ALASKA WORKERS' COMPENSATION BOARD

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

WILLIAM CONLEY, Employee, Claimant, v. INDIGO TEA LOUNGE, Employer, and BENEFIT GUARANTY FUND, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201609144 AWCB Decision No. 16-0117 Filed with AWCB Anchorage, Alaska on November 28, 2016.

William Conley's (Claimant) July 6, 2016 claim was heard on October 27, 2016 in Anchorage, Alaska. The hearing date was selected on August 30, 2016. Claimant appeared, testified and represented himself. Putative employer, Indigo Tea Lounge, appeared, testified and represented itself through managing member Nick Coltman (Indigo Tea). McKenna Wentworth appeared for the Alaska Workers' Compensation Benefits Guaranty Fund (the Fund). Velma Thomas appeared telephonically and also represented the Fund. Kirby McGhee testified on Claimant's behalf. The record closed at the hearing's conclusion on October 27, 2016.

ISSUE

Claimant contends he was an employee of Indigo Tea, an employer, on November 11, 2015 when he fell off of a ladder and injured himself. Claimant contends the injury arose out of and in the course of his employment with Indigo Tea and he is entitled to benefits under the Alaska Workers' Compensation Act (Act).

Indigo Tea contends Claimant was working as an independent contractor at the time of the injury and is therefore not entitled to benefits under the Act.

The Fund contends Claimant was not an employee at the time of his injury. However, the Fund contends if Claimant is found to be an employee of Indigo Tea, an employer, a decision and order should issue awarding appropriate benefits to Claimant.

Was Claimant an employee of Indigo Tea at the time of his injury?

FINDINGS OF FACT

1) On November 13, 2015, Claimant sustained injuries when he fell off of a ladder while doing remodeling work for Indigo Tea. (Report of Occupational Injury or Illness, June 2, 2016).

2) On July 6, 2016, Claimant filed a workers' compensation claim (WCC) against Indigo Tea and the Fund, seeking temporary total disability (TTD) benefits, medical benefits, and transportation benefits. (WCC, July 6, 2016).

3) On July 19, 2016, the Fund answered the WCC, asserting it was unclear whether there was an employee-employer relationship between Claimant and Indigo Tea. (Answer, July 19, 2016).

4) On September 26, 2016, the parties attended mediation with hearing officer Ron Ringel in Anchorage. The only issue remaining after mediation was whether the parties were in an employee-employer relationship. (Hearing Testimony, October 27, 2016).

5) Claimant testified that he worked as a commercial fisherman for 25 years. He currently works intermittent construction jobs. He has worked for the Afognak Native Corporation (Afognak) for the past eight years as a laborer or carpenter on intermittent construction jobs. Claimant believes he is an employee of Afognak and notes that he is always supervised by a foreman and receives a W-2 form. He has also done maintenance work for the Boys and Girls Club. Claimant contended his construction work is not a continuous business and that he has always moved between projects as they were completed. When Afognak won a bid to work on a project, it would call the employees it was satisfied with to come back and work. Claimant first met the owners of Indigo Tea in 2002 through Nick Coltman's father-in-law, Jerry Bagley. He was asked to help work on a remodel of the Anchorage Press building. He was supervised by

Bagley on that project. After that first project, various projects came up over the years that Nick Coltman asked Claimant to work on. Claimant was always paid an hourly wage and received a 1099 tax form at the end of the year. He has never been licensed, bonded, or insured as a contractor and never represented that he was. In 2015, Indigo Tea approached Claimant when he was in between jobs to help Kirby McGhee with the remodel of its new tea store. There was too much work on too short of a timeline for McGhee to complete alone. Claimant had just returned from Kodiak where he had worked for Afognak and was waiting to be re-hired by Afognak. Claimant agreed to work on the tea store remodel because he had free time. He began working on the remodel on October 28, 2015. He was helping clean up the job site and sheetrocking, sanding, and staining. Indigo Tea paid him $25.00 per hour. There was no written contract in place; every agreement they had ever had has been oral. He was supervised by McGhee and McGhee told him what to work on day to day. The co-owners of Indigo Tea would also come in and check on the progress of the project and confer with McGhee about what should be done next. Claimant usually worked Monday through Friday from 8:00 a.m. until 3:30 depending on how much progress he and McGhee made each day. Claimant was responsible for keeping track of his own hours and would submit them weekly to the co-owners. Claimant did not have any input on how the project was accomplished. Claimant did not have authority to hire additional workers. The tools used were minimal: a scraper, paintbrush, sanding block, and a putty knife. Claimant brought tools he brings to every project he works on, McGhee brought some tools, and some tools were at the job site. Claimant believed he was an Employee. Claimant said that the co-owners of Indigo Tea had hired many people over the years to work on various projects and not all of them could realistically be classified as self-employed contractors. Claimant argued that independent contractors usually bid on a job and charge a lump sum to complete each project, receiving 50% up front and the rest when they complete the project. Claimant contended $25.00 per hour would not be enough to hire an independent contractor who was licensed, bonded, and insured. Claimant did not give a bid because he was not sure what he would be specifically working on when he started. Claimant noted that in contrast, plumbers and electricians were hired to do the plumbing and electrical work on the project, and presumably gave bids and were treated as independent contractors. Claimant had a key to the store and would come in early in order to let the plumbers or electricians into the store. Claimant believed that he could have walked away from the project if he wanted to without any legal recourse

because there was no contract and no bid submitted. Claimant would have left the remodel job if Afognak had called him to work because Afognak pays him Davis Bacon wages of more than $50.00 per hour. (Hearing Testimony, October 27, 2016).

6) Kirby McGhee testified that he met Claimant when he began working with him on the Indigo Tea remodel in October 2015. McGhee is an artist and does drywall and painting work. He has worked for the co-owners of Indigo Tea on various projects over the years. He was paid hourly and received 1099 tax forms. On this specific project McGhee did drywall patching, painting, and framing. The project was taking longer than anticipated, so Indigo Tea brought Claimant in to help with the cosmetic work and expedite the process. McGhee only worked with Claimant for a couple of weeks. McGhee left the remodel at times to work on other projects and visit his family. He agreed with Claimant's characterization of the work, his hours, and the tools used for the project. McGhee was present when Claimant was injured. Claimant was going up a ladder to put a few more screws in a piece of drywall and fell. Claimant injured both his legs. McGhee helped carry Claimant to a car and drove him to the hospital. McGhee was not licensed, bonded, or insured for the remodel project. (Hearing Testimony, October 27, 2016).

7) Nick Coltman, co-owner of Indigo Tea, testified that Claimant has worked on many projects for him over the years, including doing repairs for his tenants, handyman work, and remodel projects. Claimant had worked for the co-owners personally and also for businesses that they owned, including Anchorage Publishing. Coltman has always considered Claimant to be an independent contractor on all of the projects and has always given him a 1099 tax form. Indigo Tea did not have an active payroll running during the remodel and did not purchase workers' compensation insurance. Indigo Tea purchased general liability insurance through Hagen Insurance Company and believed that it would cover accidents for people working on the remodel project. Nick Coltman acted as the general contractor on the project and hired G&A Contractors to do the major construction work. The project was running behind because G&A Contractors had another job at the time and pulled workers off the Indigo Tea remodel to work on the other project. Kirby McGhee managed the day-to-day work on the project. Indigo Tea provided all of the materials, but not the tools. Claimant was free to come and go and work whenever he wanted to. Claimant was reliable, would show up every day, and could leave if he had other obligations. Coltman understood Claimant was helping Indigo Tea while he was waiting for another job. Coltman was not aware that Claimant did not have insurance, and

thought that "everyone had insurance through Obamacare." Claimant had expressed to Coltman that he was uncomfortable going up the ladder and was told to not do so. (Hearing Testimony, October 27, 2016).

8) All of the witnesses' testimony was credible. (Hearing Testimony, October 27, 2016; Observations).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter …

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> **AS 23.30.020. Chapter part of contract of hire**. This chapter constitutes part of every contract of hire, express or implied, and every contract of hire shall be

> construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner provided in this chapter for all personal injuries sustained.

Coverage under the workers' compensation act must arise from a contract of hire, express or implied, and before an employee/employer relationship exists under the Act, an express or implied contract of employment must exist. *Whitney–Fidalgo Seafoods, Inc. v. Beukers*, 554 P.2d 250, 252 (Alaska 1976); *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 313 (Alaska 1989). The essence of a workers' compensation system is that it is a mutual arrangement of reciprocal rights between employer and employee, whereby both parties give up and gain certain advantages. It is from the contract of hire, either express or implicit in the employment relationship, that compensation coverage flows, with the concomitant adjustment of rights and remedies between employer and employee. *Whitney-Fidalgo Seafoods, Inc., 554 P.2d at 252.* When an employee accepts a job with an employer, it is fair that the employee loses the right to sue in tort in exchange for workers' compensation coverage because the employee knows that employment is being accepted and presumably knows the impact that such acceptance has on the right to sue. *Cluff v. Nana-Marriott, 892 P.2d 164, 174 (Alaska 1995).*

> **AS 23.30.045. Employer's liability for compensation**. (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180-23.30.215. . . .

> **AS 23.30.055. Exclusiveness of liability.** The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. The liability of the employer is exclusive even if the employee's claim is barred under AS 23.30.022. However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee or the employee's legal representative in case death results from the injury may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. In that action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of the employment, or that the injury was due to the contributory negligence of the employee. In this section, 'employer' includes, in addition to the meaning given in AS 23.30.395, a person who, under AS 23.30.045(a), is liable for or potentially liable for securing payment of compensation.

AS 23.30.075. Employer's Liability to Pay.

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(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the division, upon conviction, the court shall impose a fine of $10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

AS 23.30.082. Workers' Compensation Benefits Guaranty Fund.

…

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter….

AS 23.30.120 Presumptions. 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; . . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute. *Id.* (Emphasis omitted). The presumption's application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second step when the employer presents substantial evidence which demonstrates a cause other than employment played a

greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, Alaska Workers' Comp. App. Comm'n Dec. 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 step. *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient, the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *See Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered.

> **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 finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g*., *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **AS 23.30.255. Penalty for Failure to Pay Compensation**. (a) An employer required to secure the payment of compensation under this chapter who fails to do so is guilty of a class B felony if the amount involved exceeds $25,000 or a class

> C felony if the amount involved is $25,000 or less. If the employer is a corporation, its president, secretary, and treasurer are also severally liable to the fine or imprisonment imposed for the failure of the corporation to secure the payment of compensation. The president, secretary, and treasurer are severally personally liable, jointly with the corporation, for the compensation or other benefit which accrues under this chapter in respect to an injury which happens to an employee of the corporation while it has failed to secure the payment of compensation as required by AS 23.30.075. . . .
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> **AS 23.30.395. Definitions**. In this chapter,
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> (19) 'employee' means an employee employed by an employer as defined in (20) of this section;
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> (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. . . .

Before an employee-employer relationship exists under the Act, an express or implied contract of employment must exist. *Alaska Pulp Co. v. United Paperworkers Intern. Union*, 791 P.2d 1008, 1010 (Alaska 1990). Formation of such a contract generally requires mutual assent and consideration. *Alaska Pulp Co.*, 791 P.2d at 1010. An important purpose underlying the contract of employment requirement is to avoid "thrust[ing] upon a worker an employee status to which he has never consented . . . [since doing so] might well deprive him of valuable rights. . . ." *Id.* at 1011.

Employment generally begins after a meeting of the minds has been reached between the employee and the employer, for at that point a contract is formed. *Childs v. Kalgin Island Lodge*, 779 P.2d 310, 313 (Alaska 1989). Express contract formation requires an offer encompassing its essential terms, an unequivocal acceptance of the terms by the offeree, consideration and intent to be bound. *Childs*, 779 P.2d at 314. An implied employment contract is formed by a relationship 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 so to act." *Id.* An implied contract's existence must be determined by considering all factors in light of the surrounding circumstances. *Cluff v. Nana-Marriott, 892 P.2d 164, 171 (Alaska 1995).* A claimant's belief the claimant intended to work only for one party does not preclude the

possibility an implied employment contract may have been formed between the claimant and another party. *Childs v. Tulin*, 799 P.2d 1338, 1340 (Alaska 1990).

> **8 AAC 45.177. Claims against the workers' compensation benefits guaranty fund.**
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> (d) The fund is subject to the same claim procedures under the Act as all other parties.
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> (e) The fund may not be obligated to pay the injured worker's claim unless the
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> > (1) employee and employer stipulate to the facts of the case, including that the employee's claim is compensable, which has the effect of an order under 8 AAC 45.050(f), or the board issues a determination and award of compensation; and
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> > (2) the employer defaults upon the payment of compensation for a period of 30 days after the compensation is due.
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> (f) In case of default by the employer in the payment of compensation due under an award and payment of the awarded compensation by the fund, the board shall issue a supplementary order of default. The fund shall be subrogated to all the rights of the employee and may pursue collection of the defaulted payments under AS 23.30.170.
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> (g) In this section, 'fund' means the worker's compensation benefits guaranty fund (AS 23.30.082 (a)).

> **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
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> (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; (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 "relative-nature-of-the-work" test was adopted to distinguish between employees and independent contractors for determining whether an individual is an "employee," and thus eligible for workers' compensation benefits under the Act. In determining whether a particular individual is an employee, the board must assess the totality of all the relevant circumstances surrounding the parties' relationship. *Kroll v. Reeser,* 655 P.2d 753 (Alaska 1982). However, both relationships presuppose a contractual undertaking. Therefore, absent a contract for hire, the board is not required to make this distinction. *Alaska Pulp Corp,* 791 P.2d at 1008.

Larson's Workers' Compensation Law states in relevant part:

> **§ 61.03 Extent of Control of Details.** The rule here is best put negatively: An owner, who wants to get work done without becoming an employer, is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, as distinguished from control of the person doing it, without going beyond the independent contractor relation.

> **§ 61.06 Method of Payment.** Payment on a time basis is a strong indication of the status of employment. Payment on a completed project basis is indicative of independent contractor status. . . .
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> **§ 61.07 Who Furnishes Equipment.** When the employer furnishes valuable equipment, the relationship is almost invariably that of employment. . . . . In applying the test of who furnishes equipment, it is essential to bear in mind the rationale underlying the test. When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business. The owner of a $10,000 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like, in order to protect his or her investment. Moreover, since there is capital tied up in this piece of equipment, the owner will also want to ensure that it is kept as productive and busy as possible. For these reasons, it is not surprising that there seems to be no case on record in which the employer owned the truck but the driver was held to be an independent contractor. . . .
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> **§ 62.02 Whether Work is Integral Part of Employer's Business**. . . .
> . . .
>
> (3) Transportation
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> Transportation, depending on the main business of the employer, may be ancillary or central to his operation. . . . [W]hen the employer's main business is transportation, farming out a portion of that business will often lead to a finding of employment. . . .
>
> **§ 63.03 Effect of Name Chosen by Parties.** It is a truism that the name chosen by the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume. A plain statement that the parties intend the relationship of independent contractor and not employee is not entirely to be disregarded, however. In a close case, it may swing the balance by aiding in establishing the true intent of the parties, and after all that intent is entitled to considerable respect if it can be accurately ascertained. . . . [I]t is quite possible that the worker honestly does not want to be an employee; and paternalism should not be carried so far that the state says to him, "We do not care what you want; we think employee status with compensation protection is better for you."

3 A. Larson, *Larson's Workers' Compensation Law* § 61-63 (2008).

ANALYSIS

Was Claimant an employee of Indigo Tea at the time of his injury?

Applying the AS 23.30.120 presumption analysis and without considering witness credibility, Claimant attached the presumption he was Indigo Tea's "employee" when he was injured on November 13, 2015. This finding is based upon Claimant's testimony that he was paid hourly and was supervised. Claimant successfully established a "preliminary link" showing an employee-employer relationship between himself and Indigo Tea, attaching the §120 presumption.

Once the presumption is raised, Indigo Tea must rebut the presumption with substantial evidence, which is viewed in isolation and without considering credibility. Indigo Tea presented evidence that it treated Claimant as an independent contractor by preparing 1099 tax forms and purchasing general liability insurance instead of workers' compensation insurance. This is substantial evidence to rebut the §120 presumption and shift the burden to Claimant, who must prove his claim against Indigo Tea by a preponderance of the evidence. *Runstrom*.

The "relative-nature-of-the-work" test was adopted to determine whether an individual is an "employee" of an "employer," and thus eligible for workers' compensation benefits under the Act. *Alaska Pulp Co.*, 791 P.2d at 1012. However, both relationships presuppose a contractual undertaking. Therefore, absent a contract for hire this distinction need not be made. *Id.* Thus, the first inquiry is whether or not there was an oral or written contract for hire, express or implied, for employment purposes or otherwise, between Claimant and Indigo Tea. If there was no such agreement, the inquiry ends there and the relative-nature-of-the-work test need not be applied.

The parties do not dispute Claimant and Indigo Tea entered into an express, oral contract hiring Claimant to do work. Claimant had been working on various projects for the owners of Indigo Tea for several years. Because there was an express contract for hire between Claimant and Indigo Tea, the next inquiry is to determine the status of their contractual relationship.

The "relative nature of the work" test is applied to distinguish between employee and independent contractor status. *Alaska Pulp Co.,* 791 P.2d at 1012. The "most important factors" in the test are

8 AAC 45.890(1) and (2). At least one of these factors must be resolved in Claimant's favor to find he was Indigo Tea's "employee" at the time of his injury. These first two factors are then considered in light of the remaining four.

(1) Was Claimant's work a separate calling or business? Did Claimant have the right to hire or terminate others at the time of the November 13, 2015 accident?

Claimant has worked in the construction industry on various projects for many years. Most recently before his injury, he had worked as an hourly employee for Afognak Native Corporation. He also worked on different construction and remodeling projects for the Indigo Tea co-owners over the years. While Indigo Tea filed 1099 tax forms for Claimant, there was no evidence presented at hearing that Claimant held himself out to the public as an independent contractor available for hire. There is no dispute that Claimant did not have authority to hire or terminate others. Under this factor, there is therefore no inference Claimant was not Indigo Tea's employee.

A) Did Indigo Tea have the right to exercise control over the manner and means to accomplish the desired result?

Nick Coltman discussed with Kirby McGhee what needed to be done and McGhee was responsible for the day to day operations. Claimant was supervised by McGhee, and worked under his direction. Indigo Tea therefore had the right to exercise control over the manner and means of Claimant's work. This factor creates a strong inference of employee status.

B) Did Indigo Tea and Claimant have the right to terminate the relationship at will, without cause?

Claimant testified he could have walked away from the job if he chose to. He noted that if Afognak had contacted him to work, he would have left the job at Indigo Tea because Afognak paid Davis Bacon wages. There was no written contract between Claimant and Indigo Tea. Claimant was between jobs at Afognak and elected to work on the Indigo Tea remodel. Indigo Tea agreed with this testimony and noted that Claimant was helping them out between jobs. Indio Tea also noted that McGhee left the project at times to work on other projects and visit his family. Based on the testimony of both parties and the lack of a written contract, it is clear Claimant had the right to walk away from the job and could not be sued for his failure to complete the remodel. Thus, this factor creates an inference of employee status.

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

As stated previously, Claimant was directly supervised by co-worker Kirby McGhee, and Nick Coltman, in consultation with McGhee, dictated the work to be completed each day. This factor does create an inference of employee status.

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

The tools Claimant used in the remodel were minimal: a scraper, paintbrush, sanding block, and a putty knife. Claimant brought in some tools he always brings to projects, Kirby McGhee brought in some tools, and some tools were provided by Indigo Tea and available on the worksite. This factor creates an inference of employee status.

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

Claimant was paid $25.00 per hour. Claimant contended that if he were an independent contractor and were licensed, bonded and insured he would have a made a bid for the job and would have been paid a 50% deposit upfront and the rest of the bid once the project was completed. Claimant argued that an independent contractor could not afford to work for $25.00 per hour because it would not cover the licensing fees and insurance premiums required to conduct his own business. Claimant also testified that he did not make a bid, because he did not know exactly what he would be doing during the remodel. This factor creates an inference of employee status.

F) Did Indigo Tea and Claimant enter into a written or oral contract, and if so, what "employment status" did they believe they were creating?

The evidence shows Claimant and Indigo tea entered into an express oral contract for hire and Claimant worked on several projects for Indigo Tea. Indigo Tea and the Fund rely heavily on Claimant's 1099 tax returns as evidence he considered himself self-employed and thus not Indigo Tea's employee. While tax status is certainly a factor to consider in determining whether specific parties believed they were entering into an employee-employer relationship, it is not definitive. The

totality of all relevant circumstances surrounding the parties' relationship must be considered. *Kroll.*

The panel accepts Indigo Tea's testimony that it believed Claimant to be an independent contractor based on his 1099 tax status and their choice to purchase general liability insurance rather than workers' compensation insurance to cover any accidents that occurred on the jobsite. While the panel must give deference to the parties' intentions, the contract must be construed in view of the circumstances under which it was made and the conduct of the parties while the job was being performed. Other than his tax status, it is clear Claimant was treated as employee, and not an independent contractor. Assessing the totality of all the relevant circumstances surrounding the parties' relationship, Claimant and Indigo Tea created an employee-employer relationship.

Of the six factors considered in the first prong of the relative-nature-of-the-work test, six factors create an inference of employee status. Consequently, on balance, this of the two most important factors of the test is resolved in favor of finding an employee-employer relationship between Claimant and Indigo Tea.

(2) Were Claimant's services a regular part of Indigo Tea's business or service?

This is the second of the two most important factors in the test. Indigo Tea's business was to sell tea. Claimant did not work in the store selling tea, but was working on the building remodel prior to the opening of the tea store. This factor creates a strong inference of non-employee status. As this is one of the two "most important factors," this inference is significant.

(3) Can Claimant be expected to carry his own accident burden?

Claimant testified he was not licensed, bonded or insured. Nick Coltman testified he believed Claimant had insurance under Obama Care. However, he also testified that Indigo Tea purchased general liability insurance for the very reason of covering accidents that may occur on the worksite during the remodel. Because Claimant could not be expected to carry the accident burden as he was not licensed, bonded or insured, and Indigo Tea purchased general liability for this purpose, there is a strong inference of employee status.

(4) Did Claimant's work involve little or no skill or experience?

Claimant's work for Indigo Tea required skills of general construction work. Claimant had this experience and also worker as a carpenter/laborer for Afognak. Claimant had experience with drywall, painting, etc. This factor creates an inference of employee status between Claimant and Indigo Tea.

(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?

Claimant worked on various projects for the co-owners of Indigo tea throughout the years. However once he completed the job, the parties intended for the relationship to end. This factor creates an inference of non-employee status.

(6) Was the employment intermittent, as opposed to continuous?

As stated previously, Claimant worked on various projects for the co-owners of Indigo Tea over the years. He worked on this specific remodel, because he was in between jobs at Afognak. Claimant explained that construction work itself is intermittent and not continuous. Claimant's work for the co-owners of Indigo Tea was intermittent. This supports an inference of non-employee status.

Application of the relative-nature-of-the-work test, as codified at 8 AAC 45.890 demonstrates it is more likely than not an employee-employer relationship existed between Claimant and Indigo Tea. Claimant has proven by a preponderance of the evidence he was an "employee" and Indigo Tea an "employer," as defined at AS 23.30.395(19) and (20) on November 13, 2015.

CONCLUSION OF LAW

Claimant was an "employee" of Indigo Tea, an "employer" at the time of his injury.

ORDER

1) Claimant's July 6, 2016 claim for benefits is granted.

2) Indigo Tea shall pay all workers' compensation benefits owed under the Act, including TTD benefits, medical benefits and associated costs, as requested in Claimant's July 6, 2016 claim.

3) Jurisdiction is retained to decide any disputes over specific benefits Claimant is owed.

Dated in Anchorage, Alaska on November 28, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Amanda Eklund, Designated Chair

unavailable for signature
Stacey Allen, Member

/s/
Amy Steele, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Worker's Compensation Appeals Commission.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the board and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in 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 Final Decision and Order in the matter of WILLIAM CONLEY, employee / claimant; v. INDIGO TEA LOUNGE, employer; ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND / defendants; Case No. 201609144; 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 Monday, November 28, 2016.

/s/
Pamela V. Hardy, Office Assistant