recent case of *State v. Dupree*, 664 P.2d 562 (Alaska 1983) would support the Board's decision made in this case. *Dupree* presented essentially the converse facts of those in the present case. Dupree's average weekly wage computed pursuant to AS 23.30.220(2) exceeded her anticipated earnings as computed under subsection (3). Despite the fact that Dupree was not likely to return to work at her earlier higher wages, the majority opinion held that the formula in subsection (2) should be applied. *Id.* at 565. Without reconsidering the correctness of the result in *Dupree*, the present case is clearly distinguishable.

[3] The holding in *Dupree* was based on three reasons: (1) the administrative convenience of applying subsection (2), as opposed to subsection (3); (2) the perceived purpose of subsection (2) which was "to give the benefit of past earnings history to the employee," *id.* at 565; and (3) the "rule that ambiguous worker's compensation statutes should be construed in favor of the employee." *Id.* at 566. The second and third reasons are not present here, for

application of subsection (2) does not benefit Johnson and any ambiguity in the statute is not resolved in Johnson's favor when subsection (2) is employed. The first reason, administrative convenience, is a factor in the present case, but we regard it as insufficient to explain the result in *Dupree* or to require application of subsection (2) in this case. The structure of section 220 requires that the Board address and determine the fairness and undue hardship questions posed by subsection (3) in every case in which the points are raised. Although these questions do not have answers which can be arrived at with mathematical precision, the legislature, by enacting subsection (3), has recognized that the goal of certainty must give way to that of fairness whenever the two conflict.

[4, 5] The Board also determined that its decision to apply subsection (2) would not cause undue hardship to Johnson because he would receive his military pension in addition to any compensation award. Since the unfair calculation and undue hardship clauses of subsection (3) are disjunctive, our conclusion that Johnson's wage at the time of injury could not be fairly calculated under subsection (2) is dispositive. We note, however, that in our view consideration of Johnson's pension was improper, since worker's compensation benefits are meant to compensate for wages lost regardless of the other assets of the injured worker.

We also note that our decision that subsection (3) should have been utilized makes it unnecessary to decide whether the phrase "time of injury" as used in AS 23.30.220 means, in effect, time of disability due to injury. There is authority on both sides of this question. *See* 2 A. Larson, The Law of Workmen's Compensation § 60.11(a), at 10–543, -544 n. 77.2 (1982). REVERSED and REMANDED.

COMPTON, Justice, dissenting.

As noted by the court, it is the "rule that ambiguous workers' compensation statutes should be construed in favor of the employee." *State v. Dupree*, 664 P.2d 562, 566 (Alaska 1983). I do not disagree with this rule of construction. Despite the court's assertion that the rule is not being employed in this case, 681 P.2d at 907 (Alaska 1984), I believe that the contrary is true. Since I also believe the statutory language to be unambiguous on the point in issue, I dissent.

The court quotes Professor Larson's admonition that we not suppose that "compensation theory" is satisfied by use of a mechanical representation of a claimant's own earnings in some arbitrary past period as a wage basis.[1] It is this same quote that provides the launching pad for the dissent in *Dupree*.[2] I suggest that while this admonition is of interest to courts, it would be better addressed to legislatures which mandate the use of mechanical formulae in determining wage basis. In this case we are not applying compensation theory; we are applying an existing statute to particular facts.

The Alaska legislature has made a conscious decision to use the past to determine present and future benefits. The average weekly wage to be used in computing temporary total disability benefits is not the claimant's actual weekly wage at the time of injury. Rather, it is an artificial figure arrived at by the use of a mechanical formula applied to figures derived from reference to an arbitrary past period,[3] a procedure apparently only conditionally acceptable to Professor Larson.

The court seeks refuge from the perceived ravages of applying a mechanical formula in exceptions contained in AS 23.-

1. 2 A. Larson, The Law of Workmen's Compensation § 60.11(d), at 10–564 (1983).

2. I think the conclusion inescapable that *Dupree* is being overruled by the court, despite its protestation to the contrary.

3. AS 23.30.220(4) does provide that future normal wage increases for minors, apprentices, or trainees should be taken into account in computing the average weekly wage. It makes no such exception for military personnel entering the private sector.

30.220(3).[4] It invents the following dichotomy:

> If there is only a *slight variance* between wages at the time of injury and the average weekly wage arrived at under the formula of subsection (2) it would not be unfair to utilize the formula prescribed by subsection (2). In the present case, however, the apparent *disparity* between Johnson's military salary and what he actually earned at the time of his disability *is so substantial* that application of the subsection (2) formula clearly does not fairly reflect his wage-earning capacity. The Board should, therefore, have calculated Johnson's average weekly wage under subsection (3). (Emphasis added).

681 P.2d at 907 (Alaska 1984). I say "invent" because I can find nothing in the statute remotely suggesting the slight variance/substantial disparity test now to be applied in determining whether subsection (3) is to be utilized. Furthermore, there would have been no reason for the Alaska legislature to adopt a formula based on an arbitrary past period if it intended that reference to such period be utilized when the resulting artificial figure varies only *slightly* from actual wages at the time of injury.

The court strays, it seems to me, when it fails to keep separate the distinction between total and partial disability benefits.[5] Indeed, the court's confusion is readily apparent from its reference to Johnson's "wage-earning capacity,"[6] a term of art

4. AS 23.30.220(3) provides:
[I]f the board determines that the wage at the time of injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage ... shall be the usual wage for similar service ....

5. The pertinent statutes provide:
AS 23.30.180. PERMANENT TOTAL DISABILITY. In case of total disability adjudged to be permanent 66⅔ per cent of the injured employee's *average weekly wages* shall be paid to the employee during the continuance of the total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. (Emphasis added).
AS 23.30.185. COMPENSATION FOR TEMPORARY TOTAL DISABILITY. In case of disability total in character but temporary in quality, 66⅔ per cent of the injured employee's *average weekly wages* shall be paid to the employee during the continuance of the disability. (Emphasis added).
AS 23.30.190. COMPENSATION FOR PERMANENT PARTIAL DISABILITY. (a) In case of disability partial in character but permanent in quality the compensation is 66⅔ per cent of the injured employee's *verage weekly wages* in addition to compensation for temporary total disability or temporary partial disability paid in accordance with AS 23.30.185 or 23.30.200, respectively, and shall be paid to the employee as follows:
....
(20) in all other cases in this class of disability the compensation is 66⅔ percent of the difference between his *average weekly wages* and his *wage-earning capacity* after the injury in the same employment or otherwise, payable during the continuance of the partial disability, but subject to reconsideration of the degree of the impairment by the board on its own motion or upon application of a party in interest; whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum; (Emphasis added).
AS 23.30.200. TEMPORARY PARTIAL DISABILITY. In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 66⅔ per cent of the difference between the injured employee's *average weekly wages* before the injury and his *wage earning capacity* after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. (Emphasis added).

6. The pertinent statute provides:
AS 23.30.210. DETERMINATION OF WAGE-EARNING CAPACITY. In a case of partial disability under AS 23.30.190(20) or 23.30.200 the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his ca-

that is not synonymous with average weekly wages. Wage earning capacity is irrelevant to determination of average weekly wages and temporary total disability benefits.[7] Simply, the court is using average weekly wages and wage earning capacity interchangeably, even though they are separately defined.

Application of a mechanical formula has more than administrative convenience to recommend it. The point in time when the claimant is most likely to need an expeditious determination of benefits is during the period of temporary total disability. Presumably the claimant is then without income. The court now injects a slight variance/substantial disparity test into the equation, along with notions of fairness in general. I submit this will cause delay and in fact be counterproductive of expeditious determination of temporary total disability benefits.

If the exceptions had stated, as they easily could have, that the average weekly wage could be disregarded if it was not fairly and reasonably representative of actual wages, I would agree with the court. However, they did not. Johnson's wage can be "fairly calculated." He has shown no "undue hardship." I would affirm.

pacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

7. Indeed, Professor Larson even acknowledges that it may be proper to treat temporary disability benefits as an exception to a rule regarding projection of future earnings loss for permanent disability extending into the indefinite future. 2 A. Larson, The Law of Workmen's Compensation § 60.22(b) (1983).

legal foundation on which to hold the agency's actions an abuse of discretion.

I would adopt a rule that enforces the intent of the party. Correction of a bid error which results in an unintended bid should not result in an enforceable contract under traditional notions of offer and acceptance. This court has affirmatively approved this concept in the contract context. When a correction displaces an apparent low bidder—who has submitted an error free bid—the integrity of the bidding process is undermined. Furthermore, the errant bidder, having had an opportunity to review all bids, can determine after an item by item comparison whether its corrected bid will leave a sufficient margin of profit to make it worthwhile to accept, or whether to reject and take its chances in court, should the agency decide to seek bid bond forfeiture. Thus the errant bidder is given a competitive advantage by a process which now encourages bid manipulation.

I find little to recommend the "prevailing view," which appears to be the result of judicial accident rather than reason. I think the case at bar points out the absurdity of its application.

(2) Computing Compensation Rate § 220

Richard F. DEUSER, Appellant,

v.

STATE of Alaska, Appellee.

No. S–243.

Supreme Court of Alaska.

March 22, 1985.

In a workers' compensation case, claimant appealed from a decision of the Superior Court, State of Alaska, Third Judicial District, Anchorage, Mark C. Rowland, J. The Supreme Court, Matthews, J., held that: (1) where 25 weeks of temporary disability were suffered during the period in which claimant probably would have been serving as an acting district court judge, fact that job as acting district court judge might have lasted for only one year was not justification for discounting temporary disability payments to be received during such period, and therefore benefits should have been calculated under subsection calling for selection of the usual wage for similar service mandated by paid employees under similar circumstances, as determined by the Workers' Compensation Board, and (2) the Board erred in concluding, in making fairness determination, that it should ignore claimant's travel and resulting unemployment in first quarter of 1979 on grounds that his unemployment was voluntary, the real question being not voluntariness of unemployment but whether unemployment was likely to be repeated during the relevant future, and in view of facts that claimant's extended vacation was taken not long after he graduated from law school and that there was no evidence that he intended to repeat such experience in the foreseeable future, there was error in ignoring travel and unemployment.

Reversed and remanded.

1. Workers' Compensation ⇐822

Where 25 weeks of temporary disability were suffered during the period in which claimant probably would have been serving as an acting district court judge, fact that job as acting district court judge might have lasted for only one year was not justification for discounting temporary disability payments to be received during such period, and therefore benefits should have been calculated under subsection calling for selection of the usual wage for similar service mandated by paid employees under similar circumstances, as determined by board. AS 23.30.220(2, 3).

2. Workers' Compensation ⇐820

The Workers' Compensation Board erred in concluding, in making fairness determination, that it should ignore claim-

ant's travel and resulting unemployment in first quarter of 1979 on grounds that his unemployment was voluntary, the real question being not voluntariness of unemployment but whether unemployment was likely to be repeated during the relevant future, and in view of facts that claimant's extended vacation was taken not long after he graduated from law school, and that there was no evidence that he intended to repeat such experience in the foreseeable future, there was error in ignoring travel and unemployment. AS 23.30.185, 23.30.220, 23.30.220(2, 3).

Judith J. Bazeley and Richard F. Deuser, Anchorage, for appellant.

Elizabeth Page Kennedy, Asst. Atty. Gen., Anchorage, Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

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

OPINION

MATTHEWS, Justice.

Under former AS 23.30.185, an injured worker was entitled to temporary total disability payments which were two thirds of his weekly wage.[1] AS 23.30.220 prescribed how average weekly wage was determined. It provided:

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows:
>
> . . . . .
>
> (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury;
>
> (3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board....

The question presented here is whether the board erred in calculating Richard Deuser's average weekly wage under subsection (2), rather than subsection (3) of this statute.

On March 23, 1981, Deuser was injured when a snow machine on which he was riding collided with another snow machine. Deuser was employed at the time in the Bethel Service Area as an acting district court judge with circuit riding responsibilities. He was traveling on circuit between villages when the accident occurred.

As a result of the accident, Deuser was seriously injured and was unable to continue to work. After twenty-five weeks of total disability he began working as an attorney in Anchorage.

Under AS 23.30.220, the first step in the calculation of average weekly wage is to look at the total wages earned in any one of the three calendar years preceding the injury. In 1978, Deuser, who graduated from law school in 1976, was employed until July 1 by an Anchorage law firm, earning $2,000 per month. At that time, he terminated his employment in order to travel in Europe. His average weekly wage for 1978, using the formula required by § 220(2)(dividing total wages by fifty-two) was approximately $283.

In 1979, Deuser returned from Europe in the middle of February and in late March began doing research for other attorneys. Deuser earned approximately $15,600 doing contract research. In September, he began to work as an associate for an attorney in Bethel. His salary as an associate of the Bethel attorney was $2,500 per

1. This section and AS 23.30.220 were substantially changed in 1983. §§ 6, 12 ch 70 SLA 1983. These changes do not apply to this case.

month. His total earnings for 1979 were $24,357, yielding an average weekly wage of $468.

During 1980, Deuser continued to serve as an associate of the Bethel attorney until July 1, 1980, at the monthly salary at which he was hired. Disappointed because his employer was not interested in forming a partnership, Deuser opened his own law practice in Bethel. In November, however, he accepted an offer of employment as a circuit riding acting district court judge to start February 2, 1981, and immediately began to wind down his practice. As a sole practitioner, Dueser earned about $3,000 after expenses, which when added to his income as an associate, yielded a total income for the year 1980 of $18,535.47. His average weekly wage for 1980 was therefore $356.

Deuser's weekly wage as an acting district court judge was approximately $970. The term of his appointment was six months. Deuser presented evidence that he would have been offered the position for an extended six month term but was unable to accept the offer because of his injury. He accepted employment with an Anchorage law firm on September 15, 1981, at a salary of $769 per week.

The Board selected Deuser's 1979 earnings to establish his average weekly wage. The Board found that the subsection (2) calculation did not result in substantial unfairness. It reasoned that the fact that Deuser did not work during the first quarter of 1979 was a voluntary decision on his part that did not render the subsection (2) calculation of average weekly wage unfair. Acknowledging that Deuser had presented evidence tending to show that he would have completed two six month terms as an acting district court judge except for his injuries, the Board focused on the fact that it would be speculative to assume that he would have been appointed to a permanent position as district judge.

[1] "The objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity during the period in which compensation benefits are to be paid." *Johnson v. RCA-OMS, Inc.*, 681 P.2d 905, 907 (Alaska 1984). Deuser's twenty-five weeks of temporary disability were suffered during the period in which he probably would have been serving as an acting district court judge. The disparity between Deuser's probable future earnings during the period of disability, $970 per week, and the average weekly wage yielded by application of the subsection (2) formula, $468 per week, is substantial.

In *Johnson*, we concluded that a discrepancy between average weekly wages computed under subsection (2) of $387 and probable future weekly wages of $1,000 was "so substantial that application of the subsection (2) formula clearly does not fairly reflect [the claimant's] wage-earning capacity. The Board should, therefore, have calculated [the claimant's] average weekly wage under subsection (3)." *Id.* at 907. We reach the same conclusion in this case.

The fact that Deuser's job as an acting district court judge may have lasted for only one year cannot be regarded as a justification for discounting the temporary disability payments to be received during this period.

> An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum for a permanent award or the reverse. Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award. In making an award for temporary disability, the Commission will ordinarily be concerned with whether an applicant

would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading.

Argonaut Insurance Co. v. Industrial Accident Commission, 57 Cal.2d 589, 21 Cal. Rptr. 545, 548, 371 P.2d 281, 284 (1962). If permanent disability payments extending into the indefinite future were in question, the fairness question posed by subsection (3) might have a different answer.

[2] Further, when the Board made the fairness determination, it erred in concluding that it should ignore Deuser's travel and resulting unemployment in the first quarter of 1979 on the grounds that his unemployment was voluntary. The real question is not the voluntariness of the unemployment, but whether the unemployment is likely to be repeated during the relevant future.[2] Deuser's extended vacation was taken not long after he graduated from law school. There is no evidence that Deuser intended to repeat this experience in the foreseeable future.

REVERSED and REMANDED.

Artemie KALMAKOFF, Appellant,

v.

STATE of Alaska, COMMERCIAL FISHERIES ENTRY COMMISSION, Appellee.

No. 7767.

Supreme Court of Alaska.

March 29, 1985.

Rehearing Denied April 26, 1985.

Applicant sought limited entry permit for salmon fishery. The Commercial Fisheries Entry Commission denied the application, and he sought judicial review. The Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., affirmed, but the Supreme Court affirmed in part, reversed in part, and remanded for a new administrative hearing, 693 P.2d 844. The Commission, in accordance with a regulation, declined to issue an interim-use permit pending decision of the Supreme Court. The Supreme Court, Rabinowitz, J., held that: (1) in statute specifying terms and conditions of interim-use permits and providing that such a permit shall expire upon final determination of the holder's eligibility for entry permit, phrase "final determination" refers to determination by the final authority, which is the Supreme Court, and (2) final sentence of regulation, "an applicant unsuccessful in superior court will not be issued an interim-use permit on further appeal" is inconsistent with governing statutes and is invalid.

Order in accordance with opinion.

1. Fish ⇐10(1)

In statute specifying terms and conditions of interim-use permits for fishery and providing that interim-use permit shall expire upon final determination of the holder's eligibility for entry permit, phrase "final determination" refers to determination by the final authority, which is the Supreme Court. AS 16.43.220(a), 16.43.250(b), 16.43.270(a).

2. Fish ⇐10(1)

A central policy underlying the Limited Entry Act is to ensure that those applicants who would suffer significant hardship if excluded from the fishery be not excluded. AS 16.43.210, 16.43.220(a).

3. Fish ⇐11

The Commercial Fisheries Entry Commission does not have authority to issue

2. 2 A. Larson, Workmen's Compensation Law § 60.21(c), at 10-592 (1983) (If claimant's part-time relation to the labor market is "clear, *and above all if there is no reason to suppose it will change in the future period into which disability extends*, then it is unrealistic to turn a part-time able-bodied worker into a full-time disabled worker") (emphasis in original).

801(d)(2)(C).[1] The fact that the reasons for firing Knight merely *concerned* her employment duties was sufficient. *See Rutherford v. State*, 605 P.2d 16, 24–25 (Alaska 1979) (investigators did not need specific authority to speak for the state on issue of driver's negligence).

[11] We disagree with the trial court that Knight must show the basis for Wheeler's statement. In *Rutherford*, we adopted the majority view that "an admission is not inadmissible because it is not based on firsthand knowledge or is made in the form of an otherwise inadmissible opinion." *Id.* at 24–25. Hence, a showing of how Wheeler obtained her information is not required because the evidence is admissible regardless of its basis, e.g., even if it is only her opinion. The fact that Wheeler was an employee making a statement about a matter within the scope of *her own* responsibilities provides the statement with enough credibility to go to the jury. This is the policy behind the majority view. *See, id.* at 25 n. 24. Admitting Wheeler's testimony does not, of course, establish its truthfulness. AGA is always free to argue to the jury that the statement is false.

[12] With respect to Alyeska, the statement is not admissible. According to Rule 801(d)(2)(D), the statement must have been made by the agent of the party against whom it is introduced. Wheeler was the personnel manager for AGA, not Alyeska. Because nothing else in the record or in the briefs establishes that Wheeler was acting as Alyeska's agent or servant, no basis exists for applying 801(d)(2)(D).

IV. *Attorney's Fees*

Alaska Civil Rule 54(d) states that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." We have held that this means a prevailing party may recover attorney's fees. *DeWitt v. Liberty Leasing Co. of Alaska*, 499 P.2d 599, 601 (Alaska 1972).

Because we hold that Knight's claim against AGA should not have been dismissed, AGA is no longer a "prevailing party." Hence, it is not entitled to attorney's fees.

[13–16] Alyeska is a prevailing party and is therefore entitled to attorney's fees. Knight argues that Alyeska should have itemized its fees instead of merely submitting an affidavit which listed only the hours worked and the total fees requested. We disagree. We have repeatedly stated that we will not interfere with a trial judge's fee award unless it is "a clear abuse of discretion." *See, e.g., North Star v. Fairbanks North Star Borough*, 621 P.2d 1329, 1335 (Alaska 1981). This rule also extends to a trial judge's decision to request, or not to request, an itemization. The amount awarded, $15,000, is reasonable in light of the evident time and effort expended by counsel, including participating in two (because of a mistrial) truncated trials and considerable pre-trial discovery and motion practice. Hence, the trial court did not abuse its discretion by failing to request an itemization.

The judgment is AFFIRMED as to Alyeska and REVERSED as to AGA.

(B) Computing Compensation Rate § 220

Gerald R. BRUNKE, Appellant,

v.

ROGERS & BABLER and Alaska Pacific Assurance/INA, Appellees.

No. S–680.

Supreme Court of Alaska.

Feb. 21, 1986.

Carpenter sought to recover benefits in connection with work-related accident.

1. This rule provides that a statement is not hearsay if "[t]he statement is offered against a party and is ... (C) a statement by a person authorized by him to make a statement concerning the subject."

The Workers' Compensation Board awarded temporary disability benefits, but denied permanent partial disability benefits for back injury, and the Superior Court, Third Judicial District, Anchorage, Karen Hunt, J., affirmed. Carpenter appealed. The Supreme Court, Burke, J., held that: (1) carpenter, who ustained back injury three months after he came to work for employer, was entitled to have wage loss calculated, for purpose of determining te: .porary total award, based on usual wage for carpenters in area, and (2) carpenter bore burden of proving lost earning capacity, for purpose of claim for permanent partial benefits.

Affirmed in part, reversed in part and remanded.

Compton, J., concurred and filed opinion.

1. Workers' Compensation ⇐1939.1

Supreme Court's review of decision of Workers' Compensation Board was not limited to substantial evidence test, where appeal involved proper construction of workers' compensation statute [AS 23.30.220].

2. Workers' Compensation ⇐818

Employee who sustained back injury in work-related accident three months after job change, and whose salary dramatically increased as result of change, was entitled to have wage loss calculated, for purpose of temporary total award, under statute providing that where reliance on employee's prior annual wages would result in undue hardship, wage loss could be calculated based on "usual wage for similar services" [AS 23.30.220(3)].

3. Workers' Compensation ⇐818

In calculating "usual wage for similar services," for purpose of determining temporary total disability benefits to which injured carpenter was entitled pursuant to AS 23.30.220, Workers' Compensation Board could consider amount earned by other carpenters working on same site during period carpenter was disabled, rather than relying on 60–hour work week which carpenter worked prior to injury.

4. Workers' Compensation ⇐1377

In suit for permanent partial disability benefits, injured employee bore burden of proving extent of lost earning capacity, by introducing evidence of postinjury earnings. AS 23.30.210.

Charles W. Coe, Smith, Coe & Patterson, Anchorage, for appellant.

James R. Slaybaugh, Pletcher & Slaybaugh, Anchorage, for appellees.

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

OPINION

BURKE, Justice.

In this appeal of an Alaska Workers' Compensation Board ("Board") decision and order,[1] appellant Gerald Brunke contests both the Board's method of computation for a temporary total disability and its denial of permanent partial disability benefits for an unscheduled injury. AS 23.30.220; AS 23.30.185; AS 23.30.190(a)(20); AS 23.30.210.[2] Our recent decisions interpret-

1. The Board's decision was affirmed by the superior court. This appeal arises from the superior court decision issued September 4, 1984.

2. AS 23.30 was substantially amended in 1983. *See* ch. 70, 1983 SLA. The sections cited below are all pre-1983 versions; they apply to this claim as it arose prior to the amendments. AS 23.30.220 provided in part:

> Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury is the basis for computing compensation, and is determined as follows:
>
> ....
>
> (2) the average weekly wage is that most favorable to the employee calculated by dividing 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding the injury; (3) if the board determines that the wage at the time of the injury cannot be fairly calculated under (2) of this section, or cannot otherwise be ascertained without undue hardship

ing AS 23.30.220 compel a remand to the Board for computation of Brunke's average weekly wage under AS 23.30.220(3).

I. STATEMENT OF FACTS AND PROCEEDINGS BELOW

On October 29, 1982, appellant Brunke, a carpenter working for Rogers and Babler ("MAPCO"), lost his balance and fell approximately fifteen feet from the roof of a school under construction in Eagle River. Brunke sustained injuries to his back and shoulder as a result of the fall. Brunke was ultimately released for work on March 7, 1983.

Since his release for work in March 1983, Brunke has only held a few construction jobs. At the time of the Board hearing he was not working at all as there had been no calls from the union hall. The jobs he has worked have lasted approximately a month at a time, with a week or so off between jobs. He testified that when working, he experienced back pain whenever lifting or bending, but apparently had not lost any work due to the injury. He returned to work for MAPCO on light duty after his release, but only worked one week when he was laid off because of economic cutbacks.

At the time of the accident Brunke had been working for MAPCO for approximately three months. MAPCO paid him union scale wages of $24.00 an hour. He had earned $19,600 from MAPCO for a total 1982 income of approximately $23,000. The normal work schedules called for six, ten hour days. This is apparently common in the construction industry.

Since Brunke arrived in Alaska in June 1977, he has supported his family by doing construction work. Because his work is mostly seasonal, Brunke has collected unemployment benefits for some part of every year since 1977. While Brunke maintains his name on the union roster and is available for union jobs, he supplements his income doing odd jobs for cash.

Brunke filed a workers' compensation claim for temporary total disability benefits, medical expenses, adjustment of his compensation rate and unscheduled permanent partial disability based on the October 1982 accident. MAPCO paid a scheduled permanent partial disability benefit for Brunke's shoulder injury, the medical expenses relating to that injury and temporary total disability benefits until Brunke's release for work by Dr. Cates on January

> to the employee, the wage for calculating compensation shall be the usual wage for similar service rendered by paid employees under similar circumstances, as determined by the board;
>
> ....
>
> AS 23.30.185 provided:
>
> In case of disability total in character but temporary in quality, 66⅔ percent of the injured employee's average weekly wages shall be paid to the employee during the continuance of the disability.
>
> AS 23.30.190 provided, in part:
>
> *Compensation for permanent partial disability.*
>
> (a) In case of disability partial in character but permanent in quality the compensation is 66⅔ percent of the injured employee's average weekly wages ... and shall be paid to the employee as follows:
>
> ....
>
> (20) in all other cases in this class of disability the compensation is 66⅔ percent of the difference between his average weekly wages and his wage-earning capacity after the injury in the same employment or otherwise, payable during the continuance of the partial disability ... whenever the board determines that it is in the interest of justice, the liability of the employer for compensation, or any part of it as determined by the board, may be discharged by the payment of a lump sum;
>
> ....
>
> (b) Total compensation paid under (a)(20) of this section may not exceed $60,000.
>
> AS 23.30.210 provided:
>
> In a case of partial disability under AS 23.30.190(20) or 23.30.200 the wage-earning capacity of an injured employee is determined by his actual earnings if the actual earnings fairly and reasonably represent his wage-earning capacity. If the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the board may, in the interest of justice, fix the wage-earning capacity which is reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

16, 1983.[3] MAPCO contested Brunke's claims for temporary total disability benefits, medical expenses and permanent partial disability benefits for his back injury.

The Alaska Workers' Compensation Board decided that MAPCO had failed to rebut the presumption of compensability for the back injury with substantial evidence as required by AS 23.30.120.[4] The Board concluded "that employer is liable for compensation and medical benefits relating to [the back injury]." The Board required MAPCO to pay both temporary total disability benefits through March 6, 1983 and all of Dr. Teague's bills.[5] The Board calculated Brunke's average weekly compensation rate pursuant to AS 23.30.220(2) based upon his 1979 earnings, the highest of the three previous calendar years. It rejected his claim for an adjustment. The Board also rejected Brunke's claim for permanent partial disability benefits for his unscheduled back injury because Brunke did not provide evidence of post-injury wages. The Board stated:

> There is no evidence that employee's post-injury earning capacity is less than his pre-injury average weekly (sic) wage of $8,343.42.

Brunke appealed to the superior court. The superior court affirmed the Board's decision and order, finding that the Board's decision was supported by substantial evidence in the record as a whole.

[1] Our review of a decision and order of the Board is limited to questions of law and the substantial evidence test. *Burgess v. Smallwood*, 623 P.2d 312, 317 (Alaska 1981). Since this appeal involves the proper construction of AS 23.30.220 and our recent decisions interpreting that section, our review extends beyond the substantial evidence test used by the superior court.

II. DISCUSSION

A. *The Board Should Have Applied Subsection (3) of AS 23.30.220 Rather than Subsection (2) in Computing Brunke's Average Weekly Compensation Rate for Temporary Total Disability Benefits*

The Board relied in part on our decision in *State v. Dupree*, 664 P.2d 562 (Alaska 1983), in refusing to adjust Brunke's compensation rate. The Board did not have the benefit of our decisions in *State v. Grouroos*, 697 P.2d 1047 (Alaska 1985); *Deuser v. State*, 697 P.2d 647 (Alaska 1985); or *Johnson v. RCA-OMS, Inc.*, 681 P.2d 905 (Alaska 1984) when issuing its decision on February 29, 1984. Those decisions have substantially altered *Dupree*'s outline of the scope of the Board's discretion under subsection (5).

Dupree was the first case to determine under what circumstances the Board should use its discretion to calculate the appropriate average weekly wage. There the Board had utilized its discretion under subsection (3) to calculate a compensation rate closer to the claimant's earnings at the time of injury. *Dupree*, 664 P.2d at 564.

We held that the Board could not use its discretion to disregard the employee's documented past earnings merely because the Board felt that the employee was unlikely to match those earnings in the future. *Id.* at 566. We based much of our reasoning

3. Dr. Cates treated Brunke solely for his shoulder injury and released him for light duty on January 16, 1983.

4. AS 23.30.120 provides:

> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter;
> (2) sufficient notice of the claim has been given;
> (3) the injury was not proximately caused by the intoxication of the injured employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

5. Brunke saw Dr. Teague, a licensed chiropractor, from December 22, 1982 through the summer of 1983 for both back and shoulder pain. Dr. Teague released Brunke for work on March 7, 1983.

in *Dupree* on the legislative history of the federal counterpart to subsection (3). 33 U.S.C. § 910. We stated:

> Review of the legislative history of the federal analogue to subsection (3) indicates that the subsection was designed to permit discretionary computation *only* when the claimant was involved in seasonal, intermittent, or part time employment.

Id. at 566 n. 6 (emphasis in original). In *Dupree*, we also reviewed the legislative history of the 1977 amendments to the Alaska Workers' Compensation Act.[6] We determined that in writing subsection (2), the legislature intended "to give the benefit of past earnings history to the employee." *Id.* at 565.

In *Johnson* we backed away from such a narrow interpretation of the Board's discretion under subsection (3). 681 P.2d 905. Johnson had retired after 20 years in the military, with a final preretirement salary of approximately $20,000. *Id.* at 906. He then began working for RCA–OMS, Inc. at $42,000 per year. He was injured while working for RCA. The Board used Johnson's military salary to compute his average weekly wage under subsection (2). *Id.*

We disapproved of the Board's use of subsection (2). We reasoned that "[t]he objective of AS 23.30.220 is to formulate a fair approximation of a claimant's probable future earning capacity *during the period in which compensation benefits are to be paid.*" *Id.* at 907 (emphasis added). We held that where subsection (2)'s application would not yield a fair calculation, the Board may use its discretion under subsection (3). *Id.*

In *Deuser*, we followed *Johnson*. Deuser, an acting district court judge, was injured driving a snow machine while travelling on circuit. Deuser was a recent admittee to the Alaska bar and had a sporadic work record prior to his appointment as acting district court judge. 697 P.2d 647. The Board applied subsection (2). It used Deuser's 1979 earnings to calculate an average weekly compensation rate, reasoning that such a computation was not substantially unfair. *Id.* at 649. Applying the *Johnson* reasoning we reversed the Board's decision. We concluded that the Board should have calculated Deuser's average weekly wage under subsection (3). *Id.* We rejected the Board's reliance on the voluntariness of Deuser's absence from the job market and the temporary nature of his employment as a judge. *Id.* at 649–50. We stated:

> The fact that Deuser's job as an acting district court judge may have lasted for only one year cannot be regarded as a justification for discounting the temporary disability payments to be received *during this period.*

Id. at 649 (emphasis added).

In *Gronroos*, we again reversed the Board and remanded for application of subsection (3) in determining the average weekly compensation rate. 697 P.2d 1047. Gronroos had retired from the National Park Service with a final annual salary of $42,000. *Id.* at 1048. He subsequently took a permanent seasonal position with the State of Alaska, a job lasting approximately six months each year, at $2,000 per month. *Id.* The Board calculated his temporary total disability benefits under subsection (2). It thus gave him the benefit of his full-time work history during the three previous calendar years. *Id.*

Relying on *Deuser* and *Johnson*, we held that subsection (3) should apply. Gronroos' part-time relationship to the labor market was clear; since there was "*no reason to suppose it will change in the future period into which disability extends,*" it was unrealistic to turn a part time disabled worker into a full time disabled worker. *Gronroos*, 697 P.2d at 1049 (emphasis in original, quoting *Deuser*, 697 P.2d at 650 n. 2). In *Gronroos*, we had determined that application of subsection (2) would result in a compensation wage base of over twice Johnson's wage base at

6. The 1977 amendment of AS 23.30.220 shifted the emphasis from earnings at the time of injury to past earnings history. *Dupree*, 664 P.2d at 564–65.

the time of injury, a result that did not fairly reflect his probable future earning capacity. *Gronroos*, 697 P.2d at 1049 (discussing *Johnson*). In *Gronroos*, we concluded that "[i]t is entirely reasonable to focus upon probable future earnings *during the period into which disability extends* when the injured employee seeks temporary disability compensation." *Id.* (emphasis added).

[2, 3] Brunke argues that under our holdings in *Johnson*, *Deuser*, and *Gronroos*, he is entitled to an average weekly wage determination under subsection (3). We agree.[7] Brunke's temporary disability has now ended. When he was released on March 6, 1983, he returned to his job at MAPCO. He worked at the same construction site, for the same hourly rate. But for the injury on October 29, 1982, Brunke would have worked for MAPCO at $24.00 an hour through at least March 6, 1983. On remand the Board should calculate Brunke's average weekly compensation rate under subsection (3).[8]

B. *The Board Correctly Denied Brunke's Claim for Unscheduled Permanent Partial Disability Compensation as Unsupported by Evidence.*

In its February 1984 decision and order, the Board found that while MAPCO was liable for compensation for Brunke's back injury, Brunke had failed to produce evidence of his post-injury earnings. Therefore, the Board denied his claim for compensation. Brunke relies primarily on Dr. Teague's testimony to establish his disability. Teague testified that by applying the AMA disability guidelines he rated Brunke's permanent partial disability as 3% loss of the shoulder, 5% loss of the lower back and 3% loss of the whole man. [Teague Depo 10] His best "guesstimate" of the possible effect of these figures was that Brunke could lose 5–10 days a year. Brunke argues, therefore, that he is entitled to $2,400.00 per year for the rest of his work life ($24.00 per hour/10 hour work day/10 days a year).

The decisions of this court make it clear that it is the loss of earning capacity and not physical disability per se that is measured when awarding compensation for future losses. As early as 1962 we held that the degree of permanent partial disability was to be calculated by determining loss of earning capacity. "Awards are not to be made for physical injury as such, but for 'disability' produced by such injury. A compensable 'disability' under this section is equated with an impairment of earning capacity." *Manthey v. Collier*, 367 P.2d 884, 888 (Alaska 1962) (footnote omitted). We have continued to apply this definition. *See Hewing v. Peter Kiewit & Sons*, 586 P.2d 182, 185–86 (Alaska 1978); *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974). *See generally* 2 A. Larson, Workmen's Compensation Law, 10–1 to 10–164.173 (1983) (exhaustive discussion of the distinction).

AS 23.30.210[9] allows the Board to fix a reasonable wage earning capacity if an employee has no actual earnings or if the earnings do not fairly and reasonably represent the wage earning capacity. The statute does not mandate such a determination, however. It states: "the board *may*, in the interest of justice," make such a determination. AS 23.30.210 (emphasis added).

Brunke maintains that the Board erred in not making that determination. Brunke argues that it was the Board's duty to solicit evidence of Brunke's post-injury

7. In light of both our holding today and previous rulings in *Johnson*, *Dueser*, and *Gronroos*, we now explicitly overrule *Dupree*.

8. In making the "usual wage for similar services," calculation mandated by subsection (3), the Board may consider in its calculations the amount earned by other carpenters working on the same site during the period Brunke was disabled. This approach would allow MAPCO to present evidence of the actual hours worked by carpenters during the period Brunke would have worked but for the injury, rather than relying on the 60 hour work week which Brunke worked prior to the injury.

9. *See supra* note 2.

earnings. He admits that he submitted no such evidence. The Board found that since Brunke has only worked short calls since the accident, "[t]he effects, if any, of his back condition ... are not yet known." The Board apparently placed the burden of producing evidence of loss of earning capacity on Brunke.

[4] The explicit language of AS 23.30.-210 does not clarify who bears the burden of proof of lost earning capacity. We have not previously addressed this problem. We have, however, held that "[t]he burden of proof as to each element of the claim is on the claimant," once the employer rebuts the presumption of compensability.[10] *Delaney v. Alaska Airlines*, 693 P.2d 859, 862 (Alaska 1985); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978). Other states have interpreted their compensation statute to place the burden upon the claimant. Arizona squarely places the burden on the employee to show loss of earning capacity. *Fremont Indemnity v. Industrial Commission of Arizona*, 144 Ariz. 339, 697 P.2d 1089 (1985) (involving an unscheduled injury which occurred outside Arizona but became part of a subsequent claim). The Arizona court stated: "*the burden is on the injured employee* to show a loss of earning capacity." 697 P.2d at 1095 (emphasis added); *see also Felker v. Industrial Commission of Arizona*, 134 Ariz. 19, 653 P.2d 369 (Ariz.App.1982).

Oregon has also placed the burden of proof on the employee. Recognizing that there was no specific statutory language dealing with the burden of proof, the Oregon court resolved the issue by relying on "traditional notions of burden of proof." *Compensation of Harris v. SAIF Corp.*, 292 Or. 683, 642 P.2d 1147 (1982). Generally, the proponent of a position bears the burden of producing evidence to prove it. *Id.*

This approach is sensible. Since Alaska relies on earning capacity and not physical impairment, the impact of an unscheduled injury must be proven. The employee can best produce information of his post-injury earnings. It is not an unreasonable or unfair burden to place on the employee. The Board still retains the power to make a separate calculation if justice so requires, pursuant to the statute.[11]

Lacking further evidence the Board correctly denied Brunke's claim. However, because the allocation of the burden of proof on this issue was unclear from the statute and prior case law, on remand Brunke may present any evidence of his loss of earning capacity.[12]

AFFIRMED IN PART, REVERSED IN PART and REMANDED for further proceedings consistent with this opinion.

COMPTON, Justice, concurring.

The doctrine of *stare decisis* requires me to concur in the court's interpretation of AS 23.30.220. However, it does not require me to agree with the analysis proffered to support that interpretation.

I will not belabor my earlier disagreement with the court's interpretation of AS 23.30.220, *see Johnson v. RCA-OMS, Inc.*, 681 P.2d 905, 908 (Alaska 1984) (Compton, Justice, dissenting), but believe a couple of remarks are appropriate.

10. *See supra* note 4.

11. *See supra* note 9 and accompanying text.

12. Where the effects of an injury are unclear at the time of the hearing, the employee also has the opportunity to apply to the Board for a modification of an award due to change in conditions. Section 23.30.130(a) allows a modification up to one year after the rejection of a claim. It provides:

> Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175 a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in AS 23.30.110. In accordance with AS 23.30.110 the Board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

Neither *State v. Gronroos*, 697 P.2d 1047 (Alaska 1985), nor *Deuser v. State*, 697 P.2d 647 (Alaska 1985) explain, add to or expand upon the slight variance/substantial disparity analysis created to support the result in *Johnson*. They merely parrot it, as does the court in the case at bar. Though I must accept it, I remain unpersuaded by the *Johnson* analysis, which is used to justify the court's wholesale departure from a statutory framework in which the preference is to determine wage basis on some arbitrary past employment period.[1]

The legislature is free to identify those changed employment circumstances which should receive exceptional treatment. If it chooses, it can return to actual weekly wages as the proper wage basis. It is not for this court to create exceptions, or in effect to resurrect repealed laws.

Wade K. PARKER, Appellant,

v.

STATE of Alaska, Appellee.

STATE of Alaska, Appellant,

v.

Thane R. HOLM, Appellee.

Nos. A-1138, A-1181.

Court of Appeals of Alaska.

Feb. 7, 1986.

Defendants were convicted in the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone and Rene Gonzalez, JJ., of first-degree burglary. Older defendant appealed from his sentence, and State appealed from sentence imposed upon younger defendant. The Court of Appeals, Bryner, C.J., held that: (1) older defendant's sentence of five years imprisonment with two and one-half years suspended was not clearly mistaken and could be affirmed, and (2) younger defendant's sentence of five-year suspended term of imprisonment and five-year probation period on special condition of successful completion of residential alcoholism treatment program was not clearly mistaken as too lenient and was approved.

Sentence affirmed and sentence approved.

1. Burglary ⇐49

Term of five years in prison with two and one-half years suspended for conviction of first-degree burglary, a class B felony, was affirmed as not clearly mistaken; defendant and accomplice used violent means to break into occupied home during nighttime and caused considerable emotional trauma to occupant when they pounded and kicked on door of bathroom in which occupant had locked herself. AS 11.46.300(a)(1), (b), 12.55.125(d).

2. Criminal Law ⇐982.4(2)

Completely suspended five-year term of imprisonment and five-year term of probation under special condition that defendant successfully complete residential alcoholism treatment program was not clearly mistaken as too lenient and was approved, rather than affirmed, by the Court of Appeals pursuant to AS 12.55.120(b); because of rigorous supervision at treatment facility, sentence imposed placed substantial restraints on defendant's liberty and was appropriate to exceptionally serious burglary committed, which involved violent nighttime entry into an occupied house. AS 11.46.300(a)(1).

1. The court declares that *State v. Dupree*, 664 P.2d 562 (Alaska 1983), is being now overruled. 714 P.2d 795 at 800, n. 7 (Alaska, 1986). Since neither *Gronroos* nor *Deuser* add anything to *Johnson*, I adhere to my dissent in *Johnson* in asserting that it overruled *Dupree*. The court's belated recognition of the consequences of a decision is curious.

[17] The purchase agreement signed by Hausam on March 26, 1975, contains a provision expressly acknowledging that the real estate broker is entitled to a commission of $5,220.00 for services rendered in this transaction. This writing, signed by the party to be bound, is sufficient to meet the requirements of Alaska's statute of frauds, AS 09.25.010.[8] In the circumstances, we find no error in the trial court's ruling that the real estate brokers were entitled to a commission of $5,220.00.

VI

[18–20] Finally, Hausam challenges the propriety of the trial court's award of attorney's fees to plaintiffs in the total amount of $9,680.62. The trial court awarded $1,180.62 to McCourt under Civil Rule 82(a)(1) and $8,500 to the Wodriches under Civil Rule 82(a)(2). Correctly noting that the purpose of Rule 82 is to partially compensate a prevailing party,[9] Hausam argues that the award of $9,680.62 in fees should be set aside, as this figure represents 86 percent of the total bill submitted by plaintiffs' counsel. We agree that this figure is somewhat high; however, we will set aside an award of attorney's fees only where it is manifestly unreasonable. *Adoption of V.M.C.*, 528 P.2d 788 (Alaska 1974); *Cooper v. Carlson*, 511 P.2d 1305 (Alaska 1973). We cannot say that the instant award was manifestly unreasonable under the circumstances of this case.

AFFIRMED.

MATTHEWS, J., not participating.

8. AS 09.25.010(a)(8) provides as follows:

"(a) In the following cases and under the following conditions an agreement, promise, or undertaking is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or by his agent:

(8) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission; however, if the note or memorandum of the agreement is in writing, subscribed by the party to be charged or by his lawfully authorized agent, contains a description of the property sufficient for identification, authorizes or employs the agent or broker named in it to sell the property, and expresses with reasonable certainty the amount of the commission or compensation to be paid the agent or broker, the agreement of authorization or employment is not unenforceable for failure to state a consideration;"

9. *Irving v. Bullock*, 549 P.2d 1184 (Alaska 1976); *Malvo v. J. C. Penney Company, Inc.*, 512 P.2d 575 (Alaska 1973).

Adam HOOD, Appellant,

v.

STATE of Alaska WORKMEN'S COMPENSATION BOARD, Henson Masonry and Employers Insurance of Wausau, Appellees.

No. 3289.

Supreme Court of Alaska.

Feb. 3, 1978.

Claimant sought workmen's compensation and Workmen's Compensation Board found that Act in effect on date of injury was applicable and awarded benefits accordingly, and claimant appealed. The Superior Court, Third Judicial District, Anchorage, Victor D. Carlson, J., affirmed, and claimant appealed. The Supreme Court, Boochever, C. J., held that claimant was entitled to higher benefits under later Act.

Reversed and remanded.

1. Statutes ⇐219(9)

Where issue to be resolved in an action before Alaska Workmen's Compensation Board turned on statutory interpretation rather than formulation of fundamental policy involving particularized expertise of administrative personnel, reviewing court would independently consider the meaning of the statute rather than defer to administrative decision. AS 23.30.172, Laws 1976, c. 252; AS 23.30.190(2).

2. Workmen's Compensation ⇐52, 55

Workmen's Compensation Act should be liberally construed in favor of the employees, but statutes are presumed to operate prospectively and will not be given a retroactive effect, unless by express terms or necessary implication, it clearly appears that that was the legislative intent.

3. Workmen's Compensation ⇐60

Where workmen's compensation statute applicable at time of employee's injury provided for 248 weeks' compensation, not to exceed $20,160 for loss of leg, and where statute in effect at time that employee's condition was rated as permanent partial disability doubled the maximum allowable compensation, act in effect at time of rating of condition would be applicable. AS 23.30.172, Laws 1976, c. 252; AS 23.30.190 (2).

4. Constitutional Law ⇐156

Workmen's Compensation ⇐26

Where workmen's compensation amendment in effect at time employee's condition was rated provided that funds needed to carry out provisions would be appropriated from general fund, ultimate burden of making additional payments was not imposed on either employer or its insurance carrier and, thus, none of their contractual rights were impaired. AS 23.30.190; AS 23.30.172, Laws 1976, c. 252; U.S. C.A.Const. art. 1, § 10.

M. Ashley Dickerson, Anchorage, for appellant.

Arden E. Page, Burr, Pease & Kurtz, Inc., Anchorage, for appellees Henson Masonry and Employers Ins. of Wausau.

Elizabeth R. Arnold, Asst. Atty. Gen., Avrum M. Gross, Atty. Gen., Juneau, for appellee State of Alaska, Workmen's Compensation Bd.

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

BOOCHEVER, Chief Justice.

This appeal presents a question as to the applicable statute for awarding Adam Hood compensation for permanent partial disability. He received an injury to his left knee on September 6, 1973 [1] while employed by Henson Masonry. On March 23, 1976, Mr. Hood was rated as suffering a forty percent permanent partial disability of the leg. In September 1973, AS 23.30.190(2) provided for 248 weeks compensation, not to exceed $20,160.00 for loss of a leg. This section was amended by chap. 83, sec. 5, Session Laws of Alaska 1975, effective May 22, 1975, which doubled the maximum allowable compensation to $40,320.00. Hood would be entitled to $8,064.00 if the act in effect at the time of his injury applies, as opposed to $16,128.00, if the act in effect at the time his condition was rated as a permanent partial disability is applicable. The Alaska Workmen's Compensation Board found that the act in effect on the date of injury was applicable, and the superior court affirmed. Although a very close question is presented, we have concluded that Mr. Hood is entitled to the higher benefits of the later act.

Mr. Hood's argument is based on two contentions. Firstly, he argues that AS 23.30.172,[2] which became effective in 1974, requires application of the benefit schedule existing at the time his condition was rated as permanent or at the time the award was computed. Secondly, it is his position that, regardless of whether AS 23.30.172 has such an effect, the applicable act for awarding compensation for a permanent partial disability is the one in effect at the time that the condition became fixed for rating rather than the act at the date of injury.

1. He also received a facial injury resulting in scarring, for which he was awarded $2,500.00 for disfigurement. That portion of the award is not contested on this appeal.

2. AS 23.30.172, as enacted in 1974, provided:

> Benefits for temporary and permanent disability shall be calculated under this chapter according to currently existing benefit rates regardless of the benefit rates in existence at the time of the injury, unless this calculation would cause a decrease in the actual benefits receivable.

At the outset, a question is presented as to whether we should give deference to the Alaska Workmen's Compensation Board's construction of the statute. The Board in its decision referred to the fact that at the time AS 23.30.172 became law, the benefit provided for loss of a leg was $20,160.00. The decision also held that the section applied to rates of compensation only and not to single sum benefits payable for permanent disabilities.

In referring to an analogous situation in *Union Oil Co. of California v. Dept. of Revenue*, 560 P.2d 21, 23 (Alaska 1977), we stated:

> In recent decisions, we have distinguished between two types of questions which may confront a court in judicial review of administrative action. Where the agency decision involves the formulation of fundamental policy or the particularized expertise and experience of administrative personnel, this court will defer to the administrative decision, inquiring only whether it has a reasonable basis. *State v. Aleut Corporation*, 541 P.2d 730, 736–37 (Alaska 1975). On the other hand, where, as here, the issues to be resolved turn on statutory interpretation, the knowledge and expertise of the agency is not conclusive of the intent of the legislature in passing a statute. Statutory interpretation is within the scope of the court's special competency, and it is our duty to consider the statute independently. *State v. Aleut Corporation, supra* at 736–37. (footnote omitted)

[1] While the Alaska Workmen's Compensation Board is a quasi-judicial agency, we believe that the same criteria should apply.[3] Here the issue to be resolved turns on statutory interpretation rather than formulation of fundamental policy involving particularized expertise of administrative personnel, and we shall independently consider the meaning of the statute.

The first contention of Hood requires a construction of AS 23.30.172 as applicable in March 1976 when Mr. Hood's permanent partial disability condition was rated.[4] That section specified:

> Benefits for temporary and permanent disability shall be calculated under this chapter according to currently existing benefit rates regardless of the benefit rates in existence at the time of the injury, unless this calculation would cause a decrease in the actual benefits receivable.

Most of the arguments focus on whether this provision made applicable the 1975 amendment to AS 23.30.190 doubling the maximum compensation for loss of a leg. It is Hood's position that AS 23.30.172 applies to permanent partial disability, and that the benefits applicable in March 1976 when his condition was rated as a permanent partial disability should be regarded as those "currently existing."

The employer and the state, on behalf of the Workmen's Compensation Board, take the position that AS 23.30.172 does not apply to permanent partial disability benefits, and that to hold otherwise would impair contracts in violation of the federal and state constitutions.[5]

[2] There are two conflicting principles applicable to the construction of AS 23.30.-172. Workmen's compensation acts should be liberally construed in favor of the employee,[6] but statutes are presumed to operate prospectively and will not be given a

3. *See London v. Fairbanks Municipal Utilities' Employers Group*, 473 P.2d 639, 642 n. 2 (Alaska 1970).

4. AS 23.30.172 was amended by chap. 252, sec. 3, SLA 1976, effective September 22, 1976, so as not to apply to permanent partial disability, and then repealed in 1977. Chap. 75, sec. 11, SLA 1977.

5. Art. I, sec. 10 of the United States Constitution prohibits states from "impairing the obligation of contracts," and art. I, sec. 15 of the Alaska Constitution similarly provides that no law impairing the obligation of contracts shall be passed.

6. *S.L.W. v. Alaska Workmen's Compensation Board*, 490 P.2d 42, 43 (Alaska 1971); *Libby, McNeill & Libby v. Alaska Industrial Board*, 191 F.2d 262, 264, 13 Alaska 396 (9th Cir. 1951), *cert. denied*, 342 U.S. 913, 72 S.Ct. 359, 96 L.Ed. 683 (1952).

retroactive effect, unless by express terms or necessary implication, it clearly appears that that was the legislative intent.[7]

The employer argues that the intent of AS 23.30.172 was to bring the benefits of permanently totally disabled persons up to those of employees whose injuries resulted in anything other than permanent total disability. Prior to the 1974 amendments to the act, a permanently totally disabled person's wages were to be considered as not exceeding $175.00 per week. AS 23.30.175(b). Maximum compensation was sixty-five percent of the $175.00. AS 23.30.180. Individuals with other types of disability, however, were subject only to a $175.00-a-week maximum payment. AS 23.30.175(a). Since compensation was at the rate of sixty-five percent of average weekly wages, their maximum weekly rate for compensation purposes was $269.23 per week as opposed to the $175.00 maximum allowable in computing permanent total disability compensation. The 1974 amendments did have the effect of eliminating that discrepancy.[8] But there is no indication that this was the sole purpose of the enactment.

Both the state and the employer argue that the 1974 act applies only to "rates of compensation" established by AS 23.30.175 and .180 and not to maximum benefits of sec. 190 which are payable as a lump sum and in addition to the on-going compensation based on a percentage of the weekly wage. We find this argument unpersuasive in view of the language that "benefits" were to be calculated at "currently existing benefit rates." We construe the provision to mean that the "benefits" for loss of a leg would be calculated at the currently-existing benefit rate for such a permanent partial disability.

The state presents a complex argument based on the legislative history of AS 23.30.172 to the effect that partial disability was not intended to be covered. There are four basic types of disability compensation payable under the Alaska Workmen's Compensation Act: (1) temporary total disability, (2) temporary partial disability, (3) permanent total disability and (4) permanent partial disability.[9] AS 23.30.172 referred to "benefits for temporary and permanent disability." The state would have us construe the "permanent disability" provision as applying only to "permanent total disability."

With reference to the legislative history of AS 23.30.172, the state points out that the Senate Finance Committee report for March 26, 1974 indicates the amount that the state might be required to pay for each employee entitled to increased permanent total disability compensation, and that the appropriations and fiscal notes[10] accompanying the budget documents for the Division of Workmen's Compensation for fiscal years 1974 through 1977 were based solely on projected supplements to weekly rates of compensation paid for temporary and permanent total disability and death. No mention is made of maximum awards for permanent partial disability. Thus, the appropriation for fiscal year 1976 which doubled the benefit for permanent partial disability still was based solely on projected supplements to weekly rates of compensation paid for temporary and permanent total disability without reference to permanent partial

7. *Cropley v. Alaska Juneau Gold Mining Co.*, 131 F.Supp. 34, 36, 15 Alaska 531 (D.C.1955); *Stephens v. Rogers Const. Co.*, 411 P.2d 205, 208 (Alaska 1966); *Hill v. Moe*, 367 P.2d 739, 742 (Alaska 1961), *cert. denied*, 370 U.S. 916, 82 S.Ct. 1554, 8 L.Ed.2d 498 (1962). Sands, 2 Sutherland Statutory Construction, § 41.04 at 252 (4th ed. 1973).

8. Additional compensation for those previously injured was to be appropriated from the general fund rather than being payable by the employer or its insurance carrier. Chap. 51, sec. 2, SLA 1974.

9. *London v. Fairbanks Municipal Utilities' Employers Group*, 473 P.2d 639, 642 (Alaska 1970).

10. AS 24.30.035 provides in part:

Fiscal notes on bills. Before a bill which would require increased appropriations by the state is reported to the rules committee, there shall be attached to the bill an estimate of the probable amount of the appropriation increase for the succeeding fiscal years. The estimate or statement shall be prepared by the department or departments affected.

disability. This history may give some indication that the legislature did not intend AS 23.30.172 to apply to permanent partial disability rates. However, this conclusion is weakened by the fact that one legislature passed the 1974 bill, and a different legislature considered the appropriations for fiscal year 1976.[11] Moreover, the Division of Workmen's Compensation of the Department of Labor knew how many employees had previously been rated as permanently totally disabled so that computations could be made as to the increased amounts they would receive. There was little basis, however, for predicting the number of employees previously injured who would subsequently be rated as having a permanent partial disability.

A further enactment to be fitted into the construction of this statutory jigsaw puzzle is the amendment to AS 23.30.172 which was passed in 1976. Chap. 252, Sec. 3, SLA 1976 altered the section so as to limit its provisions expressly to temporary total disability cases which have existed for more than two years and permanent total disability. There is thus no question but that the provision does not apply to permanent partial disability awards accruing after the effective date of the 1976 amendment—September 22, 1976.[12] That amendment could be construed either as conforming to the prior intention of the legislature or as effecting a change so as to eliminate coverage of permanent partial disability from its provisions.

In favor of the employee's construction of the section is the fact that the 1974 act referred to "benefits for temporary and permanent disability." There are two types of permanent disability—total and partial. Since neither was specified, the normal literal reading of the act would include both.

Still another consideration unargued by the parties seems significant. The 1974 act referred to "currently existing benefit rates regardless of the benefit rates in existence at the time of the injury." "Currently existing rates" could have meant those in existence at the time of the enactment of the 1974 act, AS 23.30.172, or those currently existing at the time that the benefits became due and payable. Again, we are confronted with conflicting principles: one that workmen's compensation acts should be liberally construed in favor of the employee, and the other that statutes are presumed to operate prospectively. The latter principle in this case would dictate that the newly-enacted rates not be given a retroactive effect, so as to apply to injuries previously received, unless expressly indicated by the act. Here, however, it is clear that the legislature intended to give the act a retroactive effect so that we are concerned only with the scope of its retroactive provisions.

[3] We have concluded that the higher benefits prescribed by the 1975 amendment to AS 23.30.190 are applicable. Of the many conflicting policies and rules of construction, we find that the literal reading of the statute together with the liberal construction to be given workmen's compensation laws should control. AS 23.30.172 referred to "permanent disability" without limiting that term to a particular type of such disability. Thus, literally, it applied to permanent partial disability as well as to permanent total disability. If the uniformly-accepted legislative policy of benefitting the employee were enhanced by some other construction, we might be persuaded by the various arguments presented. But here, the liberal construction to be given compensation acts is in accord with the literal terms of the statute.

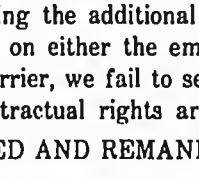
[4] Both the employer and the state additionally contend that to make the 1975 amendment applicable impairs contractual

11. AS 23.30.172 was passed by the second session of the Eighth Legislature. The newly-elected Ninth Legislature increased the permanent partial disability benefits by amending AS 23.30.190(2), effective May 22, 1975.

12. It should be pointed out that this decision applies only to the limited number of cases involving permanent partial disability in which injury occurred prior to May 22, 1975 when permanent partial disability benefits were increased, and disability did not become fixed until after that date.

rights in violation of the state and federal constitutions. We find this argument inapplicable to the law in question as sec. 2 of chap. 51, SLA 1974 expressly provides that: "[f]unds needed to carry out the provisions of this section shall be appropriated from the general fund." Since the ultimate burden of making the additional payments is not imposed on either the employer or its insurance carrier, we fail to see where any of their contractual rights are impaired.[13]

REVERSED AND REMANDED.[14]



Kent C. WELTIN, Appellant,

v.

STATE of Alaska, Appellee.

No. 2932.

Supreme Court of Alaska.

Feb. 17, 1978.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, James R. Blair and Gerald J. Van Hoomissen, JJ., of possession of cocaine, and he appealed. The Supreme Court, Rabinowitz, J., held that: (1) it was reasonable under warrantless search for weapons incident to a lawful arrest exception to warrant requirement for police officer to conduct a warrantless search of defendant's shirtpocket and to seize a glass vial found therein; (2) opening of vial and testing of white powder contained therein were justified under "plain view" doctrine, and (3) sentence in form of a fine of $500 was not excessive in view of fact that defendant had been carrying a gun and needed to be impressed with seriousness of offense.

Affirmed.

1. Arrest ⇐71.1(6)

Where, in face of a truculent defendant and a potentially hostile crowd of bystanders, officer attempted to conduct a pat-down search for weapons after arresting defendant on an outstanding traffic warrant, during course of which officer's hand hit something hard in defendant's shirt pocket, it was reasonable under warrantless search for weapons incident to a lawful arrest exception to warrant requirement

13. We do not pass on whether the act would otherwise impair contract rights. The traditional analysis following *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 4 L.Ed. 629 (1819), would hold that the rights and obligations of the parties vested at the date of injury and could not be altered thereafter. *Mitchell v. United States Fidelity & Guaranty Co.*, 206 F.Supp. 489, 490 (E.D.Tenn. 1962); *McPhail v. Latouche Packing Co.*, 8 Alaska 297, 308 (D.C.Alaska 1931); *Phillips v. City of West Palm Beach*, 70 So.2d 345, 346 (Fla.1953); *Salmon v. Denhart Elevators*, 72 S.D. 110, 30 N.W.2d 644, 648 (1948); *but see, Price v. All American Engineering Co.*, 320 A.2d 336, 339–40 (Del.1974), which held that a statute increasing benefits to employees previously injured did not violate the contract clause because the Workmen's Compensation Act created a status-oriented relationship, not a contractual one. Moreover, somewhat like the Alaska act, the Delaware statute did not deprive insurance carriers of property without due process of law, as they had a right to reimbursement of the extra payments from the state. *See also, McAllister v. Board of Education*, 79 N.J.Super. 249, 191 A.2d 212, 217–18 (1963).

14. Based on the result reached, we do not consider Hood's second argument that, without considering AS 23.30.172, he would be entitled to the higher award due to the amendment of AS 23.30.190 before his partial disability became permanent. It is his contention that the compensation for permanent partial disability became due as of the date his condition could be rated, which was March 1976, rather than the date of injury in 1973. Although a few states hold this position, *Peters v. Chrysler Corp.*, 295 A.2d 702, 704 (Del.1972); *LeBrun v. Woonsocket Spinning Co.*, 106 R.I. 253, 258 A.2d 562, 564–65 (1969); *Allen v. Kalamazoo Paraffine Co.*, 312 Mich. 575, 20 N.W.2d 731, 732 (1945), in the absence of legislation, we would find it difficult to adopt in view of what we believe to be the consistent contrary construction by the Alaska's Workmen's Compensation Board.