

Case: *Wasser & Winters Company, Inc. and Alaska National Insurance Company vs. Scott E. Linke*, Alaska Workers' Comp. App. Comm'n Dec. No. 138 (September 7, 2010)

Facts: This appeal concerns a compensation rate adjustment. Scott E. Linke (Linke) was injured on May 24, 2005, while working as a truck driver for Wasser & Winters Company, Inc. (Wasser & Winters). He had worked for that company for over a month, since April 5, 2005. As a member of the Teamsters union in good standing, he had a history of regular union truck-driving jobs. Wasser & Winters initially paid temporary total disability (TTD) benefits based on the maximum weekly rate, but the adjuster later determined Linke was a "seasonal" worker, lowered the compensation rate, and claimed an overpayment. The board concluded that Linke was not a seasonal worker and ordered Wasser & Winters to pay him compensation using a spendable weekly wage calculated under AS 23.30.220(a)(4)(A). The employer appealed.

The employer argued Linke was a seasonal worker and thus, AS 23.30.220(a)(6) applied. In the alternative, the employer urged the commission to require the board to apply AS 23.30.220(a)(10). Although that subsection applied to permanent total disability (PTD) benefits, the employer analogized Linke's long-term receipt of TTD to PTD benefits and argued that Linke's compensation rate under AS 23.30.220(a)(4)(A) was unfair because if his annual income is projected from his compensation rate, the result is an amount that is much higher than Linke's average annual income as reflected in his earnings history in the five years before he was injured.

Applicable law: AS 23.30.220(a) provided in relevant parts, at the time Linke was injured:

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

. . . .

(4) if at the time of injury the

(A) employee's earnings are calculated by the day, hour, or by the output of the employee, the employee's gross weekly earnings are the employee's earnings most favorable to the employee computed by dividing by 13 the employee's earnings, including overtime or premium pay, earned during any period of 13 consecutive calendar weeks within the 52 weeks immediately preceding the injury;

(B) employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding (1) – (3) of this subsection and (A) of this paragraph, the employee's gross weekly earnings are computed by determining the amount that the employee would have earned, including overtime or premium pay, had the employee

been employed by the employer for 13 calendar weeks immediately preceding the injury and dividing this sum by 13;

. . . .

(6) if at the time of injury the employment is exclusively seasonal or temporary, then, notwithstanding (1) – (5) of this subsection, the gross weekly earnings are 1/50 of the total wages that the employee has earned from all occupations during the 12 calendar months immediately preceding the injury;

. . . .

(10) if an employee is entitled to compensation under AS 23.30.180 and the board determines that calculation of an 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.

(c) In this section,

(1) "seasonal work" means employment that is not intended to continue through an entire calendar year, but recurs on an annual basis[.]

Issues: Does substantial evidence support that Linke was not an exclusively seasonal worker and thus, AS 23.30.220(a)(6) does not apply? Does substantial evidence support that Linke's compensation rate should be adjusted using the formula for determining his spendable weekly wage under AS 23.30.220(a)(4)(A), rather than AS 23.30.220(a)(4)(B)? Should AS 23.30.220(a)(10) be used instead?

Holding/analysis: The commission interpreted the statute, AS 23.30.220(a)(6), as applying only to "exclusively seasonal or temporary workers. Interpreting this statutory language, we conclude that this formula is inapplicable to workers who are not exclusively seasonal or temporary, otherwise the legislature's use of the word 'exclusively' in the statute would be superfluous." Dec. No. 138 at 6. The board had substantial evidence to conclude that Linke was not an "exclusively seasonal worker." Linke testified he was eligible for union work when not driving for Wasser & Winters and would have accepted such work, and the board had evidence that he had worked every month the winter of 2004-05 driving for another union job. Thus, AS 23.30.220(a)(6) did not apply.

The commission rejected using AS 23.30.220(a)(10) in Linke's case because it applied to PTD benefits, not TTD benefits, and the commission was "reluctant to judicially extend the reach of any statute pertaining to workers' compensation benefits beyond the limitations the legislature expressly places on it." *Id.* at 9. In addition, case law did not support taking a generalized fairness approach to determining spendable weekly wages.

The commission concluded that AS 23.30.220(a)(4)(B), not AS 23.30.220(a)(4)(A), applied to calculate Linke's spendable weekly wage because Linke was employed for less than 13 weeks prior to his injury. Moreover, AS 23.30.220(a)(4)(B) specifically ruled out applying AS 23.30.220(a)(4)(A) in these circumstances ("employee has been employed for less than 13 calendar weeks immediately preceding the injury, then, notwithstanding . . . (A) of this paragraph,"). The commission remanded to the board to recalculate based on AS 23.30.220(a)(4)(B).

Note: Dec. No. 105 (April 28, 2009) denied the employer's request to the commission to stay the board proceedings before the board rendered the decision in this case.