Case: *Bradford T. Wilson vs. Eastside Carpet Company and AIG Claim Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 099 (February 2, 2009)

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

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

The board agreed with Wilson that "the employee's compensation rate as calculated under the statutory formula of AS 23.30.220(a)(4), is not based on an accurate or . . . a rational prediction of the employee's potential earnings during his period of disability." *Wilson vs. Eastside Carpet Co.*, Alaska Workers' Comp. Bd. Dec. No. 08-0043 at 11. But the board concluded it was bound by the formula in AS 23.30.220(a)(4). Because the board lacked jurisdiction to determine the constitutionality of the statute, it "reluctantly" denied the employee's claim for a compensation rate adjustment. Wilson appealed believing this was unfair since he consistently earned $1,200 a week at Eastside Carpet before his injury.

Applicable law: AS 23.30.220(a)(4), which provides in relevant part:

> 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 employee's earnings are calculated . . . by the hour, . . . 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;

AS 23.30.220(a)(5) provides that "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[.]"

Issues: Are Wilson's self-employment profits equivalent to employee wages for the purposes of calculating his compensation rate? Does substantial evidence support that AS 23.30.220(a)(4) applies in Wilson's case?

Holding / analysis: The commission concluded that the board erred in assuming Wilson's self-employment profits were equivalent to employee wages without substantial evidence in the record about the nature of Wilson's business. Because the purpose of workers' compensation is to fairly approximate the value of an employee's lost wages, "the focus in determining gross weekly earnings when self-employment must be included under AS 23.30.220 should be on the value of the claimant's services to a business, not on the net business profits." Dec. No. 099 at 8. The commission noted that:

> The records developed as a self-employer, even the best, do not necessarily represent the value of the services to that business or the capacity to earn wages. If the self-employer hires other workers, or a family member works without pay, the net profits of a business reflect the efforts of these workers as well. Moreover, self-employers are frequently motivated to minimize their profits to lessen their tax liability. Thus, using tax records may undervalue the services that a claimant rendered. Other benefits of self-employment, such as ownership of tools, equipment and other work supplies, do not readily convert into wages. *Id.* at 8.

The commission noted three examples in which self-employment profits might approximate employee wages: (1) a business that consists of services performed solely by the owner; (2) when the business assets are primarily the advanced skills, education, or training of the owner and the owner performs licensed professional services to other organizations not engaged in the same business, such as engineering, architecture, or the like; and (3) the profits from the private practice of traditional professions, such as medicine or law, in which employment is historically entered only by members of the profession with limited experience, or limited to service with non-profit organizations or public service, also may approximate employee wages.

The commission concluded that AS 23.30.220(a)(5) should be used to calculate Wilson's spendable weekly wage. The commission concluded that (a)(5) applies because "[o]n the record before us, we find that Wilson's earnings in 2005 cannot be ascertained on the basis of his business profits." *Id.* at 10. The commission rejected Eastside Carpet's argument that Wilson stipulated that his self-employment profits could be used to determine a gross weekly wage. Wilson stipulated only that the calculations were done correctly, assuming that the 2005 profits were a proper basis for those calculations.

The commission remanded for the board to recalculate Wilson's compensation rate under AS 23.30.220(a)(5).

Note: Dec. No. 098 (February 2, 2009) denied certifying the appeal to the Alaska Supreme Court without reviewing the merits, and Dec. No. 106 (May 4, 2009) addressed the director's petition seeking reconsideration. Dec. No 106 clarified but did not modify Dec. No. 099.