

**Case:** *Parker Drilling Company and Liberty Mutual/Liberty Northwest Insurance Company vs. Frank Melchor*, Alaska Workers' Comp. App. Comm'n Dec. No. 091 (October 28, 2008)

**Facts:** On August 29, 2007, Frank Melchor (Melchor) sought a compensation rate review by the board, complaining that a social security offset and overpayment recoupment reduced his compensation to less than \$450 weekly. He lost a leg in a work-related accident in 1996 and had been collecting permanent total disability (PTD) benefits ever since. His compensation rate was set at the maximum rate at the time he was injured, \$700 a week under AS 23.30.175. This rate was calculated under AS 23.30.220(a)(4)(A), based on the 13 consecutive weeks, in the 52 weeks of employment prior to his injury, in which he received the highest pay. Melchor earned \$23,764 in his highest 13 weeks, so his gross weekly earnings were \$1,828. There were no additional records of Melchor's earnings history nor was there information on his payroll tax deductions in order to calculate his "spendable weekly wage."

The parties did not dispute the amount of the social security offset or the overpayment. Instead, the board understood Melchor's request as a request to modify his base compensation rate under AS 23.30.220(a)(10). The board raised Melchor's compensation rate to \$939 per week, the maximum rate in effect when he requested the increase, based on a finding that his compensation rate did not fairly reflect his lost earnings during his present disability under AS 23.30.220(a)(10). The employer appealed, arguing the board lacked substantial evidence to find the rate did not fairly reflect his lost earnings, the board erred in applying the 2008 maximum rate set by the version of AS 23.30.175 amended in 2000 based on a 1996 injury, and *Peck v. Alaska Aeronautical, Inc.*, 756 P.2d 282 (Alaska 1988) does not permit the board to apply the amended AS 23.30.175 to an injury that occurred before its effective date.

**Applicable law:** At the time Melchor was injured, AS 23.30.220(a) provided in part:

Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

. . . .

(4) if at the time of injury the

(A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, not including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;

. . . .

(10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of the employee's gross weekly earnings under (1) - (7) of this subsection does not fairly reflect the employee's earnings during the period of disability, the board shall determine gross weekly earnings by considering the nature of the employee's work, work history, and resulting disability, but compensation calculated under this paragraph may not exceed the employee's gross weekly earnings at the time of injury.

AS 23.30.180 provides that:

Permanent total disability. (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. 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. In making this determination the market for the employee's services shall be

- (1) area of residence;
- (2) area of last employment;
- (3) the state of residence; and
- (4) the State of Alaska.

(b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

At the time Melchor was injured, AS 23.30.175(a) provided in relevant part, "The weekly rate of compensation for disability or death may not exceed \$700 and initially may not be less than \$110."

This section was amended, effective July 1, 2000, by § 15 ch 105 SLA 2000, to read in relevant part:

(a) The weekly rate of compensation for disability or death may not exceed the maximum compensation rate, may not be less than 22 percent of the maximum compensation rate, and initially may not be less than \$110. . . . In this subsection, "maximum compensation rate" means 120 percent of the average weekly wage, calculated under (d) of this section, applicable on the date of injury of the employee.

**Issues:** Does AS 23.30.220(a)(10) establish an alternate maximum compensation rate that may exceed the maximum compensation rate in AS 23.30.175(a)? May AS 23.30.175(a), as amended in 2000, be applied to the claim of an employee who was

injured in 1996? May an employee injured after the 1995 amendments to AS 23.30.220 be entitled to an adjustment under *Peck*? If so, did the board properly apply the rationale of *Peck* to the evidence before it?

**Holding/analysis:** A compensation rate calculated under AS 23.30.220(a)(10) may not exceed the maximum rate set in AS 23.30.175(a). The commission found no evidence, explicit or implicit, that the Legislature intended to allow AS 23.30.220(a)(10) adjustments to exceed the maximum rate, such as an explicit exception in AS 23.30.175. Moreover, permitting such adjustments to exceed the maximum would result in a “gross disparity” between workers injured in the same year, when one worker’s gross weekly earnings are calculated under one of these subsections, AS 23.30.220(a)(1)-(7), while another’s are calculated under AS 23.30.220(a)(10). The commission concluded that under AS 23.30.220(a)(10), when it applies, a worker’s compensation rate may be set as high as the worker’s *gross* weekly wage, as long as it does not exceed the maximum cap of AS 23.30.175. Under the other subsections of AS 23.30.220(a)(1)-(7), the same worker’s compensation rate would be set at 80 percent of the *spendable* weekly wage (the gross weekly wage minus payroll tax deductions). Thus, AS 23.30.220(a)(10) permits the worker to avoid the 20 percent reduction and the reduction of payroll tax deductions but not the maximum cap of AS 23.30.175. In effect, this interpretation may give injured workers a higher compensation rate without paying them more in compensation than they were actually earning at the time of injury. The commission concluded that this interpretation gives effect to all parts of the statute without rendering any sections ineffective or superfluous.

The commission concluded that the burden is on the party seeking the variance, in this case, Melchor, to produce evidence to support that AS 23.30.220(a)(10) should apply, rather than AS 23.30.220(a)(4), citing *Thompson v. United Parcel Serv.*, 975 P.2d 684, 690 (Alaska 1999). The commission concluded the board had no evidence, much less substantial evidence, to support its finding that the calculation of gross weekly earnings at the time of injury, based on AS 23.30.220(a)(4) did not fairly represent the claimant’s earnings during the period of disability. There was no evidence of Melchor’s wage earning history over the years, evidence of future earnings, or any establishment of the diminishment in earnings that comes with retirement.

PTD compensation is fixed but does not end at the employee’s anticipated retirement. Because the Alaska Supreme Court has said that “during the continuance of the *partial* disability[,]” citing *Bailey v. Litwin Corp.*, 780 P.2d at 1009-10, permits continuing payment during the normal life expectancy, without considering retirement, it makes sense to extend that holding to “total disability.” In addition, if PTD benefits ended at retirement, then there would be no need to provide for offsetting Social Security or other pension payments. The commission observed that:

The provision of a steady stream of benefits provides most injured workers with a means of making up the loss of retirement savings or contributions that otherwise would have continued during their wage-earning years. The worker injured at the end of his work life benefits

most from this rule, but the result for younger workers is that the compensation for wage-earning capacity loss is distributed over a longer period of time. Dec. No. 091 at 23.

The commission concluded that even assuming the version of AS 23.30.175(a), amended in 2000, applies, it does not support setting Melchor's compensation rate at the maximum compensation rate for 2008 because the statute by its terms fixes the maximum compensation rate on the basis of a percentage of the state average weekly wage *at the time of injury*, so that all workers hurt in the same year are subject to the same maximum.

*Peck* does not support a *retroactive* application of increases in maximum compensation rates established in AS 23.30.175(a) to persons injured before that version of AS 23.30.175 became effective. *Peck* concerned different statutory language in AS 23.30.175 while the versions of AS 23.30.175(a) at issue in Melchor's case clearly set a maximum compensation rate. Moreover, *Peck* did not apply any version AS 23.30.175 to an injury that occurred before the effective date of that version. The commission concluded, "The decision to build a cost of living increase into permanent total disability compensation is a policy decision that is best left to the legislature, not to the board to apply on an *ad hoc* basis." Dec. No. 091 at 27. This makes the delivery of benefits "predictable" and "fair," in line with the statutory goals expressed in AS 23.30.001(1).

Finally, the commission remanded the case to the board "for rehearing to determine if, under AS 23.30.220(a)(10), the employee is entitled to a recalculation of his gross weekly earnings as not fairly reflective of his earnings during the period of permanent total disability and, if so, recalculation of the compensation rate based on the correct gross weekly earnings and spendable weekly wage." Dec. No. 091 at 30. The board was instructed to consider whether Melchor "would have had no earnings, or diminished earnings after a certain age, and whether, in view of his wage earning history, his age, the nature of the industry he was employed in, and all other available clues, the gross earnings based on the highest 13 weeks of employment in the 52 weeks preceding his 1996 injury were fairly reflective of his predicted gross earnings at age 76." *Id.* at 29-30. In other words, retirement is considered when considering what his gross earnings would be during the period of disability, even though PTD benefits do not end at retirement.