ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD STEPETIN, Claimant, v. F/V MARK I, GREAT WEST SEAFOODS, LP, and LM INSURANCE CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201416631 AWCB Decision No. 17-0014 Filed with AWCB Anchorage, Alaska on February 1, 2017

Richard Stepetin's (Claimant) October 27, 2014 claim was heard on February 1, 2017, in Anchorage, Alaska, a date selected on December 14, 2016. Claimant appeared by telephone, testified and represented himself. Attorney Colby Smith appeared and represented F/V Mark I, Great West Seafoods, LP, and LM Insurance Corporation (Defendants). There were no other witnesses. The record closed at the hearing's conclusion on February 1, 2017.

ISSUES

Claimant contends, while not an "employee" in the sense that he worked as a crewmember on disabled fishing vessel F/V Mark I, he nonetheless has coverage under the vessel's workers' compensation insurance when injured while working on the vessel's propeller. He contends Defendants are liable for his workers' compensation benefits resulting from a diving-related injury. Claimant also relies the Jones Act, a federal law, to support his claim under the Alaska Workers' Compensation Act (Act).

Defendants contend Claimant admits he was not F/V Mark I's "employee" when allegedly injured while diving to repair the vessel's propeller. Defendants contend Claimant was an independent contractor and therefore not covered under the Act.

1) Was Claimant F/V Mark I's "employee" covered under the Alaska Workers' Compensation Act?

Claimant contends he is entitled to temporary total disability (TTD) beginning March 27, 2014, and continuing until he returned to work. He seeks an order awarding these benefits against Defendants.

Defendants contend since Claimant was not F/V Mark I's "employee" when allegedly injured, he is entitled to no TTD award. Defendants seek an order denying his claim.

2) Is Claimant entitled to TTD?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) Nearly 17 years ago, Claimant obtained his "dive card, certified to become a diver." (Deposition of Richard Stepetin, August 26, 2016, at 13).

2) For 10 to 15 years, Claimant performed diving services for pay once or twice a year on various fishing vessels in Akutan, Alaska when the local diving service was unavailable. (Claimant).

3) Beginning January 2014, Claimant's "steady job" was M/V Exito's captain. (*Id.* at 17). On March 26, 2014, the day before his alleged injury, Claimant overheard a radio conversation between a fishing vessel and Trident Seafoods' processing plant in Akutan. A third vessel, F/V Mark I, had lost propulsion near Akutan and the vessel's owner was inquiring on the radio about a diver to solve a propeller problem. Darrell Pelkey, a "local diver" with his own licensed and insured diving business, also overheard the conversation and later spoke with Claimant. Pelkey told Claimant he would call F/V Mark I's captain and tell him to tow the boat to Dutch Harbor, Alaska for repair. Claimant did not work for Pelkey, but if Pelkey were unavailable, Claimant would perform dives for pay, not affiliated with Pelkey's diving business. (*Id*. at 20-21).

4) Claimant's certification is as a "sport diver," which means he dives for recreation, though on occasion he has worked for pay on boats with underwater issues. Claimant owns his own diving

equipment, including tanks, masks, fins and dry suits. If Pelkey's business was unavailable to assist boats, typically Trident contacted Claimant to see if he could help. (*Id*. at 23-24).

5) Claimant agreed F/V Mark I's owner should tow the vessel to Dutch Harbor because there must have been significant rope entanglement restricting the propeller. (*Id*. at 25).

6) Just after midnight on March 27, 2014, Claimant noticed F/V Mark I parked at Trident's dock. After Claimant awakened later the same morning, F/V Mark I's captain asked Claimant if he could dive to untangle the F/V Mark I's propeller. Claimant said:

> I said "No." I refused them. Once, twice, or three times, I refused him. He said, "Well, could you dive?" I said, "No. I'm busy. I'm running a boat." . . . So he was pretty much begging me, and I looked at him, and he said, "At least take a look." And I thought about it to help a boat out, get him on his way to go back fishing. He literally begged, and I -- I said, "Okay. Let me make a call." (*Id*. at 26-28).

Because he was hauling processed water from Trident's plant on M/V Exito to an ocean dumping area, Claimant called Trident to get permission to dive on F/V Mark I so as to not interrupt Trident's operations vis-à-vis the waste-water dumping process. (*Id*. at 29-30).

7) Claimant's M/V Exito deckhand engineer Adam Panke, also a diver, assisted with the dive. Claimant borrowed Pelkey's air tank and regulator, without cost, for Panke and loaned him Claimant's extra dry suit and other equipment, as Panke did not have his own gear. (*Id*. at 31-32).

8) Trident usually provides free compressed air for scuba divers who fill their own tanks. On this occasion, Claimant hired a local resident, Joe Bereskin, Jr., as a "helper." Bereskin took the air tanks to Trident where a Trident engineer filled them. Claimant intended to pay Bereskin "a portion of what I was going to charge for the dive for being a helper." (*Id*. at 35).

9) Claimant borrowed a skiff without cost from Akutan Corporation and he, Panke and Bereskin motored out to F/V Mark I. Though he had his own rope cutting knives, Claimant borrowed knives from F/V Mark I because theirs were newer and thus sharper. (*Id*. at 39).

10) Once in the water, Claimant started exerting energy while cutting tangled rope from the vessel's propeller. He started getting dizzy and thought he would black out. Claimant felt himself sinking about 60 feet to the ocean bottom and was concerned because he felt he might become unconscious. Without making a decompression stop, Claimant surfaced. Upon reaching the surface, Claimant hit his head on the skiff. Panke and Bereskin eventually pulled him into the skiff. His eyes were red, his skin discolored and he was disoriented and delusional. (*Id*. at 41-42).

11) F/V Mark I's captain did not set a time when Claimant had to work on the propeller. Claimant's other job with M/V Exito required him to get the dive done so it would not interfere "with [his] other job." Claimant agreed he "controlled the time" he went to F/V Mark I so the dive would not interfere with his job on M/V Exito. His job was to "take a look," but he and the other diver took knives in case they could successfully cut loose the rope entanglement. (*Id*. at 44-45).

12) Claimant and F/V Mark I did not agree on a price beforehand but Claimant "was charging $400 an hour," assumed the captain knew his price and, in any event, the captain and boat owner did not care what he charged. They just wanted their boat back in business. Panke also was to receive $400 per hour for diving. F/V Mark I was to pay Claimant directly. Claimant said he did not have a business license and did not have a diving business. He "just dove." (*Id*. at 48-49).

13) Claimant had numerous physical issues allegedly resulting from this diving incident, including cognitive, vision, kidney and lung problems, and the bends. (*Id*. at 51-56).

14) Claimant wants TTD benefits from F/V Mark I's workers' compensation carrier for the months he lost time from work as M/V Exito's captain. (*Id*. at 60-61).

15) Claimant agreed he never got a paycheck from F/V Mark I, never signed a contract with it and never worked on it, other than this one occasion. Claimant had never met the captain before and only spoke to him once when the captain asked him to look at the problematic propeller. The sharp knives are the only equipment Claimant obtained from F/V Mark I. (*Id*. at 70).

16) Claimant never purchased workers' compensation insurance to cover dives he made for other boats, which he considered "vocational times to help a boat out." (*Id*. at 73).

17) Knives for rope cutting are relatively inexpensive. (Experience, judgment, observations).

18) Claimant was operating an unlicensed, uninsured part-time diving business when allegedly injured while working on F/V Mark I. (*Id*.).

19) On October 27, 2014, Claimant filed a workers' compensation claim requesting TTD from F/V Mark I from March 27, 2014. (Workers' Compensation Claim, October 20, 2014).

20) David Bethel is a commercial fisherman and captained F/V Mark I since the 1990s. He captained it on March 27, 2014, when Claimant had his diving incident while working underwater on F/V Mark I's propeller in Akutan. F/V Mark I has a four-person crew including Bethel. Pursuant to federal law, Bethel has a contract with each crewmember. He has never had a crewmember contract with Claimant. Claimant has never been his crewmember. (Deposition Upon Oral Examination of Dave Bethel, January 9, 2017, at 5-9).

21) F/V Mark I left Dutch Harbor on or about March 26, 2014 when it entangled the propeller in rope and lost propulsion. Another boat towed F/V Mark I to port in Akutan. (*Id*. at 9).

22) All crewmembers on board are commercial fishermen. F/V Mark I is a commercial fishing vessel and it has no other purpose. F/V Mark I does not run recreational or commercial diving expeditions. (*Id*. at 9-10).

23) Bethel contacted Trident's plant manager to ask for suggestions and if Trident knew a diver who could assist. The plant manager told Bethel he knew a diver he occasionally used and suggested another vessel tow F/V Mark I into Akutan rather than to Dutch Harbor, which is several hours away, and have the local diver look at the propeller problem. (*Id*. at 10-11).

24) The Trident manager told Bethel Claimant dove for Trident "on a fairly regular basis" and "whenever they need it." Bethel did not know the local diving company and since the 1990s had never needed a diver in Akutan. At the Trident manager's suggestion, Bethel contacted Claimant at the dock and asked him to look at the propeller. Bethel asked Claimant to perform a particular task, *i.e*., dive to look at the propeller and see why it was not providing propulsion. (*Id*. at 12).

25) No F/V Mark I crewmembers performed diving or have diving tanks, dry suits, masks or fins. Diving is not the business ordinarily done on F/V Mark I. (*Id*. at 13).

26) Bethel did not tell Claimant when to dive. Claimant had a schedule with his own boat and had to deal with weather and daylight issues. Bethel had no control over when Claimant showed up at F/V Mark I to perform this dive. (*Id*. at 13-14).

27) Bethel did not recall negotiating a price with Claimant for the dive. (*Id*. at 14-15).

28) Trident acted as "banker" vis-à-vis F/V Mark I, which is why Bethel called Trident for a diver suggestion. Bethel obtained whatever his boat needed, got a bill and ran it through Trident. Trident deducted all expenses from the value of the fish F/V Mark I brought to port. Consequently, it did not matter to Bethel how much Claimant charged him for his dive because Trident would just take the amount off his total account "at the end of the day." (*Id*. at 15-16).

29) Bethel did not know the men assisting on the dive and did not ask them to help. (*Id*. at 16).

30) Diving was not a regular part of anything F/V Mark I did. Bethel did not supervise or control how Claimant performed his dive. The only thing Bethel contributed was telling Claimant his belief a rope entangled the vessel's propeller. (*Id*. at 16-17).

31) Bethel had no control over diving gear Claimant used to perform the dive. (*Id*. at 18).

32) Bethel did not intend this dive to be continuous employment. He had often hired other people to come onto his boat to perform maintenance and repairs and did not consider these persons "employees." For example, hydraulic specialists and engine mechanics often work on the vessel. In Bethel's view, these are subcontractors hired to perform a specific job. (*Id*. at 18-19).

33) Ultimately, Global Diving & Salvage came to Akutan to clear the propeller. (*Id*. at 22).

34) Bethel considered Claimant an independent contractor and not an F/V Mark I "employee." Bethel expected to pay him a flat fee from which Claimant would pay his helpers. (*Id*. at 23, 28).

35) Claimant participated in Bethel's deposition and agreed everything Bethel said sounded similar to what Claimant testified to in his deposition. However, Bethel could not recall Claimant on two or three occasions refusing to perform the dive before agreeing to do it. (*Id*. at 25-26).

36) Many independent contractors work on a "time and materials" basis, which means they charge a flat hourly rate for however long it takes to complete the job. (Experience).

37) Underwater diving is inherently dangerous work requiring considerable skill and experience; $400 dollars per hour is a substantial hourly rate. (*Id*.).

38) Claimant's hearing testimony was consistent with his deposition. He also agreed both he and F/V Mark I had the right to terminate the agreement at will without cause, though Claimant would not have done so once he gave his word. (Claimant).

39) Claimant relied in part upon the Jones Act to support his claim. (*Id*.).

40) Claimant has never heard of personal disability insurance. He has medical coverage available under the Alaska Native Medical Health system. (*Id*.).

PRINCIPLES OF LAW

The board may base its decision on not only direct testimony 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).

> **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 the need for medical treatment of an employee if the disability . . . of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . .

Only a contract, express or implied, creates an employer-employee relationship. *Selid Construction Co. v. Guarantee Insurance Co.*, 355 P.2d 389 (Alaska 1960). Unless an employer-employee relationship exists, "the provisions of the Alaska Workmen's Compensation Act are not applicable." *City of Seward v. Wisdom*, 413 P.2d 931, 935 (Alaska 1966). In *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1989), the Alaska Supreme Court 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, 2) acceptance, 3) consideration and 4) an intent 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). The parties' words and actions are given such meaning "as reasonable persons would give them under all the facts and circumstances present at the time in question." (*Id*.).

> **AS 23.30.120. 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. . . .

The presumption analysis does not apply if there are no factual disputes. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122**. **Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.185. Compensation for temporary total disability**. In 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.

AS 23.30.395. Definitions. In this chapter,

. . . .

(19) 'employee' means an employee employed by an employer as defined in (20) of this section.

(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. . . .

8 AAC 45.890. Determining employee status. For purposes of AS 23.30.395(19) and this chapter, the board will determine whether a person is an 'employee' based on the relative-nature-of-the-work test. The test will include a determination under (1)-(6) of this section. Paragraph (1) of this section is the most important factor and is interdependent with (2) of this section, and at least one of these factors must be resolved in favor of an 'employee' status for the board to find that a person is an employee. The board will consider whether the work

(1) is a separate calling or business; if the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee; if the employer

(A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;

(B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;

(C) has the right to extensive supervision of the work then there is a strong inference of employee status;

(D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;

(E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status;

(F) and person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

> (2) is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;
>
> (3) can be expected to carry its own accident burden; this element is more important than (4) - (6) of this section; if the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;
>
> (4) involves little or no skill or experience; if so, there is an inference of employee status;
>
> (5) is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;
>
> (6) is intermittent, as opposed to continuous; if the work is intermittent, there is a weak inference of no employee status (emphasis added).

ANALYSIS

1) Was Claimant F/V Mark I's "employee" covered under the Alaska Workers' Compensation Act?

Claimant relies in part on the Jones Act to support his claim. This decision has no jurisdiction to hear and decide Jones Act cases. The Alaska Workers' Compensation Act governs this case. Claimant is encouraged to pursue any and all other remedies that may apply to his situation, in other forums.

He also claims the Alaska Workers' Compensation Act allows him to recover against F/V Mark I. The first step in determining if Claimant has a compensable claim against Defendants under the Alaska Workers' Compensation Act is to determine if the parties had a "contract of hire." *Childs*. Only express or implied contracts create employer-employee relationships. *Selid.* A hiring contract requires: 1) an offer, 2) acceptance, 3) consideration, and 4) intent to be bound. *Childs*. There are no disputes between the parties over these elements, so the presumption analysis does not apply. AS 23.30.120; *Rockney*. Bethel orally offered to hire Claimant to inspect the propeller and he accepted. Bethel intended to pay Claimant, though the amount was immaterial under the exigent circumstances, and the parties intended their agreement to be binding. Bethel's boat was in a crisis and needed repair to avoid significant fishery losses. Claimant would not have arranged the dive with Trident, obtained his diving gear and hired an assistant diver and a helper if he did not intend to

complete his task. *Childs*; *Rogers & Babler*. These facts demonstrate Claimant and F/V Mark I had an express, oral contract of hire for Claimant to inspect the restricted propeller and possibly remove any observable obstruction.

The fact there was an express, oral contract of hire between Claimant and F/V Mark I does not necessarily mean Claimant was F/V Mark I's "employee," or F/V Mark I was his "employer." Claimant may have been a volunteer or an independent contractor performing the same services for F/V Mark I. *Rogers & Babler*. The next task is to determine whether Claimant was F/V Mark I's '"employee." AS 23.30.395(19); 8 AAC 45.890. To answer this question, the "relative nature of the work test" is applied. 8 AAC 45.890. The test is multifaceted. The first two elements in the test are "the most important factors," and at least one must be resolved in favor of "employee" status for this decision to find Claimant was F/V Mark I's "employee." 8 AAC 45.890. Subsection (1) is first of the two "most important" factors.

(1) Was Claimant's work a separate calling or business; *i.e.*, did he have the right to hire or terminate others?

It is undisputed Claimant had a full-time job as a motor vessel captain at the time he was working on F/V Mark I's propeller. However, Claimant also had a part-time side business diving for pay. Although Claimant denies having a business license or a diving "business," the facts show he runs an unlicensed part-time diving business. He performed diving services on various boats once or twice a year for many years. He charged $400 per hour for services. On this occasion, Claimant hired two other workers to assist in the diving project and intended to pay his diving helper from Claimant's own earnings. These are hallmarks of a separate calling or business. There is little practical difference between Claimant's part-time work as a diver and Pelkey's full-time commercial diving business. Any differences relate to degree, frequency, business organization and licensing, not business activity. The fact Claimant either does not understand or ignores licensing, certification and insurance requirements does not mean he is not involved in a separate calling or business. These facts show Claimant was an independent contractor. However, there is more to this first element to consider:

A) Did F/V Mark I have the right to exercise control over the manner and means to accomplish the desired result?

F/V Mark I's "desired result" was to get back on the water fishing. Bethel wanted Claimant to inspect the propeller and find out what caused propulsion loss, and if possible, cut away any restricting debris. Claimant never suggested F/V Mark I had the right to exercise control over the manner and means by which Claimant accomplished these results. Bethel credibly explained he had no control over when or how Claimant accomplished the task. AS 23.30.122; *Smith*. Claimant agreed. There is no evidence Bethel or anyone else from F/V Mark I exercised control over how the divers and helper performed their duties. This part of the first element is also decided against Claimant being F/V Mark I's "employee." 8 AAC 45.890(1)(A).

B) Did F/V Mark I and Claimant have the right to terminate the relationship at will, without cause?

Claimant said he and F/V Mark I could have terminated their express oral contract at any time. This creates a "strong inference of employee status." However, Claimant thrice refusing to take the job before accepting Bethel's offer does not sound like an "employee" responding to an "employer." It sounds like an independent contractor refusing work. On balance, this element creates no "inference of employee status." 8 AAC 45.890(1)(B).

C) Did F/V Mark I have the right to supervise Claimant's work extensively?

There is no suggestion Bethel or any other F/V Mark I employee, agent or representative had any right to supervise Claimant's work underwater. The evidence shows there was no supervision; Bethel specifically and credibly denied it. AS 23.30.122; *Smith*. Claimant agreed. This element creates no "inference of employee status." 8 AAC 45.890(1)(C).

D) Did F/V Mark I provide the tools, instruments, and facilities to accomplish Claimant's work and are they are of substantial value?

The tools and instruments used to accomplish Claimant's work included dry suits, masks, flippers, compressed air tanks and regulators. Claimant owned his own and borrowed extra diving gear from Pelkey's professional diving business for Panke. Claimant borrowed a skiff from another company. The only things F/V Mark I provided were two sharp knives, which experience shows are not of

significant value, relatively speaking. *Rogers & Babler*. Therefore, this element creates no inference regarding employment status. 8 AAC 45.890(1)(D).

E) Did F/V Mark I pay for Claimant's work on an hourly or piece rate wage rather than by the job?

The only evidence addressing this element is Claimant's testimony and Bethel's statement he would pay Claimant a "flat fee," which is consistent with a flat hourly rate. Claimant said he charged $400 per hour and charged an additional $400 per hour for his assistant diver. Since many independent contractors work on a "time and materials" basis, this evidence at best creates only a weak inference Claimant was F/V Mark I's "employee." *Rogers & Babler*; 8 AAC 45.890(1)(E).

F) Did the parties enter into a written or oral contract, and if so what was their understanding?

The parties entered into an express, oral hiring contract. Claimant admits he was not F/V Mark I's "employee," but wants coverage for his alleged work-related injuries nonetheless. Defendants think he was an independent contractor. The parties presented no evidence Claimant was a "loaned employee." As Claimant concedes he was not F/V Mark I's "employee," the only remaining alternatives are "volunteer" and "independent contractor." Since he charged an hourly fee, Claimant was not a "volunteer." *Wisdom*. Claimant agreed with everything Bethel said with one minor, immaterial difference. Bethel said Claimant was an independent contractor. As the parties therefore agree on the nature of the contract they believed they were creating their respective positions deserve deference.

The parties disagree on whether the Act covers him. This is a legal question not involving contract law. The evidence shows Claimant had a full-time job as a boat captain. Claimant also had a part-time side job performing diving for pay. The fact Claimant had no business license or insurance does not mean he did not have a side business. The Akutan community knew Claimant was a diver willing to repair boats for pay if the local commercial diver was unavailable. Other fishing vessels hired Claimant on many previous occasions to work on underwater issues. Claimant provided his own diving equipment and expertise and no one supervised him or told him how to perform his duties underwater. These factors all point toward the parties behaving as though Claimant was an independent contractor and not F/V Mark I's "employee." 8 AAC 45.890(1)(F). Substantial

evidence resolves the first element in the relative nature of the work test in Defendants' favor. *Rogers & Babler*. Element (2) is the second of the two "most important" factors.

(2) Were Claimant's Services a Regular Part of F/V Mark I's Business or Service?

It is undisputed F/V Mark I does not provide recreational or commercial diving services. It is strictly a fishing vessel. Claimant's underwater diving services were not even an occasional, much less a regular, part of F/V Mark I's business or services. This element is resolved in Defendants' favor. 8 AAC 45.890(2).

(3) Could Claimant Have Been Expected to Carry His Own Accident Burden?

This element is more important than elements (4) through (6). 8 AAC 45.890(3). Claimant charged $400 per hour for his services. This is a substantial hourly rate. *Rogers & Babler*. Given his hourly rate and the one or two times per year Claimant dived for pay, he may have been able to carry his own accident burden by purchasing workers' compensation or private disability insurance. Since he never heard of private disability insurance, Claimant had none. However, the question whether he could carry his own accident burden is answered in the affirmative. At Claimant's hourly rate, he could have bought his own disability insurance and accepted more diving jobs as time permitted. *Rogers & Babler*. He also has medical care provided through the Alaska Native Medical services system. This element resolved in Defendants' favor creates no "inference of employee status." 8 AAC 45.890(3).

(4) Did Claimant's Work Involve Little or No Skill or Experience?

Scuba diving requires considerable skill and experience. *Rogers & Babler*. Thus, Claimant's work required more than "little or no skill or experience." This element creates no inference of employee status but tends to show Claimant was an independent contractor. 8 AAC 45.890(4).

(5) Was the Employment Agreement Sufficient to Amount to the Hiring of Continuous Services, as Distinguished from Contracting for the Completion of a Particular Job?

Bethel said he hired Claimant to perform one dive to inspect the propeller and, if possible, cut away any rope entanglements. Claimant agreed with this description. The parties' relationship in this

instance was hiring for the completion of a particular job, the inspection and rope cutting, rather than hiring for continuous services. Therefore, this element creates no inference of employee status but tends to show Claimant was an independent contractor. 8 AAC 45.890(5).

(6) Was the Employment Intermittent, as Opposed to Continuous?

Bethel had never met Claimant before. He had never used a diver on his boat. Bethel was not even aware Pelkey's professional diving company existed in Akutan. Claimant had never worked on F/V Mark I before. There is no evidence he planned to work on it again. His intermittent work creates a "weak inference of no employee status." 8 AAC 45.890(6).

In summary, neither of the two "most important" factors, elements (1) and (2), are resolved in Claimant's favor. At least one must be resolved in his favor for Claimant to be F/V Mark I's "employee." His claim fails on this basis alone. 8 AAC 45.890. Moreover, element (3), which is "more important" than elements (4) through (6) is resolved in Defendants' favor. Elements (4), (5) and (6) are all resolved in Defendants 'favor. Claimant was not F/V Mark I's "employee," and it was not his "employer" at the time of Claimant's alleged injury. AS 23.30.395(19), (20). Claimant was an independent contractor and not covered under the Act. AS 23.30.010(a).

2) Is Claimant entitled to TTD?

Claimant requests TTD from Defendants. AS 23.30.185. The Act only covers "employees" of "employers." AS 23.30.010(a). Since Claimant was not F/V Mark I's "employee," but was an independent contractor, the Act does not cover his alleged March 27, 2014 injury and it is not compensable. Thus, this decision need not address causation issues. His claim will be denied.

CONCLUSIONS OF LAW

1) Claimant is not F/V Mark I's "employee" covered under the Alaska Workers' Compensation Act.
2) Claimant is not entitled to TTD.

ORDER

Claimant's October 27, 2014 workers' compensation claim is denied.

Dated in Anchorage, Alaska on February 1, 2017.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Patricia Vollendorf, 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 board 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 Richard Stepetin, claimant v. F/V Mark I, Great West Seafoods, LP; and LM Insurance Corporation, insurer / defendants; Case No. 201416631; 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 February 1, 2017.

/s/

Elizabeth Pleitez, Office Assistant