Alaska Workers' Compensation Appeals Commission

Wasser & Winters Company, Inc. and Alaska National Insurance Co., Appellants, vs. Scott E. Linke, Appellee.	Final Decision Decision No. 138 September 7, 2010 AWCAC Appeal No. 09-033 AWCB Decision No. 09-0202 AWCB Case No. 200507724

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0202, issued at Anchorage on December 23, 2009, by southcentral panel members Judith DeMarsh, Chair, Daniel Repasky, Member for Labor, David Kester, Member for Industry.

Appearances: Robert J. McLaughlin, Kram, Johnson, Wooster & McLaughlin, PS, for appellants, Wasser & Winters Company, Inc. and Alaska National Insurance Co.; Michael J. Patterson, Law Office of Michael J. Patterson, for appellee, Scott E. Linke.

Commission proceedings: Appeal filed December 31, 2009; Order on Motion for Stay entered January 13, 2010; briefing completed June 29, 2010; oral argument presented August 10, 2010.

Commissioners: David Richards, Stephen T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

Appellants, Wasser & Winters Company, Inc. and Alaska National Insurance Co. (W&W), appeal the Alaska Workers' Compensation Board's (board) decision[1] awarding appellee, Scott E. Linke (Linke), a truck driver at W&W's Icy Bay logging operation, an increase in his compensation rate for a work-related injury he suffered on May 24,

[1] *Scott E. Linke v. Wasser & Winters Co., Inc.,* Alaska Workers' Comp. Bd. Dec. No. 09-0202 (Dec. 23, 2009).

2005.[2] The adjustment was the result of a recalculation of Linke's spendable weekly wage as an hourly worker under AS 23.30.220(a)(4)(A), instead of a calculation under .220(a)(4)(B) or .220(a)(6).[3] As shown in the margin, subparagraph .220(a)(4)(B)

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[2] *See Linke*, Bd. Dec. No. 09-0202 at 7.

[3] The versions of the subsections of AS 23.30.220 at issue and in effect on the date of Linke's injury read as follows:

> **Sec. 23.30.220. Determination of 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:
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> . . . .
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> (4) if at the time of injury the
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> (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;
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> (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;
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> . . . .
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> (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;
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> . . . .
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> (c) In this section,

provides a formula for determining an employee's spendable weekly wage under the specific circumstances described in that subparagraph; subsection .220(a)(6) provides a formula for determining an exclusively seasonal employee's spendable weekly wage. The commission concludes that Linke's compensation rate should have been computed by calculating his spendable weekly wage pursuant to the provisions of AS 23.30.220(a)(4)(B), not .220(a)(4)(A). For the reasons which follow, we vacate the board's order, only insofar as it relates to the compensation rate issue, and remand this matter to the board for recalculation of Linke's spendable weekly wage and adjustment of his compensation rate under AS 23.30.220(a)(4)(B). The commission does not retain jurisdiction.

1. Factual background and proceedings.

By 1993, Linke was working as a truck driver.[4] He became a member of the Teamsters Union in 2000. Linke was dispatched twice in 2002, seven times in 2003, and twice in 2004 for union work.[5] He drove for Hos Brothers from June 2004 to September 2004 and worked a significant number of hours for Scarsella Brothers, Inc. in 2004 and 2005.[6] Linke's 2004 combined earnings from Hos Brothers and Scarsella Brothers totaled $32,887.64.[7] His 2005 earnings from Scarsella Brothers totaled $11,578.81, of which, $2,744.62 was earned between March 5, 2005, and March 19, 2005.[8]

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

4 *See Linke*, Bd. Dec. No. 09-0202 at 4.

5 *See id*. at 5.

6 Appellants' Exc. 0089-90. Driving for Scarsella Brothers was a union position. Appellants' Exc. 0089.

7 Appellants' Exc. 0089-90.

8 Appellants' Exc. 0090-91. The March 5-19, 2005, earnings with Scarsella Brothers are relevant to the formula for determining Linke's spendable weekly wage under AS 23.30.220(a)(4)(A) because they fall within the 13 consecutive calendar weeks of the 52 weeks immediately preceding his injury during which

Linke went to work for W&W starting April 5, 2005,[9] and drove for W&W until he was injured on May 24, 2005.[10] In that period of time, he earned $15,228.50.[11] When he took the job, Linke was in good standing with the union and would have been allowed to go back to the union for work if he discontinued driving a truck for W&W.[12] There was some dispute between the parties whether Linke's employment with W&W was year-round or seasonal. Linke believed it was year-round. However, two other W&W employees at Icy Bay, Glen Hammer, the shop foreman, and Mike Waxler, the truck boss, both testified that it was seasonal.[13]

W&W accepted Linke's claim and initially paid him temporary total disability (TTD) benefits at the maximum weekly rate of $848, reduced to $820 for a Washington state cost-of-living adjustment (COLA).[14] Thereafter, the adjuster decided that he was a seasonal worker, reduced his weekly compensation rate significantly,[15] and also claimed an overpayment in the amount of $12,422.84.[16] W&W ceased paying Linke TTD benefits on October 25, 2005.[17]

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his earnings are most favorable to him.

[9] Linke acknowledges that he did not work between March 20, 2005, the day after he last drove for Scarsella Brothers, and April 5, 2005, the first day he worked for W&W. Appellants' Exc. 0089. This gap in his employment results in Linke having been employed for less than 13 weeks preceding his injury, which is relevant to the formula for determining his spendable weekly wage pursuant to AS 23.30.220(a)(4)(B).

[10] Appellants' Exc. 0089.

[11] Appellants' Exc. 0089.

[12] Appellants' Exc. 0089.

[13] *See Linke*, Bd. Dec. No. 09-0202 at 5.

[14] Appellants' Exc. 0089.

[15] Appellants' Exc. 0089.

[16] Appellants' Exc. 0089.

[17] At this juncture, W&W had calculated Linke's weekly compensation rate, as a seasonal worker and subject to a COLA, at $212.75. Appellants' Exc. 0089.

As of the date of the board's hearing, June 17-18, 2009, Linke was not medically stable,[18] which, other considerations notwithstanding, would entitle him to ongoing TTD benefits under AS 23.30.185.[19] The board concluded that Linke was not a seasonal worker and ordered W&W to pay him compensation using a spendable weekly wage calculated under AS 23.30.220(a)(4)(A).[20]

2. Standard of review.

"The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[21] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[22] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law"[23] and therefore independently reviewed by the commission.[24]

3. Discussion.

The issues presented in this appeal are whether there is substantial evidence in support of the board's conclusions: 1) that Linke was not an exclusively seasonal worker; and 2) 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), not .220(a)(4)(B). We address these issues below.

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[18] *See Linke*, Bd. Dec. No. 09-0202 at 79-80.

[19] Linke's medical condition and entitlement to ongoing TTD benefits are not issues in this appeal.

[20] *See Linke*, Bd. Dec. No. 09-0202 at 83-84.

[21] AS 23.30.128(b).

[22] *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted).

[23] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

[24] *See* AS 23.30.128(b).

a. Linke was not a seasonal worker.

W&W argues that Linke's spendable weekly wage should be determined pursuant to the provisions of AS 23.30.220(a)(6) because he was a seasonal worker. If Linke's spendable weekly wage was calculated under subsection .220(a)(6), his weekly benefits would be approximately $600 less than they would be if calculated under either subparagraph .220(a)(4)(A) or subparagraph .220(a)(4)(B). W&W also maintains that, given his income history, calculating Linke's spendable weekly wage under .220(a)(4)(A) or .220(a)(4)(B) is inequitable. According to W&W, at the very least, his compensation rate ought to be adjusted downward to a fair amount in light of his historical earnings. Linke countered that his compensation rate should be adjusted under .220(a)(4)(A) or .220(a)(4)(B).

AS 23.30.220(a)(6) provides a formula for determining the spendable weekly wage of *exclusively* seasonal or temporary workers.[25] 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.[26] The question here is whether there was substantial evidence supporting the board's conclusion that Linke was not exclusively a seasonal worker.

At hearing, evidence was presented that Linke's employment *with W&W* was seasonal, despite an initial misconception on his part that it was year-round. On the other hand, Linke testified that, when not working for W&W, he would have been eligible for union work and would have accepted such work. W&W characterized Linke's testimony in this regard as self-serving and unsupported by any evidence. However, the board noted that Linke drove for Scarsella Brothers, a union job, every month in the winter of 2004-2005, before he went to work driving for W&W. That evidence, coupled with Linke's testimony, led the board to find that, but for his injury,

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[25] *See* n.3, *supra*.

[26] A statute is ordinarily interpreted so that no words are superfluous. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:06 (6th ed. 2002).

Linke would have been dispatched and taken on union work when not driving for W&W. We agree that this is substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate, to support the conclusion that Linke was not exclusively a seasonal worker.

Also, an Alaska Supreme Court case, *Flowline of Alaska v. Brennan*, 129 P.3d 881 (Alaska 2006)(*Flowline*), provides legal support for this conclusion. *Flowline* is helpful to the analysis here because the underlying facts are similar and the same provisions in AS 23.30.220[27] are at issue. The only distinction is that the dispute in *Flowline* was whether Brennan was exclusively a temporary worker, rather than exclusively a seasonal worker.

Brennan was a member of the laborers union, and after taking a year off in 1997 to build a house, resumed working as a union laborer in July 1998.[28] Brennan worked for Flowline off and on from November 1998 until he was injured on March 5, 1999.[29] Flowline began paying Brennan weekly compensation at the statutory minimum rate, based on its determination that he was a temporary worker. Brennan filed a claim seeking an adjustment to his compensation rate. At hearing, Brennan testified that he thought his work for Flowline was full time, subject to interruptions due to weather conditions and other factors. When he was called back to work on March 3, 1999, Brennan believed it was to finish a job the crew had previously started. The union's business manager testified that the union did not classify workers as seasonal and considered the members eligible for work year-round, although employers and contractors might consider the work seasonal.

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[27] *Flowline* was decided applying the 1995 versions of AS 23.30.220(a)(4)(A), .220(a)(4)(B), and .220(a)(6). These provisions of the statute were amended in 2000. The 2000 versions were in effect when Linke was injured, although the 2000 amendments are not material to the issues presented here.

[28] *See Flowline*, 129 P.3d at 884.

[29] *See id*. All other citations in this paragraph are to *Flowline*, 129 P.3d at 884.

Given these facts, the supreme court affirmed the superior court's conclusion that there was substantial evidence on which the board could find that Brennan was not a temporary worker; he was an hourly worker, entitling him to compensation at a rate computed under AS 23.30.220(a)(4)(A). Here, even though Linke did not offer the testimony of any union official, as Brennan did, there was evidence of his history of union work in the winter months. Because Linke had taken on union work in the winter, it is reasonable to infer that he could have and would have in the future.[30] We find there is no material distinction between the facts in *Flowline* and the facts here; the holding in that case reinforces our conclusion that there was substantial evidence that Linke was not a seasonal worker.

W&W also argued that it was unfair that Linke's compensation rate should be as high as the board adjusted it. It points out that, 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 preceding the year he was injured.[31] Analogizing Linke's long-term receipt of TTD benefits to the receipt of permanent total disability (PTD) benefits, W&W urges us to remand the matter to the board with instructions to fairly adjust his compensation rate using the criteria set forth

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[30] An injured worker's intentions regarding future employment are relevant to determining the reliability of the employee's past work history as a predictor of future lost income. *See Justice v. RMH Aero Logging, Inc.*, 42 P.3d 549, 558 (Alaska 2002).

[31] According to W&W, Linke's gross weekly earnings calculation under AS 23.30.220(a)(4)(A) was $1,382.54, which would project to a gross annual income of $71,892.08. In the five-year period from 2000 through 2004, Linke's highest gross annual income was $45,191.90. *See* Appellants' Br. 4.

in AS 23.30.220(a)(10)[32] for calculating PTD benefits. We decline this request for two reasons. First, the Alaska legislature has explicitly limited the application of AS 23.30.220(a)(10) to the computation of PTD benefits under AS 23.30.180. The commission is reluctant to judicially[33] extend the reach of any statute pertaining to workers' compensation benefits beyond the limitations the legislature expressly places on it. Second, in the wake of the 1995 amendments to AS 23.30.220, case law does not support the board, under any circumstances, taking a generalized fairness approach to the determination of spendable weekly wages in order to compute compensation rates.

In *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922 (Alaska 1994), the Alaska Supreme Court held that the pre-1995-amendment version of AS 23.30.220, as applied by the board to the determination of Gilmore's spendable weekly wage, violated the equal protection clause of the constitution.[34] The constitutional infirmity of that version of the statute was subsequently discussed in *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789 (Alaska 2002). The supreme court observed that the former version of AS 23.30.220 lacked flexibility in calculating employees' spendable weekly wages.[35] It subsequently noted that "[t]he amended version of AS 23.30.220 corrects that

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[32] This subsection of the statute provides:

> (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.

[33] The commission is a quasi-judicial agency. *See Alaska Public Interest Research Group v. State,* 163 P.3d 27, 34-38 (Alaska 2007).

[34] *See Gilmore*, 882 P.2d at 922-30.

[35] *See Dougan*, 50 P.3d at 797.

problem by providing a variety of formulas for differing employment situations."[36] Given this pronouncement, we conclude that the supreme court has effectively ruled out using a generalized fairness inquiry as a potential alternative method for calculating Linke's spendable weekly wage,[37] despite W&W's argument. Instead, the board, and by extension, this commission, should follow the supreme court's lead in *Flowline* and apply the formula for calculation of spendable weekly wage under AS 23.30.220(a) that best fits the employee's circumstances.

b. Linke's compensation rate should be calculated under AS 23.30.220(a)(4)(B).

The holdings in *Flowline* and *Dougan* compel one conclusion: In calculating an employee's spendable weekly wage under the amended version of AS 23.30.220(a), the board's task is to choose, from among the "variety of formulas for differing employment situations[,]"[38] the formula that the statute calls for in the circumstances. In *Flowline*, the supreme court eliminated the formula under .220(a)(6) from among the possibilities because Brennan was not exclusively a temporary worker. It then considered whether .220(a)(4)(A) or .220(a)(4)(B) provided the appropriate formula. The court found that the board's application of subparagraph .220(a)(4)(A) to Brennan's situation, rather than subparagraph .220(a)(4)(B), "is supported by substantial evidence given that he had been employed by Flowline for more than thirteen calendar weeks, with stoppages only for interruptions consistent with the nature of the work he performed."[39]

Here, the issue is the same, namely whether the board's use of AS 23.30.220(a)(4)(A), not .220(a)(4)(B), in calculating Linke's spendable weekly wage,

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[36] *Dougan*, 50 P.3d at 797.

[37] "In order to determine whether AS 23.30.220(a) could be constitutionally applied to a particular employee, *Gilmore* focused on the predictability of past wage levels. Accordingly, the first question under *Gilmore* is not whether an award calculated according to AS 23.30.22(a)(1) is 'fair.' Rather, it is whether a worker's past employment history is an accurate predictor of losses due to injury." *Thompson v. United Parcel Service*, 975 P.2d 684, 689 (Alaska 1999).

[38] *Dougan*, 50 P.3d at 797.

[39] *Flowline*, 129 P.3d at 882.

is supported by substantial evidence. The board found that the thirteen consecutive calendar weeks in the 52 weeks immediately preceding Linke's injury during which his earnings were most favorable to him, were the thirteen weeks between March and May 2005 that spanned the end of his employment with Scarsella Brothers and the beginning of his employment with W&W, through Linke's date of injury. This finding led the board to calculate Linke's spendable weekly wage under AS 23.30.220(a)(4)(A). There was substantial evidence supporting the board's action.

However, the inquiry is not complete. Substantial evidence also supports calculating Linke's spendable weekly wage pursuant to the formula in AS 23.30.220(a)(4)(B). Linke conceded that in the thirteen-week period between March and May 2005, he did not work for approximately two weeks from March 20th through April 4th.[40] Accordingly, he was "employed for less than 13 calendar weeks immediately preceding [his] injury[.]"[41]

The question becomes whether to use subparagraph .220(a)(4)(A) or subparagraph .220(a)(4)(B) to calculate Linke's spendable weekly wage. The issue of which subparagraph to apply is readily resolved because the Alaska legislature has instructed the board to use the formula in AS 23.30.220(a)(4)(B), in these circumstances. This subparagraph provides in relevant part that, "notwithstanding . . . (A) of this paragraph, the employee's gross weekly earnings are computed by"[42] using the formula in .220(a)(4)(B). In other words, even though subparagraph (A) applies, if subparagraph (B) also applies, the board is to use the formula in subparagraph (B). This analysis of the operation of AS 23.30.220(a)(4), which establishes a legislatively-mandated hierarchy between subparagraphs (A) and (B) when both apply, leads us to conclude that the board should have adjusted Linke's compensation rate using the formula for determining spendable weekly wage in AS 23.30.220(a)(4)(B).

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40 *See* n.9, *supra* and Appellants' Exc. 0089.

41 AS 23.30.220(a)(4)(B).

42 *Id.*

4. Conclusion and order.

In accordance with the forgoing opinion, the commission VACATES the order in the board's Dec. No. 09-0202 dated December 23, 2009, with respect to the compensation rate issue only, REMANDS this matter to the board, and ORDERS the board to recalculate Linke's spendable weekly wage and adjust his compensation rate pursuant to the provisions of AS 23.30.220(a)(4)(B). We do not retain jurisdiction.

Date: *7 September 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission vacates the board's decision 09-0202, remands the matter to the board, and orders the board to recalculate Linke's spendable week wage and adjust his compensation rate pursuant to the provisions of AS 23.30.220(a)(4)(B). This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days after this decision was distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical and grammatical errors, this is a full and correct copy of the Final Decision No. 138 issued in the matter of *Wasser & Winters Company, Inc. vs. Scott E. Linke,* AWCAC Appeal No. 09-033, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 7, 2010.

Date: *September 14, 2010*

Signed

B. Ward, Appeals Commission Clerk