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 ON MODIFICATION & RECONSIDERATION AWCB Case No. 201515667 AWCB Decision No. 16-0017 Filed with AWCB Anchorage, Alaska on March 4, 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. As a result, *Gerlach v. Leonard's Landing Lodge, Inc*., AWCB Decision No. 16-0006 (January 5, 2016) (*Gerlach I*) decided Claimant was, on the injury date, Leonard's Landing Lodge's (Leonard's) "employee" and it was his "employer." On January 19, 2016, Leonard's filed a timely petition expressly seeking reconsideration and implicitly seeking modification. On January 22, 2016, *Gerlach v. Leonard's Landing Lodge, Inc*., AWCB Decision No. 16-0008 (January 22, 2016) (*Gerlach II*), heard Leonard's petition on the written record and ordered additional briefing so the parties could brief the issues more fully. Claimant's former attorney withdrew after *Gerlach I* and Claimant now represents himself. Attorney Stacey Stone represents Leonard's and its insurer. There were no witnesses. Both parties timely filed their briefs, and the written record closed on February 20, 2016. This decision resolves Leonard's January 19, 2016 petition on its merits.

ISSUES

Leonard's contends *Gerlach I* made improper factual findings and the fact-finders inappropriately inserted their experience, judgment and observations and improperly drew inferences from the findings. Accordingly, while its petition is styled as requesting only reconsideration, Leonard's implicitly contends *Gerlach I* should be modified and some factual findings should be omitted.

Claimant did not specifically respond to this contention. However, Claimant submitted personal, hand-written statements and other documents either refuting Leonard's allegations or supporting *Gerlach I*'s factual findings and factual conclusions.

1) Should *Gerlach I* be modified?

Leonard's contends *Gerlach I* also made legal errors. It contends *Gerlach I* erred as a matter of law by finding Claimant credible while finding Leonard's witnesses not credible. Leonard's also contends the hearing panel exhibited "obvious bias" and inappropriately proceeded with the hearing without an "industry" panel member present. Lastly, Leonard's contends *Gerlach I* erred by failing to grant a "requested continuance," given the industry representative's absence.

Claimant did not specifically respond to this contention.

2) Should *Gerlach I* be reconsidered?

FINDINGS OF FACT

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

1) On September 2, 2015, Leonard's General Manager Annette Harter wrote to the division and enclosed the August 17, 2015 injury report and a separate letter she had written to Claimant. Harter's letter to the division said Claimant was hired as a "contractor," who had "told us" he had his own insurance as a contractor. (Harter letter, September 2, 2015).

2) On January 5, 2016, *Gerlach I* made numerous factual findings and factual conclusions. In the "FINDINGS OF FACT" section, *Gerlach I* stated: "The following facts and factual conclusions are established by a preponderance of the evidence:" (*Gerlach I* at 2).

3) On January 19, 2016, Leonard's filed a timely petition expressly seeking reconsideration and implicitly seeking modification. (Petition, January 19, 2016; judgment and inferences drawn from the petition).

4) On January 22, 2016, *Gerlach II* ordered additional briefing on Leonard's petition solely so the parties could address the issues more fully on the written record. (*Gerlach II*).

5) On February 5, 2016, Leonard's timely filed its brief. Leonard's contends *Gerlach I* made factual mistakes. Leonard's contends the fact-finders' experience, judgment, observations and inferences drawn from the evidence cannot be "facts" and are not "factual." (Memorandum In Support of Employer's Petition for Reconsideration, February 5, 2016).

6) *Gerlach I* made preliminary factual findings and factual conclusions to which Leonard's raises no objection. These include:

- 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). (*Gerlach I* at 2-4).

However, Leonard's contends certain factual findings and factual conclusions in *Gerlach I* should be omitted, including:

- 9) Claimant's and Leonard's relationship resulting from his teleconference with Annette while Claimant was in Anchorage between stints [8, above], 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). (*Gerlach I* at 4).

7) Leonard's contends it presented sufficient evidence to call factual conclusion (9) into dispute, and consequently factual conclusion (9) cannot be a "matter of fact." (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 2).

8) Leonard's did not elaborate on the evidence it presented to call factual conclusion (9) "into dispute." Leonard's brief concedes "there were multiple additional projects" that could be "contracted out," which Claimant could perform "if he wished" and agreed Claimant could perform additional projects for "the amount of time he wished to stay." (*Id.*).

9) At hearing, the parties agreed they had created an oral contract of hire. (Board Hearing Transcript at 95-96).

10) *Gerlach I* came to the following factual conclusion:

> • 35) . . . Work injuries <u>can be</u> catastrophic and can cause disability and impairment and can require significant, expensive medical care. (. . . ; experience). (*Gerlach I* at 12; emphasis added).

11) Leonard's contends the factual conclusion from paragraph (35) is an "inappropriate opinion," has no bearing on *Gerlach I* because the merits were not being decided, is misleading and is prejudicial to Leonard's. Further, Leonard's contends Claimant testified he was working as an independent contractor "on both ends of his time" and "did indeed expect to carry his own accident burden." (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 3).

12) The portion of factual finding (35) with which Leonard's takes issue is a general, factual conclusion based upon the fact-finders' extensive experience reviewing work-related injuries and associated medical expenses. It is akin to "official notice." Factual finding (35) does not state, and was not intended to suggest, that Claimant's injury was catastrophic, caused disability or impairment and would require significant, expensive medical care. It was not an opinion and was included to address element (3) in the "relative nature of the work test." (Experience, judgment).

13) At hearing, Claimant testified in respect to bearing his own accident burden:

> Q <u>When you were working with Mr. McGough</u> who was expected to carry the accident burden if you were injured?

> A As an independent contractor I was expected to carry that burden myself. (Board Hearing Transcript at 44-45; emphasis added).

14) At hearing, when asked why he took notes to which he referred during his hearing testimony, Claimant testified, referring to Leonard's, "Because I felt that I was an employee out there." (Board Hearing Transcript at 45; emphasis added).

15) Claimant never testified he was Leonard's independent contractor while working for Leonard's. Claimant never testified he expected to carry his own accident burden while working for Leonard's. (Board Hearing Transcript at 1-129).

16) *Gerlach I* found the following facts and came to the following factual conclusion:

- 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). (*Gerlach I* at 15).

17) Leonard's takes issue with the phrase, "Presumably, Claimant unloaded the garbage at the dump," and contends a presumption cannot be known for certain, and therefore, (49) cannot be considered a "fact." (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 3).

18) At hearing, in respect to Claimant's garbage duties, Annette Harter testified as follows:

> Q Mr. Gerlach testified that there was a period of time when he was expected to pick up the garbage and take it to the dump. Is that true?
>
> A One of the things about rural Alaska is that everything is very expensive. Fuel costs have been as much as almost six dollars a -- a gallon. So when anyone on property goes into the town of Yakutat, which is about three miles, for any reason, we try to make the trip make monetary sense. So because Mr. Gerlach was going to use the company vehicle to pick up a part at the hardware store and while he was out he was going to take time to pick up food for himself, 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. (Board Hearing Transcript at 66-67; emphasis added).

19) Based solely upon Annette Harter's testimony, factual finding and factual conclusion (49) more correctly should have stated, "Claimant unloaded the garbage at the dump." (*Id*.).

20) *Gerlach I* found the following facts and made the following factual conclusion:

- 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).

21) Leonard's contends factual finding and conclusion (60) were the panel's "opinion" and not "facts." Leonard's contends Annette Harter testified "she understood claimant Gerlach to be carrying his own insurance." Leonard's contends *Gerlach I* should have weighed all facts and determined which ones were credible, but it should not have inserted "such assumptions which are disputable and attribute them as facts." (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 4).

22) In respect to her understanding of whether Claimant had his own workers' compensation insurance, Annette Harter testified:

> Q And, Ms. Harter, you've provided to us a Post-it note that we've submitted for the record, and can you describe to me what this Post-it note is?
>
> A Yes. I distinctly remember Duane and I talking there at the Sportsman Show. I wanted -- I asked him, you know, what kind of money he needed for contract work and (indiscernible) that he was open to discuss that since he was really wanting to have a -- a chance at a -- at a job in the future, and so I said since you would be providing your own insurance what if we paid you 25-dollar-an-hour contract rate, can you do it for that.
>
> Q And what was his response?
>
> A He said that that was acceptable. (Board Hearing Transcript at 56; emphasis added).
>
> . . . .
>
> Q Ms. Harter, when did you make that note?
>
> A I wrote the note to myself at the Sportsman Show, the phone number, his name (indiscernible) his name at the top, and the fact that he had agreed to $25 an hour and -- and no insurance on our side. . . . (*Id.* At 58-59).
>
> . . . .

Was it your understanding that Mr. Gerlach was expected to carry his own accident burden?

A Absolutely.

Q And did you discuss that with him?

A When I negotiated the contract for hourly rate I said to him, since you have your own insurance, how about $25 per hour contract rate. (*Id*. at 62; emphasis added).

. . . .

Q And when you claim you had this conversation where you said how about $25 an hour since you have your own insurance, what kind of insurance did he tell you that he had?

A He told me he was a contractor and I made the assumption that he would have insurance as a contractor, so that's why I said since you have your own insurance, how about $25 per hour contract rate.

Q So you did not specify when you made the statement to him that you claim you made that you were talking about workers' comp insurance.

A No, I did not.

Q Were you aware that he has VA benefits?

A No. (*Id*. at 64-65; emphasis added).

. . . .

Q Okay. Along with that there was a question about -- I think it was maybe the sticky note. Yeah, it was the sticky note on this notice of intent to rely dated December 22nd that was filed the other day. You said something about how you and Duane came up with your agreement for $25 an hour and you said -- I think you said because he had his own insurance would he accept $25 per hour, and he said, yes, he would. Is that right?

A Yes.

Q Okay. What was it about him having his own insurance that would factor into your offer to pay him $25 per hour?

A Well, it really doesn't. It -- I just said you -- you know, you have your own insurance and would you accept $25 an hour contract rate.

> Q Well, what if he said, I don't have any insurance, what would you have offered him then?
>
> A I would have off -- I would have looked into whether I had the budget and I could hire him as an employee.
>
> . . . .
>
> A I've been very careful as I run this lodge that -- to be protected, and if someone doesn't have their own insurance as a contractor, I make them an employee.
>
> Q And it's your testimony that this little sticky note where it says, N-O, I-N-S, I assume that means no insurance, right?
>
> A That we were not providing any insurance. (*Id*. at 104-105; emphasis added).

23) Leonard's had hired an independent contractor from Washington to erect a building. In respect to this company, Annette Harter testified as follows:

> Q Did this company provide you with proof of insurance?
>
> A No.
>
> Q It wasn't part of the bidding process that you required proof of insurance?
>
> A No, we did not.
>
> Q And the board of directors didn't require proof of insurance?
>
> A They did not. (Board Hearing Transcript at 78; emphasis added).

24) Nothing in the hearing record suggests Leonard's ever asked Claimant if he had any kind of insurance. (Board Hearing Transcript at 1-129).

25) Industrial accident burdens may include temporary, permanent, total or partial disability, permanent impairment, a need for retraining, a need for medical care, or death. People typically meet these accident burdens through private resources or workers' compensation, disability or health insurance. (Official notice; experience).

26) *Gerlach I* found the following facts:

- 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). (*Gerlach I* at 20).

27) Leonard's contends at no point did the panel "make any mention of whispering," nor is whispering "clear from the record." Therefore, Leonard's contends the "only benefit improperly inserting such opinion" as "facts" is to "prejudice the employer." Leonard's contends factual finding (72) should be stricken from the record. (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 4).

28) The panel at no point during the hearing mentioned it had heard whispering. But, regardless of whether the panel mentioned it or the recording device recorded whispering, both panel members heard whispering and heard longer than normal pauses between some questions and answers from Annette Harter. (Observations).

29) *Gerlach I* found the following facts:

- 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). (*Gerlach I* at 12-13).

30) Leonard's contends paragraph (39) made a factual error by referring to these documents as "payroll records," because Claimant, not Leonard's, created these documents. Leonard's contends the "payroll records" description improperly implies these documents were created and maintained by Leonard's. (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 4).

31) At hearing, Claimant clearly testified the "timesheets" attached as Exhibit 3 to his attorney's hearing brief were created by him, not Leonard's, and were created to document his time worked for Leonard's for a state wage and hour claim. *Gerlach I* in (39) referred to the

same subject documents as both "timesheets" and "payroll records." *Gerlach I* did not state or imply these records were created by Leonard's and the panel did not consider them Leonard's records in the panel's deliberation. (Board Hearing Transcript at 101-102; observations).

32) *Gerlach I* found the following facts:

> • 47) Claimant admitted he was not required to punch a time clock and was not paid bi-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*.). (*Gerlach I* at 14).

33) Leonard's contends Claimant never offered the above testimony, so it was improper for the panel to make any such inference. (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 4).

34) At hearing, in reference to taxes being deducted from his pay at Leonard's, Claimant testified as follows:

> Q When you received your payment from Leonard's Landing Lodge were taxes deducted?
>
> A No, they were not.
>
> Q Did you ever question Leonard's Landing Lodge about that?
>
> A No, I did not.
>
> Q Were you ever required to fill out any type of employment paperwork?
>
> A No. Can I add to that?
>
> MS. STONE: I have no further questions.
>
> THE CHAIR: All right. Any redirect?
>
> DUANE GERLACH testified as follows on:
>
> REDIRECT EXAMINATION
>
> BY MS. POWELL:
>
> Q Did you want to comment on counsel's last question?

> A Yes, I did. The first time was a tryout, so I wasn't concerned about the taxes, et cetera. The second time we were not seeing eye to eye. That's when I gave my notice and I did not want these people messing with my money. I wanted my money, and you see what they did to my last paycheck. I asked them several times if I owed them anything and the answer was always no. (Board Hearing Transcript at 49-50; emphasis added).

35) The panel considered Claimant's above-referenced answers his explanation for why he did not discuss tax paperwork and tax deductions from his pay with Leonard's. (Judgment).

36) In addition to the alleged fact-finding errors, Leonard's contends *Gerlach I* also made legal mistakes. First, Leonard's contends the panel abused its discretion by finding Claimant credible even though Claimant admitted at hearing he had lied to Annette Harter about the reason for his delay in his departure following his last stint working at Leonard's. In respect to this contention, Leonard's states "in spite of his actions and obvious agitation," the panel found Claimant "cool, calm and collected." Leonard's contends these findings were "blatant abuses of the law," were "incredible," and call into question the panel's "ability to judge credibility." (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 5).

37) Leonard's did not explain Claimant's "actions and obvious agitation" to which it refers, but the panel re-deliberated about this and could recall only that while testifying, Claimant was sincere, cool, calm and collected. The panel recalled that one point during the hearing, Claimant and his former attorney had a discussion at their table, but the panel was not privy to what was said or the issue discussed because the panel could not hear the discussion. (*Id*.; observations).

38) Leonard's next contends *Gerlach I* erred as a matter of law by diminishing the weight accorded Annette and Pete Harter's testimony through their repeated use at hearing of the term "contract" and contractor." Leonard's contends this weighing demonstrates "obvious bias," and "calls into question the board's ability to properly adjudicate such matters." Leonard's requests the panel to reconsider its credibility determinations and "truly consider the facts at hand." (Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 5).

39) 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. (Board Hearing Transcript at 116).

40) When asked for his account of the changed flight, 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. (*Id*. at 117).

41) There is no evidence Claimant was under oath when he had the discussion with Annette about leaving Yakutat the final time and the reasons he did not leave as scheduled. (Record).

42) There is no evidence the Harters wanted to appear in person at the December 23, 2015 hearing and the division denied that request. The panel could judge the Harters' credibility only by what the panel heard over the phone and by comparing that with what Claimant said and with the documentary evidence. (Agency file; record; experience; judgment; observations).

43) Lastly, Leonard's contends it advised "the board at the outset of the December 23, 2015 hearing" that the absence of the industry panel member "rendered the board panel unfit to effectively analyze the issues of the case and warranted a continuance of the hearing in order to allow the evidence to be presented to a full three-member panel." In this regard, Leonard's contends the panel denied "employer's requested continuance" and the decision to proceed with the hearing absent an industry member "compromised the integrity of the fact-finding process and materially prejudiced the employer's ability to defend against the claim." Leonard's further contends the law requires three panel members for each hearing, and while the law allows for a two-member quorum to hear claims, the requested continuance should have been granted to prevent "irreparable harm." Leonard's further contends *Gerlach I* states "all workers are employees" and *Gerlach I* thus threatens to eliminate the "independent contractor." Consequently, Leonard's contends this preliminary employer-employee issue should have been decided by a three-member panel and, because the industry member was absent, the findings were "irreparably tainted." (Memorandum In Support of Employer's Petition for Reconsideration, February 5, 2016, at 6-7).

44) At hearing, the following initial colloquy occurred:

> THE CHAIR: Good morning. We're on the record before the Alaska Workers' Compensation Board. We're here in the Third Judicial District in Anchorage, Alaska. Today is Wednesday, December 23rd, 2015. The time is 10:51 a.m.,

> according to that clock. It's pretty close. And we're on the record in a case entitled Duane Gerlach, Claimant v. Leonard's Landing Lodge and its Workers' Compensation Insurance Company. This is AWCB Case No. 201515667, and my name is William Soule. I'm the designated chair for today's hearing. We have one board member with us today, which constitutes a panel for our purposes. I'd like to ask her to state her name, please.
>
> BOARD MEMBER CLINE: Pam Cline.
>
> THE CHAIR: Thank you, and for the claimant?
>
> MS. POWELL: Keenan Powell.
>
> THE CHAIR: Thank you, and for the defendants?
>
> MS. STONE: Stacey Stone.
>
> THE CHAIR: Thank you. Are there any preliminary issues before we get started today?
>
> MS. POWELL: I'm unaware of any.
>
> MS. STONE: We would just object to the two-member panel. While it does constitute a quorum pursuant to 23.30.005(a), each panel shall include three members, including the hearing officer, a representative of industry and a representative of labor, and there's no representative of industry present.
>
> THE CHAIR: All right. And your objection is noted, and I'll also point out that in the event that Ms. Cline and I do not agree on the way the decision should be written today that we will invoke the administrative regulations that call for adding -- in this case it would be an industry member -- to review the record, listen to the tapes and so forth, and issue essentially a tie-breaking vote. Okay? Okay, any other preliminary issues?
>
> MS. STONE: No. (Board Hearing Transcript, at 3-4).

45) At no time during the hearing did Leonard's advise the panel that it thought the industry member's absence "rendered the board panel unfit to effectively analyze the issues of the case." At no time did Leonard's request a continuance. (Board Hearing Transcript, at 1-129; Memorandum in Support of Employer's Petition for Reconsideration, February 5, 2016, at 6).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> 1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . ;
>
> 2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . . .
>
> 4) hearings in workers' compensation cases shall be impartial and fair to all parties and . . . all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

In *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987), the board had decided a second employer was liable for an injured worker's disability benefits. On appeal, the superior court reversed and remanded on grounds the board had failed to make certain required findings and its determination lack substantial evidentiary support. In reviewing the superior court's decision, the Alaska Supreme Court stated a reviewing court's duty was not to "reweigh the evidence presented to the Board, but to determine whether there is substantial evidence in light of the whole record that a reasonable mind might accept as adequate to support the Board's conclusion." *Rogers & Babler* also stated, "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." The board's opinion was supported by testimony and "inferentially" by the nature of the employee's work and by the fact he could work despite pain prior to his last employment but required surgery thereafter.. The court further held subjective determinations are "the most difficult to support." That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable. . . ." (*Id*. at 534).

> **AS 23.30.005. Alaska Workers' Compensation Board**. (a) The Alaska Workers' Compensation Board consists of a southern panel of three members sitting for the first judicial district, two northern panels of three members sitting for the second and fourth judicial district, five southcentral panels of three members each sitting for the third judicial district, and one panel of three members that may sit in any judicial district. Each panel must include the

> commissioner of labor and workforce development or a hearing officer designated to represent the commissioner, a representative of industry, and a representative of labor. . . .
> . . . .
>
> (f) Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board. . . .
>
> **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). Addressing the process used for determining a witness's credibility, in *Gold Dust Mines, Inc. v. Little Squaw Gold-Mining Company*, 299 P.3d 148 (Alaska 2012) the Alaska Supreme Court noted:

> In making credibility determinations, the superior court is not limited to identifying deliberate misrepresentations. The superior court may refuse to credit testimony based on inaccuracies in a witness's ability to perceive or recall events. It was within the superior court's discretion in this case to determine whether -- and on what grounds -- to disbelieve . . . testimony.
>
> . . . The superior court may overlook inconsistencies and contradictions in testimony where the weight of the evidence counsels the court to do so. And the superior court may focus on inconsistencies in testimony when the weight of the evidence so counsels. The superior court did the latter in this case, and Gold Dust offers no justification adequate to reverse this credibility determination. (*Id*. at 167).
>
> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year . . . whether or not a compensation order has been issued . . . review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

For an alleged factual mistake, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005).

> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied. . . .

AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743, n. 36 (Alaska 2005).

> **8 AAC 45.070. Hearings.** (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). . . .
> . . . .
>
> (k) The board will, in the board's discretion, permit a member
> . . . .
>
> (2) who did not attend a hearing before a two-member panel to review the written record, evidence, and hearing recording and to deliberate with
>
> (A) a deadlocked two-member panel to make a decision; or
> . . . .
>
> (l) Before the member is added to the panel under (k) of this section, the board will write to the parties, stating the member's name, and give the parties an opportunity to request the member's disqualification from the panel in accordance with AS 44.62.450(c).

> **8 AAC 45.074. Continuances and cancellations**.
> . . . .
>
> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection:
>
> (1) Good cause exists only when

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness, becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(J) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(K) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues

> set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
>
> (L) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing. . . .

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

In *Searfus v. Northern Gas Co.,* 472 P.2d 966 (Alaska 1982), the Alaska Supreme Court 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. . . .
> . . . .
>
> > (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; . . .

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.*).

In Alaska civil court cases, jurors are typically given the following jury instruction to assist them in judging witness credibility:

> **Alaska Civil Pattern Jury Instructions. 1.07 Credibility of Witnesses.** Every person who testifies under oath is a witness. You, as jurors, are the sole judges of the credibility of the witnesses.

In deciding whether to believe a witness and how much weight to give a witness' testimony, you may consider anything that reasonably helps you to evaluate the testimony. Among the things that you should consider are the following:

(1) the witness' appearance, attitude, and behavior on the stand and the way the witness testifies;

(2) the witness' age, intelligence, and experience;

(3) the witness' opportunity and ability to see or hear the things the witness testifies about;

(4) the accuracy of the witness' memory;

(5) any motive of the witness not to tell the truth;

(6) any interest that the witness has in the outcome of the case;

(7) any bias of the witness;

(8) any opinion or reputation evidence about the witness' truthfulness;

(9) any prior criminal convictions of the witness which relate to honesty or veracity; and

(10) the consistency of the witness' testimony and whether it is supported or contradicted by other evidence.

You should bear in mind that inconsistencies and contradictions in a witness' testimony, or between a witness' testimony and that of others, do not necessarily mean that you should disbelieve the witness. It is not uncommon for people to forget or remember things incorrectly and this may explain some inconsistencies and contradictions. It is not uncommon for two honest people to witness the same event and see or hear things differently. It may be helpful when you evaluate inconsistencies and contradictions to consider whether they relate to important or unimportant facts.

If you believe that part of a witness' testimony is false, you may choose to distrust other parts also, but you are not required to do so. You may believe all, part, or none of the testimony of any witness. You need not believe a witness even if the witness' testimony is uncontradicted. However, you should act reasonably in deciding whether you believe a witness and how much weight to give to the witness' testimony.

ANALYSIS

1) Should *Gerlach I* be modified?

Leonard's did not expressly ask for *Gerlach I* to be modified. But Leonard's petition contends *Gerlach I* made factual errors. Factual errors are not subject to reconsideration, which is reserved for legal errors. AS 23.30.130; *Lindekugel*. Factual mistakes are subject to modification. *Id*. For Leonard's petition to be properly decided on its merits and for its arguments to be fairly considered, this decision will treat the petition as one also requesting modification. AS 23.30.001(1), (2), (4). Leonard's petition generally follows the procedure for requesting relief through modification based on factual mistakes. 8 AAC 45.150(d)(1)-(3). Leonard's contentions will, therefore, be addressed in the order presented, general to specific.

First, Leonard's, as a general proposition, suggests *Gerlach I* inappropriately relied on the fact-finders' inferences to make factual findings and conclusions. Leonard's contends such are not "facts." But the Alaska Supreme Court disagrees. In *Rogers & Babler*, the court stated fact-finders may rely on, among other things, "direct testimony" and on their "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Rogers & Babler* credited findings made "inferentially" as appropriate. Therefore, *Gerlach I* made no error by drawing inferences from the evidence presented at hearing. Second, as clearly stated at the beginning of the "Findings of Fact" section, *Gerlach I* made both "factual findings" and drew "factual conclusions" from those findings. Leonard's has presented no legal authority to suggest this was improper. Therefore, *Gerlach I* will not be modified on these grounds.

a) Factual finding (9) draws a factual conclusion about the parties' conceded oral contract.

Leonard's takes issue with factual finding and conclusion (9) and contends Leonard's presented "sufficient evidence" at hearing to call this factual finding and conclusion into dispute. Therefore, Leonard's contends factual finding and conclusion (9) cannot be considered a "matter of fact." The parties at hearing agreed Claimant and Leonard's had an oral contract. It is undisputed Leonard's hired Claimant to do something and created some status between them. The disagreement was over whether the oral contract created a contract of hire for employment as an employee or a contract for hire as an independent contractor. Claimant contends Leonard's

hired him as an "employee," while Leonard's contends it hired him as an independent contractor. *Gerlach I*'s goal was to find facts and make factual and legal conclusions addressing this issue.

Factual findings one through eight address the parties' relationship. There was little if any factual dispute over the first eight factual findings and related factual conclusions. Leonard's takes issue with factual finding and conclusion (9). Leonard's brief did not expressly state what "sufficient evidence," in its view, placed factual finding and conclusion (9) into dispute. Leonard's brief admits there were "multiple additional projects" that could be "contracted out" so Claimant could stay as long as he wished. Based on factual findings and conclusions one through eight, *Gerlach I* drew a separate factual conclusion that, based on Annette's teleconference with Claimant between stints, Leonard's consented to Claimant returning to Yakutat to work for Leonard's, *i.e.*, "to act on Leonard's behalf and subject to its control" in some capacity. Claimant consented, resulting in the parties forming an implied, oral contract of hire. As the parties agreed they had an oral contract, and Leonard's brief lists factors confirming the contract's creation, it is unclear why Leonard's disputes the above-referenced factual finding and conclusion. Factual finding and conclusion (9) simply states the parties created an oral contract of hire; it is neutral on the issue of the relationship created.

Furthermore, Leonard's suggestion fact-finders cannot make a factual determination if a matter "is disputed" is without merit. The fact-finders' job is to make factual findings. But for disputes about the facts, no hearing would have been required as the parties would have been in agreement. Contrary to what either party argued, *Gerlach I* found two, separate hiring contracts, one for the first stint and one for the second. *Childs*. Leonards' has failed to explain how those factual findings and related conclusions were erroneous. Given the above analysis, Leonard's request to modify factual finding and conclusion (9) will be denied.

b) Factual finding (35) took official notice of a known fact.

Leonard's contends factual finding (35) concerning what consequences may result from work injuries was an inappropriate opinion, irrelevant, misleading, and prejudicial. Leonard's mis-reads this factual finding. It does not state Claimant's injury was catastrophic, caused disability or impairment and requires significant, expensive medical care. It simply states the obvious --

that work injuries "can" result in all of these things. Contrary to Leonard's assertion, this fact is relevant to the "relative nature of the work test" which requires the fact-finder to determine whether the purported employee "can be expected to carry" his own accident burden. *Searfus*. If the injured worker is found "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. 8 AAC 45.890(3). *Gerlach I* found this was the case, based upon the panel's knowledge and experience.

Leonard's appears to realize this relevance as it also contends Claimant expected to carry his own accident burden. However, the record discloses Leonard's is mistaken on this point as well. Claimant testified when he was working "as an independent contractor" for McGough, he expected to carry his own accident burden. The fact Claimant was working as an independent contractor before he went to work for Leonard's, and in between stints for McGough, does not mean he was working as an independent contractor for Leonard's. He expressly denied that he was, and stated he was working as Leonard's "employee." Again, the factual finding with which Leonard's has an issue is one the law required the fact-finders to make under the "relative nature of the work test." 8 AAC 45.890(3). Factual finding (35) will not be modified.

c) Claimant unloaded the garbage at the dump.

Leonard's contends it is unknown what occurred with the garbage once Claimant drove the truck carrying the garbage to the dump. Leonard's takes issue with the word "presumably" in factual finding (49), which it states defies certainty and thus cannot be a "fact." Further review shows Leonard's is once again factually mistaken. At hearing, Annette Harter explained why Claimant was asked to take garbage "and just drop it off at the dump." The phrase "drop it off" implies Claimant did exactly that -- he physically dropped it off at the dump. There is no evidence the Yakutat dump has personnel available to unload garbage from privately owned vehicles, or that Leonard's pickup truck has a belly-dump feature allowing the driver to simply drive through the landfill, push a button, and have the garbage fall out by itself. But Leonard's objection drew attention to Annette Harter's testimony, which forms the basis for a stronger inference and factual conclusion than already set forth in (49). On this point Leonard's petition will be granted. Factual conclusion (49) will be changed from, "Presumably, Claimant unloaded the

garbage at the dump" to "Claimant unloaded the garbage at the dump." AS 23.30.130; *Rogers & Babler*.

d) Annette Harter made inconsistent statements concerning insurance.

Leonard's contends factual finding and conclusion (60) were the panel's "opinion" and not "fact." This factual finding and conclusion determined Claimant never told Annette Harter he had workers' compensation insurance, or for that matter, any insurance. On September 2, 2015, Annette wrote to the division and said Claimant was a contractor who "told us" he had his own insurance. At hearing, Annette twice testified she told Claimant "since you would be providing your own insurance" and "since you have your own insurance" she would offer him a specific hourly pay rate. But when pressed on the issue, Annette later testified "I made the assumption that he would have insurance" because Annette thought Claimant was a then-currently licensed contractor. At no point, while under oath, did Annette ever testify Claimant told her he had any kind of insurance. To the contrary, Annette admitted she made an assumption about insurance.

Therefore, either Annette's September 2, 2015 letter in which she told the division Claimant "told us" he had his own insurance, or her sworn testimony that she only assumed he had insurance, was not accurate. Further, Annette never testified she asked Claimant if he had any insurance. This is consistent with her testimony that she never asked the Washington independent contractor she hired to build a structure if it had insurance either. Though Annette professed to be "very careful," and if someone did not "have their own insurance" she would "make them an employee," the evidence shows her propensity was to not even ask if workers had insurance. Annette made an assumption about Claimant's insurance and it turned out to be incorrect. Nevertheless, factual finding and conclusion (60) is accurate and will not be modified.

e) The panel has no duty to point out credibility issues at hearing.

Factual finding (72) found longer-then-usual pauses before Annette answered some questions and stated the panel members heard whispering in the background. It is undisputed Pete Harter was present and listened to his wife's telephonic hearing testimony. Leonard's contends the panel never mentioned this during the hearing, and whispering is not "clear from the record." It contends this factual finding is an inappropriate "opinion" inserted only to "prejudice the

employer." Leonard's is correct that at no point during the hearing did either panel member mention they heard whispering on the speakerphone during Annette's testimony. But Leonard's provided no authority stating the panel had any duty to point out issues going to a witness' credibility. There is no such duty. Contrary to Leonard's assertion, this factual finding was made not to "prejudice the employer," but was made to call into question Pete's credibility and the weight accorded Annette's testimony. AS 23.30.122; *Smith*. Regardless of whether the parties heard whispering, or it appears on the record, the panel members heard what they heard. Leonard's request to modify or strike factual finding (72) will be denied.

f) The "payroll records" were not Leonard's.

Factual finding (39) referred to "timesheet records" Claimant created for a state wage and hour claim against Leonard's. Finding (39) also referred to these same documents as "payroll records." Leonard's takes issue with the reference to "payroll records" saying these words improperly imply they were Leonard's. To the contrary, Leonard's improperly infers that the finding implicates Leonard's in any way with the wage and hour records. Based on Claimant's clear testimony, the panel was aware Claimant had created these documents for his wage and hour dispute. Therefore, there was no factual error and factual finding (39) will not be modified.

g) Factual finding (47) properly summarizes Claimant's testimony.

Factual finding (47) summarizes Claimant's testimony about taxes and related paperwork and why he did not complain to Leonard's about taxes not being withheld from his pay. Leonard's contends Claimant never offered the cited testimony and *Gerlach I* improperly made inferences not supported in the record. The subject testimony began as cross- and finished as re-direct examination. Taken together, it is clear Claimant was asked about taxes being deducted from his pay. He was also asked if Leonard's required him to fill out employment paperwork. But at the end of Leonard's cross-examination, Claimant stated, "Can I add to that?" On re-direct, Claimant's lawyer immediately asked if he wanted to comment further on opposing counsel's last question. Claimant explained that while his first stint was a tryout he was not concerned about "taxes et cetera." Following his second stint, when he and Leonard's had a disagreement, he did not want Leonard's "messing with" his money given what they had done to his last paycheck. Read in totality, these questions and answers were reasonably summarized in factual

finding and conclusion (47). *Rogers & Babler*. Therefore, factual finding (47) will not be modified.

Given the above analysis, Leonard's has demonstrated an error in factual finding (49), which will be modified in accordance with this decision. In this lone respect, Leonard's implied petition for modification will be granted. However, Leonard's failed to demonstrate any other factual mistakes in *Gerlach I*. Accordingly, Leonard's implied request for modification in all other respects will be denied.

2) Should *Gerlach I* be reconsidered?

Alleged legal errors are addressed through reconsideration. AS 44.52.540; *Lindekugel*. Leonard's contends *Gerlach I* made two legal mistakes. First, Leonard's contends *Gerlach I* made inappropriate and incorrect credibility determinations. Second, Leonard's contends *Gerlach I* improperly failed to grant a "requested continuance." Leonard's fails to say how credibility findings amount to legal errors subject to reconsideration, since credibility findings are factual conclusions. Nonetheless, Leonard's contentions will be addressed in order.

a) Credibility determinations are conclusive.

Leonard's concedes *Gerlach I* had broad discretion to determine witness credibility. AS 23.30.122; *Smith*. However, Leonard's contends *Gerlach I* abused its discretion because Claimant admitted he had previously lied to Annette Harter regarding why his plane reservation had been changed. Leonard's contention has no merit for several reasons. First, Claimant admitted he had lied to Annette Harter and gave his reasons for doing so. There is no evidence Claimant was under oath when he lied, and a reasonable inference from the evidence is that he was not. *Rogers & Babler*. Second, the incident over which Claimant admittedly lied has no bearing on the employer-employee issue, occurred after the relevant facts addressing that issue had already occurred and the plane ticket event is not relevant to the matter at hand. Third, at hearing while under oath, Claimant admitted he had previously told a lie. Leonard's apparently adheres to a "once a liar always a liar" concept. The law however does not require adherence to this idea and Leonard's has provided no supporting authority. *Gold Dust Mines, Inc*. If panels

could not rely on any witness who it could be shown had ever previously lied, no witness would ever be found credible. *Gerlach I*'s credibility findings will not be changed on this basis.

Credibility may be determined in numerous ways. For example, a panel hearing a case often has the opportunity to observe witnesses testify in person. The witness's age, education, experience, demeanor, eye contact and other non-verbal clues may support or belie their testimony and often provide insight into their credibility. *Alaska Civil Pattern Jury Instruction 1.07*. Claimant appeared personally at hearing and testified under oath. *Gerlach I* found his sworn testimony sincere, cool, calm and collected. Leonard's objects to this finding, citing Claimant's unspecified "actions and obvious agitation." The panel observed no inappropriate "actions" or any "agitation" while Claimant was testifying. At one point during the hearing, the panel noticed Claimant and his former attorney having a discussion at their table. However, the panel could not hear the conversation and is unaware of its nature. Whatever the nature of that discussion, it forms no basis for *Gerlach I* to alter its credibility findings concerning Claimant's testimony. Furthermore, fact-finders may overlook inconsistencies in testimony when the weight of the "evidence so counsels." *Gold Dust Mines, Inc*. In this case, given Claimant's other testimony and the weight of the other evidence, *Gerlach I* chose to overlook an admitted, irrelevant lie Claimant had made while not testifying under oath. Leonard's has not demonstrated why, as a matter of fact or law, this approach was improper or incorrect.

Similarly, Leonard's faults *Gerlach I*'s findings that Annette and Pete Harter were not credible and giving less weight to their testimony. In particular, Leonard's questions *Gerlach I*'s criticism of Annette Harter for repeatedly using the phrase "contract" and "contractor." Annette's repeated use of these words was strained, sounded rehearsed and was taken to an extreme, at one point even suggesting that the "contract," which admittedly never existed in written form, "required" Claimant to install a roof on the shed before painting the exterior walls. AS 23.30.122; *Smith*. This, in conjunction with other inconsistencies already mentioned above, further diminished Annette's credibility.

There is no evidence Annette and Pete Harter wanted to testify in person at the hearing and the division somehow prevented them from coming. They chose to testify telephonically. *Rogers &*

Babler. Consequently, the panel was limited in its ability to determine their credibility through observation, as it did with Claimant. Considered in light of Annette's pre- and post-injury letters to Claimant and to the division, Claimant's credible testimony as observed at hearing and Pete's and Annette's whispering during Annette's testimony, the credibility findings are supported by substantial evidence and will not be reconsidered. *Gerlach I* simply chose to rely on Claimant's testimony over Annette and Pete Harter's testimony. AS 23.30.122; *Smith*.

b) Leonard's never requested a continuance.

At the hearing's inception, Leonard's objected to a two-member panel. AS 23.30.005(a). The designated chair noted the objection, stated a quorum was present and explained the standard process the panel would follow in the event there was a tie during deliberations and the panel was deadlocked. AS 23.30.005(f); 8 AAC 45.070(k)(2)(A). Following this explanation, the chair asked if there were any other preliminary matters. Leonard's attorney responded, "No." At no time during the hearing did Leonard's request a continuance. Therefore, Leonard's request for reconsideration based upon a failure to grant a continuance will be denied.

Had Leonard's requested a continuance based on the absence of the industry panel member, it would have been denied. Hearings are held at the times and places noticed, and continuances are not favored and will not be routinely granted. 8 AAC 45.070(a); 8 AAC 45.074(b). Continuances are only granted only for "good cause." 8 AAC 45.074(b). "Good cause" is listed in 8 AAC 45.074(b)(1)(A)-(L). An absent panel member is not among the specified factors constituting good cause. By contrast, AS 23.30.005(f) expressly states two panel members constitute a quorum for hearings. Leonard's relies on 8 AAC 45.074(L), which is a "catch-all" basis for continuing a hearing. This section states a hearing may be continued if it is found, despite a party's due diligence, "irreparable harm" may result from a failure to grant a requested continuance. This section refers to a party's action, which has nothing to do with a panel member's absence. Furthermore, as *Gerlach I* awarded no benefits to Claimant, it remains to be seen if his status as Leonard's "employee" makes any difference on the merits. Thus, Leonard's can show no "irreparable harm" flowing to it from *Gerlach I.*

Finally, Leonard's contends *Gerlach I* threatens to eliminate the "independent contractor" status in Alaska altogether. Leonard's offers this argument to support its contention that this issue should have been heard and decided by a three-member panel. To the contrary, employer-employee disputes, when they occasionally arise, are resolved on a case-by-case basis based upon the peculiar facts in each case. Some litigants in such cases have written agreements, which shed light on the parties' contractual intent. For many reasons, results in many such cases are more obvious than in others. As in similar employer-employee disputes, *Gerlach I* applied the "relative nature of the work test" required by *Searfus* and 8 AAC 45.890. The fact *Gerlach I* resolved the employer-employee issue against Leonard's based upon the facts in this case does not mean *Gerlach I*'s factual findings on this issue are "irreparably tainted." *Gerlach I*, as it is fact-based, surely does not eliminate the independent contractor status in the State of Alaska. For all these reasons, Leonard's petition for reconsideration will be denied.

CONCLUSIONS OF LAW

1) *Gerlach I* will be modified in part.
2) *Gerlach I* will not be reconsidered.

ORDER

1) Leonard's January 19, 2016 implied petition for modification is granted in part and denied in part.
2) Factual conclusion (49) is modified from, "Presumably, Claimant unloaded the garbage at the dump" to "Claimant unloaded the garbage at the dump."
3) In all other respects, Leonard's January 19, 2016 implied petition for modification is denied.
4) Leonard's January 19, 2016 petition for reconsideration is denied.
5) With exception of order (2), above, *Gerlach I* remains in full force and effect.

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Dated in Anchorage, Alaska on March 4, 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 on Modification & Reconsideration 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 March 4, 2016.

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Vera James, Office Assistant