ALASKA WORKERS' COMPENSATION BOARD

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

KATHY J. SCHULTZ, Claimant, v. DEBORAH HINCHEY, Defendant, and ALASKA WORKERS' COMPENSATION BENEFIT GUARANTY FUND, Fund.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201812530 AWCB Decision No. 19-0120 Filed with AWCB Anchorage, Alaska on November 19, 2019

Kathy J. Schultz's (Claimant) August 15, 2018 claim was heard on August 14, 2019, in Anchorage, Alaska, a date selected on May 3, 2019. A May 3, 2019 stipulation gave rise to this hearing. Attorney Joseph Kalamarides appeared and represented Claimant, who appeared and testified. Attorney Elliott Dennis appeared and represented Deborah Hinchey (Defendant) who appeared and testified. McKenna Wentworth appeared and represented the Benefit Guaranty Fund (Fund). The parties stipulated to limiting the hearing to coverage under AS 23.30.230 and the employee-employer relationship issues. Issues related to any benefits to which Claimant may be entitled under the Alaska Workers' Compensation Act (Act) are reserved until after these preliminary matters are determined. The record remained open until October 4, 2018, to receive the parties' written closing arguments and closed on November 13, 2019, when the panel met to deliberate.

ISSUES

Claimant contends she was Defendant's "employee," Defendant was her "employer," she was not an "independent contractor" as defined in the Act and was not otherwise excluded from coverage under the Act when she was injured on the job. Accordingly, Claimant contends she is entitled to benefits from Defendant for her June 18, 2018 injury.

Defendant contends Claimant is not covered by the Act because she was "part-time" help under AS 23.30.230(a)(3). Defendant further contends there was no employee-employer relationship on the injury date because Claimant was working as an independent contractor.

Fund takes no position on Claimant's status under AS 23.30.230. It contends if there is no employee-employer relationship, Claimant would not be entitled to relief from Defendant.

1) Is Claimant covered under the Act and was she in an employee-employer relationship with Defendant?

Claimant contends if she prevails on these issues, she is entitled to full reasonable attorney fees and costs. She seeks an associated order.

Defendant contends Claimant is not entitled to attorney fees or costs.

Fund contends without an employee-employer relationship, Claimant would not be entitled to any benefits from Defendant, including attorney fees or costs.

2) Is Claimant entitled to an attorney fee or cost award?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On June 18, 2018, Claimant fell from a ladder while painting Defendant's duplex. She broke both wrists, her nose and right orbital bone, gashed her forehead and contused her right knee among other things. (Claimant; Claim for Workers' Compensation Benefits, August 15, 2018).

2) On August 16, 2018, Claimant sought temporary total and partial disability benefits, permanent partial impairment benefits, medical and related travel costs, a late payment penalty, interest and attorney fees and costs. (Claim for Workers' Compensation Benefits, August 15, 2018).

3) October 3, 2018, Defendant denied Claimant's right to benefits under AS 23.30.230(a)(3) and the independent contractor regulation 8 AAC 45.890. (Controversion Notice, October 3, 2018).

4) Employee first came to Alaska for one month in 2016, to care for her daughter who was living in Defendant's duplex. She met Defendant and did cleaning and maintenance in the adjacent, empty duplex unit, prepping walls for painting. Claimant left the state but returned in April 2017, to stay for as long as her daughter required. She renewed her acquaintance with Defendant who hired her to install wood trim in an empty unit and prepare it for rental. Claimant power-washed the rental unit's exterior and scraped loose paint preparatory to painting it. Defendant paid $18 per hour for Claimant's services on the duplex. The parties had an oral understanding. Claimant had no tools and Defendant provided all tools and materials. Defendant insisted the house be painted only with a brush and Claimant apply two coats. Claimant did not complete the exterior paint job in 2017. In 2018, Claimant continued to work for Defendant who gave her a list of jobs to complete in an empty unit; Claimant completed most of them. She had not completed painting the carport ceiling or the duplex exterior the prior year. The parties agreed Claimant would finish the exterior paint job and the carport ceiling. Defendant provided everything necessary for this project. In June 2018, Defendant insisted Claimant use a particular ladder to stand on while painting the carport. Claimant fell from the ladder and was seriously injured. (Claimant).

5) Claimant could refuse any job offers from Defendant. In 2016, Claimant did not consider herself Defendant's "employee" and did not expect or want payment. She liked doing the work and was just trying to "help out." Defendant told her she was very "picky" with how things were done. However, in 2017, Claimant considered herself Defendant's "employee" because she expected to be here longer, Defendant wanted things done and expressly hired her to do it. She replaced wood mouldings, cleaned an empty apartment thoroughly and helped repair damaged windowsills. Claimant submitted her hours to Defendant and was paid for what she submitted. Her son-in-law Gary Pleasant also worked for Defendant in 2017 doing electrical work. Claimant understood Defendant wanted her to complete the duplex painting and they had discussed Claimant painting Defendant's personal premises as well. The un-painted part of the duplex was crumbling and Defendant wanted her to replace some missing siding. (*Id*.).

6) Claimant also worked for Defendant's sister, who owned two rental properties that needed cleaning. Defendant put Claimant in touch with her sister Charlene Braun. Braun advised Claimant she could not work for Braun unless and until she obtained a business license and liability insurance to cover office tenants in case Claimant damaged their property. Claimant performed part-time services for Braun's businesses into June 2018, for approximately six hours per week including mostly cleaning and carpet removal. (*Id*.).

7) Claimant had minimal painting experience, learned how to paint by painting her own homes over the years and had no formal training. (*Id*.).

8) Claimant obtained a business license for Kat's Kleaning Services (Kat's), beginning in November 2017, only because Braun required her to have it to work in Braun's office buildings. Braun never made any contract with Kat's. Claimant never filed any income tax for Kat's because she never earned any money through Kat's and never received a 1099 for Kat's from either Defendant or Braun. In 2016, Claimant earned $600 from Defendant; she is unsure what she earned from Defendant in 2017 or 2018. Defendant paid Pleasant directly at times, and at other times Defendant paid Claimant and Defendant in one check to Claimant, who cashed the check and gave Pleasant his share from the check. Pleasant did not have a checking account, which is why Defendant at times paid him and Claimant in one check. Claimant did not hire Pleasant. Defendant hired Pleasant to do everything he did on Defendant's and Braun's property. (*Id*.).

9) In 2017 and 2018, Defendant would text Claimant and ask her to do whatever she needed done. Everything at the duplex was specifically assigned to Claimant by Defendant who did things exactly the way Defendant requested. Claimant never owned her own business prior to Kat's and she never intended to make contracts between Kat's and other clients. Kat's had no tools or supplies of its own. Kat's never did business with Defendant and when Claimant was working for Defendant, she was not working for her as Kat's Kleaning Service. (*Id*.).

10) Claimant described the work she did for Defendant as cleaning, painting and "maintenance." She never owned her own painting or maintenance business. Defendant could have told her to stop painting at any time and she would have stopped without any issues. Claimant would have finished the duplex paint job had she not fallen. On one occasion, Defendant required her to come to work to finish a project quickly. On that occasion, Claimant left her work at Braun's business and went to help Defendant. (*Id*.).

11) Claimant's medical bills related to the June 18, 2018 injury exceeded $100,000. (*Id*.).

12) Defendant owns two businesses and is involved with Braun in owning three limited liability companies. (Deposition of Deborah Hinchey, February 14, 2019, at 3-4). Defendant's sole proprietorships include Debbie's Horticulture Service and Hinchey Apartments. The apartment business rents three duplexes. (*Id*. at 5). She has never had workers' compensation insurance for Hinchey Apartments. (*Id*. at 6). She agrees Claimant had an injury while painting Defendant's duplex. She did not tell Claimant to paint but agreed she could. Defendant agreed orally to pay Claimant $18 per hour to do it; Claimant billed based on the hours performed. (*Id*. at 7). She did not watch Claimant paint but said she was a hard worker and did good work. Defendant agreed it was good to have a hard worker around to fix up and keep her apartments in shape. Claimant may have helped her with yard work at her rental property. (*Id*. at 9). Claimant would use Defendant's tools because she had none. When working on the duplex on which she was injured, Claimant would always use Defendant's tools and supplies. (*Id.* at 10). When Claimant was injured, Defendant did not complete or file an injury report. Post-injury, Defendant spoke to her insurance agent who did not mention workers' compensation but told her Claimant's injury was not covered under Defendant's general liability policy. Defendant was surprised because she had an umbrella liability policy to cover things like someone coming onto her property and tripping over a hose. She usually hired subcontractors to perform tasks such as furnace repair and carpet laying. Claimant "was an exception." Defendant saw no difference between Claimant's situation and a person who offered to wash her windows or shovel her driveway. (*Id*. at 11-12). As for the incident itself, Defendant told Claimant which of Defendant's ladders to use; Claimant tended to use a wobbly one. The ladder Defendant told her to use was "a very strong, sturdy ladder, and taller." (*Id*. at 14). Claimant had partly painted the same building the year prior and told Defendant she wanted to finish it. Though she did not expect the paint job to get completed, Defendant agreed it would be good if it did. (*Id*. at 16). She had no problem with Claimant finishing the job. (*Id*. at 16-17). Defendant agreed she derived profit from renting the duplex Claimant was painting when she fell. (*Id*. at 17). Defendant contends she has never had any employees. (*Id*. at 19). She contends she did not "need" Claimant to paint the duplex but Claimant needed the money; they got along well and the relationship was a "great fit." (*Id*. at 20-21).

13) At hearing, Defendant reiterated she did not consider Claimant an "employee." Claimant's hours working for Defendant were irregular. Defendant hired Pleasant and coordinated his work directly with him. It was Claimant's idea to paint the duplex and carport. Defendant earns about

$25,000 for each duplex each year. She paid Claimant for work before Claimant had a business license. Defendant contends she insisted Claimant obtain a business license to continue to work for her in late 2017, and she "guesses so" that Claimant could not return to work for Hinchey Apartments without the business license. When asked if she intended Claimant to be an independent contractor, Defendant said she was not sure if she had any intentions in this regard. Occasionally, Claimant would ask her how to do certain work. Defendant agreed Claimant could tell her "no" to any job Defendant wanted done. (Defendant).

14) Defendant contends she wrote a 1099 form for Claimant in 2017, sent a copy to the Internal Revenue Service, but accidentally failed to send a copy to Claimant. As of the hearing date, she had still not sent it. She agreed the work Claimant did on the duplex improved its value and helped preserve it. Defendant agreed she is "picky" and Claimant's work surprisingly met Defendant's "picky test." She agreed she insisted Claimant use the taller ladder with outriggers she provided, which in her view was safer. Defendant agreed she paid Claimant to paint the carport and Claimant fell while painting it. The rent Defendant charges in her duplexes is "low." In her view, Claimant's work was a "charity case." Defendant deducted the payments to Claimant on her duplex business ledgers and called them "cleaning and maintenance." She contends she would have had no problem if the duplex's exterior walls and carport painting had not been completed. But for the accident, Defendant probably would have continued to pay Claimant to work on the duplex. She considers what Claimant did "maintenance." Defendant agrees maintenance is something she has to do on her rentals regularly. She had a right to tell Claimant to stop painting and to do it her way. Claimant was only about an hour into the carport painting when she fell. This was the first painting project Claimant did in 2018. (*Id.*).

15) At hearing, Defendant's testimony was frequently evasive or nonresponsive. For example, even though she paid Claimant $18 per hour for her services, Defendant would not initially concede the parties had an agreement that Defendant would pay her $18 per hour. She eventually admitted the parties had an implied oral contract for Claimant to provide services and Defendant would pay her $18 per hour. (*Id.*; judgment, and inferences drawn from the above).

16) Defendant had authority to hire Claimant to work on Defendant's property. Claimant offered to work for Defendant and Defendant accepted the offer and agreed to pay Claimant $18 per hour to perform "maintenance" work on her duplex including cleaning, yard work, minor repairs and

painting. Claimant performed the required services and Defendant gave her the agreed-upon consideration for her work. (Experience, judgment and inferences drawn from the above).

17) There is no similarity between "harvest help" and building maintenance and painting. (Experience, judgment).

18) On October 4, 2019, Claimant's lawyer requested $12,173.75 in attorney and paralegal fees. Claimant's lawyer billed $175 per hour for a paralegal, while attorney fees billed ranged from $350 per hour to $425 per hour for two attorneys working on the case. Other litigation costs totaled $522.84. The hourly rates for the paralegal and two attorneys are reasonable; the time incurred in each instance was reasonable and necessary. The costs are also reasonable. (Affidavit of Counsel, October 2, 2019; experience, judgment and inferences drawn from the above).

19) Very competent counsel on both sides litigated this case, which involved fairly complex legal issues. The range of litigated benefits to Claimant is significant and ranges from between $0 dollars if she loses, up to over $100,000 in medical expenses with potential entitlement to temporary total and temporary partial disability benefits, permanent partial impairment benefits and future benefits, if she wins. (Experience, judgment and inferences drawn from the above).

PRINCIPLES OF LAW

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

> **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 death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . .
>
> **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. . . .

The presumption applies to any claim for compensation. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). In the first step, the claimant need only adduce "minimal" relevant evidence establishing a "preliminary link" between the injury and employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). In less complex cases, lay evidence may be sufficient to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985). Credibility is not weighed here. *Resler v. Universal Services Inc.*, 778 P.2d 1146 (Alaska 1989).

In the second step, if the claimant's evidence raises the presumption, it attaches to the claim and the production burden shifts to the defendant. The defendant has the burden to overcome the presumption with substantial evidence to the contrary. "Substantial evidence" is such "relevant evidence" as a "reasonable mind might accept as adequate to support a conclusion." *Tolbert*, 973 P.2d at 611-12. Credibility is not examined at the second step either. *Resler*.

In the third step, if the defendant's evidence rebuts the presumption, it drops out and the claimant must prove his claim by a preponderance of the evidence. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The evidence is weighed, inferences drawn and credibility determined. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000). The presumption analysis does not apply to undisputed issues. *Rockney v. Boslough Construction Co*., 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. . . .

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

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

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can retain competent counsel. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990). In *State v. Cowgill*, 115 P.3d 522 (Alaska 2005), the board ruled in Cowgill's favor on her controverted claim. The state appealed, and the superior court reversed. On remand, the board reviewed its past decisions and came to a similar result. The state appealed again. *Cowgill* explained what constitutes adequate board findings to support an attorney fee award:

> The board explained that the
>
> > claim was vigorously litigated by very competent counsel. The range of litigated benefits to the employees was significant (between $0.00 and $24,300.00 in PPI benefits). . . . [W]e find the medical evidence was fairly complex. Last, we find the employer raised unique arguments regarding attorney's fees, not previously decided. (*Cowgill*, 115 P.3d 522 at 526).
>
> **AS 23.30.230. Persons not covered**. (a) The following persons are not covered by this chapter:
>
> > (1) a part-time baby-sitter;
> > . . . .
> >
> > (3) harvest help and similar part-time or transient help;
> > . . . .
>
> (b) The exclusion of certain persons under (a) of this section may not be construed to require inclusion of other persons as employees for purposes of compensation under this chapter.

In construing the meaning of a statute, where particular words are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described, and will not be used to enlarge the particular words described. *Chugach Electric Assn. v. Calais Co*., 410 P.2d 508 (Alaska 1966). Before an employer and employee relationship arises for workers' compensation purposes, an express or implied employment contract must exist. *Alaska Pulp Corp. v. United Paperworkers International Union*, 791 P.2d 1008, 1009 (Alaska 1990). "The formation of an express contract requires an offer encompassing its essential terms, an unequivocal acceptance of the terms by the offeree, consideration and an intent to be bound." "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 so to act.'" *Childs v. Kalgin island Lodge*, 779 P.2d 310, 314 (Alaska 1989).

In *Kroll v. Reeser*, 655 P.2d 753, 756-57 (Alaska 1982), a worker was injured while constructing a four-plex intended to both house the owner's family and provide him with rental income from the remaining units. The board decided the property owner was the employer. The court remanded so the board could consider the "totality of all the relevant circumstances," and determine who, between two possible employers (the building owner, or a general contractor for whom the claimant worked), should be considered the "employer" under the Act. *Kroll* questioned whether the building owner could be an employer at all given the argument that he was a "consumer of services rather than a producer of goods." On remand, the board was to consider statutory limitations to employment relationships. *Kroll* identified the policy question as whether the owner's construction activity either by itself or as an element of his rental activities was a profit-making enterprise, which should bear costs associated with injuries incurred in its business.

In *Nickels v. Napolilli*, 29 P.3d 242, 252-53 (Alaska 2001), the injured worker labored on a farm in a "cabin-for-chores" arrangement. *Id*. at 245. The farm owner sold farm animals, eggs and equipment. A written contract between the parties stated the injured worker would provide 80 hours labor per month with excess time compensated at five dollars per hour. The injured worker and the farm owner kept careful records and the worker used a time-clock to record hours worked on farm activities. The claimant also worked concurrently for other employers three to five days per week in non-farm labor. While nailing a board to the side of a shed at the farm owner's direction, the worker fell and punctured her arm on fence wire; the arm became infected resulting in amputation. *Id*. at 246. The court said:

> As Nickels's job is not specifically exempted from the workers' compensation statute, the determination of Nickels's status as an employee based on the "relative nature of the work" test controls, and Nickels was appropriately considered an employee covered under the Act.
> . . . .
> An express or implied contract or agreement of employment must exist for there to be an employee-employer relationship. . . .
> . . . .

> We have recognized Professor Larson's distinction between consumptive activities which should not bear the burden of workers' compensation insurance, and productive business activities, which should (citations omitted). A homeowner who hires someone to perform an odd job for his own benefit is not appropriately considered an employer under the workers' compensation statute (citations omitted). A business, unlike a homeowner, can pass the cost of workers' compensation insurance on to the consumers of the business's service or product. The superior court found that "[t]he 'business' of Isabella Creek Farm was not the primary source of income for the Napolillis[;] however, the work that Ruth Nickels performed was a regular part of the regular work of Isabella Creek Farm business." Because Nickels's work for Isabella Creek Farm and the Napolillis furthered the business, it is therefore within the scope of the workers' compensation system.

In *Gaede v. Saunders*, 53 P.3d 1126, 1127 (Alaska 2002), the court noted a difference between "employees" working for "employers" as defined in the Act and "common law employees," employed other than "in connection with a business or industry." *Gaede* affirmed the board's and superior court's finding that the injured worker was not an employee working for an employer covered under the Act because the project on which he was working when he was injured, a remodel on a private residence, was not "in connection with a business or industry."

Trudell v. Hibbert, 272 P.2d 331 (Alaska 2012), found homeowners who operated a cab business along with a property rental business in the same building were "employers" under the Act in respect to a construction worker's injury. *Trudell* found the Hibberts had "two profit-making businesses that are able to pass on the cost of workers' compensation insurance to consumers -- their cab business and their property rental business" (citations omitted). It further noted the proper inquiry in a project owner case "is not the intent of the property owner, but the benefit to the business from the project." (*Id*. at 343-44).

In *Kang v. Mullins*, 420 P.3d 1210 (Alaska 2018), a woman ran a business in and lived in the same building she rented from her son. She asked a neighbor for help with major home repairs in exchange for a used pickup truck. The worker hurt his wrist while working on the building. The board and commission found an employee-employer relationship. The commission noted that although the person hiring the injured worker did not own the property and had no legal obligation to maintain it, the evidence showed she was acting in an agency relationship on behalf of the property owner and the owner acquiesced in the hiring. On appeal, the putative employer

contended she merely consumed the injured worker's construction activity as a tenant in a building she did not own but in which she also resided. She contended her business derived no profit from the injured worker's labor on someone else's building. *Kang* agreed with her argument, which in essence stated:

> Because her connection with Mullins's work could only be consumptive and not productive, she concludes that she was not Mullins employer as we have construed the Act. *Id*. at 1215.

Reversing the commission's decision, *Kang* said:

> In the absence of proof that Lee's Massage had a legal obligation to arrange and pay for major repairs on premises it rented from Benjamin Kang, Mullins did not meet his burden of proving that he entered into an employment contract with Lee's Massage -- the entity he identified as his employer. As a tenant, Kang, like the homeowners in *Gaede v. Saunders* (citation omitted), had a consumptive role with respect to the building repairs. And unlike the putative employers in *Gaede*, she did not even own the home Mullins worked on.

Kang concluded:

> Nothing in the present case suggests that Mullins was injured performing work that was part of Kang's business. Mullins was not, as Kang points out, injured performing a massage. Nor was the injury related to the business's day-to-day maintenance activities, like sweeping or cleaning (citations omitted). The Commission correctly observed that "this type of project might be characterized as a real estate improvement project rather than as maintenance or repair ancillary to [the] massage parlor business." But there is no evidence that Lee's Massage was engaged in the construction or real estate business or that Kang was engaged in any other "profit-making enterprise which ought to bear the costs of injuries" related to the major building repairs to her son's building.

> **AS 23.30.395. Definitions**. In this chapter
> . . . .
>
> (19) 'employee' means an employee employed by an employer as defined in of this section;
>
> (20) 'employer' means the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;

8 AAC 45.180. Costs and attorney's fees. . .
. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. . . .

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. Paragraph (1) of this section is the most important factor and is interdependent with (2) of this section, and at least one of these factors must be resolved in favor of an 'employee' status for the board to find that a person is an employee. The board will consider whether the work

(1) is a separate calling or business; if the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee; if the employer

(A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;

(B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;

(C) has the right to extensive supervision of the work then there is a strong inference of employee status;

(D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;

(E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status;

(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 (emphasis added).
>
> **8 AAC 45.900. Definitions**. . . .
> . . . .
>
> (c) In AS 23.30.230,
>
> (1) 'part-time help' means a person who on an intermittent, irregular, noncontinuous basis performs work which is either not an integral part of the regular business of the beneficiary of the work or which is not the regular business, profession, or occupation of the worker; . . . .

ANALYSIS

1) Is Claimant covered under the Act and was she in an employee-employer relationship with Defendant?

Defendant agrees Claimant was working for her in some capacity when she fell from a ladder and was injured while painting Defendant's duplex; yet she contends Claimant was not covered under the Act. The latter is a legal question. There are no factual disputes on these two issues and the presumption analysis need not be applied to them. *Rockney*. The parties disagree over the employment agreement, which affects Claimant's legal status when she fell and her coverage under the Act. The presumption analysis applies to this dispute. AS 23.30.120(a)(1); *Meek.* Without regard to credibility, Claimant raises the presumption with her testimony. *Wolfer*; *Resler*. She said Defendant hired her to paint her rental property for $18 per hour, Claimant performed as

requested and Defendant paid her as agreed. *Cheeks*. Without regard to credibility, Defendant rebuts the presumption with her testimony. *Wolfer*; *Resler*. She said Claimant was an independent contractor and there was no employee-employer relationship. *Tolbert*. Claimant must prove the employee-employee relationship by a preponderance of evidence. *Saxton*; *Steffey*.

A) Claimant was covered under the Act.

Claimant contends she was covered under the Act on the injury date. Defendant disagrees and relies on AS 23.30.230(a)(3), which states "harvest help and similar part-time or transient help" are "not covered." She contends Claimant was non-covered, "part-time help" when she fell from the ladder. She does not contend Claimant was "harvest help" or "transient help." The Act does not define the words or phrases found in AS 23.30.230(a)(3). However, 8 AAC 45.900(c) defines the precise phrase in AS 23.30.230(a)(3) upon which Defendant relies:

> (c) In AS 23.30.230,
>
> > (1) "part-time help" means a person who on an intermittent, irregular, noncontinuous basis performs work which is either not an integral part of the regular business of the beneficiary of the work or which is not the regular business, profession, occupation of the worker. . . .

Defendant gives this regulatory definition a broad meaning and contends workers' compensation insurance is not required for any part-time help. Defendant's reading is overbroad and ignores the introduction to the definition, which with plain language limits it to only AS 23.30.230. The word "part-time" appears only twice in §230, which states a "part-time baby-sitter" and "harvest help and similar part-time" help are not covered. The two categories, (1) baby-sitters and (2) harvest and similar help, are kept in separate subsections. AS 23.30.230(a)(1), (3). The regulation upon which Defendant relies cannot merge or enlarge the statute's limitations; §230(a)'s exclusion for part-time workers is limited to baby-sitters, and harvest workers and similar part-time workers. *Chugach Electric Assn*. The part-time baby-sitter reference is inapplicable as there is no contention Claimant baby-sat for Defendant. Therefore, in this case the referenced "part-time help" definition is limited to only "harvest" and "similar" help. Defendant offers no explanation why non-"harvest" or "similar" part-time workers are not covered for work injuries under the Act. Defendant's reading, which would exclude any and all part-time workers in any occupation from

coverage under the Act, is illogical. It is also contrary to law; part-time workers are included under the Act's coverage, with limited exceptions under AS 23.30.230(a). AS 23.30.010(a).

The "part-time help" definition upon which Defendant relies does not apply to Claimant's situation because she was not "harvest help," and building maintenance and painting are not "similar" in any way to "harvest help." *Rogers & Babler*. Accordingly, it is irrelevant under §230 whether Claimant's services were on an "intermittent, irregular, noncontinuous basis" or that she performed "work which is either not an integral part of the regular business of the beneficiary of the work or which is not the regular business, profession, occupation of the worker" because the definition does not apply to her.

Alaska Supreme Court cases addressing AS 23.30.230, while not on point, provide guidance. Defendant agreed her rental properties are a profit-making business. When injured, Claimant was assisting Defendant in a profit-making enterprise, apartment renting, which should bear costs associated with her injury. *Trudell*; *Kroll*. Defendant's use of Claimant's labor was "in connection with a business." AS 23.30.395(20); *Gaede*. Defendant rents residences to the general public for a fee. Her rental units require regular maintenance, including exterior painting. Maintenance improves her ability to rent the units and increases the property's overall value for resale. Defendant was not selling eggs and Claimant was not injured while assisting in such endeavor; Defendant was renting property and Claimant was injured maintaining it. Claimant's work aided in Defendant's rental business; it improved Defendant's ability to make a profit from her rentals. The work Claimant did was, in that sense, "productive." *Nickels*. Defendant could have offset the cost of workers' compensation insurance coverage by merely raising her "low" rent on her duplexes. By contrast and comparison, had Claimant been injured while painting Defendant's personal residence (assuming she did not have a home office therein), the work would have been merely "consumptive" and Defendant would not have been able to spread the cost of insuring Claimant to anyone because it was Defendant's personal residence. *Id*. Lastly, unlike the situation in *Kang*, Defendant owned the duplex and hired Claimant to perform maintenance services on her rental property. Therefore, given this analysis Claimant is not excluded from coverage under the Act based on any AS 23.30.230(a) provision and Defendant's defense on this basis fails.

B) There was an employee-employer relationship.

The fact certain persons are excluded from coverage under AS 23.30.230(a) does not mean other persons are included. AS 23.30.230(b). There must still be a contract for hire, an employee-employer relationship and Claimant must not be an independent contractor. *Alaska Pulp*; *Nickels*; 8 AAC 45.890. Defendant contends Claimant was not an "employee" and Defendant was not an "employer" as defined in the Act. Fund contends if this is true, Claimant is entitled to no benefits. Claimant offered to perform services for Defendant to make interior repairs and provide exterior painting on Defendant's rental. Defendant accepted the offer and agreed to pay Claimant $18 per hour for her services. There was an offer encompassing its essential terms, an unequivocal acceptance by the offeree, consideration and an intent to be bound. *Childs*. Payment demonstrates Defendant intended to be bound and she said but for the injury she probably would have continued to use Claimant's services. The totality of the circumstances and the relevant parties' behavior demonstrate that all factors required to make a contract were present. *Kroll*. There was nothing in writing but there was an express, oral contract between the parties to hire Claimant to perform services for Defendant in connection with Defendant's rental business. *Childs*. Claimant provided the services; Defendant paid her. Furthermore, Defendant at hearing reluctantly admitted the relevant parties had at least an implied, oral contract. *Id.*

Under the Act, an "employee" is a person who is not an independent contractor and who, under a contract of hire is employed by an "employer." An "employer" under the Act is a person employing someone in connection with a business coming within the Act's scope, carried on in Alaska. Defendant employed Claimant to work on her rental property in Anchorage, Alaska and the work Claimant did was done indisputably "in connection with" Defendant's residential rental business. AS 23.30.395(19), (20). So far, these facts create an employee-employer relationship.

The remaining issue is whether Claimant was an independent contractor on the date she fell. At hearing and in her controversion, Defendant contended Claimant was an independent contractor. Claimant's June 18, 2018 injury occurred before the November 22, 2018 effective date for the current AS 23.30.230 independent contractor definition. Claimant's injury is governed under the previous "relative-nature-of-the-work test," set forth in 8 AAC 45.890. This regulation determines whether a person is an "employee" as opposed to an "independent contractor." There are six

factors considered in the test. Two factors, (1) whether the work is a separate calling or business, and (2) whether the work is a regular part of the putative employer's business or service, are the "most important factors." One must be resolved in favor of "employee" status to find a person was an "employee." 8 AAC 45.890.

(1) Was the work Claimant performed a separate calling or business?

Defendant admitted Claimant was performing maintenance on Defendant's rental property. There is no evidence Claimant owned a maintenance or painting business. In November 2017, Claimant obtained a business license for Kat's, at Braun's insistence, solely so she could work at Braun's business. She did not obtain the Kat's business license so she could work for Defendant. Claimant's testimony on this point is credible. AS 23.30.122; *Smith*. Defendant's hearing testimony, not found in her deposition, stating she too insisted Claimant obtain a business license and insurance to work for her is not credible because there is no evidence Kat's ever contracted with Defendant to work on the duplex, and painting and maintenance would not be part of a business license for a cleaning service. Further, at hearing Defendant said she probably would have continued to use Claimant's services on her rentals even had Claimant not obtained the Kat's business license. This admission cuts against Defendant's hearing assertion that she also required Claimant to obtain a business license as an independent contractor to work on Defendant's rental property. *Rogers & Babler*; AS 23.30.122; *Smith*.

There is no evidence Claimant had the right to hire or terminate others to assist in the services for which Defendant hired her. Defendant admitted she and not Claimant hired Gary Pleasant and dealt with him directly. The fact Defendant occasionally paid a check to Claimant for both her and Gary's work is immaterial as this was done as a convenience to Gary who did not have a local bank account. These facts are neutral as to "employee" status.

Defendant had the right to exercise control over the manner and means Claimant used to accomplish the desired results. In fact, Defendant's exercise of her right to control formed the backdrop for the accident in question. She did not like the ladder Claimant was using to paint the car port; it was too short and wobbly. Defendant insisted Claimant use the ladder from which she

fell. She insisted Claimant use a brush to paint the duplex and insisted she apply two coats. This creates a "strong inference of employee status." 8 AAC 45.890(1)(A).

Defendant admitted Claimant could say no to any job Defendant offered her; Claimant admitted she could choose not to work for her and refuse any offers from Defendant; both without consequence. This creates a "strong inference of employee status." 8 AAC 45.890(1)(B). Claimant and Defendant agreed Defendant was "picky" about the work she did, and Defendant agreed Claimant did excellent work and met her "picky test," implying she exercised supervision. This creates some inference of employee status. *Rogers & Babler*; 8 AAC 45.890(1)(C).

It is undisputed Defendant provided all tools, instruments, supplies and the facility (the duplex to paint) for Claimant to accomplish the work. While "substantial value" is a relative phrase, these facts create an inference of employee status. 8 AAC 45.890(1)(D).

It is undisputed Defendant paid Claimant an hourly wage. This creates an inference of employee status. 8 AAC 45.890(1)(E).

The parties had an express oral contract for employment and while Defendant believed they were creating an independent contractor arrangement, the parties' conduct given the above analysis belies that assumption. 8 AAC 45.890(1)(F). Overall, this first factor, 8 AAC 45.890(1), is resolved in Claimant's favor and supports an "employee" status finding.

(2) Was the work a regular part of Defendant's service?

Some businesses provide products, such as eggs; others provide a service such as a place to live. Defendant's relevant business "service" at issue here was providing residential rental units to the public. She need not be in the business of painting or maintaining property to be an "employer" under the Act. Defendant said she did not care if the duplex or carport were painted and she viewed Claimant as a "charity case." Her intent in accepting Claimant's offer to paint the duplex and carport is not relevant to this inquiry; the benefit to the business from the project's labor is. *Trudell*. Defendant admitted regular maintenance including exterior painting was beneficial to her property.

She agreed painting made the rental property nicer and preserved it against the weather. These undisputed facts create "an inference of employee status." 8 AAC 45.890(2).

(3) Can Claimant's work be expected to carry its own accident burden?

Claimant worked for Defendant part-time making $18 per hour. As demonstrated in this case, falling from a ladder can cause serious injuries. Claimant incurred over $100,000 in medical bills. Claimant could not reasonably be expected to carry her own accident burden under these circumstances. This creates a "strong inference of employee status." 8 AAC 45.890(3).

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

Claimant was performing exterior painting when she was injured. "Skill and experience" are relative terms. With due respect to painters, exterior painting, especially with a brush, does not require significant skill or experience. *Rogers & Babler*. Claimant had personal experience painting but no formal training. This creates "an inference of employee status." 8 AAC 45.890(4).

(5) Was Claimant hired for continuous services?

The evidence shows Defendant hired Claimant sporadically and not for continuous services. She hired Claimant primarily to complete a particular job, painting the duplex and carport. This does not create an inference of employee status. 8 AAC 45.890(5).

(6) Was Claimant's work intermittent?

Lastly, the evidence shows Defendant hired Claimant intermittently. This creates a "weak inference of no employee status." 8 AAC 45.890(6). Claimant prevails on the first four factors in the relative-nature-of-the-work test, including both factors (1) and (2), "the most important factors." Defendant prevails on factors (5) and (6). On balance, Claimant demonstrated she was not an independent contractor when working for Defendant on June 18, 2018. 8 AAC 45.890.

In summary, based on the above analyses Claimant was covered under the Act. There was an express oral contract for hire. Claimant was Defendant's "employee" and Defendant was her "employer" when she fell from the ladder on June 18, 2018.

2) Is Claimant entitled to an attorney fee and cost award?

The only objections Defendant and Fund had to Claimant's request for attorney fees and costs was Defendant's general contention Claimant was not covered under the Act and Fund's contention no benefits were due if there was no employee-employer relationship when she was injured. This decision found the Act covers Claimant and she had an employee-employer relationship with Defendant. Defendant controverted Claimant's claim; therefore, this decision may award attorney fees under AS 23.30.145(a). Very competent counsel on both sides litigated this case. The range of litigated benefits to Claimant was significant -- between $0.00 if she lost and over $100,000 in medical care, plus possible disability, permanent impairment and other future benefits, if she won. The legal issue was fairly complex. *Cowgill*. Claimant's lawyer's efforts in this unusual case results in her having coverage under the Act and entitlement to any benefits for which she qualifies pursuant to the Act and applicable regulations. This is a considerable benefit to Claimant. The hourly rates for the paralegal and two lawyers working on the case were reasonable and the amounts billed were reasonable and necessary, as were the litigation costs. *Cortay*. Therefore, Claimant's request for $12,173.75 in attorney fees (including paralegal fees which are actually costs), and $522.84 in litigation costs will be granted. AS 23.30.145(a); 8 AAC 45.180(f).

CONCLUSIONS OF LAW

1) Claimant is covered under the Act and was in an employee-employer relationship with Defendant.
2) Claimant is entitled to an attorney fee and cost award.

ORDER

1) Claimant is not excluded from coverage under the Act under AS 23.30.230 for her June 18, 2018 injury while working for Defendant.
2) Claimant was not an independent contractor while working for Defendant on June 18, 2018.
3) Claimant was Defendant's "employee" and Defendant was her "employer" under the Act on June 18, 2018, when Claimant fell from the ladder.
4) Claimant's June 18, 2018 injury is compensable under the Act against Defendant.

5) Claimant is awarded $12,696.59 in attorney fees and costs against Defendant for her attorney's efforts in this case to date.

Dated in Anchorage, Alaska on November 19, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Bob Doyle, Member

/s/
Pam Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Kathy J. Schultz, claimant v. Deborah Hinchey, defendant; Benefit Guaranty Fund, Case No. 201812530; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on November 19, 2019.

/s/
Charlotte Corriveau, Office Assistant