ALASKA WORKERS' COMPENSATION BOARD

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

ALEXANDER MULLINS,	)	
	)	
Claimant,	)	INTERLOCUTRY
	)	DECISION AND ORDER
v.	)	
	)	AWCB Case No. 201508689
YONG KANG, D/B/A LEE'S MASSAGE,	)	
and THE ALASKA WORKERS'	)	AWCB Decision No. 15-0111
COMPENSATION BENEFITS	)	
GUARANTY FUND,	)	Filed with AWCB Fairbanks, Alaska
	)	on September 2, 2015
Defendants.	)	
	)	

Alexander Mullins' (Claimant) June 2, 2015 claim was heard on August 27, 2015 in Fairbanks, Alaska, a date selected on July 8, 2015. Claimant appeared, testified and represented himself. Attorney John Franich appeared and represented Lee's Massage (Lee's). Joanne Pride appeared by telephone and represented the Alaska Workers' Compensation Benefit Guaranty Fund (the fund). Other witnesses included Donald Ludwig who appeared and testified for Claimant, and Benjamin Kang, Yong Kang and Thomas Hernandez, all of whom appeared and testified for Lee's. The record closed at the hearing's conclusion on August 27, 2015.

ISSUES

Claimant contends he was working in an employee-employer relationship with Lee's when, on or about May 19, 2015, he broke his wrist. Claimant contends this injury arose out of and in the course of his employment with Lee's and is a compensable injury under the Alaska Workers' Compensation Act (Act).

Lee’s contends if Claimant broke his wrist working on its premises at all, he did so while working as a volunteer or an independent contractor. Lee’s contends this injury did not arise out of or in the course of any employment Claimant had with Lee’s and is not compensable.

The fund agrees with Lee’s position. However, the fund contends if Claimant’s case is found compensable, a decision and order should issue so stating and should award Claimant appropriate benefits against Lee’s. The fund contends it will take further action as necessary.

1) **Was Claimant Lee’s “employee” at the time of his alleged injury?**

Lee’s contends Claimant’s claim is barred under AS 23.30.100 because he failed to give timely notice within 30 days. Alternately, Lee’s contends if his claim is not barred, Claimant loses the presumption of compensability.

Employee did not express a position on the notice defense. It is assumed he opposes it.

The fund did not express a position on the notice defense. It is assumed it joins Lee’s’ position.

2) **Is Claimant’s claim barred by failure to give timely written notice?**

Claimant contends he broke his right wrist when tubular steel he was using with a hydraulic bottle jack to raise the massage parlor kicked out and struck his wrist. Therefore, he contends his injury arose out of and in the course of his employment with Lee’s.

Lee’s implies Claimant may have broken his wrist before he began working on the massage parlor. Therefore, it contends his broken wrist did not arise out of or in the course of any employment with Lee’s.

The fund did not express a position on this issue. It is assumed it agrees with Lee’s position.

3) **Did Claimant’s injury arise out of and in the course of his employment with Lee’s?**

FINDINGS OF FACT

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

1) On September 19, 2014, Yong Kang reportedly sold property located at ****, North Pole, Alaska to Benjamin Kang for $10,000. The precise address is redacted to protect Kang's privacy. (Bill of Sale, September 19, 2014).

2) May 11, 2015 was a Monday. (Official notice).

3) On or around May 13, 2015, but before May 17, 2015, Claimant contends he was jacking up Lee's massage parlor at the above address when the bottle jack slipped and a metal piece struck and broke his right wrist. Claimant contends he was working as Lee's "employee" when this injury occurred. (Claimant).

4) It is undisputed Lee's had no workers' compensation insurance covering Claimant's alleged injury. (Agency record).

5) On May 17, 2015, Claimant, Yong Kang, who testified she also goes by "Lee," and Matt Maurer signed a handwritten receipt printed on a small, yellow Sam's Club notepad as follows:

> AJ Mullins
>
> I (indiscernible signature)
> accept 500.00 $
> for all services + work
> on the roof of
> the massage parlor
>
> Paid by Lee (indiscernible signature)
>
> Witness -- (indiscernible signature)
> Matt Maurer
> 5-17-15

Claimant and Yong Kang agreed the receipt contained signatures from all signees and was dated May 17, 2015, the same day Claimant left the job over a dispute. (Claimant; Yong Kang).

6) On June 1, 2015, at about 8:54 AM, Claimant went to Fairbanks Memorial Hospital Emergency Department for "Wrist pain/injury." The emergency room gave Claimant documents

describing a navicular wrist fracture and referred him to Cary Keller, M.D., "as soon as possible." The emergency department also provided Claimant with a prescription for pain medication. (Fairbanks Memorial Hospital Emergency Department records, June 1, 2015, attached to Workers' Compensation Claim, June 2, 2015).

7) On June 2, 2015, Claimant filed an injury report stating on May 19, 2015, at approximately 3:00 PM, Claimant injured his right wrist. The report states Claimant was under a building jacking it up when the "bar slipped out of jack" and hit Claimant's arm fracturing his right wrist. The report further states Claimant was working for Lee's at the time, and Matt Maurer was a witness. (Employee Report of Occupational Injury or Illness to Employer, June 2, 2015).

8) The injury could not have happened on May 19, 2015, because Claimant left the job on May 17, 2015. (Inferences drawn from all the above).

9) Whether the alleged injury occurred on May 13, 2015 or thereafter, Claimant's June 2, 2015 injury report was timely filed within 30 days. The record does not show whether Claimant served the injury report on Lee's. (Judgment, observations; record).

10) On June 2, 2015, Claimant filed a claim against Lee's requesting temporary total disability (TTD) from June 1, 2015, and continuing, and medical costs. The claim describes the injury in a way similar to the injury report filed the same day. The claim also states it was filed against the fund because Claimant had no money and believed Lee's had no workers' compensation insurance. (Workers' Compensation Claim, June 2, 2015).

11) On June 4, 2015, the division served the June 2, 2015 claim on Lee's and on Wilton Adjustment on the fund's behalf. (*Id.*).

12) Whether the alleged injury occurred on May 13, 2015 or thereafter, Claimant's June 2, 2015 claim was served on all parties within 30 days. (Judgment, observations).

13) The claim provided as much information about the alleged work injury as the injury report would have provided. Lee's had knowledge of Claimant's alleged work injury by at least two or three days after June 4, 2015, well within 30 days of its earliest possible occurrence. (*Id.*).

14) On June 4, 2015, Claimant saw Nicolle Hendrix, PA-C, at Sports Medicine Fairbanks. Claimant reported being referred by the emergency room for a right scaphoid fracture. Claimant said he was jacking up a massage parlor when a portion of the jack slipped causing the mechanism "to strike his hand forcefully." Claimant said the injury occurred, "approximately 2 weeks ago," but the pain and swelling had not resolved. Therefore, he went to the emergency

department for evaluation and was placed in a thumb spica splint and referred for further evaluation. Claimant reported he was a "small engine mechanic." PA-C Hendrix reviewed Claimant's radiographic studies and found a mildly displaced fracture of the right scaphoid with a large scaphoid cyst. PA-C Hendrix recommended a computerized tomography (CT) scan and further treatment. (Sports Medicine Fairbanks report, June 4, 2015).

15) On June 4, 2015, someone completed a "Physician's Report" on which under "employer" the words "Contract Labor -- Lee's Massage Parlor" appear. This report lists Claimant's last day worked as "June 1, 2015." PA-C Hendrix stated Claimant was not medically stable and was not released for work for at least "15-21 Days." (Physician's Report, June 4, 2015).

16) On June 9, 2015, Lee's filed an answer denying liability, and denying Claimant's right to any benefits. Lee's defended by stating Claimant was not its "employee" and it was not his "employer" on the injury date, cited authority, argued Claimant was not injured on May 19, 2015 in the course and scope of any employment with Lee's, raised a potential fraud defense against Claimant and stated his claim was barred under AS 23.30.100. (Putative Employer's Answer to Workers' Compensation Claim Dated June 2, 2015, June 9, 2015).

17) On June 9, 2015, Lee's controverted all benefits based on its defense Claimant was not Lee's "employee" and it was not his "employer," Claimant was not injured in the course and scope of employment with Lee's, he may have committed fraud and the claim may be barred for Claimant's failure to give timely notice. (Controversion Notice, June 9, 2015).

18) On June 10, 2015, Lee's through its attorney filed an injury report stating the injury date was May 19, 2015, and Lee's first knew of the injury on June 2, 2015. (Employer Report of Occupational Injury or Illness to Division of Workers' Compensation, June 10, 2015).

19) Lee's injury report concedes it had knowledge of Claimant's alleged injury by June 2, 2015, well within 30 days of its alleged occurrence. (Observations).

20) On June 10, 2015, Lee's filed an amended answer including all denials and defenses from its original answer and including another legal citation. Lee's served this amended answer on the fund and its adjuster (Putative Employer's Amended Answer to Workers' Compensation Claim Dated June 2, 2015, June 10, 2015).

21) On June 10, 2015, Lee's filed another denial notice raising the same defenses as before, but this time served the notice on the fund and its adjuster. (Controversion Notice, June 10, 2015).

22) Lee's never denied Claimant's right to benefits, or his claim, based upon an allegation that he was not disabled as a result of the alleged injury or that he did not need reasonable and necessary medical care to address his broken wrist. Rather, Lee's defended on grounds Claimant was not Lee's "employee" and it was not his "employer," he failed to give timely written notice and his injury did not arise out of and in the course of any employment with Lee's. (Observations and inferences drawn from the above).

23) On June 22, 2015, Lee's filed a hearing request on Claimant's June 2, 2015 claim. (Affidavit of Readiness for Hearing, June 22, 2015).

24) On July 8, 2015, the parties attended a prehearing conference where the designee set a hearing on the claim for August 27, 2015. "Issues" for the hearing were: (1) was Claimant injured on May 19, 2015, while performing work on Lee's premises; (2) was the work in connection with a business or industry; and (3) was Claimant Lee's "employee" or was he an independent contractor? (Prehearing Conference Summary, July 8, 2015).

25) At the July 8, 2015 prehearing conference, the parties bifurcated the hearing, and agreed to decide the employer-employee relationship issue and whether Claimant's broken wrist arose out of and in the course of any employment with Lee's. (*Id.*; observations and inferences drawn from the above).

26) On July 15, 2015, Lee's filed a notice clarifying its correct business name and giving notice it intended to rely upon: Alaska Business License #929865; Alaska Business License #981580; Property Summary for Parcel Account No. 030-9257; and Bill of Sale recorded September 19, 2014, as Instrument No. 2014-013582-0. Lee's contends on May 19, 2015, Lee's massage was operated as a partnership by Chong Sik Kim and Yong Kang. (Notice of Correction of Business Name, Notice of Intent to Rely, July 15, 2015).

27) One above-referenced business license says "Lee's Massage" is "owned by YONG H YANG" and the license is good from February 22, 2015 through December 31, 2016. (Alaska Business License #929865).

28) The other above-referenced business license says "Lee's Massage" is "owned by CHONG SIK KIM" and the license is good from February 22, 2015 through December 31, 2016. (Alaska Business License #981580).

29) On July 16, 2015, Lee's filed a poor photocopy of a hand-written receipt signed by Claimant stating Claimant accepted $500 "for all services" and for work performed on "the roof

at the massage parlor." The receipt says the money was paid by "Lee" with the last name indiscernible. Matt Maurer also signed the receipt dated on, what the parties agreed was, May 17, 2015. (Attachment to Notice of Intent to Rely, July 16, 2015; judgment).

30) The fund contends Lee's was uninsured for workplace injuries on May 19, 2015, when Claimant says he was injured while working there. The fund contends Claimant was hired to work on a specific project, was given the project's scope and could decide whether to take the job or reject it. The fund contends Claimant was not Lee's "employee" when the injury occurred. The fund further contends Claimant had a "regular job," implying this also disproves his employer-employee status with Lee's. Nevertheless, the fund contends it is "unclear whether Lee's and Claimant had an "employer/employee" relationship. The fund contends Lee's did not intend to create an employee-employer relationship when the parties entered into an express, oral contract for hire. The fund seeks an order deciding the compensability of Claimant's right to benefits contending if the board finds Lee's was not Claimant's "employer" at the time of injury the fund's potential liability will become moot. If the board finds the claim compensable, the fund seeks an order awarding Claimant appropriate benefits and an order directing Lee's to pay these after which time the fund will seek a supplemental order of default, if Lee's fails to pay. (The Alaska Worker's Compensation Benefits Guaranty Fund Hearing Brief, August 20, 2015).

31) Claimant did not file a hearing brief. (ICERS database, accessed August 24, 2015).

32) Lee's contends Claimant lives close to the massage parlor business at which he claims to have been injured. Lee's contends the massage parlor is owned by non-party Benjamin Kang. Lee's concedes Claimant "performed some work on the premises" and was paid $500 cash on May 17, 2015, two days before his purported May 19, 2015 injury. Lee's contends Claimant was not working for it "in connection with a business or industry" and if he was, "he worked as an independent contractor, not as an employee." Lee's further contends it was not Claimant's "employer" and Claimant was not its "employee" as those terms are defined in the Alaska Workers' Compensation Act. Lee's contends Claimant, if he was injured all, injured himself while jacking up the massage parlor, "not while performing a massage." Therefore, Lee's contends this was a "consumptive" not a "productive" activity in connection with Lee's business. Lee's further contends, as there was no employer-employee relationship, Claimant must have been an independent contractor and thus not covered by the Act. It contends Claimant cannot

meet the "relative nature of the work test" to qualify as an "employee." (Hearing Brief of Putative Employer, August 20, 2015).

33) At hearing on August 27, 2015, Claimant testified he has a normal, six day per week job at Rod's Saw Shop as a small engine mechanic, and was working on Lee's building as a "favor as a friend." Claimant did not initially want to do the roofing and trailer leveling work. His close friend Yong Kang, who runs the massage parlor and lives in the building prevailed upon him and, as he is fond of her as a friend, he finally agreed to work on the massage parlor's roof and then jack the building up in an attempt to level it. Claimant met Yong Kang through a realtor when he purchased a home from her in 2004. Claimant currently lives close to Lee's. According to Claimant, in January or February 2015, Yong Kang approached him while he was retrieving mail from his mailbox and asked him to help her put a new roof on the massage parlor. At first Claimant said no, but about 10 minutes later changed his mind and agreed. Claimant said beginning around "June 2015," he, William Ludwig and Matt Maurer, with some assistance from Benjamin Kang, started tearing the old roof off. Claimant said it took approximately three weeks to perform the roofing. Yong Kang had the metal roofing materials selected and delivered to the site and had the project "all figured out." Claimant and his crew stripped off the old roof, replaced rotten wood underneath, stapled down tarpaper, and screwed down the metal roofing. Benjamin Kang drove the shiny green pickup truck used to haul construction debris to the landfill. Claimant said Yong Kang walked around on the roof and noticed there were low spots and determined the building was sinking, causing the roof to be uneven. Yong Kang asked Claimant if he would also level the building. He agreed, and Yong Kang supplied hydraulic bottle jacks while Claimant obtained tube steel and a steel plate from his employer, Rod's Saw Shop, to assist in the project. He also used Rod's Saw Shop's welder to fabricate devices used in lifting the building. Claimant explained he worked eight hours a day at Rod's, and would go to Lee's in the evenings to work on the roof and on the leveling. Claimant had worked at Rod's full-time as a small engine repair mechanic for six to seven years and had developed a stellar reputation in the community for his small engine repair ability. According to Claimant, Yong Kang agreed to pay for the massage parlor roofing and leveling job by giving him the "shiny green pickup truck." Claimant testified he did not say anything about his wrist to Rod's Saw Shop for about two weeks. He testified he told Matt Mauer he hurt his wrist, but did not initially tell Yong Tang because he "did not think it was that bad." Claimant said on May 20, 2015, and

again on May 21, 2015, he told Yong Kang he had injured his wrist and she said "nothing." According to Claimant, Yong Kang was dissatisfied with the pace at which the work was proceeding and told him she "could have hired a professional." About two weeks after the injury, Claimant finally went to Fairbanks Memorial Hospital emergency room because his wrist remained painful and swollen. Claimant said the emergency room referred him to Dr. Keller, who eventually referred him to an orthopedic surgeon in Anchorage. Before Yong Kang gave Claimant the pickup truck, he and his crew had used it to haul roofing materials stripped from the massage parlor to the dump. Yong Kang signed over the pickup truck's title to Claimant, but the next day she took the title back and ended up keeping the truck. Claimant purchased steel for the trailer-raising job from K&K and paid for it himself without being reimbursed by Yong Kang. Claimant thinks he was Lee's "employee" and Lee's was his "employer" because Yong Kang, who ran the massage parlor business, asked him to put on a new roof and level her building. (Claimant).

34) On cross-examination, Claimant admitted he had known Yong Kang for about 10 years after he bought his home from her about block away from Lee's. Their mailboxes are located at the end of the street. Claimant considered Yong Kang a friend and borrowed money from her one time. Because he was her friend, Claimant had done work for Yong Kang on her massage parlor property approximately 15 times. Claimant's son Andrew has also worked for Yong Kang on occasion. Claimant said he worked six days a week, 12 hours per day at Rod's Saw Shop. Rod's gave him a regular paycheck and withheld taxes. By contrast, Claimant conceded Lee's did not complete any employment paperwork with him and did not provide him with a W-9 form. Claimant has performed a variety of work in his lifetime including bricklayer, tile setter apprentice, framer and laborer. He feels comfortable doing all construction work except for electricity, which Claimant does not touch. Claimant felt confident in his abilities to replace the roof and level the massage parlor. As for the crew working on the massage parlor, Claimant said he obtained the help. He did not ask Yong Kang's permission to get help. However, on occasion, Yong Kang told William Ludwig to "go home." She liked Matt Maurer and kept him around, but eventually Yong Kang sent Matt home as well. Claimant is not in the roofing business. He does not think Yong Kang is in the remodeling or construction business. He agreed he was doing a "favor to a friend" when he replaced the roof and leveled the massage parlor. Claimant said Yong Kang brought up the truck, which he did not need or want because

he had several trucks in his yard already. However, Claimant thought he could probably sell the truck so he accepted the offer. Yong Kang signed the truck over to Claimant, he used it for about 24 hours and then she took it back. Claimant did not discuss automobile insurance on the shiny green pickup truck with Yong Kang. Claimant was not paid by the hour. In retrospect, Claimant wished he had never helped Yong Kang. As for control of the two projects on the massage parlor, roofing and leveling, Claimant said he would not have listened to Yong Kang if she had told him what to do unless it "sounded logical." At one point, a dangerously low power line caused Claimant to stop the roofing job until the electrical utility company arrived and raised the power line. Claimant said, in respect to the dangerous power line issue, "I took control of it" and "I made it happen." Claimant told Yong Kang to replace the entire roof because it was rotted. She did not take his advice. The injury with the jack occurred three or four days before Claimant signed the receipt. Claimant and his crew used hand tools to remove the old roofing. He decided what needed to be fixed. At some point during the re-roofing, Yong Kang was on the roof and noticed it sagged and the decision was made to level the building. After Yong Kang took back the shiny green pickup truck, a 1997 Laredo, she gave him $500 in lieu of it and they both signed the receipt. Claimant and Matt Maurer were the only two people to go under the building to do the leveling. Claimant said he hurt his right wrist about three or four days before he signed the receipt for $500. The day Claimant signed the $500 receipt was the last day he worked on the massage parlor project and the parties parted ways. Claimant's wrist injury slowed him down at his real job at Rod's Saw Shop. Nevertheless, he kept working for a time and Rod's paid him as he tried to do things left-handed. Claimant thought he was "ripping off" Rod's because his right wrist injury prevented him from working very productively. Eventually, Claimant has not worked anywhere since June 3, 2015. His injury prevents him from working. He has no health insurance and no Medicaid coverage. (*Id.*).

35) Donald Ludwig testified at hearing on Claimant's behalf. Ludwig saw Claimant working on the massage parlor job. He noted Claimant was not able to work after he hurt his wrist. Claimant's son Andrew got Ludwig a job working on the massage parlor roof. Ludwig spoke with Yong Kang, who hired him and offered to pay him $10 per hour, which he accepted. Ludwig does whatever work he can find. He earned several hundred dollars working on the massage parlor roofing project. Ludwig did not want to work under the building and did nothing to assist in the leveling project. While roofing at the massage parlor, Ludwig used Yong Kang's

tools, with exception of a roofing shovel Ludwig provided. Ludwig thought he was Yong Kang's employee. Yong Kang occasionally climbed up on the roof to "look things over," and paid Ludwig cash, usually once per week. (Ludwig).

36) Benjamin Kang is Yong Kang's son. At hearing, Benjamin Kang testified he owns the massage parlor. As he began testifying, his mother attempted to interject and correct something Benjamin Kang was saying, to which he responded, "Be quiet Mom." He first met Claimant on May 3, 2015. Benjamin Kang was living in Seattle and came to Alaska to check out the massage parlor roof after his mother said there were some leaks. Benjamin Kang was on the roof around 10:30 PM on May 3, 2015, when Claimant drove by and stopped to ask what he was doing. When Benjamin Kang extended his hand to shake Claimant's hand, Claimant pulled his hand back, declined to shake hands and mentioned his hand was broken. While discussing the roofing issues, Claimant suggested several things to repair the roof and said he knew how to do it and would do it for him. Benjamin Kang did not think he was hiring claimant as an "employee" when he accepted his offer to assist. Benjamin Kang started tearing off the roof and the following Monday morning, Claimant and others showed up to start removing the roof. Benjamin Kang told them to "talk to my Mom." Yong Kang lives in the massage parlor and pays Benjamin Kang rent. Yong Kang has a massage business in the building, and does not have a construction business. Benjamin Kang said he was not involved in making arrangements with his property because he had been "rebellious" the last couple of years and was trying to "get his act together." Benjamin Kang was in Alaska from April 30, 2015 until May 6, 2015. He returned in June 2015, and found no one working on the massage parlor. (Benjamin Kang).

37) In rebuttal, Claimant implicitly agreed he did not shake Benjamin Kang's hand, but testified he does not shake anyone's hand because he has a "boxer's fracture" on his right hand from many years ago. According to Claimant, this fracture is in a completely different area than Claimant's right wrist fracture, allegedly injured while working for Lee's. (Claimant).

38) At hearing, Yong Kang testified she lives at the massage parlor. She does not have a construction business. In September 2014, Yong Kang transferred the massage parlor property ownership to her son. Yong Kang met Claimant in 2004, when she sold him a home, and he became her next-door neighbor. They became "very good friends." According to Yong Kang, Claimant borrowed money from her many times and never paid it back. She considered the loans "gifts." On occasion, Claimant would ask Yong Kang if she needed anything repaired.

She occasionally accepted Claimant's offers, but eventually did not want him "coming around so much." According to Yong Kang, Claimant would come around at all hours, even when there were customers at the massage parlor late at night. Yong Kang said her son came to Alaska on April 30, 2015, because the massage parlor's roof was leaking. Benjamin Kang was on the roof when Claimant drove by and met him. Claimant refused to shake Benjamin's hand stating Claimant's hand was broken. According to Yong Kang, Claimant approached her and asked if he could replace the roof; it was not the other way around. Yong Kang admitted she needed considerable work done on the building and Claimant said he would do it. According to Yong Kang, in appreciation for his willingness to help her, Yong Kang said she would give him the shiny green pickup truck. Yong Kang said she was not hiring Claimant as an "employee." She was surprised when, on Monday morning, others showed up and began tearing off the roof. Yong Kang testified she did not ask Claimant to hire help. She never knew the individuals working on her property before that day. Yong Kang said she wondered why she had to pay these other men. According to Yong Kang, when she asked Claimant why she had to pay these people, Claimant whispered to her, "Just pay them, they use drugs, just pay them $10 an hour." Yong Kang testified Claimant was supposed to put siding on the massage parlor too, but he left the premises before the siding job was completed. According to Yong Kang, Matt Maurer was there working all the time by himself. Yong Kang said she had "parking insurance" on the shiny green truck, but not liability. Fearing there was no insurance on the shiny green truck, and fearing she might be responsible if Claimant or his crew got into a wreck with it, Yong Kang eventually took the keys away and instead gave Claimant $500 for the work he had done on the premises, in lieu of the truck. Yong Kang testified she did not know Claimant was hurt because he never told her. According to Yong Kang, she first heard about Claimant's injury when "Wayne" from the State of Alaska, Special Investigations Unit, contacted her. Yong Kang testified she never hired Claimant as an "employee" and never hired him as an "independent contractor" either. In short, Yong Kang implied Claimant was essentially a volunteer and she gave him the shiny green pickup truck, and later replaced it with $500 cash, as a gift for the services he was doing on the massage parlor. Only when Claimant did not insure the pickup truck, Yong Kang took the truck back and gave him $500 in lieu of the truck, and executed the receipt. (Defendant Kang Hearing Exhibit 2, August 27, 2015; Yong Kang; inferences drawn from the above).

39) At hearing, Yong Kang produced a photograph showing the building housing the massage parlor and her residence, both with a new, red metal roof. She drew a vertical line on the right edge of the massage parlor's sign and explained everything to the left of the line, fully one-third of the building, was used for the massage parlor, while everything to the right of the line was used as her and her partner's residences. (Defendant Kang Hearing Exhibit 1, August 27, 2015).

40) At hearing, Thomas Hernandez initially testified he began working on Lee's massage parlor on May 9, 2015, but later clarified he began on May 19, 2015. He never saw Claimant there. Hernandez leveled the building, though he acknowledged it looked like someone had been under the building attempting to level it previously. While under the massage parlor, Hernandez saw no metal plate, no tube steel and no jacks. Hernandez borrowed jacks from his brother to raise the building. Hernandez obtained the necessary equipment and worked there for about two weeks. When Hernandez arrived on the scene, the roof was not completed and Hernandez needed to secure some screws. (Hernandez).

41) In his closing argument, Claimant contended if Yong Kang had worked for him and had gotten injured on his property, he would do whatever it took to "do the right thing." Claimant analogized his situation to an automobile accident. He said if a person backed into someone else's car, the person doing the damage would be financially responsible to repair the other person's car. In summary, Claimant contended Lee's should pay for his medical expenses out of "good business ethics" as the injury ruined his "other job." In Claimant's view, "good human nature" compels this result. (Claimant's hearing arguments).

42) In its closing argument, Lee's contended the facts surrounding Claimant's alleged injury were questionable. It noted Claimant said he injured his wrist before he signed the May 17, 2015 receipt and said the injury occurred about four days before on May 13, 2015. Yet Claimant now contends he hurt his wrist on May 19, 2015, which is an inconsistent position. Lee's raised a notice defense and contended Claimant never timely reported the alleged work injury to Yong or Benjamin Kang. Lee's contended Yong Kang did not own the building on which Claimant contends he got injured, and occupies part of it as a residence and uses a portion as a massage parlor. Lee's contended the repairs Claimant was performing at the massage parlor were not done in conjunction with Lee's business and were "consumptive." It contended Lee's was a construction consumer not a producer. Alternately, even if Claimant was found to have entered into a hiring agreement with Lee's, he was at best an independent contractor under the relative

nature of the work test. Lee's contended it exerted no control over Claimant's work and no supervision. Lee's contended the things that injured Claimant are the things Claimant provided or manufactured. Therefore Lee's is not liable. (Lee's hearing arguments).

43) Volunteers expect nothing and get nothing for their services. (Experience, judgment, observations and inferences drawn from the above).

44) Claimant is a "poor historian," meaning he confuses dates, but is otherwise credible. (*Id.*).

45) Tearing off a shingle roof, installing a new metal roof and leveling a building this size requires moderate skill and experience. (*Id.*).

46) Both primary parties agreed they had a fair opportunity to be heard at hearing. (Parties' hearing statements).

PRINCIPLES OF LAW

The board may base its decision not only on 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. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

> **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.

An employer-employee relationship can only be created by a contract, which may be express or implied. *Selid Construction Co. v. Guarentee 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 *Alaska Pulp v. United Paperworkers' International Union*, 791 P.2d 1008 (Alaska1990), the Alaska Supreme Court held:

> . . . APC argues . . . the Board erred by not applying the 'relative nature of the work' test to determine . . . employee status. We adopted this test to distinguish between employees and independent contractors for the purpose of determining whether an individual is an 'employee,' and thus eligible for workers' compensation benefits. . . . (Citation omitted). However, both relationships presuppose a contractual undertaking. Therefore, in the absence of a contract for hire, the Board was not required to make this distinction. (*Id*. at 1012).

In *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1989), a pilot was injured in an automobile accident while allegedly employed by a hunting lodge. He filed a workers' compensation claim and the board denied coverage. On appeal, 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). The parties' words and actions should be given such meaning "as reasonable persons would give them under all the facts and circumstances present at the time in question." (*Id*.).

The Alaska Supreme Court said in *Anchorage Roofing Co. v. Gonzales*, 507 P.2d 501, 503 (Alaska 1973), "If an affirmative defense to the claim is asserted by the employer, then he has the burden of proof as to such defense."

> **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. . . .

Gaede v. Saunders, 53 P.3d 1126 (Alaska 2002) addressed a situation where homeowners hired people to build an addition on their home for purely residential purposes. One worker fell from a ladder and was injured. The board denied the worker's claim finding he was not an "employee" as defined in the Act. The Alaska Supreme Court affirmed noting the Act's "employer" definition requires an injured person be working "in connection with a business or industry." The court said the Act excluded "private, common law employees who are employed other than 'in connection with a business or industry.'" (*Id*. at 1127).

> **AS 23.30.100. Notice of injury or death**. (a) Notice of an injury . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury . . . 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 . . . 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. . . .
>
> (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. . . .
>
> (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.

> **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;
>
> (2) sufficient notice of the claim has been given; . . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). An injured employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption's application involves a three-step analysis. First, an employee must adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987).

As for the second step the employer may rebut the presumption by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 09-0186 (March 25, 2011). The Alaska Supreme Court has held "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Miller v. ITT Arctic Services.*, 577 P.2d 1044 (Alaska 1978).

If the board finds the employer's evidence is sufficient, in the third step the presumption of compensability drops out, the employee must prove his case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom* at 8. This means the employee 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). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Id.* The presumption does not apply if there is no factual dispute. *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, including medical testimony and reports, 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 23.30.395. 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 of 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. 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 Claimant Lee's "employee" at the time of his alleged injury?

The first step in this case in determining whether or not Claimant has a compensable claim against Lee's is to address Lee's implied affirmative defense that Claimant was a volunteer or independent contractor. AS 23.30.010(a); *Wisdom*.

A) Claimant was not a "volunteer."

Lee's main argument on the compensability issue can be summarized as follows: Claimant was a volunteer, and Lee's gave him a gratuity for his services. Therefore, in Lee's view, the Act does not cover Claimant's injury as it does not cover volunteers. *Wisdom*. This is an implied, affirmative

defense for which Lee's bears the burden of proof. *Gonzalez*. This case is distinguishable from a "volunteer" situation. First, volunteers do not typically get receipts for services rendered. Nor do they ordinarily get paid in kind or in cash. Volunteers expect nothing in return for their services. *Rogers & Babler*. Claimant expected to get, and got, a shiny green pickup truck from Yong Kang in exchange for his services. Yong Kang concededly gave Claimant the pickup truck and later gave him $500 cash in lieu of the truck purportedly fearing liability for Claimant's failure to obtain insurance on the vehicle. The May 17, 2015 receipt expressly states Lee's paid money to Claimant in exchange for Claimant's services, including his work under the building, and work on the roof at the massage parlor. Therefore, Yong Kang's testimony and arguments implying Claimant was a volunteer and she simply gave him a gratuity because they were such good friends is not credible. AS 23.30.122; *Smith*. Lee's failed to meet its burden of proof on this affirmative defense. Claimant was not a volunteer at the time he was injured.

Employer-employee relationships can only be created by a contract, which may be express or implied. *Selid.* The next step in deciding whether or not Lee's was an "employer," and whether or not Claimant was its "employee," is to determine if there was a "contract of hire" between Lee's and Claimant. AS 23.30.020; AS 23.30.045; AS 23.30.395(19), (20); *Alaska Pulp*.

B) There was a contract of hire between Claimant and Lee's.

A contract of hire 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. *Childs*. Some elements needed to find the existence of a contract between Claimant and Lee's are not disputed. To these elements, the statutory presumption need not be applied. *Rockney*. Who initially raised the project is in dispute -- Claimant says it was Yong Kang; Yong Kang says it was Claimant. However, who initially brought the project up is immaterial. It is undisputed Claimant offered to replace the roof on Lee's massage parlor and subsequently offered to also level the building. It is undisputed Yong Kang unequivocally accepted the offer. Thus, there was an offer by Claimant and an unequivocal acceptance by Lee's. *Childs*.

Other elements considered in determining whether or not a contract existed between the primary parties are disputed. On these elements, the statutory presumption of compensability must be

applied. AS 23.30.120; *Meek*; *Sokolowski*. On the "consideration" element, Claimant raised the presumption through his testimony that Yong Kang offered to pay him a shiny green pickup truck for his services. *Cheeks*. Lee's rebutted the presumption through Yong Kang's testimony that Claimant performed the services as her friend. *Runstrom*. Claimant must prove these remaining contractual formation elements by ponderous of the evidence. *Saxton*. It is undisputed Yong Kang gave Claimant the pickup truck and later gave him $500 in lieu of the truck. The fact Yong Kang later unilaterally altered the consideration is immaterial. The parties' receipt shows there was consideration paid for Claimant's services to Lee's. *Childs*.

The parties clearly intended to be bound. Experience shows Lee's would not have contracted with Claimant to tear its roof off it did not intend for him to complete the job. Similarly, Claimant would not have spent two weeks removing and reinstalling the roof and leveling the building without expecting the pickup truck. *Rogers & Babler*. The parties exhibited their intent to be bound by their actions. Claimant re- roofed and began leveling the building until he had a disagreement with Yong Kang over the pickup truck. Lee's gave Claimant the pickup truck and later unilaterally exchanged it for cash. These facts demonstrate Claimant and Lee's had an express, oral contract of hire for Claimant to remove and reinstall the roof and level the building. Lee's would, and did, pay him for his services. The parties' handwritten receipt memorialized the parties' oral agreement, as unilaterally modified by Yong Kang after the fact. *Saxton*.

The fact there was an express, oral contract of hire between Claimant and Lee's does not necessarily mean Claimant was Lee's "employee," or it was his "employer." Claimant may have been an independent contractor performing the same services for Lee's. *Rogers & Babler*. The next task is to determine whether or not Claimant was Lee's "employee." AS 23.30.395(19); 8 AAC 45.890. Again, Lee's bears the burden in proving its affirmative defense that Claimant was not its employee, but was instead an independent contractor. *Gonzalez*.

C) Claimant was an "employee" and not an independent contractor.

To answer this question, the "relative nature the work test" will be applied. 8 AAC 45.890. The relative nature of the work test is multifaceted. The first two elements in the test are "the most important factors," and at least one of these two factors must be resolved in favor of "employee"

status for this decision to find Claimant was Lee's "employee." 8 AAC 45.890. Subsection (1) is the 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?

Is undisputed Claimant had a full-time job as a small engine mechanic working for Rod's Saw Shop at the time of his alleged injury under the massage parlor. It is also undisputed Claimant did not have his own business. Claimant testified he obtained some workers to assist in the roofing project, while Ludwig said Claimant's son Andrew got him the job with Lee's. Ludwig spoke with Yong Kang, who offered to pay him $10 per hour to assist in the roofing. He has nothing apparent to gain through false testimony. Ludwig is credible. AS 23.30.122; *Smith*. The credible evidence shows while Claimant may have identified additional workers to assist in performing the work, Yong Kang actually hired the workers and paid them directly. Yong Kang's testimony that she was "surprised" to see several workers appear on the job on Monday morning, and wondered why she had to pay them $10 per hour, is not credible. It is unlikely an experienced businesswoman such as Yong Kang would have voluntarily paid these workers if she thought she had not hired them. AS 23.30.122; *Smith*. There is no evidence Claimant hired or terminated anybody who assisted in performing the work on the massage parlor or had his own construction or remodeling business. By contrast, Claimant credibly testified Yong Kang sent one or more workers home because she did not like them. AS 23.30.122; *Smith*. This implies Yong Kang had power to hire and fire workers. But, there is more to this first relative nature of the work test element that must be considered:

A) Did Lee's have the right to exercise control over the manner and means to accomplish the desired result?

Lee's "desired results" were to get its massage parlor re-roofed and to get the building leveled. The parties agreed Yong Kang did not have the right to exercise control over the manner and means by which Claimant accomplished these results. Yong Kang arranged for the roofing materials to be delivered. She noted while on the roof that it was uneven and suggested the building needed to be leveled to correct this problem. But there is no evidence she exercised control over how the workers removed or reinstalled the roof or leveled the building. In fact, Claimant conceded he never would have accepted suggestions from Yong Kang about how to

perform his duties, *i.e.*, the manner and means, unless they seemed "logical." This subpart of the first element is decided against Claimant being Lee's "employee." 8 AAC 45.890(1)(A).

B) Did Lee's and Claimant have the right to have the right to terminate the relationship at will, without cause?

Claimant testified Yong Kang sent two workers home because she did not like them. Yong Kang and Claimant parted ways after Yong Kang unilaterally changed the consideration for Claimant's services from the shiny green pickup truck to $500 cash and took the truck back. This demonstrates that not only did Lee's and Claimant have the right to terminate the relationship at will, without cause, they both did so without apparent legal repercussions. This creates a "strong inference of employee status." 8 AAC 45.890(1)(B).

C) Did Lee's have the right to extensive supervision of Claimant's work?

Claimant credibly testified that Yong Kang climbed up on the roof and supervised the work. He gave her numerous suggestions, some of which she rejected. Claimant credibly testified Yong Kang is the one who observed the sagging roof and suggested Claimant level the building to cure the problem. AS 23.30.122; *Smith*. Yong Kang sent at least two workers home because she did not like them. Yong Kang told Claimant she could have hired a professional when the work was not moving along fast enough. These findings show Yong Kang had the right to extensively supervise, and in fact extensively supervised Claimant's work. This creates a "strong inference of employee status." 8 AAC 45.890(1)(C).

D) Did Lee's 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 amounted to typical hand tools including a roofing shovel, pry bars, staple guns, bottle jacks and a screw gun. Claimant also fabricated some metal pieces to assist in leveling the trailer and used a level. Claimant purchased some steel from K&K and obtained the rest gratis from his employer Rod's Saw Shop. While no specific evidence was adduced concerning what these cost, experience shows these tools and instruments are not typically of "substantial value," relatively speaking. *Rogers & Babler*. Therefore, as these tools and instruments are not significant, it is immaterial who provided them as no inference is created regarding employment status. 8 AAC 45.890(1)(D).

E) Did Lee's pay for Claimant's work on an hourly or piece rate wage rather than by the job?

The evidence addressing this element is undisputed but mixed. It is undisputed Yong Kang initially paid Claimant for his services with the shiny green pickup truck. She later unilaterally changed the consideration from the pickup truck to $500 cash. There is no evidence she paid Claimant on an hourly or piece rate wage basis. Rather, she paid Claimant by the job. By contrast, it is also undisputed Yong Kang paid Ludwig $10 per hour. But as to Claimant, the undisputed evidence shows he was paid "by the job," creating an inference he was an independent contractor. 8 AAC 45.890(1)(E).

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

As already discussed, the parties entered into an express, oral hiring contract. Claimant thought he was Lee's "employee," while Lee's thought he was a volunteer. As the parties do not agree on the nature of the contract they believed they were creating, no deference can be given to their respective positions. The contract must be construed given the circumstances under which was made and the parties' conduct while the job was being performed. The evidence shows Claimant had a full-time job as a small engine mechanic. He did not have a construction business and did not work as a roofer or home remodeler. There is no evidence he had a business license or held himself out to the community in general as a contractor. Rather, the evidence shows Claimant and Yong Kang were close friends. Yong Kang hired Claimant on many previous occasions to work on her business facilities. Claimant credibly testified Yong Kang provided most of the tools necessary to perform the job. She told Claimant what to do though not how to do it. Yong Kang sent Claimant's coworkers home when she did not like them. The parties terminated their relationship at will when a dispute arose over the pickup truck. These factors all point toward the parties behaving as though Yong Kang was Claimant's "employer," and he was her "employee." 8 AAC 45.890(1)(F). On balance, substantial evidence resolves the first element in the relative nature the work test in Claimant's favor. *Miller*. Element (2) is the second of the two "most important" factors.

(2) Were Claimant's Services a Regular Part of Lee's Business or Service?

It is undisputed Lee's was not a construction company or home remodeling establishment. Claimant's services re-roofing the building and leveling it were clearly not a regular part of Lee's business or services. All that can be said on this element is that Lee's massage business benefited from the roof repair and the floor leveling efforts as much as the residence benefited. *Rogers & Babler*. Thus, on balance this element is resolved in Lee's 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). As stated previously, Claimant was to have been paid a shiny green pickup truck for his services. Yong Kang unilaterally changed this consideration to $500 cash. Either way, working on a roof from which a person could fall and jacking up a building, which could fall on and injure the laborer, is dangerous work. Even Claimant's relatively innocuous injury may require expensive surgical correction. Claimant would not have been expected to carry his own accident burden given relatively minimal compensation for relatively dangerous work. *Rogers & Babler*. This element resolved in Claimant's favor creates a "strong inference of employee status." 8 AAC 45.890(3).

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

Experience shows tearing off a shingle roof, installing a new metal roof and leveling a building this size requires moderate 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?

The evidence shows Lee's hired Claimant to install a new roof on the massage parlor and added the building leveling project during the re-roofing. Yong Kang testified Claimant was supposed to replace siding on the massage parlor but left before that project began. Though Claimant had worked for Lee's on many prior occasions, their employment agreement in this instance looked more like hiring for the completion of a particular job, the roof and the leveling, 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?

All evidence shows Lee's hired Claimant for various jobs in the past on an intermittent, rather than a continuous basis. Given Claimant has known Yong Kang since around 2004, and has performed approximately 15 projects for her over those years, Claimant intermittently worked for Lee's slightly more than an average of one time per year since they have known each other. His intermittent work creates a "weak inference of no employee status." 8 AAC 45.890(6).

Lee's relies on *Gaede* to support its contention Lee's was a construction "consumer" not a construction "producer" and was therefore not subject to the Act's insurance requirements. *Gaede* is distinguishable from this case. In *Gaede*, the homeowner utilized workers to build a home addition solely for residential purposes. Yong Kang testified fully one-third of the building upon which the new roof was being placed, and under which the foundation was being leveled, was exclusively used for her massage parlor business. Thus, Claimant's work was in part being performed in connection with Lee's "business or service" because massage parlors need roofs that do not leak as much as residences need them.

In summary, one of the two "most important" factors, element (1), is resolved in Claimant's favor. Element (3), which is "more important" than elements (4) through (6) is also resolved in Claimant's favor. Elements (2), (4), (5) and (6), the latter of which creates only a "weak inference" of no employee status, are resolved in Lee's favor. Though it is a relatively close call, when greater weight is given to element (3) as required by the regulation, on balance the preponderance of evidence demonstrates Claimant was Lee's "employee," and Lee's was his "employer" at the time of his alleged injury. AS 23.30.395(19), (20). This legal conclusion does not necessarily mean Claimant has a compensable claim against Lee's.

2) Is Claimant's claim barred by failure to give written notice?

Lee's contends Claimant's claim should be barred because he failed to give written notice of his alleged injury within 30 days as required by AS 23.30.100. Claimant is a relatively poor historian

and mixes up his dates. Nevertheless, it is undisputed Claimant never met Benjamin Kang until May 9, 2015. It is also undisputed Claimant started the roofing project the following Monday, which would have been May 11, 2015. Though Claimant initially listed May 19, 2015 as the injury date, the parties agreed he left the project on May 17, 2015, the date the parties signed the receipt. The injury, if it occurred at all, must have occurred before that date. *Rogers & Babler*. Claimant testified he injured his wrist three or four days before he signed the receipt. Therefore, the injury could have only occurred between May 13, 2015 and May 17, 2015.

Claimant had to give written notice to Lee's of his alleged work injury no later than June 13, 2015, to be within 30 days and thus timely. AS 23.30.100. It is undisputed Claimant filed an injury report on June 2, 2015, and the division served his workers' compensation claim on all parties on June 4, 2015. The record does not disclose whether Claimant served his injury report on Lee's. Nevertheless, the record shows the division served his claim on Lee's, and the claim gives sufficient, if not superior, written notice of the alleged work injury. Therefore, Claimant gave timely written notice, and his claim will not be barred under AS 23.30.100. The fact his claim will not be barred for untimely notice does not mean his injury arose out of and in the course of his Lee's employment. Lee's implied Claimant's wrist was broken before he began Lee's project.

3) Did Claimant's injury arise out of and in the course of his employment with Lee's?

Claimant says he broke his right wrist while working under the massage parlor trying to level it. Lee's implies Claimant's wrist was already broken before he began the project. Whether or not the injury occurred as Claimant stated is a factual dispute to which the presumption of compensability must be applied. *Meek*. Employee raises the presumption through his testimony that he was injured when a piece of metal kicked out from the jack he was using to raise the massage parlor and hit his wrist, breaking it. *Cheeks*. Lee's rebuts the presumption through Benjamin and Yong Kang's testimony that Claimant refused to shake Benjamin Kang's hand on May 9, 2015, before the injury could have occurred, stating his hand was already broken. *Runstrom*. Claimant must prove by a preponderance of the evidence that he broke his wrist while working for Lee's as he stated. *Saxton*.

The only evidence directly addressing this issue is Claimant's testimony and his limited medical records in the agency file. Claimant's two statements, concerning his hand and wrist, are not

inconsistent or irreconcilable. Claimant implicitly admitted he told Benjamin Kang he would not shake his hand because Claimant's "hand" was broken. At hearing, Claimant credibly explained he had a "boxer's fracture" in his hand, incurred many years earlier. He credibly stated this was in an area different from his wrist. Claimant credibly explained how, while he was jacking up the massage parlor, a piece of metal kicked out from the jack and hit his wrist, breaking it. Claimant's medical records from the emergency room demonstrate a wrist fracture in his right wrist and his other medical records report the consistent, credible history Claimant provided his physicians about how he broke his wrist while jacking up the massage parlor. AS 23.30.122; *Smith*.

This decision must determine whether the event happened as Claimant stated and if the event was the substantial cause of Claimant's need for medical care and disability. AS 23.30.010. This is not a medically complex injury. *Rogers & Babler*. The only known contributing cause to Claimant's disability and need for medical treatment for a broken right wrist is the work injury he described at Lee's. As Claimant was the only witness to the injury, there are no contrary medical records or other evidence to refute his testimony and he is credible, Claimant has met his burden of proof and persuasion. AS 23.30.122; *Smith*; *Saxton*. The unrefuted evidence shows Claimant broke his right wrist while jacking up the massage parlor as he stated. The injury was the substantial cause of his disability and need for medical treatment and his injury thus arose out of and in the course of his employment with Lee's. AS 23.30.010. Claimant's injury with Lee's will be found compensable.

Lee's only controverted Claimant's right to benefits and his claim based upon the above-discussed employer-employee, causation and notice grounds. Lee's did not controvert Claimant's request for TTD or medical benefits because it did not think he was disabled or needed no medical care, or on grounds the recommended medical care was unreasonable or unnecessary. Accordingly, as this decision finds Claimant was Lee's "employee" and it was his "employer," his claim is not barred for failure to give timely written notice and his fractured right wrist arose out of and in the course of his employment with Lee's, Lee's will be directed to pay Claimant benefits in accordance with the Act. As the parties at the prehearing conference bifurcated the preliminary employment status, causation and notice issues from the merits of Claimant's case, this decision will not rule on the claim's merits. Unless Lee's has a valid basis to further controvert Claimant's right to TTD or medical care, it must promptly pay any undisputed benefits in accordance with the law. If Lee's

fails to promptly pay any and all benefits to which Claimant is currently entitled under the Act, it may be subject to an additional order awarding interest and penalties. Jurisdiction is reserved to resolve any disputes.

CONCLUSIONS OF LAW

1) Claimant was Lee's "employee" at the time of his alleged injury.
2) Claimant's claim is not barred by failure to give timely written notice.
3) Claimant's injury arose out of and in the course of his employment with Lee's.

ORDER

1) Claimant was Lee's "employee" and it was his "employer" at the time he fractured his right wrist in May 2015.
2) Claimant's claim is not barred by failure to give timely written notice under AS 23.30.100.
3) Claimant's right wrist injury arose out of and in the course of his employment with Lee's in May 2015.
4) Yong Kang d/b/a Lee's Massage is ordered to pay directly to Claimant and his medical providers any and all benefits to which he is currently entitled under the Act unless and until Lee's controverts his right to benefits for reasons other than those addressed in this decision and order.
5) The parties are directed to attend a prehearing conference at which the designee will instruct Claimant what, if any, additional evidence he needs to file and serve to obtain benefits from Lee's.
6) Jurisdiction over this case is reserved to resolve any disputes over specific benefits.

Dated in Fairbanks, Alaska on September 2, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/____
William Soule, Designated Chair

/s/____
Robert C. Weel, Member

/s/____
Rick Traini, 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 Alexander Mullins, claimant v. Lee's Massage, and the Alaska Workers' Compensation Benefit Guaranty Fund, defendants; Case No. 201508689; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 2, 2015.

/s/____
Jennifer Desrosiers, Office Assistant