ALASKA WORKERS' COMPENSATION BOARD

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

HAMILTON COOPER, Employee, Claimant, v. PARIS BAKERY & CAFÉ, LLC, Uninsured Employer, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201808854 AWCB Decision No. 19-0021 Filed with AWCB Anchorage, Alaska On February 20, 2019

Hamilton Cooper's (Employee) June 20, 2018 claim and Alaska Workers' Compensation Benefits Guaranty Fund's December 7, 2018 petition to join were heard in Anchorage, Alaska on February 5, 2019, a date selected on January 4, 2019. A September 24, 2018 affidavit of readiness for hearing gave rise to this hearing. Employee appeared and testified. Luke Gilligan, appeared, represented Paris Bakery (Employer) and testified. Elizabeth Gilligan appeared and testified for Employer. Velma Thomas and McKenna Wentworth appeared and represented the Alaska Workers' Compensation Benefits Guaranty Fund (Fund). The record closed at the hearing's conclusion on February 5, 2019.

ISSUES

The Fund contends Gilligan Holdings, LLC (Gilligan), is the management company for Employer, and should be joined as a party to Employee's claim. The Fund contends it should be joined as a matter of law because it did not object to joinder within 20 days after the Fund's petition was served. It also contends Gilligan should be joined because it is a party against which a right to relief may exist.

Employer objects to joinder and does not wish for Gilligan's corporate veil to be pierced.

1) **Should Gilligan Holdings, LLC be joined as a party?**

Employee contends his work for Employer is the substantial cause of his disability and need for medical treatment for his right hand and wrist strain.

Employer contends an injury to Employee's thumb occurred when he was a child and did not arise out of or in the course of his employment with Employer. It contends it offered Employee light duty work and he is not entitled to indemnity benefits for more than three days. Employer contends Employee's removal from work was at his own volition.

The Fund contends Employee's testimony and medical records support he is entitled to temporary total disability (TTD) benefits from June 19, 2019 through July 27, 2019; however, there is no "compelling" evidence Employee has a loss of earnings because Employer offered and Employee declined light duty work. The Fund contends providers' bills have been paid by Medicaid and Medicaid has a subrogation right to recover the amounts paid.

2) **Did Employee's right hand strain arise out of and in the course of his employment with Employer?**

3) **Is Employee entitled to medical benefits?**

4) **Is Employee entitled to TTD benefits from June 19, 2018 to July 27, 2018?**

FINDINGS OF FACT

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

1) Employee's right thumb was amputated when he was seven years old. (Cooper; Chart Note, Kathleen Nuttle, PAC, June 19, 2018.)

2) The parties stipulated Employee worked for Paris Bakery & Café, LLC, when he sustained a strain injury to his right hand and wrist; the medical bills for treatment of Employee's right hand strain total $1,583.00; Employee's $35,000 2017 earnings should be used to calculate his TTD rate. (Hearing Stipulation.)

3) Employer was formed on June 1, 2016, and Gilligan is its only member. (Alaska Division of Corporations, Business and Professional Licensing Entity Details, Paris Bakery & Café, LLC.)

4) Gilligan was formed on November 28, 2016. Its members, Elizabeth and Luke Gilligan, own 49 and 51 percent of Gilligan, respectively. (Alaska Division of Corporations, Business and Professional Licensing Entity Details, Gilligan Holdings, LLC.)

5) On June 15, 2018, Employee reported to Employer his right hand and wrist were injured by the repetitive motion required to perform his work as a baker. (Report of Occupational Injury or Illness, June 20, 2018; First Report of Injury, June 26, 2018.)

6) On June 19, 2018, an x-ray showed Employee's right-hand thumb was amputated at the base of the proximal phalanx and there was mild flexion of the DIP joints of the second and third digits. There were no severe degenerative changes and his soft tissues were normal. There was concern Employee had an extensor tendon injury. Employee reported he worked as a pastry chef, which required hand-kneading bread and rolling croissants, and over the last two weeks he had so much pain in his right hand he could hardly move it. PAC Nuttle examined Employee and found stiffness with range of motion, pain between the second through fourth interosseous membranes between the metacarpals and, although Employee could make a fist, it was uncomfortable for him. PAC Nuttle reported Employee was treating with her for an orthopedic condition and was "unable to make bread or roll dough for the next 4 - 6 weeks." PAC Nuttle mentioned Employee was "given a note saying that he cannot utilize ling [sic] of breads and croissants while at work." She referred Employee for therapy one to two times per week for four to six weeks, prescribed Mobic and gave him a splint. (Right-Hand X-Rays, June 19, 2018;

Chart Note, PAC Nuttle, June 19, 2018; Work / School Status Note, PAC Nuttle, June 19, 2018; Orthopedic Physicians Therapy Order, June 19, 2018.)

7) PAC Nuttle did not restrict Employee from all work, just work that involved rolling dough and making bread and croissants. (*Id*.)

8) On June 19, 2018, Employer notified Employee it had a light duty position for him to perform while on restriction from his work injury. Employee declined light duty work and stated:

> All due respect Luke, I came on as a baker. I hurt my hand doing bakers [sic] tasks.
>
> I understand the thinking behind asking me to be a server, but that's not what I wish to do sir.
>
> I thank you for giving me the opportunity to be employed. My wife and I must decline the offer to serve.
>
> I will be getting therapy. There might be surgery. I am officially out of commission. I couldn't use my right hand before, now I really can't use it.
>
> No one can be more upset than me. I sincerely apologize for the inconvenience.

(Cooper Text Message to Luke Gilligan, June 19, 2018.)

9) On July 11, 2018, Employee underwent an occupational therapy evaluation and reported there was no particular mechanism of injury, but he experienced right-hand pain for approximately two to three weeks and suspected his right hand pain was a result of cumulative trauma from his job as a baker. Employee's diagnosis was pain in right-hand joints, generalized muscle weakness and right hand stiffness. It was recommended Employee receive occupational therapy two times per week for eight weeks. Employee's occupational therapy commenced on July 11, 2018. Medicaid paid for Employee's occupational therapy. (Occupational Therapy Evaluation Office Visit, July 11, 2018; Occupational Therapy Plan of Care, July 11, 2018.)

10) On July 19, 2018, Employee attended his second occupational therapy session and had been a "no show" for one session. Employee continued to complain of right-hand pain. (Occupational therapy Office Visit, July 19, 2018.)

11) On July 26, 2018, Employee attended his third occupational therapy session and had been a "no show" for two sessions. (Occupational therapy Office Visit, July 26, 2018.)

12) On July 27, 2018, Employee requested a release to return to work with no restrictions. "He has previously been seen for right-hand pain, which was sustained after an episode of exceptionally high volume work. He is a baker and he had to do some manual kneading of a lot of dough over the period of a couple weeks secondary to machine breakdown in his kitchen. He did have a lot of pain." Employee reported his pain was "mostly resolved" and he wanted to go back to work. Employee's neurological strength and sensation were intact in his right four fingers. Sensation was intact to soft touch for his right fingers. Employee's right-hand pain had resolved. Employee was advised to continue with therapy and, if he did not need additional therapy, to formally withdraw so he was not given a "no show" status. He was released to full duty work without restrictions. (Chart Note, Iva Michelle Milgram, PAC, July 27, 2018; Work / School Status Note, PAC Milgram, July 27, 2018.)

13) On August 14, 2018, OrthoAlaska's bill for medical services provided to Employee and record of payments for services from June 19, 2018 through July 27, 2018 was filed with the board. The following charges and payments are itemized:

	CPT				**Payments**	
DOS	**Code**	**Description**	**Charge**	**Adjustment**	**Medicaid**	**Employee**
6/19/18	99212	Office Visit/ Outpatient Visit	$135.00	$81.96	$50.04	$3.00
	73130	X-Ray Exam of Hand	$214.00	$178.64	$35.36	$3.00
	L3809	A1-Quick Fit WTO Univ.	$234.00	$55.19	$178.81	
7/11/18	97166	OT Eval Mod Complex 45	$195.00	$83.17	$111.83	
	97110	Therapeutic Exercises	$100.00	$61.62	$38.38	
7/19/18	97110	Therapeutic Exercises	$200.00	$123.24	$76.76	
	97140	Manual Therapy	$85.00	$49.76	$35.24	
7/26/18	97110	Therapeutic Exercises	$200.00	$123.24	$76.76	
	97140	Manual Therapy	$85.00	$49.76	$35.24	
7/27/18	99212	Office Visit/ Outpatient Visit	$135.00	$82.54	$49.46	$3.00

Totals for medical service charges, adjustments and payments are:

Charges	**Adjustments**	**Payments**	
		Medicaid	**Employee**
$1,583.00	$889.12	$687.88	$9.00

(Ortho Alaska Itemized Billing Statement.)

14) On October 11, 2018, Employee requested a referral to obtain a right thumb prosthesis because he thought "he may continue to work as a baker and be more efficient in the use of his hand." He had no pain or new numbness or tingling. Employee's occupation was "proprietor" and he was working full-time. (Chart Note, Christina Waters, PAC, October 11, 2018.)

15) Employee's October 11, 2018 medical treatment and referral for a right thumb prosthesis was not reasonable and necessary treatment for his right hand and wrist work-related strain. (Judgment, observations, unique case facts of the case, and inferences drawn therefrom.)

16) On November 12, 2018, it was noted the last day Employee attended therapy was July 26, 2018, and the therapist was "unsure of his current status." Employee's therapy started on July 11, 2018, ended on September 5, 2018, and he attended only three therapy sessions. (Occupational Therapy Office Visit, November 12, 2018.)

17) Gilligan has a "management relationship" with Employer. (E. Gilligan; L. Gilligan.)

18) On December 7, 2018, the Fund requested Employer's "managing members" be joined as additional parties, including Gilligan and Elizabeth and Luke Gilligan as Gilligan's "managing members." The Fund's petition was served upon Employee, Employer and Wilton Adjustment Service. The petition's proof of service does not contain proof the petition was served upon Gilligan, Elizabeth Gilligan or Luke Gilligan. (Petition, December 7, 2018.)

19) Prior to working for Employer, Employee worked for Dipper Donuts. He resigned after employer hired a new chef with whom he had conflicts. Employee said his injury while working for Employer was to his right wrist. He was hired to work for Employer's restaurant and was responsible for croissant production. In this position, he worked from 9:30 p.m. to 6:30 or 7:00 a.m. He could not deviate from this schedule due to family obligations. He made croissants for four weeks and was then given an offer to transfer to Employer's wholesale division, which he said was in a "contentious state." Employee said for over two weeks, he worked 10 to 13 hours per day, six to seven days per week. He presumed he was still being paid an hourly wage. He said there were many inconsistencies between the schedule and the hours he worked and Employee doubted the integrity of Mr. Gilligan's word. Employee said Employer had neither properly trained personnel nor the proper equipment to perform the job without injuring employees. Employee said working for over two weeks under these circumstances took its toll and he "injured his right hand" and he made the best decision to remove himself from his job with Employer. Employee admitted Employer offered him light work, but "from an employee's

perspective, if this Employer makes a presentation and does not follow-up to his word that gives me every reason to doubt his word." Employee contends if Employer's business was properly organized and equipped, his civil and constitutional rights would have been protected. He said he has been injured personally and professionally. Employee said "working light duty is my choice" and he could not agree to work light duty for Employer. He made the decision based upon a combination of things, both professional and personal; it was a detriment to his home and his personal safety. When Employee reported his injury on June 19, 2018, Employer gave him a couple of days off, but Employee was "utterly dejected" and did not want to continue working for Employer. Employee said he could not sacrifice his wife's career for his work injury and his wife, the family's higher wage earner, made sure he made the right decision. Employee said he was off work for six weeks as directed by his provider, searched for new jobs while off work, and began a new job after his six week "rest" period, which ended on July 27, 2018. Employee's claim for medical benefits does not seek a prosthetic thumb. (Cooper.)

20) Employee's work schedule was the same each week; he worked from 8:00 p.m. to 6:00 a.m. Working as a server would have required a different work schedule. (Hearing Exhibit 4, Schedule; Observations.)

21) Luke Gilligan said Employer is "not trying to dodge the bullet on payment" and some medical care for Employee's hand strain may have been necessary. He does maintain, however, that Employee is looking for an easy way to make some money. Mr. Gilligan said Employee and a lead employee, Roman, did not get along and it was a challenging work environment for Employee. Mr. Gilligan offered to put Employee to work as a host or a server but Employee said he was a baker and did not want to be a server. Had Employee worked for Employer in light duty, he would have been paid the same hourly wage he earned as a baker. Mr. Gilligan learned the importance of getting injured workers back to work when he worked for the Captain Cook Hotel and is committed to exercising those same practices. (L. Gilligan.)

22) Elizabeth Gilligan said Employer paid Employee for all hours he worked, including overtime. Employee worked eight to nine hours a day. Employer's records show that between June 4 and June 16, 2018, Employee worked a total of 12 days and Employer was able to maintain his schedule with Sundays and Mondays off. Employee's schedule always gave him Sundays off for family time. Ms. Gilligan said Employer does not dispute Employee was injured; however, it contends his injury did not arise out of or in the course of his employment

with Employer. Ms. Gilligan said Employee has been doing the same type work for over 20 years with the same repetitive motions; his "injury has been ongoing for years." She noted an obvious injury to Employee's thumb and stated his hand has to compensate for that injury. Ms. Gilligan suggested other contributing factors are Employee's chronic gout, which causes arthritic pain, inflammation and joint pain. She said Employee's medical records indicated he is on drugs for osteoarthritis and rheumatoid arthritis and that because Employee has only one kidney, he has excess uric acid, which causes gout and effects Employee's joint and hand pain. She acknowledged Employee's work for Employer may have "escalated" Employee's pain. Ms. Gilligan said the injury to Employee's thumb did not occur while he worked for Employer and it should not be responsible for providing Employee a prosthetic thumb. (E. Gilligan.)

23) An informal waiter or server, serves food to patrons at counters and tables at coffee shops, lunchrooms, and other dining establishments where food service is informal. Tasks include presenting menus, answering questions, making suggestions regarding food and service, writing or memorizing orders, relaying orders to the kitchen and serving the orders, observing guests to respond to additional requests and to determine when the meal is complete, totaling bills and accepting payment. The position may also perform other duties as determined by the restaurant's size and practices. It is a light strength position which requires the ability to lift, carry, push and pull 20 pounds occasionally, frequently up to 10 pounds, and a negligible amount constantly. The position can include walking and or standing frequently even though weight is negligible and can include pushing and or pulling arm and leg controls. Frequent physical demands of the position include reaching, handling, talking and hearing. (DOT Occupational Description, Waiter / Server.)

24) A restaurant industry baker is a medium strength position which requires the ability to lift, carry, push and pull 20 to 50 pounds occasionally, frequently up to 10 to 25 pounds frequently or up to 10 pounds constantly. Frequent physical demands of the position include reaching, handling and fingering, among other things. (DOT Occupational Description, Baker.)

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 who are subject to the provisions of this chapter;

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

> **AS 23.30.010. 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 . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

> **AS 23.30.045. 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. If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of compensation to employees of the contractor and employees of a subcontractor, as applicable.
>
> (b) Compensation is payable irrespective of fault as a cause for the injury. . . .

> **AS 23.30.075. Employer's liability to pay.** (a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to

transact the business of workers' compensation insurance in the state, or shall furnish the division satisfactory proof of the employer's financial ability to pay directly the compensation provided for. If an employer elects to pay directly, the board may, in its discretion, require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred.

(b) If an employer fails to insure and keep insured employee subject of 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-insure.

AS 23.30.080. Employer's failure to insure. (a) If an employer fails to comply with AS 23.30.075 the employer may not escape liability for personal injury or deaths sustained by an employee when the injury sustained arises out of and in the usual course of the employment. . . .

AS 23.30.082. Workers' compensation benefits guaranty fund.
. . . .

(c) Subject to the provisions of this section, 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 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

An employer shall furnish an employee injured at work any medical treatment "which the nature of the injury or process of recovery requires" within the first two years of the injury. The medical treatment must be "reasonable and necessary." *Bockness v. Brown Jug, Inc.*, 980 P.2d 462, 466 (Alaska 1999). Thus, when an injured employee's claim for medical treatment made within two years of an injury that is indisputably work-related, "review is limited to whether the treatment sought is reasonable and necessary." *Philip Weidner & Associates v. Hibdon*, 989 P.2d 727, 730 (Alaska 1999).

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
>
> (2) sufficient notice of the claim has been given;
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
>
> (4) the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another. . . .

An injured employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286 (Alaska 1991).

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). First, an employee must establish a "preliminary link" between the claim and his employment. An employee need only adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The witnesses' credibility is of no concern in this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004).

Lay evidence in relatively uncomplicated cases is adequate to raise the presumption and rebut it. *VECO, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the presumption is raised and attaches to the claim. The injured worker's employer, at the presumption's second stage, has the burden to overcome the raised presumption by coming forward with substantial evidence the claim is not compensable. *Miller v. ITT Arctic Services*, 577 P.2d 1044 (Alaska 1978). "Substantial evidence" is an amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Id*. The employer's evidence is viewed in isolation, without regard to the employee's evidence. *Id*. Therefore, credibility questions and weight accorded the employer's evidence is deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992). The presumption may be overcome at the second stage when the employer or, in appropriate cases, the fund presents substantial evidence demonstrating a cause other than employment played a role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012). The employer's and the fund's evidence is considered by itself and the employee's evidence is not weighed against the employer's or the fund's rebuttal evidence; credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

If the employer or the fund produces substantial evidence an injury is not work-related and thus not compensable, or in claims not involving "work-relatedness" that the injury is not compensable, the presumption drops out, and the employee must prove all case elements by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) *(reversed on other grounds, Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016)). The party with the burden of proving asserted facts by a preponderance of evidence must "induce a belief" in the fact finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Id*.

> **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.

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

In *Vetter v. Alaska Workmen's Compensation Board,* 524 P.2d 264 (Alaska 1974), the court explained disability benefits under the Act. "The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Id.* at 266. An award of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id.* A claimant is not entitled to compensation when he, through voluntarily conduct unconnected with his injury, takes himself out of the labor market. *Id.* The burden of proving earning capacity loss rests with the employee. *Brunke v. Rogers & Babler*, 714 P.2d 795 (Alaska 1986).

> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
>
> (16) 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
>
> . . . .

> **8 AAC 45.040. Parties.**
> . . . .
>
> (d) Any person against whom a right to relief may exist should be joined as a party.
> . . . .
>
> (f) Proceedings to join a person are begun by
>
> (1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or
>
> (2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action.

8 AAC 45.060. Service. . . .

. . . .

(c) A party shall file proof of service with the board. Proof of service may be made by

(1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party;

(2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or

(3) letter of transmittal if served by mail.

(d) A proof of service must set out the names of the persons served, method and date of service, place of personal service or the address to which it was mailed or sent by facsimile or electronically, and verification of successful sending if required. . . .

. . . .

8 AAC 45.082. Medical treatment.

. . . .

(d) Medical bills for an employee's treatment are due and payable within 30 days after the date the employer received the medical provider's bill and a completed report on form 07-6102. Unless the employer controverts the prescription charges or transportation expenses, an employer shall reimburse an employee's prescription charges or transportation expenses for medical treatment no later than

> 30 days after the employer received . . . an itemization of the dates of travel, destination, and transportation expenses for each date of travel.
>
> **8 AAC 45.177. Claims against the workers' compensation benefits guaranty fund**.
> . . . .
>
> (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. . . .

ANALYSIS

1) Should Gilligan be joined as a party?

The Fund petitioned to join Gilligan and its petition gave notice that Gilligan would be joined unless it objected to joinder within 20 days after the petition was served. 8 AAC 45.040(g). However, before a party can be joined, it must first be served. 8 AAC 45.040(f)(1). The Fund did not serve its petition to join on Gilligan. The petition's proof of service certifies it was served upon Employee, Employer and Wilton Adjustment Service; however, neither Gilligan nor Luke or Rebecca Gilligan are named or listed as a parties served. 8 AAC 45.060(d). Without proper service of a petition to join, joinder is not proper. 8 AAC 45.040. Gilligan, Luke Gilligan and Rebecca Gilligan will not be joined as parties.

2) Did Employee's right hand strain arise out of and in the course of his employment with Employer?

This issue contains a factual question to which the statutory presumption of compensability applies. AS 23.30.102; *Koons*; *Sokolowski*. Evidence offered to raise the presumption is considered irrespective of credibility or weighing. *Wolfer*; *Ugale.* Employee claimed he injured his right wrist and hand when working as a baker for Employer. PAC Nuttle diagnosed a right hand strain injury caused by overuse. Employee establishes the preliminary link and attaches the presumption his hand strain arose out of and in the course of his employment with Employer through his testimony and PAC Nuttle's diagnosis of right hand pain due to overuse. AS 23.30.120; *Cheeks*; *Wolfer*; *Sokolowski*.

Ms. Gilligan suggests Employee's right hand pain is caused by a childhood right thumb amputation for which Employee now must compensate. She further asserts other contributing factors to Employee's right hand pain is arthritis, excess uric acid and chronic gout. Credibility questions and weight accorded Employer's evidence are deferred until after it is decided if Employer has produced sufficient evidence to rebut the presumption. *Norcon.* Lay evidence in uncomplicated cases, such as a hand strain, can be sufficient to rebut the presumption. *Wolfer*. Ms. Gilligan's testimony is sufficient to rebut the presumption at the second stage. This shifts the burden of production back to Employee. *Id.*

At the presumption analysis' third stage, Employee was able to prove he suffered a hand strain from overuse. PAC Nuttle's June 19, 2019 report considers the work Employee performed, including kneading bread and rolling croissants. She was aware his right thumb was amputated as a child, yet she attributed Employee's hand pain to overuse. Her opinions are credible. AS 23.30.122. There are no medical records showing Employee required medical care for his right hand due to his right thumb amputation. PAC Nuttle was aware of the medications Employee took and did not attribute his right hand strain to gout, arthritis or any other contributing factor. Finally, Ms. Gilligan acknowledged Employee may have "escalated" his preexisting hand injury while performing work for Employer. *Rogers & Babler*; *Saxton*.

Employee's right hand strain arose out of and in the course of his employment with Employer. AS 23.30.010; *Miller.*

3) Is Employee entitled to medical benefits?

If an employee's injury arises out of and in the course of employment, the employer must provide reasonable and necessary medical care and other treatment and apparatus required by the injury and its recovery. AS 23.30.095(a); *Bockness*; *Hibdon.* Employee's right hand strain arose out of and in the course of his employment with Employer and his work with Employer is the substantial cause of his need for medical treatment. Employee's request for an order requiring Employer to pay for medical care for his right hand strain will be granted. AS 23.30.045; AS 23.30.095; *Hibdon.*

Employer will be ordered to reimburse Medicaid $687.88 and Employee $9.00. AS 23.30.075; AS 23.30.080; 8 AAC 45.082.

4) Is Employee entitled to TTD benefits from June 19, 2018 to July 27, 2018?

"Disability" is incapacity because of a work injury to earn the wages an employee was receiving at the time of injury in the same or any other employment. AS 23.30.395(16). Employee seeks TTD benefits from June 19, 2018 to July 27, 2018. AS 23.30.185. Entitlement to these benefits is a factual question to which the presumption of compensability applies. AS 23.30.120; *Sokolowski*. Without considering credibility, Employee raises the presumption his work injury caused his disability through PAC Nuttle's work status note that restricted Employee from making bread or rolling dough for four to six weeks. *Wolfer*; *Ugale*

Viewed in isolation without considering credibility, Employer is able to rebut the presumption Employee was disabled. Employer offered Employee light duty work as a host or server at the same wage Employee would have earned in his job with Employer as a baker. *Wolfer*; *Miller*.

At the presumption's third stage Employee must provide substantial evidence he suffered a decrease in earning capacity due to a work-related injury. *Vetter*; *Brunke*. At this stage, evidence is weighed, inferences are drawn from the evidence and credibility is determined. *Saxton*.

Although Employee's job at the time of injury was not within his physical limitations set by PAC Nuttle, Employer offered Employee light duty work as a host or server. Mr. Gilligan's testimony Employer's offer of light duty work at the same wage Employee was earning as a baker is credible. Mr. Gilligan credibly testified regarding his experience adhering to the Captain Cook Hotel's policy to return injured workers to a job within their physical restrictions and his commitment to honor that practice. Employee's stated reasons for not returning to work for Employer performing light duty work as a host or server are not sufficient to prove he suffered a decrease in earning capacity because of his right hand strain. Employee choose not to return to light duty work for Employer because he was hired as a baker, did not trust Mr. Gilligan, and the offer of light duty work was not good for his family. Employee believed it was his choice to not

accept light duty work. Employee is correct; he can choose, but making a choice to not accept light duty work within his physical capacities does not mean he is entitled to or has proven a loss in earning capacity entitling him to TTD benefits. AS 23.30.185; AS 23.30.395(16).

Employer offered Employee light duty work as a host or server. In a light duty capacity, Employee could have continued to earn his regular rate of pay, despite his baker work restrictions.

PAC Nuttle did not restrict Employee from all work; she restricted him only from making bread and rolling dough. Light duty as a server required neither kneading or rolling dough or making bread. Employee has not presented evidence he suffered a decrease in earning capacity due to his hand strain. *Vetter*.

CONCLUSIONS OF LAW

1) Gilligan should not be joined as a party.
2) Employee's right hand strain arose out of and in the course of his employment with Employer.
3) Employee is entitled to medical benefits.
4) Employee is not entitled to TTD benefits from June 19, 2018 to July 27, 2018.

ORDER

1) Employee's claim for TTD benefits is denied.
2) Employer shall reimburse Alaska Medicaid $687.88 for medical treatment OrthoAlaska provided Employee to treat Employee's work-related right hand strain.
3) Employer shall reimburse Employee $9.00 for medical treatment OrthoAlaska provided Employee to treat Employee's work-related right hand strain.
4) The Fund is not liable to pay any benefits awarded in this decision unless Employer defaults on paying the compensation for 30 days after it is due and a supplementary order declaring the amount of any default is issued.

Dated in Anchorage, Alaska on February 20, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Dave Kester, Member

/s/
Pam Cline, Member

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 boards 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 ground 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 accord 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 accord 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 Hamilton Cooper, employee / claimant v. Paris Bakery & Café, LLC, uninsured employer; Alaska Worker' Compensation Benefits Guaranty Fund, defendants; Case No. 201808854; 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 February 20, 2019.

/s/
Nenita Farmer, Office Assistant