Alaska Workers' Compensation Appeals Commission

Northern Construction and Liberty Northwest Insurance Corporation, Petitioners, vs. Andy James, Respondent.	MEMORANDUM DECISION ON PETITION FOR REVIEW Decision No. 251 July 25, 2018 AWCAC Appeal No. 17-018 AWCB Decision No. 17-0119 AWCB Case No. 201500569

Petition for review from Alaska Workers' Compensation Board Interlocutory Decision and Order on Reconsideration No. 17-0119, issued October 16, 2017, at Anchorage, Alaska, by southcentral panel members William Soule, Chair; Stacy Allen, Member for Labor; and, Bradley Evans, Member for Industry.

Appearances: Adam R. Sadoski, Holmes Weddle & Barcott, PC, for petitioners, Northern Construction and Liberty Northwest Insurance Corporation; Selena R. Hopkins-Kendall, The Croft Law Office, for respondent, Andy James.

Commission proceedings: Petition for review filed October 26, 2017, with motion for stay; petition for review and motion for stay granted December 27, 2017; briefing completed March 28, 2018; oral argument held May 10, 2018.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Petitioners, Northern Construction and Liberty Northwest Insurance Corporation (Northern), seek review of the Interlocutory Decision and Order on Reconsideration No. 17-0119 issued by the Alaska Workers' Compensation Board (Board) on October 16,

2017.[1] Specifically, Northern asks the Alaska Workers' Compensation Appeals Commission (Commission) to review the Board's determination of the method for calculating an injured worker's out-of-state cost of living allowance (COLA) when the employee's workers' compensation rate is at the Alaska maximum rate.

As part of its petition for review, Northern requested a stay of the Board's order. The Commission heard oral argument on the motion for stay on December 1, 2017, and granted both the petition for review and the motion for stay.[2] The Commission heard oral argument on May 10, 2018, on the petition for review. The Commission now reverses the Board's Interlocutory Decision and Order on Reconsideration No. 17-0119, finding the Board incorrectly interpreted how the statutes work together to determine the compensation rate for an injured worker residing outside of Alaska.

2. Factual background and proceedings.[3]

On December 31, 2014, Mr. James was hurt on the job while working for Northern.[4] Mr. James worked on Alaska's North Slope from about 2001 until his current

---

[1] *James v. Northern Constr. and Liberty Northwest Ins. Corp.*, Alaska Workers' Comp. Bd. Dec. No. 17-0119 (Oct. 16, 2017) (*James IV*). The Commission notes there have been a total of four Board decisions in this matter. The Board initially issued *James v. Northern Constr. and Liberty Mutual,* Alaska Workers' Comp. Bd. Dec. No. 16-0052 (June 30, 2016) on the question of an SIME, which decision has not been appealed (*James I*); next the Board issued *James v. Northern Constr. and Liberty Northwest Ins. Corp.*, Alaska Workers' Comp. Bd. Dec. No. 17-0044 (April 20, 2017) on the question of the proper location for calculation of the COLA rate and the method for calculation of COLA (*James II*); the Board issued *James v. Northern Constr. and Liberty Northwest Ins. Corp.,* Alaska Workers' Comp. Bd. Dec. No. 17-0052 (May 9, 2017)(*James III*), granting reconsideration of *James II*; and, lastly, the Board issued *James IV* which is the subject of this petition for review. The Commission further notes that it incorrectly identified the number of the Board's decisions in its Memorandum Decision on the Motion for Stay and Petition for Review, not being aware at that time of the existence of *James I.*

[2] *Northern Constr. and Liberty Northwest Ins. Corp. v. James*, Alaska Workers' Comp. App. Comm'n Appeal No. 17-018, Memorandum Decision on Motion for Stay and Petition for Review (Dec. 27, 2017).

[3] We do not, in this decision, make any factual findings. We state the facts as set forth in the Board's decision, except as otherwise noted.

[4] *James IV* at 3, No. 2.

injury.[5] Sometime between 2002 and 2005, he moved to Idaho where he continues to reside.[6] Following the work injury on December 31, 2014, Mr. James returned to his home in Salmon, Idaho, on January 5, 2015.[7]

The parties agree Mr. James' earnings resulted in his Alaska weekly compensation rate being the maximum of $1,143.00 per week.[8] Northern never controverted Mr. James' right to the maximum Alaska compensation rate.[9] Northern paid Mr. James temporary total disability (TTD) benefits at the rate of $1,143.00 per week for over two years, sending the checks to his Idaho address.[10]

Effective January 1, 2017, Northern adjusted Mr. James' weekly compensation rate using the COLA ratio for Idaho Falls, Idaho. Using this 62.77 ratio, Northern reduced Mr. James' weekly disability rate from $1,143.00 to $717.46 and claimed a $41,364.07 overpayment. Further, Northern began recovering the alleged overpayment by withholding 20 percent ($143.49) from Mr. James' ongoing bi-weekly disability checks. Thus, between the revised COLA rate and retroactive overpayment reductions, Northern reduced Mr. James' weekly compensation rate from $1,143.00 to $573.97.[11]

On January 18, 2017, Northern notified Mr. James for the first time about this weekly compensation rate COLA adjustment and alleged overpayment.[12] On January 27, 2017, Mr. James filed and served a petition for an order restoring his compensation rate. He contended Northern improperly used the COLA ratio from Idaho

---

5 *James IV* at 3, No. 1.

6 *Id.*

7 *Id.* at 4.

8 *Id.*, No. 3.

9 *Id.*, No. 6.

10 *Id.*, Nos. 4-5.

11 *Id.*, No. 7. A question neither raised nor addressed in the petition for review nor by the Board is whether Northern is estopped from recovering its alleged overpayment because it knew Mr. James lived in Idaho, yet continued to pay the full maximum Alaska compensation rate to Mr. James for at least 2 years.

12 *Id.*, No. 8.

Falls, Idaho, to lower his weekly compensation rate and asserted the correct COLA ratio was from Bozeman, Montana. Additionally, Mr. James contended Northern used the wrong methodology, stating Northern should have multiplied the proper COLA ratio times his spendable weekly wage calculated solely under AS 23.30.185. He concluded that had Northern done so, his weekly rate of compensation would have remained at $1,143.00 per week, the maximum rate under AS 23.30.175(a).[13]

Northern contended it used the proper COLA ratio from the nearest listed community and properly took the appropriate 20 percent offset for its alleged overpayment.[14] It further contended it had used the correct method to calculate the offset.[15]

On April 20, 2017, *James II* directed Northern to use Bozeman, Montana's 76.31 COLA ratio for Mr. James' TTD benefits from January 5, 2015, through December 31, 2016, and its 77.47 COLA ratio thereafter, subject to future revisions as the COLA ratios may change.[16] It did not adopt Mr. James' requested compensation rate calculation. *James II* understood Mr. James to contend that Northern should have multiplied the proper COLA ratio times his spendable weekly wage as calculated under AS 23.30.185.[17] On April 20, 2017, *James II* denied Mr. James' requested methodology and found the COLA ratio for Bozeman, Montana, to be the correct ratio.[18]

On May 5, 2017, Mr. James requested partial reconsideration of *James II*. On the COLA issue, Mr. James contended the proper way under AS 23.30.175(b)(1) to determine his weekly compensation rate as a recipient not residing in the state is to multiply his "weekly compensation rate calculated under . . . [AS] 23.30.185 . . . ." by the proper COLA ratio. Mr. James contended this would result in multiplying the COLA

---

13 *James IV* at 4, No. 10.

14 *Id.*, No. 11.

15 *Id.*

16 *James II* at 12.

17 *James IV* at 4, No. 10.

18 *James II* at 10, 12.

ratio times "80 percent" of his "spendable weekly wages" and then capping the result at the maximum. He also contended the statutes are plain on their face and following this clear methodology would result in his receiving a higher "weekly rate of compensation" than determined in *James II*, without exceeding the statutory maximum.[19]

On May 9, 2017, *James III* concluded *James II* had misunderstood Mr. James' COLA argument. Without commenting on its merits, *James III* granted Mr. James' reconsideration request solely to allow the parties to submit further briefing and oral argument.[20]

On May 22, 2017, Northern asserted that on the COLA issue, the Board applies four distinct steps in order, to establish an injured worker's out-of-state weekly rate of compensation: (1) calculate the spendable weekly wage under AS 23.30.220; (2) determine the percentage of spendable weekly wage under AS 23.30.185; (3) calculate the compensation rate by applying the maximum limit, if necessary, under AS 23.30.175(a); and (4) adjust the compensation rate by the COLA if the claimant resides out of state, under AS 23.30.175(b). Northern contended the Alaska Workers' Compensation Act (Act) prescribes this order and *James II* correctly applied this formula. It further contended that since the compensation rate may never exceed the maximum rate mandated under AS 23.30.175(a), the Board could use no number other than the compensation rate adjusted to the maximum for application of the COLA ratio. Northern asserted that at no point in the weekly compensation rate calculation can any number be used in the formula that exceeds the maximum weekly rate. It contended Mr. James' methodology is "self-serving and illogical." Northern contended AS 23.30.175(a) and (b) are read together as one calculation, rather than read separately.[21]

---

[19] *James IV* at 4, No. 13.

[20] *Id.* at 5, No. 14.

[21] *Id.*, No. 15.

On August 9, 2017, Northern requested the Board issue a stay of *James II.*[22] Mr. James contended the Board lacked the authority to stay its own decisions.[23] At hearing, the parties stipulated Mr. James' 2013 gross yearly earnings were $126,591.00.[24] The Board declined to order a stay on the basis it has no express authority to grant a stay.[25]

The Board, in *James IV,* held that actual weekly compensation rates for TTD cannot be determined through resort to the Act alone. The Act is used to determine an injured worker's gross weekly earnings and that figure is compared to the division's published Rate Tables, or since approximately 2015, the division's online Benefit Calculator. The Rate Tables and online calculator produce the weekly compensation rates based on predetermined spendable weekly wage (net wages after tax deductions) built into the tables or benefit calculator for any given gross weekly earning, taking into account marital status and dependents.[26]

The Board, in *James IV*, calculated Mr. James' wages and compensation rate based on one-fiftieth of his gross earnings of $126,591.00, or $2,531.82, which is Mr. James' gross weekly wage. According to the Board, the Division's online Benefit Calculator, utilizing Mr. James' marital status and dependents, calculated his spendable weekly wage at the time of his injury with Northern was $2,000.28. Eighty percent of his spendable weekly wage is $1,600.22. Multiplying 80 percent of his spendable weekly wage at the time of injury by the two COLA ratios established in *James II* resulted in both amounts exceeding $1,143.00.00 (Mr. James' weekly maximum compensation rate ($1,600.22 x 76.31 = $1,221.13; $1,600.22 x 77.47 = $1,239.69).

---

22 *James IV* at 5, No. 16.

23 *Id.* at 6, No. 18.

24 *Id.*, No. 19.

25 *Id.* at 21.

26 *Id.* at 6-7, No. 21.

Therefore, the maximum allowable rate for an Alaskan resident also applied to Mr. James.[27]

In *James IV*, the Board reversed its decision in *James II* and revised Mr. James' compensation rate to the maximum rate for injured Alaskan workers. The Board determined that even though Mr. James lives in Idaho, which has a lower cost of living than Alaska, Mr. James was entitled to the maximum rate for Alaskan workers based on his earnings history and the Board's interpretation of the sequence for applying the various statutes governing calculation of compensation rates and COLA. The Board noted it is common for workers living outside of Alaska to work a rotating schedule in Alaska and return after each stint to the state in which they reside.[28] *James IV* was stayed by order of the Commission. Northern has not paid Mr. James any increased compensation.[29]

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[30] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[31] The Commission, when interpreting a statute, adopts "the rule of law that is most persuasive in light of precedent, reason, and policy.'"[32]

4. Discussion.

The question before the Commission involves the interpretation and sequence of application of several parts of the Act. Different parts of the Act are involved in

---

27 *James IV* at 6, No. 20.

28 *Id.* at 7, No. 23.

29 *Id.*, No. 22.

30 AS 23.30.128(b).

31 AS 23.30.128(b).

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

determining an injured worker's compensation rate and the COLA rate (weekly rate of compensation) for an injured worker not currently living in Alaska. The Act must be interpreted in a manner that ensures "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . ."[33] Thus each statute must be looked at in relation to the other statutes in the Act. The three statutes involved here in determining an injured worker's compensation rate and weekly rate of compensation for an injured worker receiving TTD are AS 23.30.220, AS 23.30.175, and AS 23.30.185.

The logical and rational approach to calculating an injured workers' compensation rate is to take each statute into consideration and see if one interpretation harmonizes them as a whole. At the time of injury involving time loss, each injured worker must first have the worker's gross weekly wages determined. Once the gross weekly earnings are fixed, then the worker's spendable weekly wage is calculated followed by a determination of the workers' compensation rate and the worker's weekly rate of compensation. Every injured worker in Alaska who sustains time loss as a result of the work injury must have a compensation rate established. Finally, the worker's weekly rate of compensation may vary depending on the state of residency or type of benefit being paid, although the worker's initial compensation rate remains the same.

AS 23.30.220 provides the mechanism for determining an injured worker's "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:
>
> > (1) if at the time of injury the employee's earnings are calculated by the week, the weekly amount is the employee's gross weekly earnings;

---

[33] AS 23.30.001.

(2) if at the time of injury the employee's earnings are calculated by the month, the employee's gross weekly earnings are the monthly earnings multiplied by 12 and divided by 52;

(3) if at the time of injury the employee's earnings are calculated by the year, the employee's gross weekly earnings are the yearly earnings divided by 52;

(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;

(5) 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;

(6) if at the time of injury the employee's earnings are calculated by the week under (1) of this subsection or by the month under (2) of this subsection and the employment is exclusively seasonal or temporary, then 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;

(7) when the employee is working under concurrent contracts with two or more employers, the employee's earnings from all employers is considered as if earned from the employer liable for compensation;

(8) if an employee when injured is a minor, an apprentice, or a trainee in a formalized training program, as determined by the board, whose wages under normal conditions would increase during the period of disability, the projected increase may be considered by the board in computing the gross weekly earnings of the employee; if the minor, apprentice, or trainee would have likely continued that training program, then the compensation shall be the average weekly wage at the time of injury rather than that based on the individual's prior earnings;

(9) if the employee is injured while performing duties as a volunteer ambulance attendant, volunteer police officer, or volunteer firefighter, then, notwithstanding (1)-(6) of this subsection, the gross weekly earnings for calculating compensation shall be the minimum gross weekly earnings paid a full-time ambulance attendant, police officer, or firefighter employed in the political subdivision where the injury occurred, or, if the political subdivision has no full-time ambulance

> attendants, police officers, or firefighters, at a reasonable figure previously set by the political subdivision to make this determination, but in no case may the gross weekly earnings for calculating compensation be less than the minimum wage computed on the basis of 40 hours work per week;
>
> (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.
>
> (b) The commissioner shall annually prepare formulas that shall be used to calculate an employee's spendable weekly wage on the basis of gross weekly earnings, number of dependents, marital status, and payroll tax deductions.
>
> (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;
>
> (2) "temporary work" means employment that is not permanent, ends upon completion of the task, job, or contract, and ends within six months from the date of injury.

Once the gross weekly wage has been found, then the spendable weekly wage is calculated which is the worker's "gross weekly earnings minus payroll tax deductions."[34] "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 deductions."[35] The statute further provides the means for determining the spendable weekly wage depending on how the employee has been paid: weekly, monthly, yearly, by day or hour or output, etc. The statute directs the commissioner to "annually prepare formulas that shall be used to calculate an employee's spendable weekly wage on the

---

[34] AS 23.30.220(a).

[35] *Id.*

basis of gross weekly earnings, number of dependents, marital status, and payroll tax deductions."[36] Under this authority, the Division has developed an online benefit calculator to aid in arriving at the precise weekly compensation rate for each injured worker, taking into consideration the above noted factors.[37]

Once the weekly compensation rate for an injured worker has been determined, AS 23.30.175(a) comes into play because "the weekly rate of compensation for disability . . ." is subject to a minimum and maximum payment.

AS 23.30.175(a) defines the weekly compensation rate.

> (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.

This statute on its face applies to all workers injured in Alaska. Nowhere in AS 23.30.175(a) is there any language indicating either an express or implicit intent to limit the maximum and minimum payment to injured workers living in Alaska.

---

[36] AS 23.30.220(b).

[37] *See*, *James II* and *James IV.*

There are several principles invoked when undertaking statutory construction. Generally the language of the statute is the starting point followed by reference to legislative history for legislative intent. Moreover, the overall guiding principle in interpreting the Act is that it must be interpreted so as to ensure the "quick, efficient, fair and predictable" delivery of benefits.[38]

AS 23.30.175(b) comes into play only when the injured worker decides to relocate to another state with a different cost of living from Alaska.

> (b) The following rules apply to benefits payable to recipients not residing in the state at the time compensation benefits are payable:
>
> (1) the weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215 by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state;
>
> (2) the calculation required by (1) of this subsection does not apply if the recipient is absent from the state for medical or rehabilitation services not reasonably available in the state;
>
> (3) if the gross weekly earnings of the recipient and the resulting compensation rate are determined under AS 23.30.220 (a)(6), (7), or (10), the calculation required by this subsection applies only to the portion of the recipient's weekly compensation rate attributable to wages earned in the state;

In looking at the meaning of any statute, "[l]egislative history can be shown through messages from the executive."[39] In the legislation section analysis the Department of Law had this to say about COLA and the cap on compensation rates:

> **Section 34** creates a new statutory provision, AS 23.30.175(b)(5), which "caps" compensation paid to non-resident recipients at the compensation rate the recipient would receive if residing in Alaska. The effect of the amendment is to allow compensation rates paid to a non-resident to decrease by cost of living adjustments for the recipient's area of residence, but caps any increase due to a cost of living adjustment in the

---

[38] AS 23.30.001(1).

[39] Sutherland Sec. 48.05 at 437, no. 1, citing *State Div. of Agriculture v. Fowler*, 611 P.2d 58 (Alaska 1980).

> recipient's area of residence so that the recipient's compensation rate does not exceed what the recipient would receive in Alaska."[40]

This language reflects an intent to provide a non-resident recipient with benefits equating to the cost of living where the recipient is living. There was an express intent not to reward an injured worker who lives somewhere outside of Alaska, where there is a lower cost of living, with higher benefits than the same category of injured worker who remains in Alaska.[41] "While the Alaska Constitution requires that the right to travel to another state not be deterred or penalized, it does not require that it be *rewarded* by an increase in benefits over the benefit the employee would receive had the employee remained in Alaska."[42]

In *Alaska Airlines, Inc. v. Darrow*[43], the Alaska Supreme Court (Court) referred to the principle that a more specific provision should control over a more general provision and then went on to state that this principle applies only when the provisions cannot be harmonized. Here, there is no reason why AS 23.30.175(a) and AS 23.30.175(b) cannot be harmonized. In fact, these two provisions are not in conflict because (a) applies to all injured workers and (b) applies only to injured workers who chose to recover outside Alaska. Therefore, the principle that a more specific provision applies over a more general provision does not apply here. Moreover, the Court admonishes that "when construing a statute, 'we must, whenever possible, interpret each part or section of a statute with every other part or section, so as to create a harmonious whole.'"[44]

---

[40] Section by Section Analysis, CSSB 130 (FIN)am Prepared by Department of Law, April 15, 2005, at 16.

[41] Letter to The Honorable Frank H. Murkowski, Governor, from Department of Law, July 18, 2005, at 41-42, discussing *Alaska Pac. Assurance Co. v. Brown,* 687 P.2d 264, 273 (Alaska 1984).

[42] *Id.* (emphasis in original).

[43] *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1125 (Alaska 2017).

[44] *Id.* at 1128, citation omitted.

AS 23.30.175(b) specifically details what happens when the injured worker lives or moves out of Alaska, and is applied after an injured worker's spendable weekly wage and compensation rate have been determined.

Once a worker's compensation rate has been fixed, if the worker is to receive time loss benefits, the statutes defining the various kinds of benefits come into play. If the worker is temporarily disabled from working by the work injury, AS 23.30.185 states the injured worker is entitled to TTD. Only after an injured worker's compensation rate has been determined under AS 23.30.220 and AS 23.30.175, is it necessary to look at AS 23.30.185, AS 23.30.180, AS 23.30.190, or AS 23.30.200 to identify what kind of benefit is due to an injured worker depending on where the employee is in the recovery process.

The Board, in *James IV*, stated if the Legislature intended a compensation rate to be determined using AS 23.30.220 and AS 23.30.175(a) it would have included these statutes in the enumerated list. However, this interpretation mixes apples and oranges. The enumerated statutes define the kind of benefits an injured worker receives at various points in the injury process. AS 23.30.220 and AS 23.30.175 are statutes describing the method used to calculate an injured worker's compensation rate. The Legislature had no reason to include the method statutes in a list of types of benefits to be paid, and so it did not.

Also, at issue here is the role of AS 23.30.185, which defines TTD, and when this benefit may be paid. It does state this benefit is to be based on 80 percent of the employee's spendable weekly wage. However, the determination of what constitutes 80 percent of spendable weekly wage has already been made by the division and is assessed by utilizing AS 23.30.220, its authorized benefits calculator, and the maximum and minimum rates under AS 23.30.175.

AS 23.30.185 defines "temporary total disability" as "disability total in character but temporary in quality" and provides that the injured worker is to receive "80 percent of the injured worker's spendable weekly wages" during the "continuance of the disability" but is not to be paid for "any period of disability occurring after the date of medical stability." The statute in its totality states "[i]n 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. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability."[45] AS 23.30.220 is involved because the online benefits calculator has predetermined the 80 percent of the spendable weekly wage for the injured worker based on the worker's gross weekly earnings and the worker's marital status and number of dependents.

Using Mr. James' scenario, AS 23.30.175(a) is ignored and AS 23.30.220 is deemed irrelevant for workers not living in Alaska. For workers living outside Alaska at the time of injury and not living in Alaska after the time of injury, Mr. James contends his compensation rate is calculated solely using AS 23.30.185 and AS 23.30.175(b) and, thus, the COLA rate does not change the worker's maximum allowable weekly compensation rate. However, this produces a scenario wherein an employer must recalculate an injured worker's base compensation rate when a worker moves from Alaska rather than merely applying a new COLA rate for the community outside Alaska to the base compensation rate. It also produces a scenario wherein an Alaskan worker whose weekly compensation rate is the maximum allowable under AS 23.30.175(a), but who then decides to move to a locale, such as Idaho, with a lower cost of living, would have his compensation rate recalculated under AS 23.30.220 and AS 23.30.175(b), ignoring the maximum language in AS 23.30.175(a). According to Mr. James, the COLA is applied not to the maximum allowable compensation rate, but to the initial compensation rate before adjustment to the maximum allowable weekly rate of compensation. This would potentially allow the injured worker to receive the exact same weekly compensation rate as when the worker was living in Alaska.

Using the Board's interpretation of how to calculate COLA for an out-of-state injured worker necessitates at least three different calculations of compensation rates depending solely on when and where the injured worker decides to live following the injury. According to the Board, one method is used exclusively for an injured worker

---

[45] AS 23.30.185.

who lived in Alaska at the time of injury and continues to live in Alaska while receiving benefits. Under *James IV*, an entirely different method is used to determine the compensation rate for an injured worker who lived in another state at the time of injury and continues to live out of state. According to *James IV*, if the injured worker decides to move out of state sometime after the injury, his original compensation rate must be thrown out and a new compensation rate established. According to Mr. James' scenario in the later event, the injured worker receives one compensation rate while living in Alaska, but has the worker's compensation rate recalculated when the worker moves out of state. If the injured worker has been receiving the maximum rate while living in Alaska, under the Board's analysis this worker will receive exactly the same rate when the injured worker moves to a place with a lower cost of living. This is precisely the scenario the Legislature wished to avoid when it adopted the revised statute.

The Board declared the computation in AS 23.30.185 is unnecessary because the Board has produced a benefits calculator which, according to the Board, renders AS 23.30.220 unnecessary. AS 23.30.175 does not define spendable weekly, although AS 23.30.185 does. AS 23.30.175(a) sets the maximum and minimum compensation rate an injured worker may receive in weekly compensation benefits and so should be ignored for injured workers living outside Alaska. However, by its language this section applies to every worker injured in Alaska. AS 23.30.175(b) describes what happens to an injured worker's weekly compensation rate when that injured worker moves out of state.

The Board, in adapting Mr. James' contention, implicitly decided there is one set of calculations for in-state workers (using AS 23.30.220 and AS 23.30.175(a) and ignoring AS 23.30.185) and another set of calculations for out-of-state workers (ignoring AS 23.30.175(a) and utilizing AS 23.30.185 and AS 23.30.175(b) only). This process sets up a situation where similarly situated workers are treated differently based on where they are living at the time of receiving benefits. The Board, in *James IV*, further contended that if AS 23.30.175(a) controls all compensation rates, it was unnecessary for the Legislature to add AS 23.30.175(b)(5). This interpretation is a misreading of the intent or language in AS 23.30.175 (b)(5). This subsection is

intended to apply not to employees whose compensation rate is already capped under AS 23.30.175(a), but is intended to apply to an employee whose compensation rate is not at the cap and who moves out of state. That employee's compensation rate after the COLA adjustment cannot exceed "the weekly compensation rate that the recipient would have received if the recipient had been residing in the state."[46] For example, if an injured worker moves to a state with a higher cost of living than Alaska, the employee's compensation rate, in spite of a higher COLA adjustment, will not be more than the employee's Alaskan compensation rate. The employee would be paid at the same rate the employee would have received while living in Alaska. That is not the case for Mr. James. He lives where the cost of living is lower than in Alaska and, thus, under the Act his compensation rate must be reduced by the COLA for his new residence.

Paul Lisankie, former Director of the Division of Workers' Compensation, testified as to the need for AS 23.30.175(b) on March 10, 2005, before the Senate Labor & Commerce Committee. He said:

> The third heading that I have generated is "Fair Benefits at Reasonable Employer Cost." The first is section 32, and this sound kind of reminiscent for people who have been following this process for the last year – since last session, anyway. It's a reprise of the cap on non-resident compensation rates. Currently there is a cost of living adjustment in the Workers' Compensation Act and it only applies outside the state. So, people who are injured within the State of Alaska get a unified rate. It's based on a blended of the cost of living in Anchorage, Fairbanks, and Juneau – Juneau being the highest and Fairbanks and Anchorage being fairly close together now. So there is a unified Alaskan rate. So, no matter where you reside in Alaska, no matter how expensive or inexpensive, you get the same rate. However, if you are a non-resident worker at the time of your injury working in Alaska or if you move out after you get injured and you go to someplace that has a arguable higher cost of living, my division is tasked by the current statute to do a cost of living analysis allow you to receive a higher compensation than you could have anywhere in the state. I don't think that it's appropriate to pay people who are non-injured workers more than we pay our own injured workers. So, section 32 would preclude and cap the rate that can be paid

---

[46] AS 23.30.175(b)(5).

> to a non-resident at the rate that would be paid someone who was residing in Alaska.[47]

Mr. James contends this testimony reveals that he should get exactly the same amount of money whether he lives somewhere with a lower cost of living or in Alaska. But to reach the same compensation rate regardless of whether he is living in Idaho with a lower cost of living or in Alaska, the employer must recalculate his compensation rate without reference to AS 23.30.175(a) and apply the COLA rate for Idaho on the gross compensation rate. This seems unfair to the injured Alaskan worker and puts an additional burden on an employer who must recalculate the underlying compensation rate each time an injured worker moves between Alaska and elsewhere. Also, it distorts the testimony of Mr. Lisankie who was concerned with non-resident injured workers receiving higher benefits than Alaskan injured workers.

AS 23.30.175(a) sets the maximum and minimum weekly compensation rates and these rates apply to all workers injured in Alaska. For injured workers who reside out of Alaska, the COLA rate under AS 23.30.175(b) is applied to the worker's weekly compensation rate to determine the injured worker's weekly rate of compensation or amount of the weekly benefit due to the injured worker.

AS 23.30.175 refers both to weekly rate of compensation and to weekly compensation rate. It must be presumed that the Legislature meant different things when it used these two terms.[48] In AS 23.30.175(a) the statute states "[t]he weekly rate of compensation . . . may not exceed the maximum compensation rate." In AS 23.30.175(b) the statute initially refers to "weekly rate of compensation." In AS 23.30.175(a) the statutory language refers to an injured worker's compensation rate upon which all benefits are based and does not limit the term to the injured worker's place of residence. This compensation rate is derived from the computation of the worker's spendable weekly wage, which has been first determined utilizing

---

[47] Minutes of the March 10, 2005, Senate Labor & Commerce Committee Hearing. Errors in original.

[48] *Central Recycling Servs., Inc. v. Municipality of Anchorage,* 389 P.3d 54, 58 (Alaska 2017)(citations omitted).

AS 23.30.220(a) for computing the worker's grossly weekly wage. Once this computation has been made the spendable weekly wage, or compensation rate, is determined by utilizing the Division's benefit calculator as authorized and required by AS 23.30.220(b). AS 23.30.175(b), in subsections (1), (3), and (5), refers explicitly to the worker's weekly compensation rate.

Although AS 23.30.175(b) refers to the kind of time loss benefit the worker is to receive with reference to specific time loss statutes, this reference does not mandate that AS 23.30.175(a) is to be ignored. AS 23.30.185 defines TTD and simply states that TTD is to be based on 80 percent of the injured worker's spendable weekly wage. However, the Board ignored that this calculation is already provided by the online benefits calculator required by AS 23.30.220(b). Neither party argued the benefits calculator was unauthorized, unfair, or irrelevant to injured workers. Mr. James' contention is that AS 23.30.185 stands alone as the only method for calculating his compensation rate while he is getting TTD. He further contends that applying the COLA rate for his current residential state to his Alaskan compensation rate is in error because all parts of the Act must be construed as a harmonious whole. However, it is his sequence of statutes for applying COLA that ignores the whole by leaving out certain statutes in calculating his weekly rate of compensation. It would require minimal attention to AS 23.30.220 and would have AS 23.30.175(a) ignored as not applying to injured workers living outside Alaska.

Mr. James and the Board also looked to the regulation at 8 AAC 45.138 as support for the tortured calculation of his weekly rate of compensation. This regulation was, however, adopted by the Board prior to the Legislature revising AS 23.30.175 in 2005. "The cost-of-living ratio obtained under this section is presumed to fairly reflect the cost of living difference between this state and the area where the recipient resides."[49]

The regulation at 8 AAC 45.138 states, in pertinent part:

---

[49] 8 AAC 45.138(g).

(a) The cost-of-living adjustment provided in AS 23.30.175 applies only to payments related to injuries occurring on or after July 1, 1988.

(b) the department will identify an organization it selects to perform the cost-of-living surveys that determine the cost-of-living adjustment applicable to a recipient's compensation rate when the recipient does not reside in this state.

(c) The results of the cost-of-living survey for this state, various areas in other states and the District of Columbia will be published annually in the Workers' Compensation Manual, published by the department. The cost of living for this state will be the averaged cost of living for Anchorage, Juneau, and Fairbanks.

(d) If the cost-of-living adjustment under AS 23.30.175 and this section results in a compensation rate that exceeds the maximum weekly rate provided in AS 23.30.175, the recipient's compensation rate must be reduced to the maximum weekly rate in effect under AS 23.30.175 at the time of injury.

(e) If the recipient does not reside in this state but resides in the United States, the cost-of-living ratio must be determined by using the ratio of the published cost of living for the area nearest where the recipient resides and the cost of living for this state. If the recipient resides an equal distance between two areas for which cost-of-living surveys have been published, the ratio that results in the highest compensation rate must be used.

(f) If the recipient does not reside in the United States, the department will obtain a cost-of-living survey for the largest city in the country in which the recipient resides. The cost of living for that city must be used to obtain the ratio for purposes of this section and AS 23.30.175.

(g) The cost-of-living ratio obtained under this section is presumed to fairly reflect the cost of living difference between this state and the area where the recipient resides. In accordance with AS 23.30.110 and 8 AAC 45.070, a hearing may be requested for board review of the cost-of-living ratio for a particular recipient. If a hearing is requested,

(1) the issue at hearing will be limited to whether there is a substantial difference between the actual cost of living in the area where the recipient resides and the cost of living published by the commissioner for that area;

(2) the board will refuse to accept, at the hearing, evidence of a particular recipient's actual cost of living;

(3) if a party presents evidence of a substantial difference between the cost of living for a particular recipient's area and the cost of living

> determined by the board's survey, the board will, in its discretion, adjust the ratio accordingly.
>
> (h) If the cost-of-living ratio calculated under AS 23.30.175 and this section is from 98 percent through 102 percent, the cost-of-living ratio will be rounded off to 100 percent, and the employer need not adjust the employee's weekly compensation benefits under AS 23.30.175 and this section.

The Board, in *James IV*, based its decision in part on the regulation at 8 AAC 45.138 and said "this regulation presupposes a COLA calculated under AS 23.30.175(b) could result in 'a compensation rate that exceeds the maximum weekly rate in AS 23.30.175(a).'"[50] The Board then added that the regulation undercuts the idea that no compensation rate can ever exceed the maximum and contended that this would render the regulation superfluous and statutory construction principles would preclude this. However, this logic ignores the fact that 8 AAC 45.138 is a regulation which was adopted prior to AS 23.30.175(b) and the Board simply never got around to modifying it. Moreover, a statute does not need to conform to a regulation; rather the regulation is subject to the statute.

"The very object of delegating rulemaking power to administrative agencies, however, is to insure flexibility and effectiveness in regulation by making it possible for the rules governing a subject to be refined and reduced to specific, detailed and definitive terms."[51] Further, "an administrative agency's interpretation of its own regulation is controlling 'unless it is plainly erroneous or inconsistent with the regulation.'"[52] However, "an administrative interpretation developed during, or shortly

---

[50] *James IV* at 19.

[51] 1A Singer, Norman, *Sutherland Statutory Construction* (6th ed. 2002) Sect. 31:6 at 726.

[52] *Id*. at 727 (citing *Tunley v. Municipality of Anchorage School Dist.*, 631 P.2d 67 (Alaska 1980)).

before, the litigation in question is entitled to less weight than that of a long-standing administrative interpretation of administrative rules."[53] *Id*. at 730.

More importantly, the intent of both the regulation and the statute is to ensure that when an injured worker moves from Alaska to a locale with a higher cost of living than Alaska, the worker's compensation rate cannot be adjusted to a rate higher than the Alaskan maximum compensation rate. The regulation does not address an injured worker who moves to a locale with a lower COLA.

Moreover, the Board interpreted the statutes to conform to the regulation instead of interpreting the regulation to conform to the statutes. Statutory construction does not require construing a statute to fit a pre-existing regulation. While the Legislature is assumed to have been aware of the regulation when it revised the statute, the Legislature is also presumed to believe the Board would adapt its regulations to conform to the new legislation. This is precisely what the Board failed to do here. To twist the statutory scheme around to fit a regulation makes no sense at all. To interpret the regulation to conform to the new statute is just common sense. "Since the central legislative body is the source of an administrative agency's power, the

---

[53] AS 23.30.175

> (b) The following rules apply to benefits payable to recipients not residing in the state at the time compensation benefits are payable:
>
> > (1) the weekly rate of compensation shall be calculated by multiplying the recipient's weekly compensation rate calculated under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215 by the ratio of the cost of living of the area in which the recipient resides to the cost of living in this state;
> >
> > (2) the calculation required by (1) of this subsection does not apply if the recipient is absent from the state for medical or rehabilitation services not reasonably available in the state;
> >
> > (3) if the gross weekly earnings of the recipient and the resulting compensation rate are determined under AS 23.30.220 (a)(6), (7), or (10), the calculation required by this subsection applies only to the portion of the recipient's weekly compensation rate attributable to wages earned in the state[.]

provisions of the statute will prevail in any case of conflict between a statute and an agency regulation."[54]

AS 23.30.220, AS 23.30.175(a), and AS 23.30.185 apply to workers injured in Alaska and work harmoniously together to provide every injured worker with a compensation rate relative to the injured worker's earnings. By construing these statutes and regulations as one harmonious whole, a worker's compensation rate is established without reference to place of residence or type of benefit. Only when and if an injured worker chooses to recover from the Alaska injury in another state does AS 23.30.175(b) come into play. The injured worker's weekly rate of compensation may change depending on the state of residency or type of benefit being received (e.g. reemployment benefits (AS 23.30.041) or temporary partial disability (AS 23.30.200)), but the worker's compensation rate does not change. Interpreting these statutes together in one sequence for every worker injured in Alaska ensures that the Act is applied quickly, efficiently, fairly, and predictably.

5. Order.

It is ORDERED that *James IV* is hereby VACATED and the matter is REMANDED to the Board to reinstate *James II*.

Date: *25 July 2018* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See*

[54] Sutherland, Sect. 31.2 at 713-714.

AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days from the date of this order's distribution as shown in the box below.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov

RECONSIDERATION

This is a not a final decision issued under AS 23.30.128(e). It is not an appealable decision, so reconsideration is not available.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision No. 251, issued in the matter of *Northern Construction and Liberty Northwest Insurance Corporation vs. Andy James*, AWCAC Appeal No. 17-018, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 25, 2018.

Date: *7/27/18*

Signed
K. Morrison, Appeals Commission Clerk