Alaska Workers' Compensation Appeals Commission

Parker Drilling Co. and Liberty
Mutual/Liberty Northwest Ins. Co.,
Appellants,

vs.

Frank Melchor,
Appellee.

Final Decision
Decision No. 091 October 28, 2008

AWCAC Appeal No. 08-008
AWCB Decision No. 08-0034
AWCB Case No. 199605337

Appeal from Alaska Workers' Compensation Board Decision No. 08-0034 issued on February 26, 2008, by northern panel members William Walters, Chair and Damien J. Thomas, Member for Labor.

Appearances: Tasha M. Porcello, Livsey and Porcello, for appellants, Parker Drilling Co. and Liberty Mutual/Liberty Northwest Insurance Corp. Chancy Croft, Esq., for appellee, Frank Melchor.

Commission proceedings: Appeal filed March 10, 2008. Appellants' motion for stay pending appeal heard Thursday, April 3, 2008; order denying motion for stay issued April 22, 2008. Appellee's motion for partial remand to the workers' compensation board filed June 11, 2008; denied by order issued July 10, 2008. Appellants' motion to strike granted and appellee's request to supplement the record denied by order issued July 10, 2008, with instructions to file a corrected brief. Appellants' motion for a one-day extension of time to file a reply brief granted July 11, 2008. Oral argument on appeal presented July 29, 2008.

Commissioners: David W. Richards, Stephen T. Hagedorn, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

In response to a workers' claim for a compensation rate review, the workers' compensation board increased Frank Melchor's permanent total disability compensation payment rate from the statutory maximum rate in effect when he was injured in 1996,

$700 per week, 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." Parker Drilling Co. and its insurer appeal, arguing that the board lacked substantial evidence to find that appellee's compensation rate did not "fairly reflect his lost earnings," that the board erred as a matter of law in applying *Peck v. Alaska Aeronautical, Inc.,*[1] to the appellee's claim, and the board erred in retrospectively applying the 2008 version of AS 23.30.175 to a claim based on a 1996 injury. The appellee opposes and contends that the presumption of compensability applies to his claim and the appellants failed to rebut the presumption by substantial evidence; in light of legislative intent, the board correctly interpreted AS 23.30.220(a)(10) as an exception to the AS 23.30.175(a) maximum rate; and, that the commission may affirm the board on grounds not argued below by the appellee.

The parties' contentions require the commission to decide if the board had substantial evidence upon which to base a recalculation of the statutory wage basis for a compensation rate under AS 23.30.220(a)(10). The commission is also required to interpret AS 23.30.175, .180 and .220(a)(10) together, in light of the Supreme Court's decisions.

The commission determines that AS 23.30.220(a)(10) does not provide a maximum permanent total disability compensation rate that may exceed the applicable maximum compensation rate in AS 23.30.175(a). The commission concludes that the board failed to make adequate findings of fact to support a recalculation based on gross unfairness under *Peck v. Alaska Aeronautical, Inc.*[2] The commission concludes that an adjustment of gross earnings during permanent total disability requires a detailed inquiry into the employee's lifetime earning capacity, including diminishment during retirement, but that compensation continues at a level rate beyond retirement. The commission reverses the board's decision and remands the case to the board.

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[1] 756 P.2d 282 (Alaska 1988).

[2] *Id.*

1. Factual background.

When Frank Melchor was injured, he was 64 years old. He was working as a mechanic in 1996 for Parker Drilling in the Kuparuk field, seven days per week, two weeks on, two weeks off, earning $23.21 per hour. He reported that on March 27, 1996, the wind blew him over on an ice berm, so that his left leg was bruised. He developed serious pain. He was admitted to Providence Hospital the next day with cellulitis and necrotizing fasciitis of the thigh, so that his leg had to be removed at the hip.

Melchor's compensation rate was based on the most favorable 13 consecutive weeks within the 52 calendar weeks immediately before the injury.[3] His gross earnings in those 13 weeks were $23,764; so his gross weekly earnings were set at $1,828. By April 26, 1996, his employer had begun paying permanent total disability compensation at the maximum weekly rate of $700.

On November 15, 1996, a few weeks before his sixty-fifth birthday, Melchor applied for social security retirement benefits. In June 1997, the employer's adjuster received a copy of the Social Security Administration's determination letter, establishing a base retirement benefit of $1197.10 effective November 1996.[4] In July 1999, Melchor, through his attorney, filed a claim for unpaid transportation and medical expenses.[5] The adjuster admitted liability for the claimed benefits.[6] Melchor moved to Nevada, and his compensation rate was reduced to reflect the cost of living adjustment there.[7]

In September 2000, the adjuster established that it was entitled to an offset for Melchor's social security benefits, and, through its attorney, notified Melchor's attorney

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[3] AS 23.30.220(a)(4)(A) (amended 2005).

[4] R. 0021.

[5] R. 0027.

[6] R. 0045.

[7] R. 0011.

of an overpayment of “some $35,000.”[8] The attorney wrote, “As I indicated when you called, my client will want to adjust the compensation rate to reflect the social security offset, and recover over time any overpayment . . . .”[9] A January 31, 2001 compensation report filed to reflect the cost of living adjustment change included the statement that “the employer continues to reduce weekly rate by 20% in an attempt to recoup an overpayment.”[10] The offset was challenged by a Division of Workers’ Compensation technician in April 2001, and documents were sent to justify it.[11] Shortly afterward, Melchor’s attorney withdrew.[12] Later in that same year, the adjuster began paying permanent total disability compensation without a social security offset.

On March 3, 2004, the adjuster notified Melchor that an audit showed that, because his social security offset had not been taken since September 12, 2001, he had been overpaid $39,252.44,[13] and that his compensation would be reduced by 20 percent to recover it.[14] As a result, Melchor’s compensation payments were again reduced by the social security offset and a further 20 percent was taken to recoup the overpayment. Because Melchor had moved back to Anchorage, Alaska, his compensation rate increased to the maximum rate for a 1996 injury, $700 per week.

2. Proceedings before the board.

On August 29, 2007, Melchor filed a workers’ compensation claim. He asked for a “comp. rate review” by the board and complained that the social security offset and overpayment recoupment reduced his compensation to less than $450 per week.[15] The

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[8] R. 0077.

[9] R. 0077.

[10] R. 0020.

[11] R. 0270.

[12] R. 0052.

[13] The bulk of the overpayment must have been accrued between March 1996 and September 2000, when Melchor’s attorney was notified of an overpayment of “some $35,000.”

[14] R. 0276.

[15] R. 0053.

claim was controverted[16] and answered with an assertion that the compensation rate was accurately calculated with an offset for an overpayment and the social security offset.[17] A prehearing conference was held on November 14, 2007, stating the issue for hearing was "Rate Adjustment on PTD benefits."[18] The workers' compensation officer conducting the hearing wrote in her summary that "Mr. Melchor is seeking an adjustment of his permanent total disability benefits pursuant to AS 23.30.220(10)."[19] The parties were advised to file all evidence 20 days before the January 2008 hearing date.[20]

The hearing was held in Fairbanks on January 31, 2008. The hearing was not completely recorded, ending just as the employer began to present its case.[21] However, the brief testimony offered by Melchor in support of his claim was recorded.[22]

> All – all the things that I was wanting to get done was to kind of review my pay, see if everything was in proper order and everything else, and also I – I kept complaining about, you know, everyone else that – that works for the State and everything got raises and everything, and, well, I'm under state workmen's comp. and, you know, I don't seem to -- to get any of that, and – and the way things are costing now, everything is going up and up, and – and that's one of the reasons I wanted to know, see – see if there's compensation for – for inflation, and – and that would really mean a lot to me.[23]

The employer's attorney confirmed that Melchor was paid the $700 per week maximum, less a social security offset and a 20 percent recoupment of an overpayment. The remainder of the employer's argument was not recorded.

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[16] R. 0025.

[17] R. 0055-56.

[18] R. 0219.

[19] R. 0219.

[20] *Id*.

[21] Hrg Tr. 9.

[22] Hrg Tr. 6:13 – 7:13.

[23] Hrg Tr. 6:13-24.

3. The board's decision.

The board took administrative notice of the Alaska average weekly wage established in December 2007 at $782.68, so that the maximum compensation rate for 2008 was $939.00 per week.[24] The board noted that it would not address "the application of the SSA offset at AS 23.30.225(a), or recoupment of asserted overpayments under AS 23.30.155(j)."[25] The board said it "must apply the statutory formula unless there is substantial evidence that past wage levels will lead to an irrational award."[26] Citing *Dougan v. Aurora Electric Inc.*,[27] the board stated "we presume the legislature intended to apply the provision of the corrected version of AS 23.30.220 that most closely fits the earnings fact-pattern in any given claim."[28]

The board, citing *Flowline of Alaska v. Brennan*,[29] said, "The parties have a burden to provide substantial evidence that applying the statutory formula does not rationally predict earning losses due to injury."[30] After acknowledging that there is no cost of living increase provided for workers' compensation benefits, and briefly discussing *Peck v. Alaska Aeronautical, Inc.*,[31] the board explained its decision:

> We have long held that, in most circumstances, the employee is responsible to provide earnings information to the employer for determination of the compensation rate. In this case, the employee became permanently totally disabled, receiving PTD benefits under AS 23.30.180, in 1996. Approximately 12 years have passed since his work injury, and we find that the rationale of the Court's decision in *Peck* could potentially apply to the calculation of his compensation rate. We note the employee in the instant case has not produced evidence of reliable, long term

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[24] *Frank Melchor v. Parker Drilling Co.*, Alaska Workers' Comp. Bd. Dec. No. 08-0034, 5 (Feb. 26, 2008).

[25] *Id.*

[26] *Id.* at 6.

[27] 50 P.3d 789 (Alaska 2002).

[28] *Frank Melchor,* Bd. Dec. No. 08-0034 at 6.

[29] 129 P.3d 881 (Alaska 2006).

[30] *Frank Melchor,* Bd. Dec. No. 08-0034 at 6.

[31] 756 P.2d 282 (Alaska 1988).

> increased earning capacity as did the claimant in *Peck*. Nevertheless, in the instant case, the fundamental barrier to the employee's claim is the maximum compensation rate imposed in 1996. The employee's gross weekly earnings calculated in 1996 were $1,828.00. If those earnings were used as the basis for compensation for an injury at present, the employee would still receive the maximum compensation rate: $939.00 per week. A demonstration of additional earning capacity would not increase the employee's compensation rate. Based on the Court's rationale in *Peck*, especially its notice of the Legislature's intent in increasing the maximum compensation rate to accommodate economic changes over extended periods of time, we find the employee's present compensation rate does not fairly reflect the employee's lost earnings during his present disability. In accord with the Court's rationale in *Peck*, and the statutory requirement at AS 23.30.220(a)(10), we will award PTD compensation under AS 23.30.180 and AS 23.30.220(a)(10) at the 2008 maximum compensation rate of $939.00 per week, effective the date of filing of this order.[32]

The board then ordered the employer to pay compensation at $939.00 per week, but dismissed the claim for interest.[33] This appeal followed.

4. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[34] The board's determination of the credibility of a witness who appears before the board is binding on the commission.[35] The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act.[36] If the commission must exercise its independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, it draws upon its specialized

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[32] *Frank Melchor,* Bd. Dec. No. 08-0034 at 7-8 (footnotes omitted).

[33] *Id.* at 8.

[34] AS 23.30.128(b).

[35] *Id.*

[36] *Id.*

knowledge and collective experience and expertise in workers' compensation[37] and adopts the "rule of law that is most persuasive in light of precedent, reason, and policy,"[38] to preserve the benefits, balance, and structural integrity of the Alaska workers' compensation system.[39]

5. Discussion.

The commission is asked to decide if AS 23.30.220(a)(10) establishes an alternate maximum compensation rate that may exceed the maximum compensation rate in AS 23.30.175(a). The commission is asked to decide if AS 23.30.175(a), as amended in 2000, may be applied to the recipient of compensation who was injured in 1996, to "inflation proof" the maximum compensation rate. The commission must decide if an employee injured after the 1995 amendments to AS 23.30.220 may be entitled to an adjustment under *Peck v. Alaska Aeronautical, Inc.*[40] If so, the commission must decide if the board properly applied the rationale of *Peck* to the evidence before it.

a. AS 23.30.220(a)(10) does not establish an alternative maximum compensation rate that may exceed the maximum rate established in AS 23.30.175(a).

When appellee was injured in 1996, AS 23.30.220(a) provided in pertinent 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:
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> (4) if at the time of injury the

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[37] *See Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002); *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

[38] *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

[39] *Conam Constr. Co. v. Bagula*, Alaska Workers' Comp. App. Comm'n Dec. No. 024 at 5, 2007 WL 80650 (Jan. 9, 2007).

[40] 756 P.2d 282 (Alaska 1988).

> > (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;
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> (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[41] authorizes payment of permanent total disability compensation. When he was injured, the appellee's spendable weekly wage was calculated under

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[41] AS 23.30.180 provides:

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

AS 23.30.220(a)(4)(A).[42] It was based on the 13 consecutive weeks, in the preceding 52 weeks of employment, in which he received the highest pay. In 1996, appellee had earned $23,764 in his highest 13 weeks, so his gross weekly earnings were reported at $1,828. No spendable weekly wage[43] was reported, apparently because appellee's gross weekly earnings resulted in a maximum compensation rate of $700. There is no record of appellee's actual earnings history except his total for his highest paid 13 weeks of employment.

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

[42] In 2005, the legislature rewrote § .220(a)(4) so that it now reads:

> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

[43] Spendable weekly wage is the gross weekly earnings minus "payroll tax deductions." AS 23.30.220(a). Payroll taxes include:

> (A) the amount that would be withheld under withholding tables in effect on the January 1 preceding the injury under the Internal Revenue Code of 1954 as amended and regulations issued under the code, as though the employee had claimed the maximum number of dependents for actual dependency, blindness, and old age to which the employee is entitled on the date on which the employee is injured; and
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> (B) the amount that is or would be deducted or withheld as of the January 1 preceding the injury under the Social Security Act of 1935 as amended from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which the employee was injured and regardless of whether the amount was actually withheld or the earnings were subject to withholding;

AS 23.30.395(30). Without knowing appellee's anticipated annual earnings, withholding rates in 1996, etc., appellee's spendable weekly wage cannot be determined.

Also in 1996, AS 23.30.175(a) provided:

> Rates of compensation. (a) The weekly rate of compensation for disability or death may not exceed $700 and initially may not be less than $110. However, if the board determines that the employee's spendable weekly wages are less than $110 a week as computed under AS 23.30.220 , or less than $154 a week in the case of an employee who has furnished documentary proof of the employee's wages, it shall issue an order adjusting the weekly rate of compensation to a rate equal to the employee's spendable weekly wages. If the employer can verify that the employee's spendable weekly wages are less than $154, the employer may adjust the weekly rate of compensation to a rate equal to the employee's spendable weekly wages without an order of the board. If the employee's spendable weekly wages are greater than $154, but 80 percent of the employee's spendable weekly wages is less than $154, the employee's weekly rate of compensation shall be $154. Prior payments made in excess of the adjusted rate shall be deducted from the unpaid compensation in the manner the board determines. In any case, the employer shall pay timely compensation.

This section was amended in 2000 by § 15 ch 105 SLA 2000, to read:

> (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. However, if the board determines that the employee's spendable weekly wages are less than $110 a week as computed under AS 23.30.220, or less than 22 percent of the maximum compensation rate a week in the case of an employee who has furnished documentary proof of the employee's wages, it shall issue an order adjusting the weekly rate of compensation to a rate equal to the employee's spendable weekly wages. If the employer can verify that the employee's spendable weekly wages are less than 22 percent of the maximum compensation rate, the employer may adjust the weekly rate of compensation to a rate equal to the employee's spendable weekly wages without an order of the board. If the employee's spendable weekly wages are greater than 22 percent of the maximum compensation rate, but 80 percent of the employee's spendable weekly wages is less than 22 percent of the maximum compensation rate, the employee's weekly rate of compensation shall be 22 percent of the maximum compensation rate. Prior payments made in excess of the adjusted rate shall be deducted from the unpaid compensation

> in the manner the board determines. In any case, the employer shall pay timely compensation. 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.

§ 23 ch 105 SLA 2000 provided an effective date of July 1, 2000, for the amended § .175(a), without reference to whether it should be applied to persons whose injuries predated the amended provision.

The commission assumes that when the legislature amends or rewrites a workers' compensation statute, "the legislature has available other provisions of the Alaska Workers' Compensation Act."[44] Statutes that are *in pari materia* should be construed together.[45] "Statutes are deemed to be *in pari materia* when they relate to the same purpose or thing or have the same purpose or object."[46] The commission is also guided by the principle that different provisions of the Workers' Compensation Act should not to be interpreted so as to create inconsistency or to invalidate one in favor of another, presuming "that the legislature intended every word, sentence, or provision of a statute to have some purpose, force, and effect, and that no words or provisions are superfluous."[47] The Supreme Court has cautioned against too narrow an interpretation, advising that "rather, the language should be given a 'reasonable or

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[44] *Kennecott Greens Creek Mining Co. v. Clark*, Alaska Workers' Comp. App. Comm'n Dec. No. 080 at 22, 2008 WL 2469054 (June 9, 2008) (citing 2B N. Singer, *Sutherland Statutory Construction*, § 51.01 (6th ed. 2000)).

[45] *Id.* at 22 (citing *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994)).

[46] *State v. Eluska*, 724 P.2d 514, 517 (Alaska 1986) (Compton, J., dissenting); 2B N. Singer, *Sutherland Statutory Construction*, § 51.02 (6th ed. 2000); *but see State v. Bundrant*, 546 P.2d 530, 545 (Alaska 1976) ("a statute in pari materia with a subsequent, but approximately contemporaneous, measure is a proper source of evidence of legislative intent in that second measure"); *Kirby v. Alaska Treatment Center*, 821 P.2d 127, 130 (Alaska 1991) (construing subsequent amendment to AS 23.30.041 *in pari materia* with repealed AS 23.30.265(28)).

[47] *Mech. Contractors of Alaska, Inc. v. State, Dept. of Pub. Safety*, 91 P.3d 240, 248 (Alaska 2004) (citing *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 761 (Alaska 1999) quoting *Rydwell v. Anchorage Sch. Dist.*, 864 P.2d 526, 530-31 (Alaska 1993)).

common sense construction, consonant with the objectives of the legislature.' The intent of the legislature must govern and the policies and purposes of the statute should not be defeated."[48]

Every version of the Alaska workers' compensation act has included *some* form of maximum rate, initially established as a dollar amount. In 1966, the maximum rose to $100 per week,[49] and it continued to rise incrementally until, in 1972, the maximum compensation rate rose to $175 per week.[50] In 1975, the legislature amended AS 23.30.175(a) to index the maximum *compensation* rate to the state's average weekly wage, with increasing percentages of the state average weekly wage phased in over several years.[51] Two years later, the statute was amended to state that the weekly compensation rate may not exceed the applicable percentage of the Alaska average week wage *in effect on the date of injury.*[52]

After 13 years of experience with an indexed maximum, the 1988 amendments to AS 23.30.175(a) resulted in the return to a flat dollar maximum, $700 per week.[53] At that time, the state average monthly wages had been falling, and a trend of falling average wages[54] would result in lower maximum compensation rates. By 2000, the

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[48] *Mech. Contractors*, 91 P.3d at 248 (Alaska 2004) (citing *Mack v. State*, 900 P.2d 1202, 1205 (Alaska Ct. App. 1995) quoting *Belarde v. Anchorage*, 634 P.2d 567, 568 (Alaska Ct. App. 1981)).

[49] § 1 ch 206 SLA 1968.

[50] § 3 ch 10 SLA 1972.

[51] § 2 ch 83 SLA 1975.

[52] § 3 ch 75 SLA 1977. *See Wein Air Alaska v. Arant*, 592 P. 2d 352, 356 n.15 (Alaska 1979) (discussing effect of the 1977 amendment), *overruled on other grounds by Fairbanks North Star Borough Sch. Dist. V. Crider,* 736 P.2d 770, 775 (Alaska 1987).

[53] § 30 ch 79 SLA 1988.

[54] From 1985 to 1995, Alaska's average monthly wage dropped in every year except 1989 after adjusting for inflation. Neal Fried, *Income and Wage Gains are Slow to Come,* Alaska Economic Trends, 1, 6 (November 1996). In 1988, the average monthly wage had fallen below $3000, so the average weekly wage was *below* $693. *Id.* at 7. In 1995, the average weekly wage was $621. *Id.* at 6. If the maximum

pressure against the flat dollar maximum had increased, and the legislature returned the maximum compensation rate to a percentage indexed against the state average weekly wage. The legislature avoided ambiguity about which year's average weekly wage served as the base rate for the maximum by providing, in the last sentence of AS 23.30.175(a), "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*." (emphasis added). Since 1977, the legislature has made it clear that it intended that a fixed maximum would apply to every employee's total compensation rate, whether based on a percentage of the average weekly wage in effect at the time of injury (or applicable on the date of injury), or a flat dollar amount.

AS 23.30.175(a) does not contain an exception for a compensation rate that exceeds the maximum rate through an adjustment of the gross weekly earnings under AS 23.30.220(a)(10). The commission can find no reference in the legislative history that such a result was intended. While a § .220(a)(10) adjustment could result in an increase of the compensation up to the maximum compensation rate, application of the adjustment to exceed the maximum rate, as appellee argues, results in gross disparity between workers injured in the same year. Two examples below illustrate this effect:

Worker A, who has an annual salary of $104,000 in a stable occupation with stable earnings history, suffers a permanently totally disabling injury in 1996. His gross weekly earnings are $2000, under AS 23.30.220(a)(3) his spendable weekly wage is approximately $1370 ($2000 – $630 approx. payroll deductions). 80% of $1370 is $1096/week. Because 80% of his spendable weekly wage exceeds $700, Worker A receives the maximum compensation rate of $700 per week. His uncompensated wage loss is $670 per week ($1370 - $700).	Worker B proves his gross weekly earnings of $554, based on $2400/month in a temporary job, do not fairly reflect his earnings during the period of disability as he had accepted a job in his career field before he was injured, which paid $70,000/year. The board calculates gross weekly earnings at $1346/week. His spendable weekly wage is approx. $949 ($1346 - $397 *approx.* payroll deductions). Under appellee's theory, Worker B would receive $759.20 per week (80% of spendable weekly wage), without regard to the maximum in AS 23.30.175(a). His uncompensated wage loss is $190 per week ($949 - $759).

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compensation rate was 120% of the 1995 average weekly wage, as the current statute provides, it would have been about $745 when appellant was injured.

Appellee's theory gives Worker B, whose uncompensated wage loss is $480 per week *less* than the wage loss experienced by Worker A, $59 per week *more* compensation than Worker A.

Section .220(a)(10) is triggered by a board finding that the "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," not that the *compensation rate* based on gross weekly earnings under (1) - (7) does not fairly represent *lost earning capacity*. Section .220(a)(10) provides a means of establishing a *different* gross weekly earnings number than gross weekly earnings at the time of injury. The board cannot find that the *same* gross weekly earnings number both establishes that the gross weekly earnings at time of injury is unfair and also forms the basis for a compensation rate exceeding the maximum under AS 23.30.220(a)(10). Also, compensation under § .180 is always less than the gross weekly earnings, because it is based on 80 percent of *spendable* weekly wages – gross weekly earnings less payroll deductions. If the *same* gross weekly earnings could be used, there would be no reason to provide, as § .220(a)(10) does, a maximum based on gross earnings at the time of injury. A maximum defined as gross earnings at the time of injury would always be greater than the compensation rate – such a cap is no cap at all.

The commission cannot accept an interpretation of § .220(a)(10) that produces irrational, unfair results, renders § .175(a) ineffective, *and* results in rendering part of § .220(a)(10) superfluous. Section .220(a)(10) provides a mechanism for altering the number on which the compensation rate calculation is made, but it also states that the calculation of the compensation rate is to occur. Part of that calculation is that the resulting compensation rate "may not exceed" the maximum rate.

On the other hand, if § .220(a)(10) establishes a second cap *under* the maximum compensation rate, both statutes are given full effect. Thus, using the same examples, the compensation rates are established as follows:

Worker A, who has an annual salary of $104,000 in a stable occupation and a stable wage history, suffers a	Worker B proves his gross weekly earnings of $554, based on $2400/month in a temporary job, do not fairly reflect his earnings during

permanently totally disabling injury in 1996. His gross weekly earnings are $2000 under AS 23.30.220(a)(3), so his spendable weekly wage is approximately $1370 ($2000 – $630 approx. payroll deductions). 80% of $1370 is $1096/week. Because 80% of his spendable weekly wage exceeds $700, under AS 23.30.175(a) Worker A receives the maximum compensation rate of $700 weekly.	the period of disability (e.g. he had accepted a job in his career field before he was injured). The new job paid $70,000/year, so the board calculates gross weekly earnings at $1346. Using this amount, his spendable weekly wage is approximately $949 ($1346 - $397 *approx.* payroll deductions). 80% of Worker B's spendable weekly wage is $759.20, but under AS 23.30.220(a)(10), his compensation cannot exceed his gross earnings at time of injury or $554 weekly.

Worker A receives the maximum compensation rate. If Worker B had been injured in his new job, his compensation rate would also be the maximum rate. Under § .220(a)(10) the maximum B can receive is the gross weekly earnings B received in the job he held at the time of injury: $554. It is less than the maximum compensation rate, but it is more than a compensation rate based on the wages he earned when injured. It is fair, because the employer paying compensation is not insuring for liability based on another employer's prospective wages. In this reading of the statute, both maximum rates are effective, as the compensation calculated on the new gross earnings figure cannot exceed either the § .175(a) maximum or the § .220(a)(10) cap.

This interpretation benefits workers injured while in temporary lower wage jobs, or whose low gross weekly earnings at the time of injury otherwise do not fairly represent their earnings during the disability. It may give them a higher compensation rate without paying them more in compensation than they were actually earning at the time of injury. It gives greatest effect to all parts of the act and renders none ineffective. Therefore, the commission concludes that a compensation rate calculated on a gross weekly earnings established by the board under § .220(a)(10) is subject to both the limit established in § .220(a)(10) and the maximum compensation rate established in AS 23.30.175(a).

b. The board lacked substantial evidence that appellee's gross weekly earnings under AS 23.30.220(a)(1)-(7) did not fairly represent his earnings during the period of disability.

The board based its decision on application of AS 23.30.220(a)(10). That section requires the board to find that a calculation of gross weekly earnings at the time of injury, based on AS 23.30.220(a)(1)-(7) does not fairly represent the claimant's earnings during the period of disability. The appellee's gross weekly earnings were established under AS 23.30.220(a)(4)(A). However, the board made no findings that appellee's gross weekly earnings based on AS 23.30.220(a)(4)(A) were not fairly representative of his earnings during the period of disability.

There was no evidence of the appellee's wage earning history over the years, evidence of future earnings, or any establishment of the diminishment in earnings that comes with retirement. The only evidence the board had was that Parker Drilling reported that in 13 consecutive weeks, out of 52 weeks preceding his injury, the appellee earned $23,764 and these were his *highest* earnings. No payroll records, annual tax records, or W-2's were in the record. There is no evidence of anticipated work assignments stretching into the period of disability, nor, as the board acknowledged, of earnings during the period of disability. No evidence demonstrates that gross weekly earnings of $1,828 is unfairly reflective of his earnings in the 12 years after his injury, and no evidence that it fairly reflects his earnings either. The commission determines the board had no evidence on which to base a recalculation of the appellant's gross weekly earnings.

The board stated that the burden is on "the parties" to bring evidence to vary the gross weekly earnings from the method provided by statute. More accurately, the burden is on the party seeking the variance to produce the evidence to support a variance from the method established by statute.[55] The opposing party may produce

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[55] *Thompson v. United Parcel Serv.*, 975 P.2d 684, 690 (Alaska 1999) ("Because UPS seeks deviation from the statutory formula in the calculation of Thompson's disability award, UPS carries a heavy burden."). Although in *Dougan v. Aurora Elec., Inc.,* 50 P.3d 789, 797 (Alaska 2002), the Supreme Court held that the

evidence to rebut the request for a variance – but is not required to do so if there is insufficient evidence to support one. In the absence of evidence, the claim for a variance from the statutory formulae in AS 23.30.220(a)(1)-(7) fails.

The board, having found that the appellee failed to produce evidence of any earnings during the period of disability, or any evidence that would establish that his wage earning history, the nature of his work and resulting disability, or any other available clues to his earnings, had nothing to compare to the gross weekly earnings at the time of injury established under AS 23.30.220(a)(4)(A) (1988). Therefore, the board had no evidence on which to base a calculation of a *different* gross weekly earnings number under AS 23.30.220(a)(10).

c. *Alaska permanent total disability compensation is fixed but extends beyond the employee's anticipated work life; so that the stability of the compensation rate offsets the loss of additional savings, including increased pension contributions, for retirement.*

In *Bailey v. Litwin Corp.*,[56] the Supreme Court discussed an employee's entitlement to unscheduled permanent partial disability compensation under a version of AS 23.30.190,[57] now repealed in favor of the current regime of permanent partial

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test applied in *Thompson* to determine if the statutory calculation of base wages was constitutionally applicable to the injured worker (i.e., whether the statutory calculation based on historical wages is an accurate predictor of future earning losses) did not apply to the 1995 amendments to AS 23.30.220, it did not alter the burden of producing evidence to support deviation from the statutory formulae. The assignment of a burden to affirmatively raise the exception and produce evidence on which the board could base a finding in his favor is not inconsistent with the presumption that a claim for compensation is compensable; even to raise the presumption the employee must produce some evidence to support the claim.

[56] 780 P.2d 1007 (Alaska 1989).

[57] At the time Bailey was injured, AS 23.30.190 provided in part:

> (a) In case of disability partial in character but permanent in quality the compensation is 66 2/3 percent of the injured employee's average weekly wages . . . , and shall be paid to the employee as follows:

* * *

impairment compensation based on the percentage of loss of function. Bailey challenged the limitation of his loss of earning capacity based on his probable future retirement. The court said:

> Under the act, an employee with an unscheduled injury is entitled to collect benefits "during the continuance of the partial disability." AS 23.30.190(a)(20). By definition, a permanent partial disability will last the rest of the claimant's life; therefore, nothing in the language of AS 23.30.190(a)(20) suggests that a lump sum disability benefit should be calculated based on anything other than the employee's total life expectancy.[58]

The Court acknowledged that in *Fairbanks North Star Borough Sch. Dist. v. Crider*,[59] it had stated that "AS 23.30.190(a)(20) . . . permits a claimant to recover the full $60,000 maximum compensation if the claimant will sustain that amount of loss or more before retirement."[60] However, the Court said, because Crider's pre-retirement loss exceeded the maximum, inclusion of post-retirement disability benefits was not in issue.[61] Therefore, the Court concluded, "[a]ny suggestion to the contrary [in Crider] is dicta, and may be disregarded."[62] In calculating a lump sum award for a permanent *partial* disability, the Court held, "the employee's total future loss equals the total payments

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> (20) in all other cases in this class of disability the compensation is 66 2/3 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.
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> * * *
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> (b) Total compensation paid under (a)(20) of this section may not exceed $60,000.

[58] 780 P.2d at 1009-10 (footnotes omitted).

[59] 736 P.2d 770 (Alaska 1987).

[60] 780 P.2d at 1011, quoting *Crider,* 736 P.2d at 774.

[61] 780 P.2d at 1011, citing *Crider*, 736 P.2d at 772.

[62] 780 P.2d at 1011.

the employee would receive for his normal life expectancy, without considering his actual or possible retirement."[63]

However, the court also reiterated an acknowledgement that one of the policies of the Workers' Compensation Act and the legislative intent was that employer liability for unscheduled injuries would never exceed $60,000.[64] In other words, the maximum recoverable amount applied to all unscheduled injuries, regardless of how long it took to reach the maximum.

This appeal concerns permanent total disability, not an award of permanent partial disability compensation. Permanent total disability compensation is awarded under AS 23.30.180, which states:

> 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
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> (1) area of residence;
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> (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.

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[63] *Id.*

[64] *Id.* at 1009.

Permanent total disability, like unscheduled permanent partial disability, is paid to the employee "during the continuance of the total disability." The Supreme Court has said that, "during the continuance of the *partial* disability" permits continuing payment during the normal life expectancy, without considering retirement. But, does permanent total disability compensation payment also continue during the normal life expectancy? In the commission's view, it does. The Supreme Court has held that "permanent" means lasting the rest of the employee's life,[65] therefore, the duration of the *permanent* total disability compensation extends so far if the total disability endures the rest of the employee's life.

The definition of disability found at AS 23.30.395(16) states that "disability" means "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." The incapacity to earn wages is at the heart of permanent total disability compensation. AS 23.30.180 refers to the measurement of the ability to earn wages by identifying "the market for the employee's services" and stating that failure to achieve "remunerative employability as defined in AS 23.30.041(r)" is not sufficient to establish permanent total disability.

This understanding of permanent total disability compensation is also at the heart of the argument that compensation for the loss of wage-earning capacity should not continue after the employee's work life is over, i.e., when the employee would have had no wages to lose, even if he had not been injured. In some states, permanent disability payments cease on reaching the normal retirement age.[66] Other states, like

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[65] *Alaska Intern. Constructors v. Kinter*, 755 P.2d 1103 (Alaska 1988).

[66] Arkansas ends permanent total disability benefits at age 65, "provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (60), regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks." Ark. Code Ann. §11-9-522(f)(1). The intended purpose is to "prohibit workers' compensation from becoming a retirement supplement." Ark. Code Ann. §11-9-522(f)(2). However, the Arkansas Court of Appeals struck down the 260-week cap on benefits for workers injured after age 60 in *Osborne v. Bekaert Corp.*, 245 S.W.3d 185 (Ark. Ct. App. 2006). A Colorado statute ended permanent total disability compensation payments on reaching age 65; the Colorado Supreme Court declared the statute unconstitutional in *Indus. Claim Apps.*

Alaska,[67] offset permanent disability benefits by federal social security payments or pension payments to which the employer contributed.[68] In some states, the legislature

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Office v. Romero, 912 P.2d 62 (Colo. 1996). Kentucky terminates permanent total disability compensation "as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1379f, or two (2) years after the employee's injury or last exposure, whichever last occurs." Ky. Rev. Stat. Ann. § 342.730(4). The Kentucky Supreme Court upheld the statute, rejecting equal protection, due process and other constitutional challenges. *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (Ky. 2002). In Massachusetts, an employee over age 65, who (a) has been out of the labor market for at least two years and (b) is eligible for social security or benefits from a pension paid for in part by an employer, is not entitled to total disability benefits, unless the employee can establish that, but for the injury, he or she would have remained active in the labor market. The statute creates a rebuttable presumption of non-eligibility for employees over age 65. Mass. Gen. Laws ch. 152, § 35E. Minnesota statutes provide that "Permanent total disability shall cease at age 67 because the employee is presumed retired from the labor market. This presumption is rebuttable by the employee. The subjective statement the employee is not retired is not sufficient in itself to rebut the presumptive evidence of retirement but may be considered along with other evidence." Minn. Stat. § 176.101 (4). Oklahoma limits permanent total disability payments from the Multiple Injury Trust Fund to a specified period (depending on the date the subsequent injury occurred) or until the employee reaches age 65, whichever is longer. Okla. Stat. tit. 85, § 172. North Dakota ends permanent total disability payments when "[a]n injured employee … begins receiving social security retirement benefits or other retirement benefits in lieu of social security retirement benefits, or … attains retirement age for social security retirement benefits unless the employee proves the employee is not eligible to receive social security retirement benefits or other benefits in lieu of social security retirement benefits." N.D. Cent. Code § 65-05-09.3(2). But, an employee whose benefits end under this provision receives "an additional benefit" under N.D. Cent. Code § 65-05-09.4 that is based on the length of time the employee received disability compensation, and is paid for a period as long as the employee's compensation lasted or until the employee dies, whichever is first. Tennessee ends permanent total disability compensation at age 65 unless the disability results from injuries that occurred after age 60 in which case the benefits are payable for 260 weeks and offset against Social Security benefits. Tenn. Code Ann. § 50-6-207(4). West Virginia ends permanent total disability benefits once claimants "attain[ ] the age necessary to receive federal old age retirement benefits." W. Va. Code § 23-4-6(d).

[67] AS 23.30.225.

[68] *See*, *e.g.*, Colo. Rev. Stat. § 8-42-103; Fla. Stat. § 440.15(9); Kan. Stat. Ann. § 44-501(h) (upheld by the Kansas Supreme Court against an equal protection

has explicitly provided that permanent total disability compensation continues for the life of the employee.[69] In others, the courts have so held.[70]

In the commission's view, the legislature would not have provided for social security old age benefits or pension payments to be offset from compensation, if the legislature had intended that permanent total disability compensation, awarded prior to retirement, would terminate at the end of the work life of the employee. 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. The lowest wage earners, who are least likely to have set aside money for retirement, benefit most from this mechanism. Their compensation is not reduced to a present value and paid in a

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challenge on the basis that the provisions were rationally related to the legitimate government purpose of preventing duplication of wage-loss benefits. *Injured Workers of Kansas v. Franklin*, 942 P.2d 591, 609-14 (Kan. 1997)); Me. Rev. Stat. Ann. tit. 39-A, § 221 (constitutionality of coordinating disability benefits with Social Security retirement benefits upheld under an earlier version of the statute in *Berry v. H.R. Beal & Sons*, 649 A.2d 1101 (Me. 1994)); Mich. Comp. Laws §§ 418.354, 418.357; ; Utah Code Ann. §34A-2-413(5) (Utah Supreme Court granted cert. to review decision of appeals court upholding constitutionality against equal protection challenge, *Merrill v. Labor Comm'n*, 163 P.3d 741 (Utah Ct. App. 2007), *cert. granted*, 186 P.3d 347 (Utah 2007)); Wash. Rev. Code Ann. §§ 51.32.225, 51.32.220 (constitutionality upheld, *Harris v. State*, 843 P.2d 1056 (Wash. 1993)).

[69] Arizona provides permanent total disability compensation "during the life of the injured person." Ariz. Rev. Stat. Ann. § 23-1045(B). Missouri provides for payment of permanent total disability benefits "during the continuance of such disability for the lifetime of the employee." Mo. Ann. Stat. § 287.200(1). Ohio provides for permanent total disability benefits "to continue until the employee's death." Ohio Rev. Code Ann. § 4123.58(A).

[70] *Shiek v. North Dakota Workers Comp. Bureau*, 634 N.W.2d 493, 501 (N.D. 2001) (construing earlier version of statute amended in 1993, *see* n.66 above); *State ex rel. Reliance Elec. Co. v. Wright*, 748 N.E.2d 1105 (Ohio 2001) (discussing application of rule that retirement prior to becoming disabled does not disqualify worker from receipt of permanent total disability compensation unless retirement is voluntary and constitutes abandonment of the labor market).

lump sum that may be lost in speculative ventures or unwise investments. The highest wage earners, whose compensation is limited by the maximum rate, may benefit less, but they have had more opportunity, due to their high wages, to save for retirement. They also benefit from the certainty associated with a fixed sum.

Permanent total disability compensation is "paid to the employee during the continuance of the total disability";[71] the commission holds that this means that permanent total disability compensation payments continue as long as the total "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,"[72] lasts, even beyond the normal age of retirement.[73]

However, whether the compensation rate may be altered without regard to the underlying wage basis is another question. The general rule is that maximum compensation rate increases are not retroactive, and the benefit level in effect at the time of injury applies.[74] The Alaska State Legislature states in AS 23.30.175(a) that the maximum compensation rate is fixed on the basis of a percentage of the state average weekly wage *at the time of injury,* thus insulating the employer from increases based on wage inflation, and the employee from decreases associated with falling wages. The maximum compensation rate may rise and fall from year to year when indexed to the state average weekly wage, but all employees injured in a given year are subject to the same maximum for the lifetime of the injury. Thus, even if the later version of AS 23.30.175(a) could be applied retrospectively, it would not support an increase in

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[71] AS 23.30.180.

[72] AS 23.30.395(16).

[73] *Kinter,* 755 P.2d at 1105. This holding does not alter the rule that voluntary withdrawal from the labor market for reasons unconnected with the injury may be the basis for a denial of compensation; in such a case the employee's loss of earning capacity is not "because of injury." *Cortay v. Silver Bay Logging*, 787 P.2d 103, 107 (Alaska 1990); *Fairbanks North Star Borough Sch. Dist. v. Crider*, 736 P.2d 770, 773, (Alaska 1987); *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 266 (Alaska 1974).

[74] 5 A. Larson & L. Larson, *Larson's Workers' Compensation Law,* § 93.05[1] at 93-79 (2008).

Melchor's compensation to the current maximum rate. AS 23.30.175(a) (2005) would require that Melchor's maximum compensation rate be 120% of the state average weekly wage in 1996, when Melchor was injured. Nothing in AS 23.30.175(a) (2005) suggests that indexing of maximum compensation rates to the state's average weekly wage was meant to provide a cost of living increase to recipients of permanent total disability compensation at the maximum rate.

The board relied on *Peck v. Alaska Aeronautical, Inc.,*[75] to assert that the maximum compensation rate effective in 2008 should apply to appellee. However, in *Peck*, the Supreme Court, examining the language of the 1962 statute in effect at the time Peck was injured, looked first to the board's refusal to apply the alternate method of determining wages, which then provided:

> (3) If either of these methods set out in (1) and (2) of this section of arriving at the average annual earnings of the injured employee *cannot reasonably and fairly be applied,* the average annual earnings are the sum which, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same neighboring locality, *or other employment of the employee,* including the reasonable value of the services of the employee if engaged in self-employment, *reasonably represents the annual earning capacity of the injured employee.*
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> AS 23.30.220 (1962) (emphasis added). It seems clear that subsection (3) sets forth the identical concern with fairness in calculating earning capacity that we identified in subsection (3) of the version of AS 23.30.220 in effect in *Johnson.* If anything, subsection (3) of the 1964 version is even clearer than the 1982 version in expressly stating that the act is principally concerned with awarding an amount which "reasonably represents the annual earning capacity of the injured employee." The fact that the mechanical formulas for calculating average weekly wages in subsections (1) and (2) are different in the 1964 and 1982 versions is a distinction without a difference. We conclude that

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[75] 756 P.2d 282 (Alaska 1988).

> the Board improperly refused to apply subsection (3) in this case, as requested by Peck and as required by *Johnson.*[76]

Having concluded that Peck was entitled to a recalculation of his average weekly wage on the basis of *the law in effect at the time of his injury*, the Supreme Court determined that the purported maximum compensation rate in the 1962 statute was no maximum at all:

> If AS 23.30.175(b) (1962) were applied in a vacuum, the Board might be correct in applying the 1964 statutory limit which provides that "the average weekly wages are considered to have been not more than $81," unless this limit must also give way in circumstances where its application would be grossly unfair.[77]

After rejecting the argument that *Wien Air Alaska v. Arant*[78] mandated the application of this limit on wages, the Court held that,

> "wages may not exceed" is not used in section 175(b) as it then existed, rather "are considered to have been not more than" is. It therefore cannot be said with certainty that section 175(b) contains any "maximum" limitation.
>
> We conclude that section 175(b)'s limitation is one that the legislature intended to be applied unless its application would lead to a grossly unfair result.[79]

Because the disparity between Peck's 1964 and 1982 weekly wages was so great, the Court held

> it would be grossly unfair to apply the 1964 version of section 175(b)'s limitation of $81 [on weekly *wages*] in order to compensate Peck for his lost earning capacity. Thus we hold that section 175(b) is not to be applied where to do so would negate the legislative intent underlying section 220(3).[80]

However, in the 1988 version of AS 23.30.175(a) the legislature said that compensation "may not exceed $700" and in the 2000 version of AS 23.30.175(a), it said

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[76] *Id.* at 287.

[77] *Id.*

[78] 592 P.2d 352 (Alaska 1979).

[79] 756 P.2d at 288.

[80] *Id.* (emphasis added).

compensation "may not exceed the maximum compensation rate . . . '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." Both versions of the statute clearly provide for a maximum *compensation* rate, not a maximum wage.

In *Peck,* the Supreme Court invited comparison to its holding in *Wien Air* that the 1982 amendments establishing increasing *compensation rate* maximums "has no retroactive effect because it does not grant increases to claimants injured before the new rates were passed."[81] The Court's holding in *Peck* supports a recognition of adjustment of the employee's wage basis if using wages at the time of injury results in gross unfairness for purposes of determining the permanent disability compensation rate. The Court's reasoning in *Peck* does not support a retrospective application of the increases in maximum compensation rates established in AS 23.30.175(a) to persons injured before they became effective.

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. The board decided here that appellee should receive a cost of living adjustment only because a calculation of the employee's compensation, (using a 1996 gross earnings figure), under the 2008 statute would result in more compensation. In effect, the board decided that the appellee's maximum compensation rate should be given a "cost of living" increase.

The design of the workers' compensation system is intended to provide quick, efficient, *fair*, and *predictable* compensation to injured workers at a *reasonable* cost to their employers.[82] The predictability of the compensation is lost if some permanent total disability compensation recipients may establish that the maximum compensation rate should not apply because costs of living have risen – but others do not; costs to employers would rise, and the fairness of the system would be diminished by giving those at the maximum rate a cost of living raise denied to those whose compensation is

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[81] 592 P.2d at 363.

[82] AS 23.30.001(1).

less than the maximum.[83] While some states have adopted cost of living adjustments to compensation,[84] the "provisions vary so wildly that it is almost impossible to frame any general rules or observations applicable to them."[85] Alaska previously provided a supplemental fund to insulate employers from the effect of mandated compensation rate increases, but that provision was repealed.[86] While other state courts have upheld the constitutionality of different forms of such statutes,[87] at least one has refused to extend a cost of living increase in the absence of legislation.[88] The Legislature is best suited to study, decide, and design such increases, and the Supreme Court to determine their constitutionality, especially if no supplemental fund is created to reimburse self-insured employers and insurers for application of such increases to those injured before they became effective.

d. An employee injured after the 1995 amendments to AS 23.30.220 may be entitled to an adjustment in gross weekly earnings under Peck v. Alaska Aeronautical, Inc., but the board failed to properly apply Peck in this case.

The commission holds that the reasoning in *Peck v. Alaska Aeronautical, Inc.*,[89] may support a recalculation of gross weekly earnings pursuant to AS 23.30.220(a)(10)

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[83] The board's reasoning applies only to recipients of the maximum compensation rate because only they would experience the "barrier" of a lower maximum.

[84] For a list of states, with brief description of benefits to which the cost of living increase is provided, see A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 93.06[1], 93-81 – 93-86 (2008).

[85] *Id.* at 93-86.

[86] AS 23.30.172, repealed, § 11 ch 75 SLA 1977.

[87] *Compare Cooper v. Wicomico Co.,* 398 A. 2d 1237 (Md. 1979) *and Harris v. Hartford Acc. & Indem. Co*., 462 A.2d 81 (Md. 1983) *with K-Mart Corp. v. State Indus. Ins. Sys*., 693 P.2d 562 (Nev. 1985). The comparison among states is complicated by the use of state accident insurance funds in some states, instead of mandatory, but privately purchased, insurance in other states.

[88] *Bellendir v. Kezer*, 648 P.2d 645, 647 (Colo. 1982).

[89] 756 P.2d 282.

if the evidence supporting the calculation under AS 23.30.220(a)(1)-(7) does not fairly reflect the earnings at the time of injury, given the duration of the permanent total disability and the employee's earnings during the disability. As the Supreme Court restated in *Peck*, "Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award."[90] Permanent total disability compensation is paid after retirement, for the duration of the employee's permanent total disability, even if it extends throughout his lifetime; the gross weekly earnings calculation underlying that compensation must "fairly reflect the employee's earnings *during the period of disability*."[91] Thus, if the employee demonstrates that the gross weekly earnings calculation in AS 23.30.220(a)(1)-(7) does not fairly reflect his gross earnings during the permanent disability, the board may adjust the employee's gross earnings to fairly reflect the employee's prospective earnings over that lifetime, so long as the board includes the years when, owing to advancing age, the employee has no prospective earnings. Payment of permanent total disability *compensation* for a lifetime does not mean the board should assume that *gross earnings* would persist unchanged for a lifetime when making an adjustment under AS 23.30.220(a)(10).

In most cases, if the compensation is based on gross weekly wages that fairly reflect the employee's earnings during the disability, the commission expects that, as the legislature designed the act, a level payment of permanent total disability compensation extending over the employee's expected lifetime offsets the loss of possible wage increases between disability and normal retirement. The payment of permanent total disability compensation during old age, when diminished or no wages are expected, provides additional compensation for lost earning capacity during the employee's work life, even if the compensation is reduced by offsets.

The board in this case gave no consideration to whether appellee 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

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[90] 756 P.2d at 286.

[91] AS 23.30.220(a)(10) (emphasis added).

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. Moreover, the board then adopted a 2008 maximum compensation rate without recalculating appellee's compensation rate on the basis of the 2008 method of calculating gross weekly earnings. Setting aside the improper retrospective application of the 2005 amendments providing an increased maximum compensation rate, there was no evidence in the record to support a finding that 80% of the appellee's spendable weekly wages, if gross weekly earnings were calculated pursuant to AS 23.30.220(4) (2005), would have exceeded the maximum compensation rate in effect in 2008. Thus, even if the board were correct in its retrospective application of the 2005 amendments, the board had no evidence on which to base a finding that the only barrier to appellee receiving more compensation was the maximum compensation rate in effect at the time of injury.

6. Conclusion.

The board's decision and order is REVERSED. The case is remanded 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. The commission does not retain jurisdiction.

Date: *Oct. 28, 2008*   ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision in this appeal, filed by Parker Drilling Co. and Liberty Mutual/Liberty Northwest Ins. Corp., from Alaska Workers' Compensation Board Decision No. 08-0034 awarding Frank Melchor an increase in permanent total disability compensation. The effect of this decision is to reverse the board's decision and remand (send back) the case to the board to make further findings of fact and to determine if Frank Melchor is entitled to an adjustment of his gross weekly earnings. The commission has not retained jurisdiction to review the board's final decision on remand.

The commission reversed (disapproved) the board's decision. This is a final administrative decision.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box on the last page.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after distribution or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision in Alaska Workers' Compensation Appeal Commission Appeal No. 08-008, *Parker Drilling Co.*

& Liberty Mutual/Liberty Northwest Ins. Corp. v. Frank Melchor, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this __*28th*__ day of October, 2008.

_____________*Signed*___________
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *10/28/08* a copy of this Final Decision No. 091 in AWCAC Appeal No. 08-008 was mailed to T. Porcello and C. Croft at their addresses of record, and faxed to AWCB Appeals Clerk, WCD Director, C. Croft, T. Porcello and AWCB – Fbx.

____*Signed*______________________ *10/28/08*
L. Beard, Appeals Commission Clerk Date