ALASKA WORKERS' COMPENSATION BOARD

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

JACLYN ERBEY, Employee, Claimant, v. OPLUENCE GRAND SALON AND DAY SPA, Employer, and WORKERS' COMPENSATION BENEFITS GUARANTEE FUND, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201418069 AWCB Decision No. 15-0011 Filed with AWCB Anchorage, Alaska on January 27, 2015

Jaclyn Erbey's (Employee) October 20, 2014 claim was heard in Anchorage, Alaska on January 22, 2015, a date selected on November 26, 2014. Employee appeared and testified. Jim Vittone and Roberta Vittone both appeared and testified as owners of Opulence Grand Salon and Day Spa (Employer). Joanne Pride appeared for Wilton Adjustment. Velma Thomas appeared telephonically for the Alaska Workers' Compensation Benefits Guaranty Fund (Fund). The sole issue for determination is whether Employee was Employer's "employee" with respect to Employee's October 20, 2014 claim. There were no other witnesses. As a preliminary matter, the panel sustained Employer's objection to Employee's late-filed evidence. This decision examines the oral order excluding Employee's late-filed evidence and decides the employment status issue on its merits. The record closed at the hearing's conclusion on January 22, 2015.

ISSUES

At hearing, Employee filed two letters from co-workers and acquaintances, which she argues support her contention of "employee" status. The evidence was not previously served on Employer. Employer objected to the evidence being considered and the objection was sustained. The Fund did not take a position with respect to the proferred evidence.

1) **Was the oral decision to exclude Employee's late-filed evidence correct?**

At the November 26, 2014 prehearing conference, the parties disagreed as to the employment arrangement between Employee and Employer. However, at hearing Employee contended she was Employer's "employee" at all relevant times, and Employer agreed Employee was its "employee." The Fund did not take a position with respect to the "employee" status at hearing.

2) **Was Employee Employer's "employee" with respect to her October 20, 2014 claim?**

FINDINGS OF FACT

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

1) On October 20, 2014, Employee filed a claim seeking temporary total disability (TTD) from October 11, 2014 ongoing and a compensation rate adjustment. Employee described her injury as "repetitive strain injury due to overuse" with the affected body parts as "fingers, wrist, forearm, elbow, shoulder, neck, back." Employee listed "Opulence Grand Salon and Day Spa" as her employer at the time of her injury. (Workers' Compensation Claim, October 20, 2014).

2) On November 26, 2014, the parties attended a prehearing conference. The summary states:

> Claimant requested hearing on employee/employer status in order to move her case forward. Noting no Affidavit of Readiness for Hearing has been filed, Designee Slodowy exercised his discretion under 8 AAC 45.070(b)(3) to bifurcate issues and set hearing on employer/employee status issue only. Parties strongly disagree as to the facts on this issue. . . .
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> Action: A hearing is set for January 22, 2015 on the sole issue of determination of employee/employer status. (Prehearing Conference Summary, November 26, 2014).

3) No objection was filed by any party to the November 26, 2014 prehearing conference summary, or to the hearing being scheduled. (Record; Observations).

4) On January 22, 2015, prior to the hearing, Employee filed two unsigned letters, purportedly from co-workers and acquaintances familiar with Employee's history with Employer. One letter is from Chelsea Beetch and the other is from Brittany Gould. Employee contends the letters are relevant and go to the issue of employer/employee status. Employee did not serve the proffered evidence on Employer prior to hearing. Employer objected to the letters being considered at hearing and the designated chair sustained the objection. (Record).

5) Employee's explanation for why she did not file the letters until the morning of the hearing was that Ms. Beetch was out of state, while Ms. Gould did not respond in time. (Employee).

6) Also on January 22, 2015, Employee filed pay stubs from Employer, a "work ticket" sheet, and copy of an Alaska Department of Commerce business license. Employer did not object and the evidence was admitted. (Employee's hearing exhibit, January 22, 2015; Record).

7) Employee testified: she was hired by Employer as a massage therapist in January of 2014. During the initial interview, Employer made it clear she was being hired as an employee, rather than an independent contractor. Part of the reason for this arrangement was to have employees available for "set hours during the day." Employee accepted the employment offer, executed a IRS W-4 form, and began a three-month trial period at a pay rate of $15.00 per hour. After the completion of the trial period, Employee was told she would be getting paid on a commission basis for services provided and also for product sales. Costs of services were established by Employer. Days and hours of Employee's work were set by Employer, and were "not flexible." Employer provided an exclusive list of services Employee could offer clients. Employee could be terminated at any time and at Employer's will. Employer set forth dress and uniform policies and standards. Employer provided in-house training with respect to the needs of clients and additional services which may be offered. Employer provided the tools and materials Employee would use in her work; this cost was then deducted from commissions Employee would earn. Employee would still earn money from Employer even though she was not scheduled to have clients on a given day. Employee could not afford to maintain her own insurance; Employer told her it would provide insurance. (Employee).

8) Both Jim and Roberta Vittone, speaking as Employer's owners testified they do not dispute Employee was their employee. The Vittones therefore stipulated to Employee's "employee"

status with respect to her October 20, 2014 claim. However, Employer maintained its objection to compensability of Employee's claimed industrial injury. (J. Vittone; R. Vittone).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> > (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. . . .
> > . . . .
> >
> > (3) this chapter may not be construed by the courts in favor of a party;
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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.
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> **AS 23.30.005. Alaska Workers' Compensation Board**.
> . . .
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> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

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).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

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 45.050. Pleadings. . . .

. . . .

(f) **Stipulations**.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of record, or may be made orally in the course of a hearing or prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.120. Evidence. . . .

. . . .

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .

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. Paragraphs (1) and (2) of this section are the most important factors, and at least one of these two 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; and

(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.

ANALYSIS

1) Was the oral decision to exclude Employee's late-filed evidence correct?

The January 22, 2015 hearing date was set on November 26, 2014, almost two months prior. Arguably, Employee had since October 20, 2014, the date she filed her claim, to obtain evidence in support. While technical rules of evidence do not generally apply these proceedings, the regulations require evidence be served on parties and on the board at least 20 days in advance of hearing. 8 AAC 45.120(f). Part of the rationale for this regulation is to avoid surprises and allow parties to adequately prepare for and respond to evidence and arguments offered against them. Employee did not adequately explain why the letters from Ms. Beetch and Ms. Gould could not have been filed and served until the morning of the hearing. AS 23.30.135; 8 AAC 45.120; *Rogers*. Employer should not be required to argue with respect to statements by individuals it has not had prior opportunity to examine. AS 23.30.001(4); AS 23.30.135. Therefore, the oral order excluding Employee's proffer of the letters from Ms. Beetch and Ms. Gould was correct. *Id.*; 8 AAC 45.120.

2) Was Employee Employer's "employee" with respect to her October 20, 2014 claim?

The relevant facts on the employment status issue are not disputed. Therefore, the statutory presumption of compensability analysis need not be applied. Stipulations between parties may be made orally in the course of a hearing. 8 AAC 45.050(f)(2). Here, Jim and Roberta Vittone, speaking on Employer's behalf as its owners, stipulated Employee was an "employee" of Employer with respect to her October 20, 2014 claim. While Employer may ultimately dispute the compensability, and therefore its responsibility, for Employee's claimed injury at a hearing on the merits, stipulations of fact are binding upon the parties and have the effect of an order. 8 AAC 45.050(f)(3). The parties' stipulation is further supported by Employee's undisputed testimony and the evidence admitted at hearing, all of which also demonstrates Employee was Employer's "employee" at all relevant times. AS 23.30.005; AS 23.30.135; 8 AAC 45.890. Therefore, Employee will be found to have been Employer's "employee" with respect to her October 20, 2014 claim. *Id*; *Rogers & Babler*.

CONCLUSIONS OF LAW

1) The oral decision to exclude Employee's late-filed evidence was correct.
2) Employee was Employer's "employee" with respect to her October 20, 2014 claim.

ORDER

1) Employee was Employer's "employee" with respect to her October 20, 2014 claim as a matter of law.
2) Employer's objections with regard to compensability of Employee's October 20, 2014 claim remain in place until a hearing and a decision on the merits of Employee's claim.

Dated in Anchorage, Alaska on January 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

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Linda Hutchings, Member

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Donna Phillips, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of JACLYN ERBEY, employee / claimant v. OPLUENCE GRAND SALON AND DAY SPA, employer; WORKERS' COMPENSATION BENEFITS GUARANTEE FUND, insurer / defendants; Case No. 201418069; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on January 27, 2015.

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Pamela Murray, Office Assistant