ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

GEORGE A. ELGARICO, Claimant, v. JACK STEWART, and ALASKA WORKERS' BENEFIT GUARANTY FUND, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 200907237 AWCB Decision No. 17-0050 Filed with AWCB Anchorage, Alaska on May 8, 2017

On the board's own motion, the issue of whether there was an employee-employer relationship between George Elgarico (Elgarico) and Jack Stewart (Stewart) was heard on April 18, 2017 in Anchorage, Alaska. Also heard were the Alaska Worker's Compensation Benefits Guaranty Fund's (Fund) and Stewart's petitions to dismiss Elgarico's claim. This hearing date was selected on February 7, 2017. Attorney Charles Coe appeared and represented Elgarico. Attorney Kenneth Jacobus appeared and represented Stewart. Assistant Attorney General Kimberly Rodgers appeared and represented the Fund. Elgarico and Stewart testified as did Joel Almario and Paulo Tomeldan. The record closed at the hearing's conclusion on April 18, 2017.

On January 28, 2016 a hearing was held in the case to address Stewart's and the Fund's petitions to dismiss. Also heard was a petition to dismiss by Adak Fisheries, LLC, which was also alleged to be Elgarico's employer at the time of the injury. Because of concerns about dismissing either of the putative employers before determining which, if either, was Elgarico's employer, the panel ordered further briefing on the employee-employer issue. Both Elgarico and Stewart testified at the January 28, 2016 hearing.

ISSUES

Elgarico contends he was injured while working for Stewart as an employee. Stewart and the Fund contend Elgarico was not an employee, and if he was an employee, he was a part-time or transient worker who was not covered under the Act

1. Was Elgarico Stewart's employee at the time of his injury?

Both Stewart and the Fund contend that if Elgarico was an employee, they did not receive timely notice of the injury and his claims were untimely and should be dismissed. Elgarico contends Stewart and the Fund were given timely notice and his claims were timely and should not be dismissed.

2. Should Elgarico's claims be dismissed because they were not timely filed?

Elgarico contends his attorney provided valuable legal services in securing benefits under the Act, and he is entitled to attorney fees. Stewart and the Fund contends Elgarico is not entitled to benefits, and, consequently, is not entitled to attorney fees.

3. Is Elgarico entitled to attorney fees, and, if so, in what amount?

FINDINGS OF FACT

The following facts and factual conclusions are undisputed or established by a preponderance of the evidence:

1. In 2009, Elgarico worked in Adak, Alaska for Adak Fisheries, LLC, operating a forklift at the company's fish processing plant. Elgarico had worked the "A" season, which runs from early January to late April or early May for Adak Fisheries since 2006 or 2007. (Elgarico).
2. Elgarico met Stewart prior to 2009, when both of them worked for Adak Fisheries as forklift drivers. (Elgarico). Stewart resided in Adak, but did not work for Adak Fisheries in 2009. (Stewart; Elgarico).
3. At some point prior to 2009, Stewart acquired two tugboats from the Aleut Corporation, one of which was the Redwing. Both tugboats are large former Navy tugboats, about 110 feet long. The tugboats were not operational, and Stewart intended to convert the Redwing into

living quarters. Stewart abandoned the conversion when he was able to purchase a fourplex in Adak. (Stewart Deposition).

4. Prior to 2009, Stewart obtained several large commercial batteries from "contractor's camp," an area where unwanted or unused items were left. The batteries weighed 200 to 300 pounds, and were loaded on pallets with two batteries to a pallet. Stewart had hoped to use them in connection with wind generators for electrical power on the Redwing. Again, because he purchased other living quarters, the installation was never completed. (Stewart Deposition).
5. In 2009, Stewart worked full-time for Aleut Real Estate. (Stewart Deposition).
6. Stewart lived in one unit of the fourplex and rented three of the units to caribou hunters. He rented a pickup truck as well. In addition, he and his domestic partner Rogelia acted as transfer agents, arranging to wire money to foreign countries for workers at the fish processing plant, and occasionally sold Filipino food to some of the workers. (Stewart Deposition, Elgarico Deposition).
7. At some point in late April or early May 2009, Elgarico met Stewart on the way to work. Stewart asked Elgarico if he could use Adak Fisheries forklift to remove the batteries from the boat. Elgarico agreed to help before going home at the end of the season. (Elgarico Deposition).
8. About May 4, 2009, Elgarico and some coworkers were fishing on the dock where the Redwing was moored. They were waiting for the last tramper to arrive at Adak Fisheries, at which point there would be about two or three more hours work to load the boat. Stewart stopped by, and he and Elgarico looked at the batteries. Elgarico told Stewart he would ask his supervisor and about using the forklift on May 6, 2009, the day before Elgarico was to fly to Anchorage. (Elgarico Deposition).
9. Work at the Adak Fisheries was essentially done by May 5, 2009, but the next flight from the island was not until May 7, 2009. Although Elgarico could have worked a few hours cleaning up on May 6, 2009, he took the day off, but borrowed Adak Fisheries forklift. (Elgarico Deposition).
10. Elgarico met with Stewart, and because the forks on the forklift were not long enough, they took the forklift to pick up extensions. It is unclear who owned the extensions, but Stewart had access to the property where they were stored. (Elgarico, Stewart). When they returned

to the dock where Redwing was moored, Paulo Tomelden and Lamberto Yabut, Elgarico's housemates, were there fishing. (Tomelden). Because it was not high tide, the deck of the Redwing was perhaps as much as 30 feet below the dock. Chains or cable were attached to the forks of the forklift and lowered down to attach to the batteries. (Elgarico). Tomelden and Yabut assisted Stewart in connecting the first battery, which was lifted without incident. (Tomelden). Stewart returned to his job at ARE, and Elgarico, Tomelden, and Yabut proceeded to lift the second battery. Because this battery was heavier, the forklift tipped forward and fell off the dock, landing on the Redwing. Elgarico jumped from the forklift as it fell, hitting the railing on the Redwing and falling into the water. (Elgarico; Tomelden). Yabut jumped into the water and pulled Elgarico to the shore. (Tomelden, Undated Incident Report).

11. Stewart returned to the site and saw the forklift on the deck of the Redwing and Elgarico and Yabut on the shore. Stewart contacted the first responders, and Elgarico was transported to the clinic in Adak and then medivaced to Anchorage. (Stewart, January 28, 2016; Elgarico, January 28, 2016).
12. Elgarico suffered a lacerated liver, dislocated left knee, broken right great toe, and a forehead laceration. (Providence Alaska Medical Center, Discharge Summary, May 14, 2009).
13. Elgarico was deposed on April 17, 2012. In explaining his agreement to help Stewart, he stated:

    Q. Okay, what did Mr. Stewart offer to pay you for lifting the batteries?

    A. We never talk about anything, sir.

    Q. You were just doing this out of friendship?

    A. That's what I told him. It's up to him, you know.

    Q. Did you expect that he would pay you?

    A. I don't know, sir.

    Q. Well, what was your expectation?

    A. I don't know, sir.

    Q. You didn't have any expectations? Pardon?

A. I don't know, sir.

Q. Okay. What did Mr. Stewart say to you when he asked you to help him move the batteries?

A. Well, he approached me, you know, when we were walking down - we always go to work or ride sometimes, working in the cannery. And he always stop by. He asked me if I could, you know- because he knows I was driving that big forklift on that and maybe could use that. I said: Yeah, sure. We can do that before we go home, I told him, you know.

Q. Did he offer you any money for it?

A. No, sir. He said we'll just talk about it or something, you know. Just help him out. (Elgarico Deposition, pp. 44-45)

14. Stewart was deposed on June 27, 2016. He described his discussion with Elgarico as follows:

Q Okay. Could you describe for me how this transaction came about in terms of the end result was that Mr. Elgarico helped you with the batteries?

A Well, he was -- he was driving a forklift down the road. I asked him if I could borrow the forklift for a little while to get the batteries off the tugboat. He said: Well, I just – there was something like that. Why don't I -- he said he could do it, is what he said. I think, something like that. I says: Okay, but I can't help you because I got -- I won't be able to help you until after 5:00. So he said he -- he had to do it the next day, I guess, or whatever it was.

Q Okay. You previously described this before the Board as an agreement among friends. Is that accurate?

A Yes, I think it is.

. . . .

Q Did you discuss payment with him for doing this?

A I don't remember if that subject even came up.

Q In your mind, did you intend to pay him?

A I don't think so. I don't remember.

. . . .

Q At the time when Mr. Elgarico volunteered to unload the batteries for you, did you believe you were hiring him as your employee?

A The thought never crossed my mind. I didn't think anything about employee or hiring or anything like that.

Q Did you believe you were hiring him as an independent contractor?

A No. (Stewart Deposition, pp. 19-22).

15. On May 26, 2009, Adak Fisheries filed a Report of Occupational Injury or Illness, listing Elgarico as an employee, but stating he had been injured while using the forklift off-premises without permission. (Report of Injury, May 21, 2009).
16. On May 5, 2011, Elgarico sued Stewart in civil court. (Complaint, Case No. 3N-11-07454 CI).
17. On August 3, 2015, Elgarico filed a claim alleging Stewart was his employer at the time of his injuries. The claim noted Stewart was uninsured and requested the Fund be joined as a party. Adak Fisheries was not named in the claim. (Claim, July 31, 2015). The claim was served on Stewart, the Fund, and Adak Fisheries. (ICERS, Claim Served Events, August 4, and September 1, 2015).
18. On January 28, 2016, a hearing was held on petitions to dismiss filed by Adak Fisheries, Stewart, and the Fund. The petitions alleged that Elgarico had failed to timely notify them of injury or had failed to file his claim within the allowed time. Adak Fisheries asserted Elgarico was not its employee at the time of the injury, and the report of injury had only been filed as a precaution. Stewart asserted Elgarico was not his employee, but was working for Adak Fisheries at the time. The parties stated the civil case had been stayed to allow the workers' compensation case to proceed. (Record).
19. After deliberations, the panel reopened the record and directed the parties to address the employee status issue. (Record).
20. On February 7, 2017, the parties filed a stipulation dismissing Adak Fisheries as a party. (Stipulation, February 7, 2017).
21. At the April 19, 2017 hearing, Elgarico testified that Stewart offered to pay him $10 to $12 per hour when Stewart first asked him about lifting the batteries with the forklift, but there was no discussion as to how long the job would take. Elgarico confirmed he was not working for Adak Fisheries the day of the injury. Stewart testified he first asked Elgarico if he could borrow the forklift to remove the batteries, but Elgarico said he would have to do it.

Stewart stated he never offered to pay Elgarico and explained that because of its remoteness, people on Adak often help each other without any expectation of payment. (Record).

22. Paulo Tomeldan testified at the April 19, 2017 hearing that he was present on May 5, 2009, when Elgarico and Stewart discussed the need for the forklift extensions, and he went with them to pick up the extensions to help if needed. Mr. Tomeldan stated that on the day of the injury he and Mr. Yabut had worked at Adak Fisheries during the morning, but went fishing in the afternoon. While fishing, Elgarico asked them to help with the batteries. They were not paid for their work, and no one offered to pay them. He would not have accepted payment if someone had offered, because "it wasn't work," they were just helping. (Tomeldan).
23. Elgarico filed attorney fee affidavits detailing $28,725.00 in attorney fees and $173.25 in costs. (Attorney Fee Affidavits, January 21, 2016, January 26, 2017, April 13, 2017, and April 19, 2017).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

> **AS 23.30.010. Coverage.**
> (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment.
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> **AS 23.30.020. Chapter part of contract of hire**. This chapter constitutes part of every contract of hire, express or implied, and every contract of hire shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner provided in this chapter for all personal injuries sustained.

Coverage under the workers' compensation act must arise from a contract of hire, express or implied, and before an employee/employer relationship exists under the Act, an express or implied contract of employment must exist. *Whitney-Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250, 252 (Alaska 1976); *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 313 (Alaska 1989). The essence of a workers' compensation system is that it is a mutual arrangement of reciprocal rights between employer and employee, whereby both parties give up and gain certain advantages. It is from the contract of hire, either express or implicit in the employment relationship, that compensation coverage flows, with the concomitant adjustment of rights and remedies between employer and employee. *Whitney-Fidalgo Seafoods, Inc., 554 P.2d at 252*.

In *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1989), the Alaska Supreme Court reversed and set forth the appropriate test for a contract for hire, express or implied. *Childs* noted the board correctly recognized "that before an employee/employer relationship exists under the Act, an express or implied contract of employment must exist." *(Id.* at 312). *Childs* further held while a "formalization of a contract for hire is not the controlling factor" in determining whether an employment contract exists, a hiring contract is still necessary. An "express contract" requires (1) an offer encompassing its essential terms, (2) unequivocal acceptance by the offeree, (3) consideration and (4) an intent by the parties to be bound. *(Id.* at 313). An "implied employment contract" is formed by a "relation resulting from the manifestation of consent by one party to another that the other shall act on his behalf and subject to his control, and consent by the other to so act" (*Id.* at 314). Each case is determined on its

facts, but the parties' "words and acts" should be given such meaning "as reasonable persons would give them under all the facts and circumstances present at the time in question." *Id.*

> **AS 23.30.045. Employer's liability for compensation.**
> (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180-23.30.215 . . . .
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> **AS 23.30.055. Exclusiveness of liability**. The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. In this section, 'employer' includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045(a), is liable for or potentially liable for securing payment of compensation.
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> **AS 23.30.075. Employer's Liability to Pay.**
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> (b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the division, upon conviction, the court shall impose a fine of $10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

AS 23.30.082. Workers' Compensation Benefits Guaranty Fund.

. . . .

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter. . . .

AS 23.30.100. Notice of injury or death.

(a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.

(b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.

(c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. If the employer is a partnership, the notice may be given to a partner, or if a corporation, the notice may be given to an agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give notice does not bar a claim under this chapter

(1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;

(2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;

(3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

In *Tinker v. Veco*, 913 P.2d 488, 491-92 (Alaska 1996) the Supreme Court explained a failure to give timely written notice be excused under AS 23.30.100(d)(1) if two requirements were met:

"first, knowledge of the injury by the employer, in-charge agent, or carrier, and second, a lack of prejudice to the employer or carrier." The court then set out the test for determining whether the employer had been prejudiced:

> we must first ask whether this written notification would have informed Veco of anything about which Tinker had not already told [his supervisors]. If a legally sufficient written notification would have only duplicated the same information Tinker already had communicated verbally to Veco through its in-charge agents, it would require an exceptional set of circumstances for this difference in the form by which the information was conveyed to prejudice the employer. *Id*. at 492.

In *Kolkman v. Greens Creek Mining Co.*, 936 P.2d 150 (Alaska 1997), the employer was aware the employee had a heart attack soon after it happened, but did not know the employee was alleging work was the cause. Supreme Court rejected the proposition that notice to an employer must include notice the injury was work related.

> **AS 23.30.105. Time for filing of claims.**
> (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, ... except that, if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215.
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> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard . . . .

In *W.R. Grasle Co. v. Alaska Workmen's Compensation Board*, 517 P.2d 999 (Alaska 1974), the Alaska Supreme Court repealed the four year statute of limitations of AS 23.30.105(a). Thus, a claim must be filed within two years of actual or chargeable knowledge of the nature of the disability and its relation to employment, and after disablement. *Id.*

The limitations period under AS 23.30.105(a) is an affirmative defense which must be raised in response to a claim. *Horton v. Nome Native Community Ent.*, AWCB Decision No. 94-0139 (June 16, 1994). In workers' compensation cases, the employer bears the burden of proof to

establish the affirmative defense of failure to timely file a claim. *Egemo v. Egemo Construction Co.*, 998 P. 2d 434, 438 (Alaska 2000); *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501, 504 (Alaska 1973). The purpose of § 105 is to "protect the employer against claims too old to be successfully investigated and defended." *Morrison-Knudson Co. v. Vereen*, 414 P.2d 536, 538 (Alaska 1966) (citing 2 Larson, Workmen's Compensation s 78.20 at 254 (1961)).

> **AS 23.30.120. Presumptions.**
> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
> (1) the claim comes within the provisions of this chapter . . . .

Under AS 23.30.120, benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker's claim. At the first step, the claimant need only adduce "some" "minimal" relevant evidence establishing a "preliminary link" between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. If the employer can present substantial evidence demonstrating that "a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.145. Attorney fees.**
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

> Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

> **AS 23.30.395. Definitions**. In this chapter,
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> (19) 'employee' means an employee employed by an employer as defined in (20) of this section;
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> (20) 'employer' means the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state ....

Before an employee-employer relationship exists under the Act, an express or implied contract of employment must exist. *Alaska Pulp Co. v. United Paperworkers Intern. Union*, 791 P.2d 1008, 1010 (Alaska 1990). Formation of such a contract generally requires mutual assent and consideration. *Alaska Pulp Co.*, 791 P.2d at 1010. An important purpose underlying the contract of employment requirement is to avoid "thrust[ing] upon a worker an employee status to which he has never consented . . . [since doing so] might well deprive him of valuable rights . . . . " *Id.* at 1011.

Employment generally begins after a meeting of the minds has been reached between the employee and the employer, for at that point a contract is formed. *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 313 (Alaska 1989). Express contract formation requires an offer encompassing its essential terms, an unequivocal acceptance of the terms by the offeree,

consideration and intent to be bound. *Childs*, 779 P.2d at 314. An implied employment contract is formed by a relationship resulting from "the manifestation of consent by one party to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* An implied contract's existence must be determined by considering all factors in light of the surrounding circumstances. *Cluff v. Nana-Marriott, 892 P.2d 164, 171 (Alaska 1995).*

ANALYSIS

1. Was Elgarico Stewart's employee at the time of his injury?

The law requires the existence of an express or implied contract of hire before an employment relationship arises. Because there are factual disputes as to whether there was a contract of hire between Elgarico and Stewart, the presumption analysis applies.

To raise the presumption, Elgarico was required to show some evidence of a contract of hire. He did so through his testimony at hearing that Stewart agreed to pay him for his work. At this step, credibility is not considered, nor is the evidence weighed against competing evidence.

Because Elgarico raised the presumption, Stewart was required to rebut it. Again, credibility is not considered at this step, and the evidence is not weighed against competing evidence. Stewart rebutted the presumption through his testimony that he did not believe he was hiring Elgarico as an employee.

Because Stewart rebutted the presumption, Elgarico must prove by a preponderance of the evidence that a contract of hire was formed. At this stage, competing evidence is weighed, and credibility is considered. The preponderance of the evidence is that no express contract was formed. An express contract requires four elements, an offer encompassing its essential terms, an unequivocal acceptance of the terms by the offeree, consideration, and intent to be bound. Additionally, there must be a "meeting of the minds" on the four elements; that is to say that both parties must have the same understanding as to each element. In this case, the parties did not have a meeting of the minds regarding consideration. Stewart has consistently testified that he did not intend to hire Elgarico as an employee and did not discuss payment. On the other hand, in his 2012 deposition Elgarico testified Stewart did not offer him any money, he was

doing it "just to help him out," while in his hearing testimony he stated Stewart had offered to pay him $10 to $12 per hour. Because Elgarico's 2012 deposition testimony is nearer in time to the 2009 injury than is his hearing testimony, and thus more likely to be an accurate recollection, his deposition testimony is given greater weight. While Elgarico may have expected to be paid, Stewart did not share that understanding. There was no meeting of the minds, and no express contract was formed.

Despite the lack of an express contract, an implied contract of hire can be found after considering all factors in light of the surrounding circumstances. However, AS 23.30.395(2) requires that the contract of hire be in relation to a business or industry. Elgarico argues that the facts that Stewart had other businesses in Adak, the tugboat was a large vessel, and the batteries could be considered industrial batteries imply Stewart was hiring Elgarico to assist in a business venture. That argument is not persuasive. While the commercial or industrial nature of the boat and the batteries are a consideration, Elgarico has not shown they were, in fact, used in a business or industry. Stewart's testimony that the boat and the batteries were intended for a planned residence and had not been used in his business is persuasive.

There was no express contract of hire, and if there was an implied contract of hire, it was not in connection with a business or industry. As a result, Elgarico was not an "employee" as defined in the Act.

2. Should Elgarico's claims be dismissed because they were not timely filed?

Because Elgarico was not Stewart's employee under the Act, it is unnecessary to determine whether his claims were timely filed.

3. Is Elgarico entitled to attorney fees, and, if so, in what amount?

Attorney fees may only be awarded under AS 23.30.145(a) when an employer has controverted benefits, either by filing a notice of controversion or through a controversion in fact. Fees are only allowed on the amount of compensation controverted and awarded. This decision did not award any compensation, so attorney fees cannot be awarded under AS 23.30.145(a).

Attorney fees may be awarded under AS 23.30.145(b) when an employer resists payment of compensation, and an attorney is successful in prosecuting the employee's claim. Here, the attorney was not successful in prosecuting Elgarico's claim and attorney fees cannot be awarded under AS 23.30.145(b). Employee's claim for attorney fees and costs will be denied.

CONCLUSIONS OF LAW

1. Elgarico was not Stewart's employee at the time of his injury.

2. Whether Elgarico's claims should be dismissed because they were not timely filed is moot since Elgarico was not an employee.

3. Elgarico is not entitled to attorney fees.

ORDER

1. Elgarico was not Stewart's employee at the time of his injury.
2. Elgarico's claim for attorney fees is denied.

Dated in Anchorage, Alaska on May 8, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Amy Steele, Member

/s/
Rick Traini, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of GEORGE A. ELGARICO, claimant; v. JACK STEWART, and the ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 200907237; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on May 8, 2017.

/s/
Nenita Farmer, Office Assistant