Case: *Bradford T. Wilson vs. Trena Heikes, Director, Division of Workers' Compensation, Intervenor, and Eastside Carpet Company and AIG Claim Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009)

Facts: Bradford Wilson (Wilson) hurt his back working for Eastside Carpet Company (Eastside Carpet) in June 2007. He received temporary total disability (TTD) and sought a compensation rate adjustment in August 2007. Wilson's TTD payments were based on his earnings in prior years per AS 23.30.220. He had worked for the last six months of 2006 for Eastside Carpet, paid on an hourly basis, earning $30 an hour and about $1,200 a week. He was voluntarily unemployed for the first half of 2006 and part of 2005. In 2005, Wilson was running his own business and made $44,687 in that year, after subtracting expenses and wages paid to Wilson's employees.

Because Wilson was paid hourly, the board used AS 23.30.220(a)(4) to calculate his compensation rate. Since he earned more in 2005, it used the profits of $44,687 from his business in the formula. This formula resulted in a spendable weekly wage of $894.

In Alaska Workers' Comp. App. Comm'n Dec. No. 099, the commission concluded that Wilson's business profits could not be used to approximate an employee's wages and thus were an improper basis to do the AS 23.30.220(a)(4) calculations. The commission concluded the compensation rate should be calculated under AS 23.30.220(a)(5), the "usual wage for similar services when the services are rendered by paid employees[.]" Dec. No. 106 at 6.

The Director of the Division of Workers' Compensation filed a motion to intervene.

Applicable law: AS 23.30.220(a)(4) and (a)(5).

Issues: Does Dec. No. 099 require the board to guess whether AS 23.30.220(a)(4) or (a)(5) applies? Can tax records be used as proof of income?

Holding/analysis: The commission clarified two points. First, an employer may use AS 23.30.220(a)(4) when a worker is paid hourly to calculate the compensation rate. It is the worker's burden to challenge the compensation rate "when an AS 23.30.220(a)(4) spendable wage does not represent the equivalent of employee wages when derived from self-employment profits." Dec. No. 106 at 3-4. When considering such a challenge, the board

> need not go beyond AS 23.30.220(a)(4) if (1) the reported self-employment profits represented the equivalent of employee wages; or, (2) the board is able to determine that, with adjustments to reflect claimed depreciation, value of uncompensated services, receipts from prior years' billings, sales of company assets and the like, the self-employment profit represents the equivalent of employee wages. *Id.* at 4.

Noting that the factual circumstances in Wilson's case were unusual, the commission "stress[ed] that AS 23.30.220(a)(5) applies only in cases of previously self-employed hourly workers if the board finds the employee's wage equivalent cannot be determined from self-employment records and other evidence, so that a spendable weekly wage may be calculated under AS 23.30.220(a)(4)." *Id.* at 5.

Second, the commission agreed that tax records may be used as proof of taxable income. "The commission's decision examined whether the material the employee may produce to prove wage equivalence of business income is *limited* to reported self-paid 'wages, salaries, tips,' on tax records and concluded that it is not." *Id.* at 5.

The commission did not modify its Dec. No. 099.

Note: Dec. No. 098 (February 2, 2009) denied certifying the appeal to the Alaska Supreme Court without reviewing the merits, and Dec. No. 099 (February 2, 2009) decided the merits of the compensation rate adjustment appeal, as clarified by this decision, No. 106.