# Alaska Workers' Compensation Appeals Commission

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| Pamela J. Darrow (f/k/a Creekmore),<br>Appellant,<br><br>vs.<br><br>Alaska Airlines, Inc., Eberle Vivian, Inc., AIGA, as successor in interest to Lumbermen's Insurance Companies, and Northern Adjusters, Inc.,<br>Appellees,<br><br>and<br><br>State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation,<br>Intervenor. | Final Decision<br><br>Decision No. 218 October 13, 2015<br><br><br><br><br><br><br><br>AWCAC Appeal No. 14-024<br>AWCB Decision No. 14-0133<br>AWCB Case No. 199616590 |

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0133, issued at Fairbanks, Alaska, on October 3, 2014, by northern panel members Robert Vollmer, Chair and Lake Williams, Member for Labor.

Appearances: J. John Franich, Jr., Franich Law Office, LLC, for appellant, Pamela J. Darrow (f/k/a Creekmore); Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Alaska Airlines, Inc., Eberle Vivian, Inc., AIGA, as successor in interest to Lumbermen's Insurance Companies, and Northern Adjusters, Inc.; Craig W. Richards, Attorney General, and Kimberly D. Rodgers, Assistant Attorney General, for intervenor, State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation.

Commission proceedings: Appeal filed October 23, 2014; briefing completed June 1, 2015; oral argument held on July 15, 2015.

Commissioners: James N. Rhodes, Philip E. Ulmer, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

*1. Introduction.*

Pamela Darrow incurred an on-the-job injury in 1996. Over a period of more than fifteen years, she was periodically paid temporary total disability benefits and in addition received permanent partial impairment benefits. Eventually, she was found to be disabled in 2010 by the Social Security Administration and was awarded Social Security disability benefits. In 2012, she was deemed to be permanently totally disabled and entitled to permanent total disability benefits under the Alaska Workers Compensation Act (Act). She appeals a decision of the Alaska Workers' Compensation Board concluding that the correct amount of the offset for Social Security benefits is $493.57 per week, and that amounts paid to her for permanent partial impairment may be withheld from the payments for her permanent total disability.

We conclude that the board erred in its calculation of the Social Security offset, but not in its ruling that amounts paid for permanent partial impairment may be deducted.

*2. Factual Background and Proceedings.*[1]

Pamela Darrow began working for Alaska Airlines, and concurrently for the State of Alaska, in 1996.[2] On August 6, 1996, while working for Alaska Airlines, Ms. Darrow injured her right knee.[3] The injury resulted in multiple surgeries over the course of the next fifteen years, including five failed knee replacements and recurrent infections and revisions.[4] Ms. Darrow continued working for various employers,[5] but she was periodically temporarily totally disabled as a result of the injury for short periods of time in 1996-1997 and in 2001, and (in addition to shorter periods) for lengthy periods of

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[1] We make no factual findings. We state the facts as found by the board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[2] *Pamela J. Darrow v. Alaska Airlines, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 14-0133 at 5 (Nos. 1-2) (October 3, 2014) (hereinafter, *Darrow*). *See* R. 254 (Darrow Dep., p. 10).

[3] *Darrow*, p. 5 (No. 4).

[4] *Darrow*, p. 5 (No. 5). *See generally*, R. 394-544.

[5] *See* R. 292-296.

four to six months in 2002, 2006, and 2008 and in excess of two years in 2003-2004 and 2010-2013.[6] During those periods of time, Ms. Darrow was paid temporary total disability compensation based on gross weekly earnings at the time of injury of $270,[7] derived from her earnings with Alaska Airlines only.[8] She was also paid, in 1998, 2005, and 2006, a total of $40,500 in permanent partial impairment benefits, based on a 30% disability rating due to her right knee injury.[9]

On October 19, 2012, the Social Security Administration found that Ms. Darrow became disabled (as defined by the Social Security Administration) on December 10, 2010, and awarded her a Social Security Disability Insurance (SSDI) benefit equivalent to a weekly amount of approximately $359.77.[10] On November 6, 2013, Alaska Airlines filed a petition requesting an offset for Social Security benefits, pursuant to AS 23.30.225(b).[11] On January 15, 2014, Ms. Darrow filed a claim asserting that Alaska Airlines had miscalculated Ms. Darrow's "average weekly wage" (and, accordingly, her

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[6] R. 344, 353-359. Ms. Darrow testified she was periodically unable to work due to surgery. *See* R. 255-256 (Darrow Dep. pp. 14, 17-18, 20).

[7] R. 125 (12a, 15b). The board's and the parties' usage of the terms "average weekly wage" and "gross weekly earnings" is at times inconsistent with the statutory language. Unless otherwise stated, in this decision we use the term "gross weekly earnings" (absent quotation marks) to refer to amounts determined under AS 23.30.220, and we use the term "average weekly wages" or "average weekly wages at the time of injury" (both without quotation marks) when referring to the maximum amount of a disability benefit after application of the Social Security offset under AS 23.30.225(b).

[8] R. 344, 125-131.

[9] *See* R. 545. This is the total of four payments: $9,450 (February 10, 1998), $3,105 (August 26, 2003), $1,000 (May 6, 2005), and $26,945 (July 15, 2005). R. 344, 125-131.

[10] *See* R. 237-246. The board found that Ms. Darrow's monthly benefit was the equivalent of $359.77 per week, based on a monthly amount of $1,550. *Darrow*, p. 5 (No. 7). Ms. Darrow noted that the board's calculation reflects an arithmetic error. *See* Appellant's Brief, p. 6. However, it appears that the board's finding as to the weekly amount was correct. As the board found, the actual monthly benefit was $1,559 per month, not $1,550. *Darrow*, p. 5 (No. 6) ($1,559 x 12 = $18,708; $18,708 ÷ 52 = $359.77). *See* R. 260 (Darrow Dep., p. 35), 289.

[11] R. 229-232. *See Darrow*, p. 6 (No. 13).

temporary total disability benefit) and requesting an award of permanent total disability benefits effective December 10, 2010 (the date of disability as determined by the Social Security Administration).[12] Alaska Airlines answered the claim, agreeing that an adjustment in the compensation rate was due but contesting the amount.[13]

On March 21, 2014, the parties participated in mediation, which resulted in a settlement of some, but not all, of the issues.[14] The parties filed a partial settlement agreement, noting their agreement that Ms. Darrow was permanently totally disabled beginning October 8, 2012, and that her temporary total disability compensation rate was $423.23 based on gross weekly earnings of $668.98, determined under AS 23.30.220(a)(4).[15] After further negotiations, the parties agreed the board should set the permanent total disability compensation rate based on gross weekly earnings of $1,390, determined under AS 23.30.220(a)(10), resulting in a weekly benefit of $668.98.[16] The following issues were left to be resolved by the board: (1) what is the correct amount of the Social Security offset under AS 23.30.225(b); (2) may permanent partial impairment benefits previously provided to Ms. Darrow be deducted from permanent total disability payments pursuant to 8 AAC 45.134; and (3) should the board exercise its discretion to permit withholding of any overpayments at a rate greater than 20% of permanent total disability payments.[17]

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[12] R. 249-250. *See Darrow*, p. 6 (No. 14).

[13] R. 309-312. *See Darrow*, pp. 6-7 (Nos. 15-17).

[14] *Darrow*, p. 7 (No. 18).

[15] *Darrow*, p. 7 (No. 19). *See* R. 347. The settlement agreement is not consistent in this regard. At page three, it states that "[a]ll compensation reports . . . show an average weekly wage of $270.00" and that "the parties . . . agree that the employee's average weekly wage was actually $668.98" and "that [Ms. Darrow] is entitled to a compensation rate adjustment based upon [her] average weekly wage of $668.98." R. 344. In fact, as previously noted, the compensation reports refer to gross weekly earnings, not average weekly wages. *See supra*, note 7.

[16] *See* R. 372; 381; Hr'g Tr. 5-6, 23, August 14, 2014.

[17] *See* R. 347-348, *Darrow*, p. 8 (No. 25). Future medical benefits were left open. R. 348. *See Darrow*, p. 7 (No. 19).

The board ruled that: (1) the Social Security offset is $493.57 per week; (2) previously paid permanent partial impairment benefits (adjusted for inflation) may be deducted from permanent total disability payments; and (3) the amount deducted may not exceed 20%.[18]

*3. Standard of review.*

The board's findings regarding the weight to be accorded to witnesses' testimony, including medical testimony and reports, is conclusive, even if the evidence is conflicting or susceptible to contrary conclusions.[19] We must uphold the board's factual findings if they are supported by substantial evidence in light of the whole record.[20]

On questions of law, we do not defer to the board's conclusions. We exercise our independent judgment.[21]

*4. Discussion.*

This case raises two issues: (1) did the board err in calculating the amount of the Social Security offset under AS 23.30.225(b); and (2) may permanent partial impairment benefits previously provided to Ms. Darrow be deducted from future permanent total disability payments.[22] There are no disputed facts regarding those issues.

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[18] *Darrow*, p. 33. The board did not preclude a subsequent increase in withholding. *Id.*

[19] AS 23.30.122.

[20] AS 23.30.128(b).

[21] AS 23.30.128(b).

[22] *See* Appellant's Brief, p. 2. Ms. Darrow did not raise on appeal any issue regarding whether the Social Security offset could be deducted from ongoing permanent total disability payments. Alaska Airlines did not cross-appeal the board's decision to limit deductions to 20% of ongoing permanent total disability payments, "at this point in time."

*a. The Board Erred In Calculating the Social Security Offset.*

Since 1977, AS 23.30.225(b) has provided for an offset to weekly disability benefits for recipients of Social Security disability benefits.[23] The offset is the amount by which the sum of the weekly Social Security benefits and the "weekly disability benefits to which the employee would otherwise be entitled under [the Act] exceeds 80 percent of the employee's average weekly wages at the time of injury."[24]

When AS 23.30.225 was enacted, AS 23.30.220 provided that "the average weekly wage of the injured employee at the time of injury is the basis for computing compensation, and is determined [as provided in AS 23.30.220(1)-(5)]."[25] In 1983, however, the legislature amended AS 23.30.220, removing any reference to the average weekly wage.[26] As amended in 1983, "[t]he spendable weekly wage of an injured employee at the time of injury is the basis for computing compensation"; the spendable weekly wage is gross weekly earnings minus payroll tax deductions and "[t]he gross weekly earnings shall be calculated as [provided in AS 23.30.220(a)(1)-(4)]."[27]

The removal of the statutory formula for determining "average weekly wage at the time of injury" in AS 23.30.220 created ambiguity in AS 23.30.225(b)'s provision for an offset based on "average weekly wages at the time of injury." In 1994, the Alaska Supreme Court ruled in *Underwater Construction* that "'average weekly wages' as a benefit cap under AS 23.30.225(b) is synonymous with 'gross weekly earnings' under AS 23.30.220, insofar as both terms represent a measure of historical earning capacity."[28] However, the provisions of AS 23.30.220 in effect at the time of the court's

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[23] *See* §9 ch. 75 SLA 1977.

[24] AS 23.30.225(b).

[25] AS 23.30.220 (1977).

[26] *See* §12 ch. 70, SLA 1983.

[27] *Id.*

[28] *Underwater Construction, Inc. v. Shirley*, 884 P.2d 150, 156 (Alaska 1994) (hereinafter, *Underwater Construction*).

1994 decision were substantially revised in the 1995 legislative session.[29] Under the revised version of AS 23.30.220, permanent total disability benefits determined under AS 23.30.220(a)(10) are not intended to reflect earning capacity at the time of injury based on historical earning capacity. Rather, they are intended to reflect earning capacity "during the period of disability" based on "the nature of the employee's work, work history, and resulting disability[.]"[30] Moreover, the 1995 revisions provided an increased cap for permanent total disability benefits determined under AS 23.30.220(a)(10), setting that cap at 100% of gross weekly earnings at the time of injury[31] (subject to a maximum of $700)[32] as compared with the former limitation (in the form of a specific benefit formula under AS 23.30.180) of 80% of average weekly

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[29] The version of AS 23.30.220 in effect in 1994 (enacted in 1988) restricted the board's discretion to adjust the compensation rate to specified circumstances. *See* §37 ch. 79 SLA 1988. In 1994, those restrictions were found to be unconstitutional as applied. *See Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994). In 1995, the legislature removed the restrictions, with respect to permanent total disability benefits. *See* §9 ch. 75 SLA 1995; AS 23.30.220(a)(10). For other benefits, the legislature provided additional statutory formulae for determining the spendable weekly wage. *Id.*; AS 23.30.220(a)(1)-(7). These additional formulae have been deemed sufficient to meet constitutional requirements. *See Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 797 (Alaska 2002).

[30] AS 23.30.220(a)(10) ("if . . . 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[.]").

[31] AS 23.30.220(a)(10) (1995) ("[C]ompensation under this paragraph may not exceed the employee's gross weekly earnings at the time of injury.").

[32] AS 23.30.175(a) (1994). The fixed $700 cap was repealed in 2000 and replaced with a variable cap, which remains in effect under current law. §15 ch. 105 SLA 2000. *See* AS 23.30.175(a) (2015) ("'maximum compensation rate' means 120 percent of the average weekly wage, calculated under (d) of this section, applicable on the date of injury. . . ."). AS 23.30.175(d) provides for annual determination of the average weekly wage by the commissioner. The parties agree that the fixed $700 cap applies to Ms. Darrow as that was the cap in effect on the date of her injury. *See Louie v. BP Exploration (Alaska), Inc.*, 327 P.3d 204 (Alaska 2014) (hereinafter *Louie*).

wages at the time of injury (subject to a maximum of $700).[33] Because permanent total disability benefits determined under AS 23.30.220(a)(10) are not intended to reflect earning capacity at the time of injury based on historical earning capacity (but rather earning capacity during the period of disability based on a variety of factors) and the statutory cap for permanent total disability benefits determined under AS 23.30.220(a)(10) has been increased, the court's ruling in *Underwater Construction*, premised as it was on the use of historical earnings (and, implicitly, on the existence of the same 80% limit for permanent total disability benefits as for other benefits) as a basis for determining permanent total disability payments both with and without an offset under AS 23.30.225, is not controlling authority for the application of the Social Security offset to permanent total disability benefits determined under AS 23.30.220(a)(10).

In this case, for purposes of permanent total disability benefits, the parties agreed that the board should calculate Ms. Darrow's gross weekly earnings based on imputed "earnings during the period of disability" under AS 23.30.220(a)(10), rather than based on historical earning capacity at the time of injury, under AS 23.30.220(a)(4). The parties agreed that the appropriate figure to use for Ms. Darrow's gross weekly earnings during the period of disability was $1,390. The parties further agreed that with that starting point, Ms. Darrow was entitled to a permanent total disability benefit of $668.98 per week, that is, an amount equal to her gross weekly earnings, as determined under AS 23.30.220(a)(4), at the time of injury (the maximum benefit allowed under AS 23.30.220(a)(10)).

The board, citing a prior board decision on point, concluded that the Social Security offset should be calculated based on Ms. Darrow's gross weekly earnings as determined (for purposes of permanent total disability benefits) under

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[33] AS 23.30.175(a) (1995). The cap stated in AS 23.30.220(a)(10) is applied first, and then the cap stated in AS 23.30.175(a). *See Louie*. The latter cap was actually a reduction from the previously existing cap. *Id.*, 327 P.3d at 209, note 33.

AS 23.30.220(a)(10).[34] It then proceeded to calculate the amount of the offset, using this formula:[35]

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| A. Average Weekly Wages (AWW) at the Time of Injury | $668.98 |
| B. Adjusted AWW under AS 23.30.220(a)(10) | $668.98 |
| C. Weekly Compensation Rate | $668.98 |
| D Weekly Social Security Disability (SSDI) Benefit | $359.77 |
| E. PTD Plus SSDI (C + D) | $1,028.75 |
| F. 80% of Adjusted AWW (B x .8) | $535.98 |
| G. Offset (E - F) | $493.57 |
| H. Adjusted Worker's Compensation Disability Benefit (C - G) | $175.41 |

Ms. Darrow agrees with the board's conclusion that when permanent total disability benefits have been determined under AS 23.30.220(a)(10), the Social Security offset under AS 23.30.225(b) is calculated using gross weekly earnings (referred to in the board's formula as "Adjusted AWW under AS 23.30.220(a)(10)") as determined under AS 23.30.220(a)(10). She argues, however, that the formula used by the board

[34] *See Darrow*, pp. 19, 21-22 citing *Miller v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 13-0099 (August 20, 2013), aff'd. on other grounds, *Municipality of Anchorage v. Miller*, Alaska Workers' Comp. App. Comm'n Dec. No. 197 (July 1, 2014).

[35] *Darrow*, pp. 23-24. The board's formula (and the formulae used by the parties) refers to average weekly wages rather than to gross weekly earnings. We depict the formulae as set forth by the board and the parties. *See supra*, note 7.

was improper, in that it fails to comply with *Louie.*[36] Ms. Darrow argues that the correct formula is this:[37]

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|---|---|
| A. Average Weekly Wages (AWW) at the Time of Injury | $668.98 |
| B. Adjusted AWW under AS 23.30.220(a)(10) | $1,390.00 |
| C. Weekly Compensation Rate from Table | $700.00 |
| D Weekly Social Security Disability (SSDI) Benefit | $359.77 |
| E. PTD Plus SSDI (C + D) | $1,059.77 |
| F. 80% of Adjusted AWW (B x .8) | $1,112.00 |
| G. Offset (E - F) | ($52.23) |
| H. Adjusted Worker's Compensation Disability Benefit (C - G) | $752.23 |
| I. Maximum Compensation Rate (AS 23.30.175) (1996) | $700.00 |

According to Ms. Darrow, the flaw in the board's formula is that the board's formula imposes the maximum compensation rate cap (AS 23.30.175(a) (1996)) in line B, rather than after determining the amount of the offset and the resulting benefit in line H.[38] This, Ms. Darrow contends, is contrary to *Louie*. In that case, the court reiterated that the cap stated in AS 23.30.220(a)(10) is applied first, before the cap stated in AS 23.30.175(a).[39]

Alaska Airlines does not take issue with Ms. Darrow's analysis on this point, but we do. The board did not impose the maximum compensation rate of AS 23.30.175(a) at step B: rather, it imposed the limitation on permanent total disability benefits stated in AS 23.30.220(a)(10), that is, 100% of gross weekly earnings at the time of injury, at

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[36] *Louie,* 327 P.3d 204. *See* Appellant's Brief, pp. 7-8.

[37] *See* Appellant's Brief, p. 8. The amounts stated in Ms. Darrow's brief have been corrected to reflect the board's finding as to the amount of the Social Security benefits. *See Darrow*, p. 23; *supra*, note 10.

[38] Appellant's Brief, p. 8.

[39] *See Louie*, 327 P.2d at 208, citing *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979), overruled on other grounds by *Fairbanks North Star Borough School District v. Crider*, 736 P.2d 770, 775 (Alaska 1987).

step B.[40] This was, however, incorrect. The limitation stated in AS 23.30.220(a)(10) should be applied at step C, because it limits the amount of compensation, not the amount of gross weekly earnings.[41] Ms. Darrow's gross weekly earnings under AS 23.30.220(a)(10) are $1,390, not $668.98, and that is the correct amount to show in step B. The limit on the benefit stated in AS 23.30.220(a)(10) is applied at step C. The maximum compensation rate limit is applied only at the last step, after the benefit and all offsets have been applied. But the real issue in this case is not whether the maximum compensation rate cap should be applied at step B or after step H. The real issue is whether, at step F, the basis for calculation should be "gross weekly earnings at the time of injury," as determined at step A under AS 23.30.220(a)(4), or "gross weekly earnings" that "fairly reflect . . . earnings during the period of disability", as determined at step B under AS 23.30.220(a)(10), as in this formula:

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|---|---|---|
| A. | Gross Weekly Earnings (GWE) under §220(a)(4) | $ 668.98 |
| B. | GWE under §220(a)(10) | $1,390.00 |
| C. | Weekly PTD under §220(a)(10) (B x .8, max. = A) | $ 668.98 |
| D | Weekly Social Security Disability (SSDI) Benefit | $ 359.77 |
| E. | PTD Plus SSDI (C + D) | $1,028.75 |
| F. | 80% of AWW at the time of injury (A or B x .8) | $535.18 or $1,112.00 |
| G. | §225(b) Offset (E - F) | $493.57 or ($52.23) |
| H. | Adjusted §220(a)(10) PTD (C – G, max. = A) | $175.41 or $668.98 |
| I. | Maximum Compensation Rate (§175 = $700) (1996) | NA |
| J. | Combined SSDI + PTD (D + H) | $535.18 or $1,059.77 |

Alaska Airlines, rather than taking issue with the manner in which the board applied the two separate limitations on benefits stated in AS 23.30.220(a)(10) and AS 23.30.175(a), asks that we affirm the board on an entirely different ground. According to Alaska Airlines, the board correctly calculated the offset,[42] because at step F, the correct figure to use is not 80% of gross weekly earnings as calculated under

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[40] *See Darrow*, p. 24 ("The first step . . . is to determine . . . adjusted weekly wages under §220(a)(10). . . . §220(a)(10) limits this amount to the employee's gross weekly earnings 'at the time of injury,' which the parties agree was $668.98. It is believed this is where [Ms. Darrow] miscalculates.").

[41] *See, supra,* note 31.

[42] Appellee's Brief, p. 2.

AS 23.30.220(a)(10) ($1,390 x .8 = $1,112), but is rather 80% of gross weekly earnings as calculated under AS 23.30.220(a)(4) ($668.98 x .8 = $535.18). We disagree.

Under the board's calculation, which Alaska Airlines would have us affirm, Ms. Darrow's combined weekly benefit from both Social Security and Workers' Compensation is $359.77 + $175.41 = $535.18, which is less than the amount she would receive as a benefit under the Act for permanent total disability if there were no offset at all. The reason for this anomalous result is that when a permanent total disability benefit is determined under AS 23.30.220(a)(10), the benefit may be up to 100% of the employee's gross weekly earnings at the time of injury, rather than being fixed at only 80%, as occurs when the benefit calculation is done under AS 23.30.220(a)(1)-(7).

The net effect of the board's calculation was not to offset Ms. Darrow's benefit under the Act with benefits received under the Social Security Act, leaving her in the same position that she would have been in absent any Social Security benefits, but rather to reduce the combined benefit to less than what she would have otherwise received under the Act: Ms. Darrow would be better off without Social Security benefits than she is with them. We reject the idea that, in reducing the amount to be paid by employers when Social Security benefits are paid, the legislature intended to provide an injured employee with a lesser combined benefit than the employee would receive

under the Act alone.[43] We do not believe the legislature intended that inequitable result.[44]

Alaska Airlines argues that to interpret AS 23.30.225(b) as permitting the use of gross weekly earnings as determined under AS 23.30.220(a)(10) in calculating the Social Security offset would be inconsistent with the clear meaning of the phrase "at the time of injury" in AS 23.30.225(b),[45] and would "effectively eliminate" that phrase from the statute.[46] It is evident that the legislative intent in enacting AS 23.30.225(b) was to reduce benefits paid by employers under the Act when federal benefits are made available to injured employees,[47] and Alaska Airlines argues that, in accordance with that intent, AS 23.30.225(b) should be interpreted to "restrict the benefits to be paid to [an employee], regardless of future adjustments that might be made to her adjusted gross weekly wage [sic] under [AS 23.30].220."[48] Finally, Alaska Airlines says, AS 23.30.225(b) is the more specific provision, and as such should prevail over

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[43] The board justified its formula with the observation that the total amount Ms. Darrow would receive, $535.18, from both Workers' Compensation benefits and SSDI, was greater than the $423.23 she had previously been receiving in the form of Workers' Compensation benefits alone. *See Darrow*, p. 24 ("Incidentally, [Ms. Darrow's] previous [temporary total disability] compensation rate was $423.23; so she does realize the benefits of the adjustment provision at AS 23.30.220(a)(10).").

[44] *Cf. Peck v. Alaska Aeronautical, Inc.*, 756 P.2d 282 (Alaska 1988). It does not appear that the board intended this result, either. In its decision, the board observed that under a prior board decision, application of the offset in accordance with AS 23.30.225(b) ought not to reduce overall benefits, but rather should only redistribute the payments as between the Social Security Administration and the workers' compensation insurance carrier. *See Darrow*, p. 21, citing *Stanley v. Wright-Harbor*, Alaska Workers' Comp. Bd. Dec. No. 82-0039 (February 19, 1982), aff'd., 3AN 82-2170 CI (Alaska Superior Court, May 19, 1983). We observe, moreover, that to interpret the law in this fashion could be constitutionally suspect. *Cf. Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994).

[45] Appellee's Brief, p. 3.

[46] Appellee's Brief, p. 5.

[47] *See Underwater Construction*, 884 P.2d at 155, note 10.

[48] Appellee's Brief, p. 5.

AS 23.30.220.[49] That this interpretation may adversely impact workers who, like Ms. Darrow, become disabled long after they are injured may be unfortunate, but Alaska Airlines asserts that is not a sufficient ground upon which to disregard the plain language of AS 23.30.225(b), and the legislative intent "to provide predictable benefits at a lower cost to the employer."[50]

In response to Alaska Airlines' argument that using gross weekly earnings as determined under AS 23.30.220(a)(10) as the basis for determining the offset under AS 23.30.225(b) would effectively write the phrase "at the time of injury" out of the latter statute, we observe that it was the legislature's enactment of AS 23.30.220(a)(10), not our interpretation of AS 23.30.225(b), that has that purported effect. As we view the matter, in amending AS 23.30.220 in 1995 the legislature did not in effect write out the phrase "at the time of injury" from AS 23.30.225(b); rather, it in effect wrote in the phrase "as determined under AS 23.30.220(a)(1)-(10)" into that statute. By providing for calculation of certain benefits based not on historical earning capacity at the time of injury, but on wage loss during the period of disability, the legislature removed the symmetry between AS 23.30.225(b) and the former version of AS 23.30.220 that was the basis of the Supreme Court's decision in *Underwater Construction*. To characterize AS 23.30.225(b) as more specific disregards that AS 23.30.220(a) is the more specific provision, as pertains to the determination of wage earning capacity as the basis for compensation. In any event, insofar as AS 23.30.225(b) may be said to be more specific than AS 23.30.220(a), we conclude that the relevant provisions are not in conflict, because a determination of gross weekly earnings under AS 23.30.220(a)(10), while it should "fairly reflect the employee's earnings during the period of disability", is by statute effectively equivalent to gross weekly earnings at the time of injury: it remains the basis for determining "spendable weekly wage at the time of injury" which under AS 23.30.220 is the touchstone for determining <u>all</u> compensation, including compensation under AS 23.30.220(a)(10). We

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[49] Appellee's Brief, pp. 5-6.

[50] Appellee's Brief, pp. 6-7, citing *Louie.*

conclude that AS 23.30.220(a)(10) and AS 23.30.225(b) may be harmonized by treating the phrase "average weekly wages at the time of injury" in AS 23.30.225(b) as equivalent to "gross weekly earnings" as determined under AS 23.30.220(a), including, when applicable, AS 23.30.220(a)(10).[51] As to the legislative intent in enacting AS 23.30.225(b), we note that the effect of AS 23.30.225(b) as we read it is to reduce the total amount of benefits paid by employers overall when federal benefits are paid, even if in some cases, such as Ms. Darrow's, there may be no reduction in the amount paid by the employer. We note, furthermore, that to the extent the legislature intended to enhance the predictability of benefits, setting a cap to benefits under AS 23.30.220(a)(10) at 100% of gross weekly earnings at the time of injury helps achieve that end without regard to the amount of the offset.

*b. Permanent Partial Impairment Payments May Be Deducted.*

Ms. Darrow was paid a total of $40,500 in permanent partial impairment benefits, based on a 30% disability rating, before she was found to be permanently and totally disabled. AS 23.30.180 provides that "[i]f 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. . . ." 8 AAC 45.134(c) provides that "[f]or purposes of . . . AS 23.30.180, permanent partial disability benefits includes permanent partial impairment benefits paid under AS 23.30.190."

The board concluded that the legislature, in enacting AS 23.30.190, did not intend to provide for recovery (under AS 23.30.180) of amounts paid as permanent partial impairment benefits under AS 23.30.190.[52] The board reasoned that permanent partial impairment benefits under AS 23.30.190, unlike permanent total disability benefits under AS 23.30.180, are unrelated to a loss of wage earning capacity, and thus benefits paid under AS 23.30.190 do not constitute a double recovery for the same loss

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[51] *See In the Matter of the Estate of Hutchinson*, 577 P.2d 1074, 1075 (Alaska 1978).

[52] *Darrow*, pp. 30-31.

and should not be subject to recovery under AS 23.30.180. Nonetheless, in light of 8 AAC 45.134(c), it concluded that it had no choice other than to order a reduction of permanent total disability payments to permit the recovery by the employer of the amounts it had previously paid as permanent partial impairment benefits.[53]

After the board issued its decision, Ms. Darrow filed an action against the Division of Workers' Compensation in the superior court seeking a declaratory judgment that 8 AAC 45.134(c) is invalid and unenforceable pursuant to AS 44.62.030. The director intervened in this appeal, and by agreement of the parties to the superior court case, that action was stayed pending the appeal. On appeal, Ms. Darrow asks that the commission "agree with the Board that the regulation is unenforceable under AS 44.62.030, for the reasons state[d] by the Board."[54]

We do not, of course, have the authority to declare a regulation invalid under AS 44.62.030: that authority rests in the superior court. But we do have jurisdiction to interpret the various statutes involved. In this case, we look first to AS 23.30.155(j), which provides:

> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

AS 23.30.190 provides that permanent partial impairment benefits are paid "[i]n case of impairment partial in character but permanent in quality, and not resulting in permanent total disability [emphasis added]." Ms. Darrow's knee impairment resulted in permanent total disability.[55] Because Ms. Darrow has been determined to be permanently totally disabled as a result of the same impairment for which she received permanent partial impairment benefits, the amounts she received as permanent partial impairment benefits are overpayments within the meaning of AS 23.30.155(j), and thus

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53 *Id.*, p. 31.

54 Appellant's Brief, p. 11.

55 *See, supra,* note 9.

Alaska Airlines is entitled to withhold 20% of her permanent total disability payments, without regard to AS 23.30.180 and without regard to 8 AAC 34.134.

*5. Conclusion.*

The board did not properly calculate the Social Security offset under AS 23.30.225(b). We therefore REVERSE the board's order setting the amount of permanent total disability benefits. Alaska Airlines is entitled to withhold 20% of future installments of compensation to recover overpayments in the form of permanent partial impairment benefits. We therefore AFFIRM the board's order permitting Alaska Airlines to withhold 20% of future installments of compensation.

Date: ___*October 13, 2015*____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

*Signed*
James N. Rhodes, Appeals Commissioner

*Signed*
Philip E. Ulmer, Appeals Commissioner

*Signed*
Andrew M. Hemenway, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

If you wish to appeal 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 for

reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Final Decision No. 218 issued in the matter of *Pamela J. Darrow (f/k/a Creekmore) vs. Alaska Airlines, Inc., Eberle Vivian, Inc., AIGA, as successor in interest to Lumbermen's Insurance Companies, and Northern Adjusters, Inc.; and, State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation, Intervenor,* AWCAC Appeal No. 14-024, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 13, 2015.

Date: *October 14, 2015*

*Signed*

K. Morrison, Appeals Commission Clerk