ALASKA WORKERS' COMPENSATION BOARD

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

DUANE GERLACH, Claimant, v. LEONARD'S LANDING LODGE, INC., and LIBERTY MUTUAL INSURANCE CO., Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201515667 AWCB Decision No. 16-0003 Filed with AWCB Anchorage, Alaska on January 5, 2016

Preliminary issues bifurcated from Duane Gerlach's (Claimant) September 22, 2015, October 12, 2015 and October 13, 2015 claims were heard on December 23, 2015, in Anchorage, Alaska, a date selected on November 25, 2015. Attorney Keenan Powell appeared and represented Claimant who appeared and testified. Attorney Stacy Stone appeared and represented Leonard's Landing Lodge (Leonard's) and American Fire & Casualty Co. (Defendants). Annette and Pete Harter testified by telephone for Defendants. At hearing, the parties agreed if Claimant prevailed, this decision would be interlocutory as it did not resolve all pending issues in the case; if Defendants prevailed, it would be a final decision. The panel noted Defendants' objection to a two-member panel, which constitutes a quorum under AS 23.30.005(f), because there was no "industry" panel member. The record closed at the hearing's conclusion on December 23, 2015.

ISSUES

Claimant contends Leonard's and he entered into an oral contract of hire. Claimant contends he was Leonard's "employee." Claimant contends he was working as Leonard's "employee" when

he injured his back and finger at work. Therefore, Claimant contends his injuries are work-related and compensable under the Act.

Leonard's agrees the parties entered into an oral contract for hire but contends it was never Claimant's "employer." Leonard's contends it hired Claimant as an independent contractor and since there was never an "employer-employee" relationship between it and Claimant, his injuries, if any, did not arise out of or in the course of employment and are not compensable.

1) Was there an employer-employee relationship between Leonard's and Claimant?

Claimant contends if he prevails on this preliminary issue he is entitled to interim attorney's fees and costs. He seeks an order awarding actual attorney's fees and costs.

Defendants contend Claimant is not entitled to an interim attorney's fee and cost award because even if he prevails, this decision will award no actual benefits.

2) Is Claimant entitled to interim attorney's fees and costs?

FINDINGS OF FACT

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

1) For many years, Claimant had business and contractor licenses and worked as an independent contractor owning several businesses, including Denali Drywall and Solid Rock Interiors. Claimant has not had a business or contractor's license since 2013. He let them expire because he was "done with it," wanted to "get a job" he enjoyed as an "employee" and was tired of the hassles associated with owning his own business. Claimant had considerable experience in, and felt confident performing, construction including framing, sheet rocking, painting, electrical, plumbing and roofing. Claimant had also worked off and on over the years as an "employee" for various contractors. Because he likes to hunt and fish, Claimant was looking for a position as an employee working for an employer in a location where he could enjoy his outdoor interests while also earning a living. Leonard's, located in Yakutat, Alaska, was his "dream job." (Claimant).

2) In March 2014, Claimant first met Leonard's General Manager Annette Harter at the Sportsman's Show in Anchorage. Claimant noticed a sign at Leonard's booth stating Positions

Available 2014" listing "Fish Cutters" and "Maintenance Person." Claimant inquired about being a maintenance man and Annette told him they had "someone else in mind" but to "keep in touch." Claimant did not work for Leonard's in 2014. (*Id*.).

3) In March 2015, Claimant met Annette again at Leonard's booth at the Sportsman's Show. Leonard's had another "Positions Available" sign posted and Annette was "glad to see" Claimant because her "other person" had fallen through. Annette asked Claimant, "how soon can you get there," referring to Leonard's in Yakutat. Claimant and Annette discussed what Claimant would be doing at Leonard's. Annette said she had "several little projects" she needed to get done including two kitchens and a bathroom. He was interested in knowing whether she had enough work to keep him busy at Leonard's. According to Claimant, Annette told him his position would be "Maintenance Man," as Annette and her husband were retiring in a couple of years and needed someone to take over this position. Annette agreed to pay Claimant $25 per hour for his services. During this discussion with Annette, Claimant believed he was going to Leonard's in Yakutat to "try out" for the maintenance position on Leonard's staff as an "employee." In Claimant's view, the difference between an "employee" and an "independent contractor" is as follows: A "contractor" has a job before him and does whatever it takes to get the job done, including hiring additional employees, providing tools and doing whatever is necessary to finish the job to everyone's satisfaction, and then moves on to another job. An "employee" does whatever the boss says, makes the boss happy and tries to keep his job. (Claimant).

4) Leonard's never denied it had "Positions Available" signs posted, soliciting Fish Cutters and Maintenance Persons at the 2014 and 2015 Sportsman's Shows. (Record).

5) Claimant said he and Annette initially agreed at the Sportsman's Show he would go to Leonard's and try out for the maintenance man position for a couple of weeks, and then return to Anchorage and complete a project for a friend. "If all of us were happy" after his initial stint with Leonard's, Claimant wanted to return to Yakutat and join Leonard's operation, with which he was "very impressed." However, Claimant told Annette he would not leave his Anchorage friend "hanging" and wanted to fulfill his commitment to that person, but would return to Leonard's "as soon as possible." (*Id*.).

6) Claimant and Leonard's entered into an express, oral contract of hire at the 2015 Sportsman's Show. (Experience, judgment and inferences drawn from the above).

7) On or about April 27, 2015, Claimant arrived at Leonard's. During his first stint with Leonard's, Claimant remodeled two kitchens and two bathrooms in a duplex on the waterfront. He also did minor drywall patchwork in "Unit 10" and "a couple other little things" but he conceded the kitchens and bathrooms were his primary responsibility because Leonard's had clients coming in and was under a deadline. (Gerlach time sheets; Claimant).

8) On or about May 14, 2015, Claimant left Leonard's and returned to Anchorage to finish his friend's project. While in Anchorage, Claimant had a teleconference with Annette, who had spoken to her husband, Leonard's "Maintenance Manager" Pete Harter. Annette had initially only wanted Claimant to return to Yakutat for a few weeks. However, Pete was so pleased with the kitchens Claimant had remodeled that Annette and Pete decided they wanted Claimant at Leonard's through the season's end in October. Contrary to his tasks during his first stint, Claimant's duties and projects for his second stint were ill-defined. (Claimant).

9) Claimant's and Leonard's relationship resulting from his teleconference with Annette while Claimant was in Anchorage between stints, manifested consent by Leonard's to Claimant for him to act on Leonard's behalf and subject to its control. Claimant's consent to so act resulted in an implied, oral contract of hire between Claimant and Leonard's. (Experience, judgment and inferences drawn from the above).

10) On or about June 19, 2015, Claimant returned to Leonard's to begin his second stint. (Gerlach time sheets).

11) In Claimant's view, he was not allowed to hire anyone to help him during either stint. He brought his own "personal hand tools" and portable drills but needed "bigger tools" once he got to Yakutat, which Leonard's provided. Claimant used Leonard's table saw nearly every day, as well as its saws, drills and anything in Leonard's shop. Pete told Claimant to "make himself to home" in Leonard's shop and he did. Leonard's provided all materials to complete his work. Claimant performed services during his first stint "to show what I could do" and "get it done" because Leonard's had a deadline. (Claimant).

12) At times, Leonard's provided Claimant with a Leonard's employee to assist him. The helper was a fish processor who did "great work" when he was available to help. (*Id*.).

13) Things changed on Claimant's second stint at Leonard's. Upon his return to Leonard's, the first thing Annette told Claimant to do was install log coat hangers. But Claimant first had to fix an electrical problem, which required him to crawl underneath a building, remove existing

wiring and replace it. Thereafter, Annette "loaded [him] up" with so many other chores Claimant never finished the coat hanger installation job. For example, Claimant: installed a washer and dryer in employee housing; installed a washer and dryer in Annette and Pete's residence; installed a toilet; cleared off a deck on the second floor in employee housing and pulled off carpeting and vinyl; was told to install a screen door, but never got to it because he was too busy doing other assignments; installed a roof over half the front deck to keep rain off the tools he was using; was directed by Pete on occasion to hook up a boat trailer and take it back to the lodge; put a cover over an open sewer so no one would fall in; collected garbage every day when Pete was gone; shuttled vehicles to and from the river; installed shelves in Pete's residence and in employee housing; crawled under a kitchen to install concrete footings; installed beams under floors; cleaned and organized the paint room; helped with refrigeration units in the freezer area; hauled tin out of storage for a building; operated Leonard's forklift to move beams from a Conex; and helped unload a trailer full of food and supplies for customers. Claimant did not perform a "whole lot of customer service," but he and Annette discussed Claimant performing customer service in the future. In general, Claimant tried to be friendly to Leonard's clients and represent Leonard's "in a good way." On his second stint at Leonard's, by agreement, Claimant was again paid $25 per hour. (*Id*.).

14) Claimant kept track of his hours every day on Pete's American Elk Federation calendar kept on site. Claimant completed the timecards attached to Claimant's brief at Exhibit 3 in conjunction with a wage and hour dispute. Leonard's paid Claimant on three occasions: (1) when he finished his first stint; (2) when Claimant and Pete had a disagreement; and (3) when Claimant finished his work for Leonard's. (*Id*.).

15) During Claimant's second stint, Pete wanted him to work at 50 hours per week. Claimant recovered somewhat from an illness and tried to work more hours as Pete had requested. (*Id*.).

16) On August 4, 2015, Claimant alleged he was alone lifting waterlogged boards weighing between 80 and 100 pounds onto a roof on Leonard's building to install them when he injured his back. He had asked Leonard's for someone to help him, but no one was available due to "budget concerns." Claimant said he also hit his left index finger with a finishing nail gun on or about the same day. (Employee Report of Occupational Injury or Illness to Employer, August 17, 2015; Claimant).

17) On August 9, 2015, Pete was "very agitated" and "jumped all over" Claimant because Pete thought the roofing job was taking too long. Pete reminded Claimant he could not afford to provide help to assist with the roofing. Claimant wanted to prime the exterior walls before completing the roof, as rains were coming. Pete vigorously disagreed and "insisted" the roof be completed first. Claimant installed the roof first as Pete had directed. Claimant and Pete also disagreed about roof purlins. Pete wanted the purlins installed 16 to 18 inches apart; Claimant wanted the purlins eight to 10 inches apart. Claimant was concerned he would not be able to see where he could walk safely after he covered the purlins with tarpaper. Claimant eventually installed the purlins as Pete had directed. During their argument about the roof, Claimant told Pete he had injured his back as described above. Following the argument with Pete, Claimant became frustrated with his employment with Leonard's. He says he told Annette he had injured his back and gave her notice he was quitting, but told her he would stay until the building upon which he was working was completed. Claimant was willing to stay because he appreciated the opportunity Leonard's had given him to try out for the maintenance man position. No one at Leonard's offered Claimant an injury report to complete. Claimant had worked through back pain before and thought he had a strained muscle. He wanted to get his work done and leave Leonard's on "good terms." Claimant subsequently learned he has a pinched nerve and may require surgery. (Claimant).

18) On August 12, 2015, Claimant left Leonard's and retuned to Anchorage. (Claimant; Annette Harter).

19) On August 12, 2015, Claimant had medical treatment at the Veterans Administration Clinic (VA) for low- and mid-back pain. He reported pain for "about two weeks" after lifting heavy objects at work as a carpenter. Larry Myles II, Capt., MC, diagnosed a lumbosacral back strain and referred Claimant for physical therapy. (VA clinic report, August 12, 2015).

20) On August 13, 2015, Claimant returned to the VA clinic, and reported:

> [T]hat about 10 days ago he was lifting very heavy 100 lb items over his head at work. He is a carpenter. He felt 8/10 lower back pain afterwards. The pain is shooting from mid to lower midline back. It radiates down both legs. Denies numbness/weakness. Activity makes it worse. (VA clinic report, August 13, 2015).

21) On August 15, 2015, Annette wrote a letter to Claimant and attached his final check for work he did on Leonard's "storage locker building." The letter states:

> Dear Duane,
>
> Enclosed please find your final check for the work on our storage locker building.
>
> Deductions were taken from the check because of your use of maintenance supplies we keep on hand and additional items you purchased at the hardware store in your efforts to make the cabin '*livable*' to your standards *on your own time*. You were told we did not want to put any money into it and yet high priced 10-2 wire was used when you wired the arctic [sic] entry. Wiring the arctic [sic] entry was not necessary in order to inhabit the cabin and if you felt you had to do it, you should have chosen the less expensive supplies. Additionally, you charged plumbing supplies at the hardware store when we had the same things sitting on a shelf in the shop.
>
> We gave you the best room in employee housing with a great view! You were promised the new separate apartment as soon as our kitchen was completed. But you chose to spend our resources and your time to fix up the little cabin. Between that and your illness, my kitchen was delayed by at least two weeks. I was clear when I brought you here to work that you would be sharing employee housing. We provided you free housing and decent accommodations and yet it seemed that nothing was ever enough.
>
> You also moved in two refrigerators, a stove, a bed, chair, tv [sic], freezer, all kinds of kitchen utensils, and many other items into the cabin which we now have to pay staff to move out in order to have the cabin ready for removal from the property. You left behind unwanted food in the refrigerator and other garbage, plus loads of dirty dishes!! All this after I paid to have Direct TV wired in for you.
>
> Duane, you can do quality work, but I cannot recommend you for a position as lodging maintenance personnel. In order to work at a lodge you need to be able to work well with others, many times younger people. You need to be able to work on your own without an assistant as lodges often do not have the budget for additional staff. You need to be able to multi task and deal with interruptions and give customer service. Staffing at a lodge also does not usually allow for back up employees as you observed with Pete and I working 7 days a week and lodges are usually remote without access to any type of health care facility.
>
> I also do not appreciate being lied to. The reason that I followed up with Alaska Airlines after you came in on Wednesday morning to 'give me the bad news' is that Alaska Airlines does not work like that. When you add a kennel they either say that there is room or there is not. They do not 'call you later' with different

> information! The agent confirmed that you and the kennel had been confirmed and that you then called and changed the reservation. Makes me think that there were other lies about things causing delays and changes to commitments you made in coming back here. Additionally, your tendency when you did not get the answer you wanted from Pete or I to go to the other one with the same question was childish and unprofessional.
>
> When you first came here earlier in the season, you did some excellent work in the duplex cabins. Then I was frustrated by your delays in returning, but was looking forward to having you work with us and perhaps be a long term solution for lodge maintenance staff. Then it seemed like you came back a different person. I had been clear about not having the budget to have Manuel work with you and yet you did not seem able to function without him. You were constantly expecting us to accommodate your whims in regard to your FREE housing. You abused the use of company vehicles with excessive trips into town when I had explained from the beginning that they would not be available for personal use.
>
> Thank you for your work.
> [Signature]
>
> Annette Harter, General Manager/BOD (Annette Harter letter, undated, emphasis in original).

22) On August 17, 2015, Claimant returned to the VA clinic concerned about continuing back pain "after lifting at work about 14 days ago -- works as a carpenter." (VA clinic note, August 17, 2015).

23) On August 17, 2015, Claimant also completed a timely injury report. (Employee Report of Occupational Injury or Illness to Employer, August 17, 2015).

24) On August 23, 2015, Claimant went to Alaska Regional Hospital Emergency Room and had thoracic, lumbar and left-hand x-rays. The history given to the radiologist was "trauma." Thoracic and lumbar x-rays showed mostly degenerative changes. The left-hand x-ray showed a small, volar avulsion fracture at the base of the middle phalanx of the left index finger. Claimant gave the following history:

> He had a prior back injury several years ago were [sic] he sustained a fall with some lumbar compression fractures and pelvic fractures. He states he was working remotely approximately 2 weeks ago when he feels like he restrained his low back and [sic] has been causing persistent pain both in the middle and left lower back. He also states that [sic] approximately that time and [sic] he accidentally shot his left index finger with a nail gun. He states he pulled the nail out immediately but now recently has noticed some increasing redness at the tip

> of the finger and is concerned that it is infected. . . . (VA clinic records, August 12, 2015).

On examination, Claimant had a puncture wound on the distal, radial aspect just lateral to the nail bed on his left index finger. It was mildly red and swollen. Claimant was given antibiotics for an infected wound and was diagnosed with back pain for which he was also given prescription pain killers. (Alaska Regional Hospital report, August 23, 2015).

25) On August 27, 2015, Annette Harter received Claimant's injury report. (Harter letter, September 2, 2015).

26) On August 31, 2015, Claimant appeared for a physical therapy evaluation at the VA Clinic. He gave "carpenter" as his trade and reportedly stated:

> Vet had a sudden onset of acute back pain w/lifting about 3 wks ago. He admitted it has improved a little but has been persistent and quite intense. Vet admitted to intermittent L LE shooting pain extending to the knee -- resolving quickly -- perhaps a dozen times since onset. . . . Vet has continued to work. He admitted that the pain is so bad he has been considering filing for disability.

Judith Hoch, PT, recommended physical therapy two to three times a week for two to three weeks. (Hoch report, August 31, 2015).

27) On September 2, 2015, Annette wrote to the division as Leonard's General Manager and enclosed the August 17, 2015 injury report and a separate letter she had written to Claimant. Annette's letter to the division said Claimant was a "contractor," who had represented to her that he had his own insurance. Annette insisted Leonard's never hired Claimant as an "employee." Annette referenced her separate letter, also dated September 2, 2015, which she had written to Claimant, in which she reportedly "lined out the projects contracted for and completed, dates of travel, and contract terms." (Harter letter, September 2, 2015).

28) On September 2, 2015, Annette also wrote to Claimant in response to having received his injury report on August 27, 2015. Among other things, Annette told Claimant:

> You were brought here twice this year to do specific projects as a Contractor, not an employee. Our agreement was that as a Contractor, you would provide your own insurance. . . .
> . . . .
>
> No reported injury was made during the time you were here working on either contract. No indication of needing medical care for anything related to your work

> here was ever reported. I am aware of your visits to the Yakutat clinic for an infection unrelated to your work for Leonard's Landing Lodge. . . . As you had to borrow a Lodge vehicle to get to the clinic, you would have had perfect opportunities to let me know about any injuries. Nor did I observe any type of bandage injury that would have been consistent with a finger injury by a nail gun.
>
> I am not able to assist you with this at this time. (Annette Harter letter, September 2, 2015).

29) On September 24, 2015, Claimant filed a claim requesting temporary total disability (TTD) from August 13, 2015, and ongoing, in the alternative temporary partial disability (TPD) from August 13, 2015, and ongoing, permanent partial impairment (PPI), medical costs, transportation expenses, an unspecified penalty, interest and attorney's fees and costs. Claimant said the injury, listed on the claim's first page as "August 14, 2015," happened while "lifting" and stated he injured his back and had a "pinched nerve." The claim's second page listed "August 4, 2015" as the injury date. Claimant said the reason he filed a claim was, "Employer's failure and refusal to file Report of Injury. AS 23.30.070." (Workers' Compensation Claim, September 22, 2015).

30) On October 1, 2015, Claimant saw providers at Orthopedic Physicians Alaska (OPA) for his alleged work injury with Leonard's. In his "New Spine Patient Intake Form," Claimant said his injury date was "1 month ago," and he "hurt for a long time," but his pain was, "Worse at work." Claimant referenced "lifting in Yakutat," which resulted in low back pain and shooting pains in his left lateral leg and instances when his left leg would "give away." Claimant gave James Glenn, PA-C, the following history:

> . . . He does note that he has had lower back pain on and off through his life, but about one month ago when he was working in Yakutat, he was lifting some wood and had immediate onset of left lower back pain. He does work as kind of a jack of all trades doing sheetrock, carpentry work, construction type work. He did go see his primary care provider at the VA and they sent him to physical therapy. He does note that physical therapy really has not given him any relief at all, other than just maybe an hour or so. . . . He has had several episodes where he has had a loss of urine and he has had a hard time getting to the bathroom and has to rush and has a little bit of leakage of urine. . . .

PA-C Glenn obtained from Claimant a prior history of having fractured one or more lumbar vertebra and his pelvis. PA-C Glenn reviewed Claimant's x-rays and magnetic resonance imaging (MRI) films and diagnosed acute onset left lower back pain with occasional referral symptoms to Claimant's left lower extremity; lumbar spondylosis at L5-S1 with degenerative

discs with L4-5 broad-based disc protrusion and facet hypertrophy, causing, bilateral neural foraminal narrowing; compounding medical issues, including diabetes, irregular heartbeat and cardiovascular disease; and gait imbalance abnormalities with possible cervical myelopathic changes. Claimant requested, and PA-C Glenn gave him, a work release for the following six weeks. PA-C Glenn suggested a cervical MRI scan to rule out significant cervical abnormalities causing his ongoing symptoms, and physical therapy and an epidural steroid injection for Claimant's lumbar spine complaints. PA-C Glenn completed a form stating Claimant was totally disabled for six weeks. (PA-C Glenn report, October 1, 2015).

31) On October 13, 2015, Claimant filed a second claim with the same basic information as the September 22, 2015 claim but with the case number included, and an additional claim for a "nail gun" injury on a "finger," and a compensation rate adjustment. (Workers' Compensation Claim, October 13, 2015).

32) On October 14, 2015, Claimant filed a third claim with the same basic information as the September 22, 2015 claim but with the case number included and a claim for a compensation rate adjustment. The nail gun reference and finger injury do not appear on this claim. (Workers' Compensation Claim, October 12, 2015).

33) On October 15, 2015, Leonard's answered Claimant's September 22, 2015 claim by denying his right to all benefits. As affirmative defenses, Leonard's stated Claimant's injury "did not arise out of or in the course and scope of employment"; he failed to attach the presumption of compensability as there was no evidence his recent treatment was due to an injury "within the course and scope of his employment" with Leonard's; the medical issues involved were "highly complex" requiring medical evidence to support his contention that the need for treatment was work-related to attach the presumption; Claimant was an "independent contractor" and thus not entitled to compensation under the Act; Leonard's mailed the injury report it had received from Claimant to the division on September 2, 2015; there was no nexus between benefits paid to Claimant and work performed by his attorney, so no attorney's fees or costs were due; and Leonard's reserved its right to raise additional defenses. (Answer to Employee's Workers' Compensation Claim, October 15, 2015).

34) On October 23, 2015, Claimant underwent an initial evaluation at Chugach Physical Therapy on PA-C Glenn's referral. Claimant gave the following history:

> Patient is a 60-year-old male with complaints of left low back pain radiating into the left gluteal region -- 11 weeks ago he was working as a carpenter at a fishing lodge in Yakutat. He was unable to get help for the roofing. So he was lifting 80-100# boards overhead (moving awkward positions-roofing, scaffolding). . . . Currently working odd jobs but working tolerance is only 5 hours and pain gets up to 10/10. By the end of the day he is walking bent over and puts pressure left low back to relieve pain. . . .

Kimberlee Hutchins, DPT, suggested physical therapy for Claimant two to three times per week for 16 weeks. (Chugach Physical Therapy Initial Evaluation, October 23, 2015).

35) On November 10, 2015, Claimant reported to PA-C Glenn that his lower back pain was doing better following physical therapy. PA-C Glenn prescribed therapy for six to eight additional weeks. PA-C Glenn also continued Claimant's work restriction and said he was totally disabled for an additional eight weeks. Work injuries can be catastrophic and can cause disability and impairment and can require significant, expensive medical care. (PA-C Glenn report, November 10, 2015; experience).

36) On November 19, 2015, Claimant reported to his therapist that he was more aware of his posture and body mechanics "while at work." (Progress Note, November 19, 2015).

37) On November 25, 2015, the parties attended a prehearing conference, bifurcated the issues and agreed to a preliminary hearing on December 23, 2015. The issues identified for hearing were limited to "Employee/Employer relationship Attorney's fees/costs." (Prehearing Conference Summary, November 25, 2015).

38) Not scheduled for hearing were Claimant's merits claims for TTD, TPD, PPI, medical costs, transportation expenses, penalty and interest. (*Id*.).

39) On December 9, 2015, Leonard's counsel sent by e-mail additional discovery to Claimant's attorney. The e-mail stated, "We just received the attached discovery this morning." Attachments to the e-mail included handwritten timesheet records for Claimant for April, May, June, July and August 2015. Claimant's name appears on each document's heading along with his "HOURLY RATE OF PAY" stated at $25 per hour. The payroll records, enumerated in the upper right-hand corners as "Page 6" and "Page 7," while they contain some addition errors, say Claimant worked 479 total hours for Leonard's in April, May, June, July and August 2015, with 402 hours "ST" (straight time) and 77 hours "OT" (over time). During a period in which Claimant had lesser hours, the words "sick weeks" were also recorded. Also attached to the letter were checks made out to Claimant. An August 15, 2015 check for $617.01 deducted $500

from the total for, "Clean out fee for employee housing." (Stone e-mail, December 9, 2015; attachments; Claimant).

40) At hearing on December 23, 2015, Leonard's referenced a handwritten Post-it note it had filed the previous day. Claimant had no objection to the panel considering this document as evidence. (Notice of Intent to Rely, December 22, 2015; Claimant's hearing statements).

41) At hearing, Claimant testified that on a typical day at Leonard's, Pete supervised his work "every day." Claimant and Pete met together at about seven o'clock each morning and went over what "needed to be done." Pete or Annette either made a list or on the "spur of the moment" interrupted Claimant during the day to perform certain jobs like repairing a broken hand rail. Pete gave him permission to go to the hardware store each day around noon to both obtain materials he needed for the day's work and to obtain his food, as Claimant is a person with diabetes who did his own cooking and prepared certain food. Claimant usually did not charge Leonard's for going to the hardware store. On one occasion, Annette interrupted Claimant's work on a building and sent him to the airport to "load a fish." Claimant would frequently see Pete during the day as he came around to "check on" him. At first, Claimant and Pete got along well, but when Claimant became sick, Pete "didn't want to hear it." In Claimant's view, Pete checked his work to make sure progress was being made, and while Pete had "total confidence" in Claimant's ability, Pete supervised him to make sure the work was being done in an efficient manner the way Pete "wanted it done." Pete introduced Claimant to someone at a restaurant as "my new right-hand man." (Claimant).

42) In Claimant's view, he was "absolutely not" permitted to hire or fire someone to assist with his work at Leonard's. Pete exercised control over the manner and means by which Claimant accomplished his tasks. Claimant said he had the right to quit his job at any time and, in fact did so, as in his view Pete had asked him to do "unsafe things" in regard to the roofing project. Annette and Pete were initially so happy with his work, after his first stint they talked about Claimant working for Leonard's year-round, full-time including working as Leonard's "winter caretaker." In Claimant's opinion, Leonard's had the right to exercise supervision over his work. Leonard's provided tools and facilities for his work. Claimant averred the tools were "expensive." Claimant believed he was being hired by Leonard's as an "employee." He had no insurance and could not afford to pay for his work-injury-related medical bills. Claimant is familiar with workers' compensation insurance as he had it when he was an employer and

contractor. However, when he allowed his business and contractor licenses to lapse, he did not renew his own workers' compensation insurance as he had no employees. (*Id*.).

43) Collecting garbage, loading a fish, hauling a boat, cleaning off a deck, and running the forklift, in Claimant's opinion, did not require any special skill or experience. (*Id*.).

44) Collecting garbage, loading a fish, hauling a boat, cleaning off a deck, and running a forklift require little to no skill or experience. General remodeling, electrical, plumbing and roofing require moderate skill and experience in construction. (Experience; judgment).

45) On cross-examination, Claimant said he kept in contact with Annette by telephone two or three times until the 2015 season. He explained what he meant when he said he was "trying out" for a maintenance man position with Leonard's. "Trying out" meant seeing how Leonard's liked his work; how much work he got done; quality of his work; how they got along together; and whether his work was a "good fit" for all involved. During their conversation at the 2015 Sportsman's Show, Claimant told Annette he had operated his own businesses off and on and was skilled in all aspects of construction, wanted to hunt and fish and wanted to try out for a maintenance man position with Leonard's. Claimant told Annette he was in the middle of a project for a friend and had to complete it, which he thought might take two weeks. Annette was fine with this arrangement. Claimant's friend's project took longer than expected and Claimant had diabetes-related issues, all of which delayed his departure to Leonard's. (*Id*.).

46) Claimant's referenced friend is Mike McGuff. Claimant's relationship with McGuff on the unfinished project was as an "independent contractor." McGuff compensated Claimant for the referenced job at $35 per hour. Claimant is not familiar with "handyman laws" in Alaska. When he worked for McGuff, Claimant expected to bear his own work-related accident burden. Claimant admitted he was concerned about working for McGuff without a contractor's license, and conceded he should have had a valid license while working for McGuff. (*Id*.).

47) Claimant admitted he was not required to punch a time clock and was not paid by-weekly. He completed no hiring paperwork with Leonard's and Leonard's deducted no taxes from his pay. Claimant explained as his first stint was a "tryout," he was not concerned with tax deductions. However, during his second stint, when he had a falling out with Pete, Claimant did not want Leonard's to "mess with" his money, so he did not raise income tax and other deductions as an issue. (*Id*.).

48) Claimant made an important employment status distinction between his first and second stints with Leonard's. In Claimant's view, during his first stint with Leonard's, he was "trying out" for the maintenance man position. Claimant admitted he was "hoping to become a full-time employee" with Leonard's, but nonetheless also considered himself a full-time employee with Leonard's in 2015. Asked to explain this, Claimant reiterated that on his first stint, he was "hoping to become" a full time employee. In between stints, when he was in Anchorage, Claimant had a teleconference with Annette. Annette told Claimant Leonard's had enough work to keep him busy through the end of the season and make him a full-time employee. Before Claimant gave his notice during his second stint, Leonard's promised him work for the following year as a maintenance man. Claimant explained that during his first stint, he considered his status as "trying out" but not as a full-time employee. But when Claimant told Leonard's he wanted to come back and join their operation and Annette told him on the telephone that Leonard's had work for him through the end of the season, and would talk about the following year, at that point Claimant considered himself Leonard's "employee." (*Id*.).

49) Claimant explained his garbage collection duties as follows: He would pick up black garbage bags the cleaning ladies had put out around the facilities, empty garbage cans at various locations and personally load the garbage into the truck and take it to the dump. Presumably, Claimant unloaded the garbage at the dump. (*Id*.; inferences drawn from the above).

50) In respect to his tools, the first time Claimant went to Leonard's, he had three bags of personal tools. Annette promised to compensate him for shipping his tools, but never did. On the second trip, Claimant took tools weighing approximately 400 to 500 pounds with him as he thought he would be there until October 2015. (*Id*.).

51) Claimant originally said he returned to Anchorage from Leonard's on August 17, 2015. He later clarified the date and agreed his last date working for Leonard's was August 10, 2015, and he actually left Leonard's premises on August 12, 2015. (*Id*.).

52) At hearing, Annette agreed she first met Claimant at the Sportsman's Show in Anchorage in March 2014. She agreed "down the road" Leonard's would be looking for a "maintenance man" because Annette and her husband would be retiring. Claimant mentioned he was a contractor, and Annette discussed possibly hiring him to do some contracts at Leonard's, which would allow him to also explore Yakutat. Claimant told her he could do "pretty much anything" in construction. She agreed Claimant did not perform any "contracts" for Leonard's in 2014.

Annette denied Claimant contacted her between the 2014 and 2015 Sportsman's Shows. Annette agreed she was happy to see Claimant at the 2015 Sportsman's Show, because she was confident he could do "contract work" for Leonard's and had "contract work" for him to do in 2015. Annette agreed she asked Claimant how soon he was available. Claimant said he had a job to finish first, and Annette assumed it was "a contract." He eventually called Annette and said he was available to go to Yakutat and do "a contract" for Leonard's. Annette described a hand-written "Post-it Note" upon which she had written some information at the Sportsman's Show, as follows: During the 2015 Sportsman's Show visit, Annette asked Claimant how much money he needed for "contract work." Claimant was interested "in a job in the future," and, according to Annette, since Claimant would be providing his own insurance, she offered to pay Claimant $25 per hour and he accepted. Annette said the "no ins." notation meant Leonard's had no obligation to provide any insurance. She obtained Claimant's full name and birthdate to obtain an airline ticket for his travel to Yakutat. About a week after the Sportsman's Show, Annette spoke to Claimant, who advised he was available by April 24, 2015, and she agreed to obtain a ticket for him using her airline miles. (Annette Harter).

53) According to Annette, Claimant's entire scope of duties for this first "contract" period was to remodel two kitchens and two bathrooms. Claimant could not look at the job to estimate how long it would take, so neither party knew how long he would have to be present at the lodge. In Annette's view, this is why they set up the contract on an hourly basis. Annette stated all Claimant did during this first stint was to complete the two kitchens and two bathrooms as agreed. Leonard's provided one of its employees to help Claimant, as guests were coming. Annette told Claimant to track his time on a daily basis. When he was ready to be paid, he was to give Annette his hours and she would pay him. "Employees" at Leonard's punched a time clock and were paid by-weekly. Annette maintained Claimant did not have the right to terminate his employment at will; he was expected to fulfill "his contract." He completed his first contract, and when he returned for the second stint, he finished a kitchen and was completing "the second project" and finished his work on August 10, 2015. (*Id*.).

54) Annette agreed Claimant returned to Anchorage after his first stint because he had to finish "a contract" with his friend. While Claimant was in Anchorage, Annette told him Leonard's wanted him to come back and finish the kitchen in the manager's unit and repair the storage unit. Annette said she told Claimant if things went well, Leonard's had additional "projects" or

"contracts" he could do to stay longer. In Annette's words, Claimant had no title because he was "a contract employee -- a contractor." Leonard's already had a maintenance man and property manager, Pete Harter. (*Id*.).

55) Annette said during the "second contract period," Claimant never told her he was injured and she never saw him limping. Claimant told her he had "diabetic nerve pain." (*Id*.).

56) When asked what her understanding was about the parties' contractual relationship, Annette said she understood she was hiring Claimant "both times" and he would come and complete the contract projects assigned and, "if things went well," Leonard's had additional work that "could be contracted." In Annette's view, Claimant was expected to carry his own accident burden and the parties discussed at the 2015 Sportsman's Show the fact Claimant had his own insurance when she negotiated the contract and offered him $25 per hour. (*Id*.).

57) In Annette's opinion, the services Claimant provided to Leonard's required skill and experience. (*Id*.).

58) Leonard's provides lodging for fishermen and travelers. It provides fish processing and booking services for guides and charters. Leonard's is not in the contracting or carpentry finishing business nor is it in the remodeling business. (*Id*.).

59) On cross-examination, Annette explained she did not give the Post-it note to her attorney sooner because she did not think it was important. The note is not dated and not signed by Claimant. Claimant told her he was a contractor, so Annette "made the assumption" he would have insurance. (*Id*.).

60) Given Annette's testimony she made an "assumption" Claimant had insurance, Claimant did not tell Annette he had workers' compensation insurance. (Experience, judgment and inferences drawn from the above).

61) In respect to Claimant taking garbage to the dump, Annette agreed Claimant did this at her direction and explained that in rural Alaska, things are "very expensive," especially gasoline. Therefore, whenever anyone at the lodge went to Yakutat, approximately three miles away, Leonard's tried to make the trip cost effective. Since Claimant used the company vehicle to get supplies at the hardware store and to buy his personal groceries, "it only made sense for him to take the garbage, which was already loaded in the truck, and just drop it off at the dump." However, Annette denied he was ever directed to collect garbage and put it in the truck. (Annette Harter).

62) As to shuttling vehicles, Annette said "on his off time," Claimant went along on a river shuttle. Annette explained, that in her view, Claimant "volunteered" so he could see more of the Yakutat area. Claimant was not paid to take vehicles back and forth to and from the river. Annette is "fairly sure" the vehicle Claimant shuttled was a "customer's" rental vehicle. She agreed Claimant drove a Leonard's trailer to the river, but maintained Claimant volunteered to perform this service as well. She denied Claimant ever unloaded supplies from a trailer; according to Annette. Leonard's employee Manuel unloaded the trailer. (*Id*.).

63) Annette confirmed she wrote the undated letter attached as Exhibit 4 to Claimant's brief on August 15, 2015, and she mailed this letter to Claimant along with his final paycheck. She did this before she had received Claimant's injury report. When asked to explain the second sentence in the final paragraph in the letter regarding Claimant perhaps being a "long term solution for Leonard's lodge maintenance staff," Annette stated she had hoped the 2015 contract "would work out" and Claimant would be "a good fit" for a "future lodge maintenance person." A lodge maintenance person's duties would include parking boats; checking boats out to guests; and "pretty much anything that was necessary to do on the property to have the property ready for guests." Duties could include repairing toilets; doing "whatever was necessary"; roof repairs; installing toilets; installing washers and dryers; electrical work; all property maintenance; and shoring up pilings under buildings. (*Id*.).

64) In Annette's opinion, Claimant could have hired someone to complete his contracts. If he had hired someone, Claimant would have been expected to pay his assistant from his $25 per hour contractual rate. Annette said Pete did not exercise supervision over how Claimant did his work though he did check in with him daily to check progress. She was aware of the disagreement between Claimant and Pete concerning the roofing purlins, but was unaware how the issue was ultimately resolved. As for painting the siding, Annette said the "contract called for" the roof to be put on first before the exterior walls were painted to keep the interior dry. Annette knew nothing about any painting dispute; all she knew was that "the contract" required the roof to go on first. Annette conceded there was no written contract. (*Id*.).

65) Annette disputed Claimant's account of her telephone conversation with him after he had returned to Anchorage following his first stint. According to Annette, she told Claimant if he was able to work on these "various projects one at a time," and complete more projects, and wanted to "stay around," Leonard's had "more things that needed to be done." Annette denied

telling Claimant she wanted him to stay at Leonard's to the end of the season. Annette said she told Claimant she would "try to make it" so he could do "additional contracts." In Annette's view, Claimant had the right to quit "at the end of any project, of any contract." When Claimant said he wanted to leave the premises during the second stint, Annette asked him how much time he needed to complete the storage building project. Annette averred Claimant told her he could complete this final project by August 10, 2015. (*Id*.).

66) Annette testified the tools Leonard's "allowed [Claimant] to use" included tools too large to be sent to Yakutat as a practical matter. (*Id*.).

67) Leonard's had in 2015 hired a contractor, All Valley Construction, to construct a building on-site. All Valley prepared a "bid," which Leonard's "signed off on." Leonard's provided all necessary materials for this project at All Valley's request. All Valley barged specialty tools to the site because they were building a 40 by 120 foot building. If All Valley's employees were going to town, and Leonard's truck was loaded with trash, they would have been asked to, and did, drive Leonard's vehicle to the dump. All Valley's employees did, on one occasion, "on their off time," assist with a shuttle. Leonard's had worked with this company before and asked All Valley to put together a proposal. She did not ask All Valley to show proof of insurance. All Valley was not paid on an hourly basis because they knew how long it would take to build the building and already had the plans. All Valley's employees were also able to use Leonard's tools, but they were not Leonard's "employees." (*Id*.).

68) Annette intended to hire Claimant as an "independent contractor" in 2015. But, if a position became available in 2016, Leonard's would consider hiring Claimant as a maintenance person. In respect to her August 15, 2015 letter to Claimant, Annette explained she wrote she would not be able to "recommend him" as "maintenance personnel" because she did not see Claimant as being able to give good customer service because of his "temperament." (*Id*.).

69) Pete Harter has been Leonard's Maintenance Manager since 2009. Pete said his duties include "everything." More specifically, Pete's duties as Maintenance Manager include keeping toilets clear; keeping lights on; building construction; remodeling; general plumbing; basic electric; and a "wide scope of various duties." He first met Claimant in April 2015, when he arrived in Yakutat. Pete showed Claimant what he needed to have done with the two kitchens and bathrooms. He relied upon Claimant's expertise to finish these projects and, in Pete's view, did not supervise his work. Pete checked in anywhere from two to four times per day to see if

Claimant needed any supplies from town. As for the roofing dispute, Pete agreed the weather was changing and rain was coming. The siding had been completed, but the roof was not done. Claimant wanted to paint the siding and Pete told Claimant, given the coming weather change, the roof needed to be completed first to protect the interior. Claimant argued the primer needed to be done first. Pete disagreed. Pete's supervisor is Leonard's Board of Directors. Annette is the General Manager, but is not Pete's supervisor on site. (*Id*.).

70) According to Pete, Claimant never "said a word" about his back being injured and Pete never saw him limping or appearing to be in pain. (*Id*.).

71) Pete had been present and listened to his wife's hearing testimony but denied he had passed her notes or that the two had communicated during his wife's testimony. (*Id*.).

72) In response to some questions to Annette, there were longer-than-usual pauses before she answered and the panel heard whispering in the background. (Observations).

73) Pete denied he asked Claimant to help Manuel unload food from a trailer. Pete acknowledged in respect to the siding versus roofing dispute, Claimant did as Pete wanted and finished the roof before painting the siding. Pete did not think there was a dispute as to the purlins, as in his view Claimant eventually installed the purlins at the distance Claimant wanted. Pete admitted he was gone for about three days in July 2015, but denied Claimant performed maintenance duties. Pete conceded Claimant was asked to drive the pickup to the dump and, on his own time, took a boat on a trailer to the river and left it there, as a "volunteer." (Pete Harter).

74) In response to the panel's questions, Pete said Leonard's employees ordinarily shuttled boats and trailers to and from the river and were paid to do so as "employees." In August 2015, Leonard's had 10 to 12 people it considered Leonard's "employees." Job titles for Leonard's employees included Fish Processor, Housekeeping, Maintenance Man, and Lodge Manager. Fish processors met charter boats at the dock, filleted fish, carried fish to the fish house for rinsing and processing and loaded clients' fish into vehicles. Housekeepers cleaned rooms between guests, performed limited daily maid service, and kept common areas clean. "Garbage" around the lodge included clients' food preparation remnants and "typical trash" found anywhere. Guests put the trash into small bags and housekeepers put these into larger garbage bags. According to Annette, either she or Pete put the larger garbage bags into the pickup truck. Leonard's employees were paid by the hour. Most Leonard's employees were local people so paying their transportation to and from Yakutat was usually not an issue. Leonard's provided

free housing for some employees, but not for locals. "Employee housing" in Annette's letters referred to a place for employees to live if they were not locals. The value of employee housing ranged from $800 to $1,200 per month. Most Leonard's employees did not have the right to charge things on Leonard's accounts; only Annette and Pete as employees had that right. Leonard's employees could use Leonard's vehicles for business purposes. Examples of using company vehicles for business purposes included going to the airport to pick up a guest, going to the dump or performing river shuttles. Leonard's added its employees to its liability insurance on company vehicles. Leonard's also provided free housing to All Valley Construction's three-member crew. Independent contractors had the right to charge things on Leonard's accounts. When asked why there was a distinction between employees' and independent contractors' rights to charge things on Leonard's accounts, Annette said the employees' jobs did not require them to obtain supplies from town. (Pete Harter; Annette Harter).

75) When asked if Claimant's work requirements changed from the original, oral agreement negotiated at the Sportsman's Show once he finally got to Yakutat, Annette stated:

> On the first time he came, he did specifically what we had discussed. And that was because he only had a certain amount of time and he had to go back to finish up a different contract in Anchorage. On the second time, because he was hoping to stay around longer, we had multiple things for him to do and so we originally had thought he was going to do an additional project for us, work on the completing the outside of the employee housing building, and it changed because he did not do that. He finished up the storage building, and asked to leave.

When asked to clarify, Annette testified:

> On the second time, we had a general idea of the projects he contracted to do, the first being completing things in the employee housing and the second being building a storage locker building. And then we had additional things in mind that would allow him to continue doing contract work for us in Yakutat. But because he decided he needed to leave, and he told us on the ninth that he was going to do that, we changed the scope of work and did not have him do the work on the outside of the employee housing building. (Annette Harter).

76) When asked if he had introduced Claimant to someone as his "new right-hand man," Pete said, "I do not remember saying that at this point." (Pete Harter).

77) Annette confirmed Leonard's provided Claimant's plane ticket to and from Yakutat. Leonard's has considerable mileage on its Alaska Airlines account. Therefore, Leonard's can

often obtain tickets using its airline miles for contractors rather than having the contractor include transportation costs in its expenses and then request reimbursement. In short, Leonard's paid Claimant's way to and from Yakutat. A round-trip plane ticket from Anchorage to Yakutat is between $300 and $700 but usually in the range of $450 to $500 if the purchaser does not use airline miles. If Claimant had brought all the tools he used at Leonard's to Yakutat, it would have cost approximately $2,000. (Annette Harter).

78) Putting aside freight costs, the value of Leonard's tools it allowed Claimant to use would be approximately $1,200. (Pete Harter).

79) Claimant provided no similar services to anyone other than Leonard's while he was in Yakutat. (Claimant).

80) Pete explained the necessity of Pete's employment as maintenance man at Leonard's since 2009 was to "oversee maintenance on the buildings at Leonard's Landing." (Pete Harter).

81) In response to the panel's questioning, Annette testified she said and asked Claimant at the Sportsman's Show in 2015, "you have [indiscernible] your own insurance, and would you accept $25 an hour contract rate?" If Claimant had said he had no insurance, Annette would have looked at her budget to determine if she could have hired him as an employee. If she had hired Claimant as an "employee," Annette would have offered him $18 to $20 per hour. Annette said she was "very careful" managing Leonard's "to be protected," and if a contractor did not have insurance, "I make them an employee." Leonard's has hired other "independent contractors" besides All Valley to perform services such as electrical contracting. Leonard's had verbal agreements with these contractors. According to Annette, Leonard's offered Claimant employee housing but he could not get along with his roommate. So, Claimant moved into Leonard's small cabin to be by himself. Claimant moved personal belongings including refrigerators into the cabin and, according to Annette, left the cabin in disarray. Leonard's paid $500 to its fish processing employees to remove these items and clean the cabin after Claimant left. Leonard's paid its employees $17 to $18 per hour to clean out the cabin and deducted this amount from Claimant's final check. Similarly, Leonard's deducted the cost of "maintenance supplies" Claimant had used, from his final check. In reference to the words "not licensed or insured" hand-written on the check stub for Leonard's check 1441 attached to Claimant's hearing brief, no one at the hearing knew who wrote these words on the check stub. (Claimant; Annette Harter; Peter Harter; attorneys' statements at hearing).

82) Annette admitted she was thinking of hiring Claimant as a maintenance man employee in 2016 or 2017 if Claimant was a "match" and "if things worked out." In her view, on Claimant's first stint, he did "quality work." On the second stint, Claimant also did quality work but there were constantly issues with an infection, his dissatisfaction with his Leonard's housing and "general discontent on his part." Annette did not think Claimant worked well with others. He was able to work on his own without an assistant but could not multitask. He provided "no customer service whatsoever." When asked if Claimant ever asked anyone at Leonard's for a job reference, Annette explained Claimant wanted to return to work for Leonard's, so her August 15, 2015 letter was her way of telling Claimant that Leonard's would not be willing to hire him for the "reasons stated" in her letter. Annette acknowledged Claimant never requested a job reference letter from anyone at Leonard's. (Annette Harter).

83) Regarding Annette's August 15, 2015 letter, where she references Claimant going between Annette and Pete to obtain an answer to his questions, Pete said if he and Claimant did not agree on something, Claimant would ask Annette a question about the topic, or vice versa, seeking a different answer so he could do the topic of the questioning "his way." When asked for an example of questions Claimant asked, Annette was "fairly sure" Claimant came to her seeking direction regarding the roof versus painting dispute with Pete. (Pete Harter; Annette Harter).

84) At hearing, the parties agreed there was a verbal contract creating some relationship between them but no written contract. They agreed the issue was whether the contract was to hire Claimant has an independent contractor or as an employee. (Parties' hearing statements).

85) Claimant's attorney clarified that his claims contained typographical errors and incorrectly listed the injury date on the front pages as August 14, 2015, rather than August 4, 2015, as it was correctly stated on the second pages. (Claimant's attorney's statements).

86) Claimant and Leonard's had an issue over Claimant's return flight to Anchorage on August 12, 2015. Annette said Claimant told her Alaska Airlines had changed his flight arrangements. Annette called Alaska Airlines and learned it had not changed Claimant's flight, but rather, Claimant had called and changed his flight. Annette changed it back and told Claimant she expected him to be on the plane and off the premises on August 12, 2015. (Annette Harter).

87) When asked for his account, Claimant said, "I guess you could call it a lie," but he was "hurting so bad" and had so much gear to get to the airport, he did not think he could get his personal belongings there in time. He had asked Annette for an additional day so he could clean

out his cabin, but Annette refused and wanted him off her premises. Claimant managed to get his belongings to the airport on August 12, 2015, with assistance from a local friend. (Claimant).

88) Claimant said, upon leaving Yakutat and returning to Anchorage, he "tried" working only for his friend McGuff as he needed an income. (*Id*.).

89) Claimant confused his dates at times and was a bad date historian. (Experience, judgment, observations and inferences drawn from all the above).

90) Leonard's argued Claimant admitted he lied about "being injured." It also argued that to find Claimant was an "employee" in this case would eliminate "independent contractors" from the law and prevent business owners from hiring independent contractors to complete appropriate projects. (Leonard's closing argument).

PRINCIPLES OF LAW

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). That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." (*Id*. at 534).

> **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. . . .

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). Witness credibility is of no concern in this step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004). Second, for injuries occurring after the 2005 Act amendments, if the employee establishes the link, the presumption may be overcome at the second stage when the

employer presents substantial evidence rebutting the raised presumption. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150, at 7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985). Third, if the board finds the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. The party with the burden of proving asserted facts by a preponderance of evidence must "induce a belief" in the fact finders' minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn and credibility is considered. *Ugale*, 92 P.3d at 417.

The presumption analysis need not be applied to an issue if there is no factual dispute and applying the analysis "does not promote the goals of encouraging coverage and prompt benefit payments." *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1244 (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 findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

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

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

In *Sears v. World Wide Movers, Inc*., AWCB Decision No. 15-0140 (October 27, 2015), the parties bifurcated hearing issues and asked the board to decide only whether the injured worker's claim was compensable. *Sears* held the injury was compensable under the personal comfort and minor deviation doctrines, but decided no merit issues from his pending claim and awarded him no benefits. *Sears* held the injured worker's claim for attorney's fees and costs related to the compensability issue in abeyance, because the parties presented no evidence on any other issues pending in his claim and it remained to be seen whether he was entitled to any indemnity, retraining or medical benefits, and the amounts.

The Alaska Supreme Court in *Egemo v. Egemo Construction Co*., 998 P.2d 434 (Alaska 2000) held filing a claim prematurely "does not justify dismissal" of the claim, as the employer was not prejudiced or inconvenienced. *Id*. *Egemo* further stated:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely (footnote omitted). (*Id*. at 441).

> **AS 23.30.395. Definitions**.
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> In this chapter,
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> . . . .
>
> (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. . . .

In *Searfus v. Northern Gas Co*., 472 P.2d 966 (Alaska 1982), the Alaska Supreme Court adopted the "relative nature of the work test." *Searfus* said:

We believe that the 'nature of the work' test should be adopted in resolving future employee status issues under the Alaska Workmen's Compensation Act. (Footnote omitted; *id.* at 969).

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.

"The relationship of employer-employee can only be created by a contract, which may be express or implied." *Selid Construction Company v. Guarantee Insurance Co*., 355 P.2d 389, 393 (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 working at 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*.).

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).

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."

The Alaska Workers' Compensation Appeals Commission recently held in *Trident Seafoods v. Saad*, AWCAC Decision No. 213 (July 16, 2015), that the board's characterization of a decision as "final" is not conclusive for purposes of an appeal, rather than for a petition for review. *Id*. at 2. *Saad* said a board decision is final for appeal purposes when it "is final as to the appellant's rights, and leaves no further dispute on a pending claim or petition for the Board to resolve." *Id*. The Alaska Supreme Court in *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1971) addressed discretionary review in administrative proceedings and held a superior court decision, which reversed an administrative agency's decision and remanded for further proceedings, was a "non-final order." *Thibodeau* said though such an order was not a "final judgment" for "appeal" purposes this did not preclude the court from reviewing a party's contentions. *Id*. at 629-30.

ANALYSIS

1) Was there an employer-employee relationship between Leonard's and Claimant?

The first step in deciding whether an employer-employee relationship existed on Claimant's alleged injury date is to determine if there was an express or implied employment contract in effect. *Selid*. This issue is resolved by the parties' stipulation at hearing that there was initially, prior to the first stint, an express, oral employment contract between Leonard's and Claimant. The undisputed facts show there was an offer encompassing its essential terms, unequivocal acceptance by the offeree, consideration and an intent by the parties to be bound. *Childs*. Since there is no dispute between the parties on this preliminary issue, the statutory presumption of compensability need not be applied. *Rockney*.

However, the parties disagree on what employment relationship they contractually created at the Sportsman's Show in 2015. Claimant contends Leonard's hired him as an "employee," while Leonard's contends it hired him as an "independent contractor." Unless an employer-employee relationship existed when Claimant was injured, the Act's provisions are not applicable. *Wisdom*; *Alaska Pulp*. To resolve this dispute, the "relative nature of the work test" must be applied to the facts. *Searfus*; 8 AAC 45.890. This central issue presents numerous factual disputes, and the relative nature of the work test has multiple evidentiary prongs.

The presumption of compensability must be applied to each evidentiary question. AS 23.30.120; *Sokolowski*. Without regard to credibility, Claimant raises the presumption as to each evidentiary prong in the relative nature the work test through his testimony. *Cheeks*; *Ugale*. Again without regard to credibility, Leonard's rebuts the presumption on each prong through Annette and Pete Harter's testimony. *Runstrom*; *Wolfer*. With the presumption gone, all evidence is weighed, credibility is determined and Claimant must prove he was Leonard's "employee," and it was his "employer," by a preponderance of the evidence. *Saxton*; *Ugale*. Leonard's bears the burden on its affirmative defenses. *Gonzales*.

Surprisingly, the parties agree on many relevant facts. However, when it comes to the factual elements in the "relative nature of the work test," they disagree on nearly every point. The

witnesses' testimony is, in many instances, conclusory. Because Claimant worked for Leonard's on two separate occasions, for clarity, and because the employment relationship could vary for each employment period, each stint will be analyzed separately.

(i) First stint: Claimant was an "independent contractor."

When parties agree there was an express oral employment contract but disagree about the relationship the parties created, the relative nature of the work test must be applied to resolve the dispute. *Searfus*. Element (1) and (2) are the "most important factors" in the test and one of these factors must be resolved in favor of "employee" status to find Claimant was Leonard's "employee" during his first stint. 8 AAC 45.890. Applying the test to Claimant's first employment stint with Leonard's results in the following:

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

The parties, in conclusory fashion, disagree on whether Claimant had the right to hire or terminate others to assist in performing the service for which he was hired. The necessity to hire or terminate additional help never arose. The fact Leonard's employee assisted Claimant at times with the remodel projects is not dispositive of Claimant's employment status. Claimant conceded his primary job during his first stint with Leonard's was to complete the kitchen and bathroom remodels. Leonard's' witnesses agreed with this premise. Though Claimant also performed other minor duties during his first stint, like repairing a hole in drywall, he conceded his main purpose in going to Yakutat the first time was to remodel kitchens and bathrooms. It is difficult to draw any inference on this element given this evidence. But on balance, Claimant's work limited to remodeling looks more like a separate business or profession. This raises an inference Claimant was not an employee during this stint. 8 AAC 45.890(1).

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

Claimant did not suggest Annette or Pete exercised control over how he remodeled bathrooms or kitchens, or how he performed other minor jobs during his first stint. This element is resolved against Claimant being an employee. 8 AAC 45.890(1)(A). The answer to this question is no.

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

Again, since this eventuality never arose during the first stint, it is difficult to draw any inferences. Nevertheless, the evidence shows Claimant and Leonard's had an express, oral employment contract for him to remodel kitchens and bathrooms during his first stint. Leonard's was relying upon Claimant to perform these duties because they had clients coming and needed the remodels completed in a timely manner. Claimant traveled to a remote area to do a job. A reasonable inference from this shows the parties did not have the right to terminate the initial contract at will, without cause. Had either party done so, they would have been in breach. This element is resolved against Claimant being an employee. 8 AAC 45.890(1)(B); *Rogers & Babler*.

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

Claimant did not suggest Annette or Pete Harter exercised extensive supervision of his remodel work on the kitchens or bathrooms. The fact they did not extensively supervise Claimant's work implies they had no right to do so. By all accounts, the answer to this question is again no. This element is resolved against Claimant being an employee. 8 AAC 45.890(1)(C).

D) Did Leonard's provide the tools, instruments, and facilities to accomplish Claimant's work and are they are of substantial value?

It is undisputed Leonard's provided tools and facilities to assist Claimant in performing his work. While "substantial value" is relative and subjective, a reasonable mind would consider travel expenses Annette said were worth around $500, lodging Annette said was worth $800 to $1200 per month, a well-equipped shop and tools Pete said were worth at least $1,200 to be of substantial value. This raises an inference of "employee" status. 8 AAC 45.890(1)(D).

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

The parties agreed Leonard's paid Claimant on an hourly basis. But Leonard's premise that the parties struck this hourly agreement only because Claimant could not view the premises and estimate how long it would take to finish the remodels has merit. Given these facts, this element is neutral and no employee status can be reasonably inferred. 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 stipulated they entered into an oral employment contract. *Selid*. Claimant thought he was being hired as an "employee," while Leonard's thought they were hiring him as an "independent contractor." Giving required "deference" to the parties' diametrically opposed views necessarily cancels out each view and no inference can be drawn. 8 AAC 45.890(1)(F).

In summary, in this "most important" factor, only one element is resolved in in favor of employee status, (8 AAC 45.890(1)(D)) while two are neutral (8 AAC 45.890(1)(E) and (F)) and four are resolved against Employee status (8 AAC 45.890(1), (1)(A), (B) and (C). Thus, on balance this factor is resolved against employee status. 8 AAC 45.890(1).

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

This is the second of the two "most important" factors. 8 AAC 45.890. Leonard's focuses on the "service" part of this element and contends Claimant could not have been its "employee" because it is not in the business of providing maintenance or remodeling "services." Leonard's misapplies the regulation and ignores the statute. An "employer" is defined as a person employing one or more persons "in connection with a business. . . ." AS 23.30.395(20). The services performed by the putative "employee" need not be the services the business provides to the public for that person to be an "employee." AS 23.30.395(19); *Gaede.* Pete's job with Leonard's since 2009 has been as its "Maintenance Manager," and his duties included remodeling. Leonard's hired Claimant because Pete could not complete the remodeling projects in a timely manner given Pete's other responsibilities. Leonard's provides, among other things, lodging to its guests. Experience and Pete's testimony show lodging must be maintained "in connection with" Leonard's business. Pete's testimony shows remodeling is part of "maintenance," and maintaining Leonard's premises in good condition to please guests, through remolding, is therefore "in connection with" and "a regular part" of Leonard's "business." *Rogers & Babler*. This second "most important" factor raises an inference supporting Claimant's employee status. 8 AAC 45.890(2).

(3) Could Claimant Have Been Expected To Carry his Own Accident Burden?

This element is "more important" than the following elements. Claimant received only $25 per hour. Industrial injuries can be expensive. Eye injuries from nail guns or other flying debris can require highly specialized surgical procedures. Using table saws and other devices in remodel projects can result in catastrophic injuries. It is unlikely Claimant could have been expected to carry his own accident burden while receiving only $25 per hour for his services. This creates a "strong inference" of employee status. *Rogers & Babler*; 8 AAC 45.890(3).

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

Leonard's focused entirely on the skill and experience required to perform remodeling. By contrast, Claimant focused entirely on his other duties during his first stint, which he conceded were minimal. The evidence shows Claimant's primary work during his first stint with Leonard's was remodeling bathrooms and kitchens. Again, while "skill and experience" are relative and subjective, experience shows it takes moderate skill and experience in construction to remodel a kitchen or bathroom. Whether or not remodel results are "good" is also subjective. *Rogers & Babler*. The fact Claimant and Annette and Pete Harter all agreed Claimant did a fabulous job remodeling the kitchens and bathrooms, demonstrates he had considerable skill and experience in remodeling. This element is resolved against employee status. 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 parties essentially agree the express oral employment contract for Claimant's first stint at Leonard's was for completion of a particular job with a deadline -- remodeling kitchens and bathrooms. Therefore, this element is resolved against employee status. 8 AAC 45.890(5).

(6) Was The Employment Intermittent, As Opposed To Continuous?

To this point, Leonard's had never previously hired Claimant to perform any services. By definition, therefore, this first stint at Leonard's was "intermittent" and not continuous. Most importantly, near the hearing's conclusion Claimant made an employment status distinction between his first and second stints with Leonard's. During his first stint with Leonard's,

Claimant said he was "trying out" for a maintenance man position. Claimant admitted he was "hoping to become a full-time employee" with Leonard's, but nonetheless also considered himself a full-time employee. Asked to explain, Claimant candidly said that during his first stint, he considered his status as "trying out" but *not as a full-time employee*. Claimant's candid admission is consistent with the other facts. It makes sense for Claimant to take on a particular job, *i.e*., remodeling kitchens and bathrooms, to show Annette and Pete his proficiency as a future maintenance man. Leonard's would also benefit from observing Claimant's demonstrated skills. Given these facts, this element is also resolved against Claimant being Leonard's employee. *Rogers & Babler*; 8 AAC 45.890(6).

In summary, applying the 12 elements from the relative nature the work test to Claimant's first stint with Leonard's, the facts show seven elements are resolved against employee status with one of those elements being one of "the most important factors." 8 AAC 45.890(1), (1)(A), (B), (C) and (4), (5) and (6). Of the remaining elements for which inferences could be drawn from the evidence, only three imply employee status with one of those being one of the "most important" (8 AAC 45.890(2)) and one being "more important" than two subsequent factors resolved against employee status. 8 AAC 45.890(3). On balance, given Claimant's candid admission he was trying out but not as an "employee," the test demonstrates Claimant's status during his first Leonard's stint was "independent contractor," not "employee." *Rogers & Babler*.

(ii) Second stint: Claimant was an "employee."

Neither party disputed the fact there was a contract in effect when Claimant returned to work for Leonard's for his second stint. *Selid*. The same dispute remains, however, over the employment relationship the parties actually created. When Claimant returned to Anchorage to complete his friend's project, he had a teleconference with Annette. Annette and Pete were so happy with the remodel jobs Claimant had done during his first stint, she decided to offer Claimant more work. Claimant contends Leonard's hired him as an "employee." Leonard's contends it was simply offering him more "contracts" as an "independent contractor." These differing accounts create factual disputes to which the presumption of compensability must be applied. *Sokolowski*.

Without regard to credibility, Claimant raises the presumption there was a new hiring contract through his testimony. *Cheeks*; *Ugale*. Again without regard to credibility, Leonard's rebuts the presumption through Annette's testimony. *Runstrom*; *Wolfer*. The presumption drops out, the evidence is weighed and credibility assigned, and Claimant must prove there was a new hiring contract making him Leonard's "employee." *Saxton*; *Ugale*. Leonard's remains with the burden of proof on its affirmative defenses. *Gonzales*.

Annette admitted she and Claimant had a teleconference between stints and she told him she would try to arrange things and give Claimant enough work for him to continue at Leonard's. Annette and Pete conceded they wanted to retire in a year or two and wanted to hire a maintenance man. Annette's letter to Claimant suggesting he might be an answer to their maintenance issues supports Claimant's account. Claimant said Annette promised him additional work and discussed the possibility he might become the winter caretaker and have a full-time, year-round position at Leonard's. While Annette tried to minimize her promises, given all the facts, Claimant's account of the teleconference is more credible and is given greater weight. AS 23.30.122; *Smith*.

Unlike the first oral contract, which was express, the second oral contract was implied because the terms were more vague and the hiring more open-ended. *Selid*. Leonard's consented to Claimant acting on its behalf and under its control and Claimant consented to so act. *Childs*. The parties at hearing agreed the underlying issue is whether Claimant was hired as an "independent contractor" or as an "employee." AS 23.30.395(19). As was the case with Claimant's first stint, the relative nature of the work test must be applied to Claimant's second stint at Leonard's. *Searfus*. The first two factors are the most important and one must be resolved in favor of employee status to find Claimant was Leonard's employee. 8 AAC 45.890.

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

The parties, again in conclusory fashion, disagree on whether Claimant had the right to hire or terminate others to assist in performing the services for which he was hired during his second stint at Leonard's. As was the case during the first stint, the necessity to hire or terminate

additional help never arose. The fact Leonard's employee assisted Claimant at times with his duties does not determine Claimant's employment status. Again, since the hiring and terminating issue never arose, no inference can be drawn on this evidence. 8 AAC 45.890(1).

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

Unlike during the first stint, Claimant listed a litany of jobs he was told to do or performed during his second stint with Leonard's. This list included installing log coat hangers; fixing an electrical problem; installing washers and dryers in employee housing and in the Harter residence; installing a toilet; clearing off a deck in employee housing; installing a screen door; installing a roof over a work area; shuttling a boat trailer back to the lodge; covering a sewer; collecting garbage; driving garbage to the dump and unloading it; shuttling vehicles to and from the river; installing shelves; installing concrete footings and beams under floors; cleaning and organizing the paint room; helping with refrigeration units; hauling tin out of a storage area; operating the company forklift to move beams; completing a storage unit; loading a fish and unloading food and supplies for customers from a trailer. Annette and Pete Harter mostly agreed with Claimant's list though they claimed he did not do some jobs and performed some tasks, such as shuttling, as a "volunteer." Given the parties' diametrically opposed testimony, at this point credibility must be determined before proceeding with the analysis.

The panel observed Claimant's demeanor at hearing. He was generally cool, calm and collected. He was not evasive and his answers were detailed and sincere. Claimant's injury account also comports generally with his accounts given to his medical providers, though Claimant is not a good date historian. Claimant's detailed description of his duties during his second stint with Leonard's is credible and is given considerable weight. AS 23.30.122; *Smith*.

Annette and Pete Harter testified by telephone. The panel could not observe their demeanor. But Annette's testimony, in particular, sounded carefully rehearsed. For example, she missed few opportunities to insert the word "contract" or "contractor" into her testimony in an effort to show Claimant was an "independent contractor" at any and all relevant times. Though Pete denied giving assistance to his wife during her hearing testimony, at times when questioned,

Annette paused longer than usual and the panel could hear whispering in the background. At one point, Annette said she had hired Claimant as a "contract employee" and quickly corrected herself to say "a contractor." On occasion, Annette referred to what the "contract called for" even though there was no written contract. For example, in reference to the roofing issue, Annette tried to support Pete's testimony by saying "the contract called for" Claimant to install the roof before painting the siding. As there was no written contract, is difficult to see how this statement could be true.

Annette's testimony was also inconsistent and contradictory. At hearing, Annette said she only "assumed" Claimant had insurance because he was "a contractor," implying she never actually asked him. This is consistent with her testimony she never asked All Valley Construction if it had workers' compensation insurance either. Later, however, Annette said she discussed workers' compensation insurance with Claimant and even recorded she had "no ins." obligation on her Post-it note and said she told and asked Claimant, "you have [indiscernible] your own insurance, and would you accept $25 an hour contract rate?" Annette further stated she was "very careful" about hiring people and if a contractor had no insurance, she made him an "employee." Yet Annette said she "assumed" Claimant had workers' compensation insurance, admitted she never asked All Valley Construction if it had coverage, and as evidenced by this case, was not "very careful" in creating contracts with her hirelings. Annette also said she had no knowledge of a painting disagreement between Claimant and Pete, but later said she was "fairly sure" this dispute is an example of a time when Claimant went between her and Pete seeking the answer he wanted. Further, Annette's insistence on making everything Claimant did at Leonard's based on an ever-changing litany of serial "contracts" strains logic. Leonard's and Claimant did not enter into individual contracts for him to, for example, take the trash to the dump on each occasion, cover up a sewer pipe, fix a hand rail, install wooden coat hangers and go to the airport to load a fish. For all these reasons, Annette and Pete's testimony is less credible and is given less weight. AS 23.30.122; *Smith*.

Greater credibility and weight is given to Claimant's account of the jobs he performed during his second stint. AS 23.30.122; *Smith*. Applying these findings to this element, some jobs, such as picking up trash and covering a sewer, given their simplistic nature, required no control over the

manner and means by which Claimant accomplished the tasks. Even so, Leonard's controlled the manner and means by which Claimant concededly disposed of trash. Leonard's told Claimant when and where to take the company pickup truck to dump the garbage on his way to town. An independent contractor would remove garbage as he saw fit. *Rogers & Babler*. Annette told Claimant when and where to deliver a fish to the airport. Annette gave Claimant chores to complete, but he never completed some because she or Pete would interrupt his work and impose new assignments. Annette and Pete on occasion would pull Claimant off one project to begin work on another, which they believed was more urgent. Annette and Pete made lists of things for Claimant to do and Claimant and Pete met together each morning and went over tasks that "needed to be done." This was an employer-employee relationship. *Rogers & Babler*.

Pete gave Claimant permission use the company vehicle and allowed him to go to town each day around noon both to obtain supplies and to buy his own food. An independent contractor would go to town when necessary. *Rogers & Babler*. Most notably, in respect to the roofing job on the storage unit, Pete exercised control over the manner and means by which Claimant completed this job. Claimant wanted to prime the siding before finishing the roof to protect the siding from rain. Pete overruled Claimant and insisted he roof the storage unit first. Similarly, Claimant wanted the purlins closer together for safety reasons and Pete again overruled him and insisted they be placed farther apart. This disagreement made Claimant so angry he quit. While Pete said Claimant got his way on the purlins, Claimant's account is given greater weight. AS 23.30.122; *Smith*. This creates a strong inference of employee status. 8 AAC 45.890(1)(A).

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

The evidence shows Claimant and Leonard's had an implied, oral employment contract for him to return to Leonard's for his second stint and do whatever Annette and Pete wanted. *Selid*. Initially, Annette said Claimant could not simply leave any time he wanted. She subsequently stated Claimant could leave at any time, at the end of each "contract." Again, Annette's insistence that each task Claimant did during his second stint was a new, separate "contract" stretches her credibility beyond belief. When Claimant and Pete ceased getting along together and Claimant decided Pete's instructions were dangerous to his safety, Claimant quit. Annette

insisted Claimant get off her premises by a date specific. A reasonable inference from this shows the parties not only had the right to terminate the contract at will, without cause, but did so. *Rogers & Babler*. This creates a strong inference of employee status. 8 AAC 45.890(1)(B).

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

The answer to this question depends upon the work. In many instances, Claimant's work during his second stint did not require supervision. But when it came to big projects, like a roof on the storage area, the facts show Pete exercised extensive supervision over Claimant's work. Claimant wanted to prime the siding first, while Pete insisted he first finish the roof. Claimant wanted the roof purlins farther apart and Pete again overruled him. Pete or Annette listed Claimant's work assignments each day and told him when and where to take the garbage and shuttle vehicles and trailers. Not only did Leonard's have the right to extensive supervision over Claimant's work, Pete exercised that supervisory right on many occasions. This creates a strong inference of employee status. 8 AAC 45.890(1)(C).

D) Did Leonard's provide the tools, instruments, and facilities to accomplish Claimant's work and are they are of substantial value?

Leonard's provided transportation, tools and facilities to assist Claimant in performing his work. The fact Claimant also brought his own hand tools is immaterial. A reasonable mind would consider transportation worth approximately $500, lodging worth $800 to $1200 per month, a well-equipped shop and tools worth at least $1,200 to be "of substantial value." *Rogers & Babler*. This raises an inference of "employee" status. 8 AAC 45.890(1)(D).

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

The parties agreed Leonard's paid Claimant on an hourly basis for both stints. Leonard's premise that the parties struck this hourly agreement only because Claimant could not view the premises and estimate how long it would take to finish remodels has no application to the second employment period. Claimant had already been to Yakutat, was familiar with Leonard's and knew what was involved in various projects Annette discussed with him while he was in Anchorage. Leonard's paid Claimant for his second stint hourly, just as it paid its other employees. These findings create an inference of employee status. 8 AAC 45.890(1)(E).

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

Again, the parties stipulated they entered into an oral employment contract. Claimant thought he was being hired as an "employee," while Leonard's thought they were continuing his hiring as an "independent contractor." Giving "deference" to the parties' respective views nullifies each view. No inference can be drawn based on this evidence. 8 AAC 45.890(1)(F).

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

As discussed above, an "employer" is defined as a person employing one or more persons "in connection with a business. . . ." AS 23.30.395(20). The services performed by the putative employee need not be the services the business provides to the public for that person to be an "employee." AS 23.30.395(19); *Gaede*. Pete's job with Leonard's since 2009 has been as its "Maintenance Manager." Claimant and Annette both agreed the duties Claimant performed for Leonard's during his second stint mirrored many duties Pete performed as Maintenance Manager. Claimant's work maintaining the lodge and the premises was therefore performed "in connection with" and was "a regular part" of Leonard's "business." *Rogers & Babler*. This evidence raises an inference supporting Claimant's employee status. 8 AAC 45.890(2).

(3) Could Claimant Have Been Expected To Carry his Own Accident Burden?

Once again, this element is more important than subsequent elements. Claimant received only $25 per hour for his services. Climbing on ladders and roofs can be dangerous work. People sometimes fall off. Falling from a ladder or roof can cause expensive, serious injury, permanent impairment and permanent disability. It is unlikely Claimant could have been expected to carry his own accident burden while receiving only $25 per hour. This creates a strong inference of employee status. 8 AAC 45.890(3).

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

Unlike his first stint, Claimant's primary work during his second stint with Leonard's was anything and everything Pete and Annette told him to do. Again, while "skill and experience" are relative and subjective, experience shows many of Claimant's tasks during his second stint required little or no skill or experience. It takes moderate skill and experience in construction to

properly install a roof. *Rogers & Babler*. The fact Pete did not like the way Claimant prioritized his work on the storage shed or the way he installed roof purlins suggests Claimant lacked skill and experience performing these tasks. On balance, experience shows most of Claimant's tasks during his second stint, such as installing washers and dryers, installing a toilet, clearing off a deck, shuttling vehicles, covering a sewer, and collecting garbage involved little or no experience, creating an inference of employee status. *Rogers & Babler*; 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?

Unlike the first stint, the implied, oral employment contract between Claimant and Leonard's was for continuous work through the season doing whatever Annette and Pete told him to do. There was no particular, primary "project" but a series of ordinary maintenance duties and some construction. Based upon Claimant's credible testimony, absent the dispute with Pete, Leonard's would have hired Claimant for the season and to be its winter caretaker and to provide further services during the following season and beyond. AS 23.30.122; *Smith*; 8 AAC 45.890(5).

(6) Was The Employment Intermittent, As Opposed To Continuous?

At this point, Leonard's had already hired Claimant to perform contractual services during his first stint. Based upon Claimant's credible testimony, Leonard's hired him for continuous employment during and after his second stint. AS 23.30.122; *Smith*. This creates an inference he was Leonard's employee. 8 AAC 45.890(6).

Claimant convincingly said once he decided to return to Leonard's for his second stint, and Annette promised him continuous employment, he considered himself an "employee." Once Claimant returned to Yakutat, the parties behaved like Leonard's was an "employer" and Claimant was its "employee." All elements of the relative nature the work test, from which an inference could be drawn, are resolved in favor of Claimant being Leonard's "employee." Therefore, the relative nature of the work test demonstrates Claimant's status during his second Leonard's stint, and on August 4, 2015, was as an "employee," not an "independent contractor."

It is not surprising Claimant thought he was being hired as an "employee" during both stints. Neither Annette nor Pete denied Leonard's had a sign soliciting employees at the 2014 and 2015 Sportsman's Show. "Positions available" are not terms normally used by someone looking to hire an "independent contractor." If Leonard's needed an independent contractor to work on unfinished projects, it would have looked in the Yellow Pages or on the Internet to find and hire an independent contractor. It would not have solicited "employees" at the Sportsman's Show. Further, once Claimant got to Leonard's for his second stint, Pete directed him to work at least 50 hours per week, which Claimant tried to do. Claimant said Pete introduced him at a restaurant as his "new right-hand man." Pete never denied saying this, but simply could not recall. This implies more than a temporary, "independent contractor" relationship. Annette promised to reimburse Claimant for shipping his tools to Yakutat, but never did. Lastly, Claimant going between Annette and Pete to get answers so he could do things "his way" further supports the notion he was not an "independent contractor," but was an "employee" seeking permission from one of his two bosses. *Rogers & Babler*. Claimant has met his burden of proof. *Saxton*. Leonard's has failed to meet its burden on its affirmative defense that Claimant was not its "employee" and it was not his "employer." *Gonzales*. Therefore, Claimant was Leonard's "employee" and it was his "employer" during his second stint at Leonard's.

2) Is Claimant entitled to interim attorney's fees and costs?

Since no benefits were at issue or argued at hearing, the parties have not yet presented evidence for or against any specific award, and this decision has not awarded any benefits. Thus, it is unknown whether Leonard's has other valid defenses to Claimant's claims. Attorney's fee awards under AS 23.30.145(a) are awarded based upon the "compensation awarded." This decision awards no compensation. Attorney's fee awards under AS 23.30.145(b) require successful prosecution of a claim. As it remains to be seen whether Employee is entitled to any specific benefits as requested in his workers' compensation claims arising from his August 4, 2015 work injuries with Leonard's, it is premature to award attorney's fees and costs at this time. *Sears*. Therefore, Claimant is not entitled to an interim attorney's fee and cost award, and the attorney's fee and cost issues will be held in abeyance. *Egemo*. Claimant has not waived his right to seek and receive attorney's fees and costs incurred addressing the issue decided in this decision, as well as attorney's fees and costs related to any benefits Leonard's might voluntarily

pay, or which Claimant might be awarded following a future hearing on his claims' merits. AS 23.30.145.

Claimant's claims for attorney's fees, costs and all other benefits, and all Leonard's' defenses, other than the employment status issue resolved in this decision, remain pending. *Saad*. Therefore, this decision does not resolve all issues in Claimant's case, and it is not a final decision subject to appeal. However, any party may seek interim appellate review pursuant to the instructions set forth below. *Thibodeau*.

CONCLUSIONS OF LAW

1) There was an employer-employee relationship between Leonard's and Claimant.
2) Claimant is not entitled to interim attorney's fees and costs.

ORDER

1) Claimant was Leonard's "employee" and it was his "employer" at all times during his second stint including at the time of his August 4, 2015 injuries.
2) Claimant's request for interim attorney's fee and costs is held in abeyance.
3) If the parties do not resolve the remaining issues in this case, Claimant may request, and he will receive, a hearing on his claim's merits, at which time he can request attorney's fees and costs for all work performed representing Claimant in this claim, as applicable under the Act.
4) If the parties resolve the remaining issues in this case, the parties may submit a stipulation for attorney's fees and costs for approval to the designated chair.
5) If the parties resolve the remaining issues in this case but cannot agree on appropriate attorney's fees and costs, Claimant may request, and he will receive, a hearing on those issues.
6) The panel reserves jurisdiction to resolve any additional disputes.

Dated in Anchorage, Alaska on January 5, 2016.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Pam Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 Duane Gerlach, claimant v. Leonard's Landing Lodge, and Liberty Mutual Insurance Co., defendants; Case No. 201515667; 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 January 5, 2016.

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Vera James, Office Assistant