Alaska Workers' Compensation Appeals Commission

Bradford T. Wilson,
Appellant,

vs.

Eastside Carpet Co. and AIG Claim Services,
Appellees.

Final Decision
Decision No. 099 February 2, 2009

AWCAC Appeal No. 08-013
AWCB Decision No. 08-0043
AWCB Case No. 200709372

Appeal from Alaska Workers' Compensation Board Decision No. 08-0043, issued at Anchorage, Alaska, on March 5, 2008, by southcentral panel members Janel Wright, Chair, Patricia Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Bradford T. Wilson, *pro se*, appellant.[1] Colby Smith, Griffin and Smith, for appellees Eastside Carpet Co. and AIG Claim Services.

Commission proceedings: Appeal filed April 3, 2008. Appellant's request for extension of time to file opening brief granted June 19, 2008. Order denying appellant's motion to certify appeal to the Supreme Court issued July 16, 2008.[2] Appellees' request for extension of time to file brief partially granted August 18, 2008. Appellees' request for extension of time granted August 28, 2008. Oral argument on appeal presented November 4, 2008.

Appeals Commissioners: Philip Ulmer, Kristin Knudsen, David Richards.

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

By: Philip Ulmer, Appeals Commissioner.

This is an appeal of the board's denial of a compensation rate adjustment. Wilson sought the compensation rate adjustment because of the disparity between his actual

[1] Mr. Wilson was represented by attorney William J. Soule until he withdrew on September 15, 2008. Mr. Soule prepared the brief filed by Mr. Wilson in this appeal.

[2] This order is also issued today as Decision No. 098, with changes in format for publication.

hourly wage when he was injured and his "spendable weekly wage at the time of injury" under AS 23.30.220(a)(4) on which his compensation rate was based. Wilson argues AS 23.30.220, as applied to him, violates the equal protection clause of the Alaska Constitution and is unfair.

At the time of his injury, Wilson had a gross weekly income of about $1,200 and earned $30 per hour working for Eastside Carpet. But calculating his "spendable weekly wage" under AS 23.30.220(a)(4), which requires dividing a prior calendar year's worth of the employee's wages by 50, led to a compensation rate based on gross weekly earnings of $894 because Wilson worked only six months in 2006 and was self-employed in 2005.

Eastside Carpet and AIG Claim Services [hereafter Eastside Carpet] contend that AS 23.30.220(a)(4) applies because it most closely fits Wilson's earning fact pattern because he was paid hourly at the time of injury. Eastside Carpet argues that Wilson's spendable weekly wage was properly calculated by dividing his 2005 business profits by 50. Moreover, Eastside Carpet claims that Wilson stipulated that the self-employment earnings could be used to determine a gross weekly wage, waiving any argument that his self-employment profits did not approximate wages.

The parties' contentions require the commission to decide whether substantial evidence supports a finding that AS 23.30.220(a)(4) most closely fits Wilson's earnings fact pattern and whether the board correctly applied AS 23.30.220 to the facts established. The commission concludes that the board erred in assuming Wilson's self-employment profits were equivalent to employee wages without substantial evidence in the record about the nature of Wilson's business. The commission believes that applying AS 23.30.220(a)(5), which requires determining the usual wage for similar services when performed by paid employees, would more closely approximate the value of Wilson's services rendered to his subcontracting business in 2005. Additionally, the commission concludes Wilson merely stipulated that if his 2005 business profits were used, the calculation was done correctly. This stipulation does not waive the argument that his self-employment profits were not the proper basis for his gross weekly earnings calculation. The commission vacates the board's decision and remands the case to the

board for rehearing to calculate Wilson's spendable weekly wage under AS 23.30.220(a)(5).

1. Factual background and board proceedings.

Wilson injured his back lifting and moving carpet and resetting a toilet while working at jobs for Eastside Carpet in June 2007.[3] He began receiving temporary total disability payments in July 2007.[4]

On August 2, 2007, Wilson filed a claim requesting a compensation rate adjustment. Wilson testified that "I think [my compensation rate is] not fair. . . . I think that I was making a lot more money on a weekly basis for my entire employment with Eastside Carpet."[5] Wilson was paid $30 per hour at Eastside Carpet and consistently earned about $1,200 per week, excluding overtime hours.[6] Wilson began working at Eastside Carpet on July 6, 2006, after spending the first six months of that year out of the labor market.[7]

Wilson also supplied information about his earnings in 2005. In that year, he ran his own business, BDW Enterprises, Inc. According to Wilson's accountant and his tax records, in 2005, the corporation had a gross income of $95,304, less $50,617 in wages paid to other employees and other expenses, leaving $44,687 available to Wilson.[8] Wilson paid himself $12,000[9] and the remainder of the $44,687 was corporate profits of $32,687.[10] Wilson testified that he wound down his subcontracting business in late

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3 R. 0015.

4 R. 0199.

5 Hrg Tr. 16:23-17:1.

6 R. 0207.

7 R. 0015.

8 R. 0056, 0203.

9 R. 0181.

10 R. 0056.

2005 and voluntarily withdrew from the labor market for nine months, including the first six months of 2006.[11]

Wilson's compensation rate was calculated based on gross weekly earnings established under AS 23.30.220(a)(4), which provides in relevant part:

> 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 employee's earnings are calculated . . . by the hour, . . . 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; . . .

The adjuster and the board found that Wilson was an hourly employee; Wilson agreed that he was paid by the hour.[12] Wilson earned $30,331.39 in 2006,[13] working for Eastside Carpet for only six months of that year.[14] In 2005, Wilson made $44,687 operating his own business.[15] Thus, because he earned more in 2005, that year was used in the calculation of the gross weekly wage. The adjuster, and later the board, calculated Wilson's gross weekly wages as 1/50 of the $44,687 in business profits, or $894.[16]

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[11] Hrg Tr. 25:15-20.

[12] *Bradford T. Wilson v. Eastside Carpet Co.*, Alaska Workers' Comp. Bd. Dec. No. 08-0043, 10 (Mar. 5, 2008) (J. Wright, chair); Hrg Tr. 17:15-17.

[13] R. 0058.

[14] R. 0258.

[15] R. 0056.

[16] R. 0051; *Eastside Carpet Co.*, Alaska Workers' Comp. Bd. Dec. No. 08-0043 at 10-11. The board refers to the "2006 earnings" as resulting in gross weekly earnings of $893.74, but it was the 2005 business profits that resulted in gross weekly earnings of $893.74. In addition, the board refers to 2006 as "the total calendar wage most advantageous to the employee" when its calculations were based on 2005, the

Wilson's weekly compensation rate for temporary total disability was calculated as 80 percent of the spendable weekly wage based on gross weekly earnings of $894, or $599.17.[17]

At a prehearing conference, Wilson agreed that the compensation rate was calculated "correctly based on the earnings information he supplied but still feels that the 2005 earnings do not accurately reflect his prior work history."[18] Wilson argued that his gross weekly wages should be more than $894 because he consistently earned about $1,200 gross weekly at Eastside Carpet.

The board agreed with Wilson that "the employee's compensation rate as calculated under the statutory formula of AS 23.30.220(a)(4), is not based on an accurate or . . . a rational prediction of the employee's potential earnings during his period of disability."[19] But the board concluded it was bound by the formula in AS 23.30.220(a)(4). Because the board lacked jurisdiction to determine the constitutionality of the statute, it "reluctantly" denied the employee's claim for a compensation rate adjustment.[20] Wilson appealed.

2. Standard of review.

Although the commission does not have jurisdiction to decide issues of constitutional law,[21] it does have the power to correct board errors of law arising from

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year in which Wilson earned more income. Thus, because the board stated it agreed with the adjuster's calculations and these calculations were based on 2005, the commission presumes that these two references to 2006 were typographical errors.

[17] AS 23.30.185 provides in part that "In the case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability."

[18] R. 0247.

[19] *Eastside Carpet Co.*, Bd. Dec. No. 08-0043 at 11.

[20] *Id.*

[21] *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007).

application of the Workers' Compensation Act.[22] The commission exercises its independent judgment concerning questions of law within the scope of the act,[23] drawing upon its specialized knowledge and collective expertise in workers' compensation[24] to preserve the benefits, balance and structural integrity of the Alaska workers' compensation system.[25] The commission also reviews the board's findings of fact to ensure substantial evidence supports them in light of the whole record.[26]

3. The board erred by treating self-employment profits like wages without evaluating whether those profits accurately represented employee wages for services.

The Supreme Court has stated that the intent 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."[27] The Court has pointed out:

> [A] fair approximation of a claimant's future earning capacity lost due to the injury is the "essential component of the basic compromise underlying the Workers' Compensation Act – the worker's sacrifice of common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation." . . . [T]his compromise,

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[22] Because the commission resolves Wilson's appeal on statutory interpretation grounds, it does not discuss the constitutional issues that he raises. *See State, Dep't of Health & Social Servs. v. Valley Hosp. Ass'n, Inc.*, 116 P.3d 580, 584 (Alaska 2005) (noting the Court's practice is to reach constitutional issues "only when the case cannot be fairly decided on statutory or other grounds.").

[23] AS 23.30.128(b).

[24] *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).

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

[26] *Id*.

[27] *Johnson v. RCA-OMS*, 681 P.2d 905, 907 (Alaska 1984) (construing an earlier version of AS 23.30.220). *See also Flowline of Alaska v. Brennan*, 129 P.3d 881, 882-83 (Alaska 2006); *Thompson v. UPS*, 975 P.2d 684, 689-90 (Alaska 1999); *Gilmore v. Alaska Workers' Comp. Bd.*, 882 P.2d 922, 927 (Alaska 1994).

> and the fairness requirement it engenders, provide the context for interpreting the Workers' Compensation Act.[28]

Under previous versions of AS 23.30.220, the Court has required the board to use the statutory method that most closely fits the employee's earnings fact pattern.[29]

The clear intent of the act is to fairly approximate the value of an employee's lost wages, rather than to account for lost income in any capacity. This distinction is based on the nature of workers' compensation, which mandates payment of compensation only to employees, not to business owners, such as independent contractors.[30] Thus, its provisions are meant to provide partial replacement for the approximate lost wages of employees, not for the lost business profits of independent contractors.[31] This intent to approximate lost employee wages is reflected in the definition of "gross earnings,"

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[28] *Flowline of Alaska*, 129 P.3d at 882-83 (quoting *Gilmore*, 882 P.2d at 927).

[29] *See, e.g., Flowline of Alaska*, 129 P.3d at 885-86; *Thompson*, 975 P.2d at 689-91; *Brunke v. Rogers & Babler*, 714 P.2d 795, 798-800 (Alaska 1986); *Johnson*, 681 P.2d at 906-07.

[30] *See* AS 23.30.055 (providing that the workers' compensation act is the exclusive remedy for an employee injured by an employer or fellow employee). *See also Odsather v. Richardson*, 96 P.3d 521, 523 (Alaska 2004); *Benner v. Wichman*, 874 P.2d 949, 952-53 (Alaska 1994) (both cases requiring the application of the "relative nature of the work" test to distinguish employees from independent contractors for the purposes of determining workers' compensation coverage. Factors in this test are the degree of claimant's skill involved; whether the claimant holds himself out to the public as a separate business; whether the claimant bears the accident burden; the extent to which claimant's work is a regular part of the employer's regular work; whether claimant's work is continuous or intermittent; whether the duration of the claimant's work is such that it amounts to hiring of continuing services rather than a contract for a specific job.). *But see* AS 23.30.239 allowing sole proprietors and partners to elect coverage "as an employee" under the workers' compensation act by "making written application to an insurer" who "may accept the application and fix an assumed monthly wage" for workers' compensation purposes. AS 23.30.239(a). Wilson did not elect to obtain coverage as an employee while operating his business.

[31] A sole proprietor who elects to obtain coverage under AS 23.30.239 has a monthly wage fixed in advance for compensation purposes, indicating the legislature did not intend that workers' compensation should compensate sole proprietors for lost business profits if they elected coverage.

which are "periodic payments, by an employer to an employee for employment . . ."[32] "Earnings" and similar terms in AS 23.30.220 also are defined as "periodic payments made by an employer to an employee for employment . . ."[33] Thus, the focus in determining gross weekly earnings when self-employment must be included under AS 23.30.220 should be on the value of the claimant's services to a business, not on the net business profits.

Specifically, the board must evaluate whether self-employment income in a particular case accurately represents the equivalent of employee wages before using self-employment profits to calculate the employee's spendable weekly wage under AS 23.30.220(a)(4).[34] The records developed as a self-employer, even the best, do not necessarily represent the value of the services to that business or the capacity to earn wages. If the self-employer hires other workers, or a family member works without pay, the net profits of a business reflect the efforts of these workers as well. Moreover, self-employers are frequently motivated to minimize their profits to lessen their tax liability. Thus, using tax records may undervalue the services that a claimant rendered. Other benefits of self-employment, such as ownership of tools, equipment and other work supplies, do not readily convert into wages. As a result, too often the board is comparing apples to oranges when it uses business profits to approximate wages.

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[32] AS 23.30.395(22).

[33] 8 Alaska Admin. Code 45.220(c) (defining the terms used in AS 23.30.220, including "weekly amount," "monthly earnings," "yearly earnings," "earnings," "usual wage," and "total wages," as "periodic payments made by an employer to an employee.").

[34] The Alaska State Legislature or the Department of Labor and Workforce Development may adopt a different approach to valuing self-employment earnings or business profits by making changes to the statute or regulations. For example, a version of AS 23.30.220 in effect in the early 1980s, explicitly included self-employment income, providing in subsection (2) "the average weekly wage is that most favorable to the employee calculated by dividing by 52 into the total wages earned, including self-employment, in any one of the three calendar years immediately preceding injury." *See also Ivan Moore v. State of Alaska, Div. of Workers' Comp.*, Workers' Comp. Appeals Comm'n Dec. No. 092, 14-15, 2008 WL 5021439 at *7 (Nov. 17, 2008) (explaining the roles of the department, board and commission in the workers' compensation system).

On the other hand, self-employment profits may result in a fair approximation of employee wages,[35] particularly in three circumstances. The first situation is a business that consists of services performed solely by the owner. Second, self-employment profits and employee wages also may be equivalent when the business assets are primarily the advanced skills, education or training of the owner and the owner performs licensed professional services to other organizations not engaged in the same business, such as engineering, architecture or the like. Third, the profits from the private practice of traditional professions, such as medicine or law, in which employment is historically entered only by members of the profession with limited experience, or limited to service with non-profit organizations or public service, also may approximate employee wages.[36]

Here, the board failed to look at Wilson's business records to determine if his business profits fairly represented the equivalent of wages over the year. In this case, Wilson's business was engaged in the same line of work that Wilson performed as an employee for Eastside Carpet when he was injured. Wilson testified he was winding up the operation of the business in 2005 and that he voluntarily withdrew from the labor

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[35] *See also Pioneer Constr. Co. v. Conlon*, 780 P.3d 995 (Alaska 1989), for a case in which the record was sufficiently detailed to value a claimant's services to his own business. In *Conlon*, the Court took a nuanced approach to converting self-employment profits into employee wages. First, the Court held the claimant's management of his own business after he was injured had to be valued and thus, he was properly entitled to temporary, partial – rather than total – disability benefits. *Id*. at 997. In addition, in determining the claimant's earnings from his own business, the Court upheld the board's method of not deducting depreciation from the business profits and thereby increasing a claimant's self-employment earnings. *Id*. at 997-99. Third, the Court required the board to deduct the value of his wife's uncompensated bookkeeping services from the claimant's self-employment earnings. *Id*. at 999-1000. This requirement strongly suggests that Wilson's business profits should reflect, and thus deduct, the value of his uncompensated services to the business for the purpose of determining a compensation rate.

[36] *See* AS 23.30.240, exempting members of limited liability corporations organized under AS 10.50 and executive officers of municipal or non-profit corporations from coverage, but allowing them to elect coverage as employees.

market the last three months of 2005 and the first six months of 2006.[37] He provided his tax records for his business. His business profits did not reflect solely his own work because he hired employees.[38] The record reveals little else about the nature of Wilson's business.[39] Therefore, the commission concludes the board lacked substantial evidence to value Wilson's services to his business or to otherwise conclude that his business profits would be equivalent to employee wages in order to base the gross weekly wage calculation on those profits.

4. The board should determine the usual wage for similar services performed by paid employees to calculate Wilson's gross weekly earnings under AS 23.30.220(a)(5).

Based on the record that the board has developed in Wilson's case, the commission concludes that AS 23.30.220(a)(5) would more closely approximate Wilson's gross weekly earnings. AS 23.30.220(a)(5) provides that "if at the time of injury the employee's earnings have not been fixed or cannot be ascertained, the employee's earnings for the purpose of calculating compensation are the usual wage for similar services when the services are rendered by paid employees." On the record before us, we find that Wilson's earnings in 2005 cannot be ascertained on the basis of his business profits.[40] We reject Eastside Carpet's argument that Wilson stipulated that his self-employment profits could be used to determine a gross weekly wage. Wilson merely agreed that the calculations were done correctly, assuming that the 2005 profits were a proper basis for those calculations.[41]

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[37] Hrg Tr. 25:15-20.

[38] R. 0056.

[39] *See Conlon*, 780 P.3d at 995 (valuing self-employment in a case in which the record contained more details about the nature of that business).

[40] Wilson argues in his brief that "his hourly wages are easily 'fixed' and 'ascertained.' " Appellant's Br. 28. But the relevant inquiry under AS 23.30.220(a)(5) is whether his 2005 earnings can be ascertained so that they can be used in the gross weekly wage calculation.

[41] The stipulation is in the prehearing conference summary that states Wilson "agreed that [the employer's representative] has recalculated the compensation

Therefore, we remand to the board to hold a hearing to determine the "usual wage for similar services when the services are rendered by paid employees"[42] and to recalculate Wilson's compensation rate.

5. Conclusion and Order.

The commission concludes that the board erred in equating self-employment profits with employee wages in Wilson's case. The commission REVERSES the board's decision and REMANDS the case to the board for REHEARING, so that the board can determine Wilson's gross weekly earnings under AS 23.30.220(a)(5) and recalculate his compensation rate. The commission does not retain jurisdiction.

Date: *2 Feb. 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. It is a final decision and order reversing the board's decision and remanding the case to the board to recalculate the appellant's compensation rate. The board will rehear Bradford Wilson's claim and decide what his compensation rate should be under AS 23.30.22(a)(5).

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

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 the Appellate Rules, you should file your

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rate correctly based on the earnings information he supplied but still feels that the 2005 earnings do not accurately reflect his prior work history." R. 0247.

[42] *Id.*

petition for review or hearing within 10 days after the date this decision is distributed to you. You may wish to consider consulting with legal counsel before filing a petition for review or hearing, or an appeal.

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 AS 23.30.128(f) and 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. If the commission does not respond to the motion for reconsideration by an order granting reconsideration within 60 days of the date of this decision, the motion for reconsideration is considered denied.

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).

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 099 entered in Appeal No. 08-013, *Bradford T. Wilson v. Eastside Carpet and AIG Claim Services,* dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *2nd* day of *February*, 2009.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *2/2/09* a copy of this Decision No. 099 was mailed to: Bradford Wilson (certified) & C. Smith at their addresses of record and faxed to: C. Smith, AWCB Appeals Clerk, AWCB Anc. (Wright) & the Director WCD.

Signed
L. A. Beard, Appeals Commission Clerk