ALASKA WORKERS' COMPENSATION BOARD

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

EZZELDIN ELATTAR, Claimant, ALAN MILLER, Guardian & Conservator for Claimant, v. LXS CARPENTRY, LLC, Defendant, and ALASKA WORKERS' COMPENSATION BENEFIT GUARANTY FUND, Fund.	FINAL DECISION AND ORDER AWCB Case No. 201816325 AWCB Decision No. 19-0123 Filed with AWCB Anchorage, Alaska on November 27, 2019

Ezzeldin Elattar's and his guardian and conservator Alan Miller's (Claimants) November 6, 2018 claim was heard on October 24, 2019, in Anchorage, Alaska, a date selected on July 30, 2019. A July 24, 2019 Affidavit of Readiness for Hearing gave rise to this hearing. Attorney Robert Bredesen appeared and represented Claimants. Alexis Zaitsev appeared and represented LXS Carpentry, LLC (Defendant). Attorney Nora Barlow appeared and represented contractor-over Abraham Gallo doing business as Diamond Construction, and its insurer (Diamond). Assistant Attorney General Rebecca Hatton did not appear or otherwise participate in the hearing but represents the Alaska Workers' Compensation Benefit Guaranty Fund (Fund). Velma Thomas, Fund Administrator, appeared by telephone and represented Fund. Ivan Hernandez, Brandon Haworth, Ashraf Mousa, and Alan Miller, testified for Claimants, Alexis Zaitsev testified for Defendant and Kristy Harvey testified for Diamond. Jesus Vega interpreted for Hernandez. An

oral order denied Claimants' request to have his claims against Defendant and Diamond heard and decided at this hearing. This decision examines the oral order and decides Claimants' claim against Defendant on its merits. The record remained open until November 4, 2019, for Claimants to submit a supplemental cost affidavit and until November 17, 2019, for Diamond to file an opposition to Claimants' costs and closed on November 17, 2019.

ISSUES

Claimants contended no party opposed their request to join their claim against Diamond with their claim against Defendant. They contended both claims should be heard at the same time.

Diamond contended the separate claim against it was not set as an issue for the October 24, 2019 hearing. It opposed Claimants' request to hear both claims at the same time.

Defendant and Fund did not express a position on this preliminary issue. An oral order denied Claimants' request to hear their claim against Diamond at this hearing.

1) Was the oral order denying Claimants' request to have their claims against Defendant and Diamond heard at the same time correct?

Claimants contend Defendant's owner Zaitsev hired Elattar based on an express or implied oral hiring contract, which created an employee-employer relationship. They contend Elattar was not trespassing when he fell and was injured while working for Defendant.

Zaitsev contends he never hired Elattar. He contends there was no hiring contract, no employee-employer relationship and Elattar should not have been on work site at all.

Diamond and Fund did not express a position on this issue.

2) Did Zaitsev hire Elattar and create an employee-employer relationship?

Claimants contend Defendant did not timely report Elattar's injury or begin paying any disability or medical benefits. Accordingly, they seek an order awarding penalties against Defendant.

This decision addresses only Claimants' request for benefits against Defendant. Diamond's position on penalties is not material at this time.

Fund agrees with Claimants' position as set forth in their brief.

3) Are Claimants entitled to penalties against Defendant?

Claimants contend Defendant denied all responsibility for benefits related to Elattar's injury. If they prevail at hearing, Claimants seek an order awarding interest on all benefits awarded and attorney fees and costs against Defendant.

Defendant never responded directly to the interest, attorney fees and cost request. However, since it denies liability for Elattar's injuries, it also denies liability for interest, attorney fees and costs.

This decision addresses only Claimants' request for benefits from Defendant. Therefore, Diamond's position on attorney fees and costs is not material.

Fund agrees with Claimants' position as set forth in their brief.

4) Are Claimants entitled to interest, attorney fees and costs against Defendant?

FINDINGS OF FACT

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

1) Hernandez, who speaks English as a second language, is a construction worker who was working for Defendant when Elattar's accident occurred. Zaitsev had hired Hernandez without any paperwork and paid him $20 per hour cash, with no taxes withheld. He started approximately two months before Elattar's accident. Hernandez's hours for Defendant were generally 8:00 AM to 5:00 PM and he was not usually allowed to work on weekends. A few days prior to Elattar's accident, Hernandez asked Zaitsev if he could work on Saturday, July 21, 2018, and Zaitsev said he could but no one would be working on Monday, July 23, 2018. Nevertheless, Hernandez also showed up to work on Monday. (Hernandez).

2) On the job site on Monday, July 23, 2018, a co-worker named "Mahir" told Hernandez that Zaitsev had hired Elattar, who accompanied Mahir to the job site. Zaitsev had not said anything to Hernandez about a new employee. Hernandez, Mahir and Elattar met together and Hernandez laid out the work for Mahir and Elattar. The goal was to install insulation on the roof. Hernandez and the other two men went up on the roof to begin work. Hernandez began installing insulation and Elattar asked if he could help; Hernandez told him no. He was trying to show Elattar how to lay the insulation. Hernandez surmised Elattar wanted to show he was willing to work, but got distracted by someone on the floor below. Elattar bent down to mark the insulation and, while so doing, stepped on insulation and fell to the floor below. It all happened "too fast." Hernandez does not think Elattar was a trespasser because Mahir told him Elattar was hired to work. (*Id*.).

3) At 9:40 AM on July 23, 2018, Anchorage Police Department officer Darrell Evans responded to a call at a building under construction where a male adult had fallen two stories and needed medical care. Evans described the scene as a steel-frame building still under construction, which appeared to be a garage or warehouse. The "roof" consisted of steel beams, with no materials yet installed between the beams, which were placed approximately three to four feet apart. Insulation had been laid across the beams and Evans saw a tear in insulation between two beams, directly above Elattar, who was unconscious on the floor. Witnesses indicated Elattar had fallen through the structure at that place. Evans stated, "I did not see any of the employees wearing safety harnesses, including the victim, and there were no safety harnesses anywhere in the vicinity that I could see." Evans interviewed Abraham Gallo and Michael Bullock. According to them, Defendant was a subcontractor who "hired employees present at the site." Evans noted:

> BULLOCK made a statement to me that the employees had been using safety harnesses that morning, so he did not understand where the harnesses were now located. This was despite the fact that employees advised me they never use safety harnesses and there were none. (Police Report, July 23, 2018).

4) Zaitsev would not necessarily tell Hernandez who he had hired so he did not know who Zaitsev hired. So far as Hernandez knew, the only three on the crew were Mahir, Zaitsev and him. Hernandez would often see people on the job site, did not know who they were and did not know if any were Zaitsev's employees. Hernandez did not consider Mahir his supervisor. Hernandez was aware Monday, July 23, 2018, was a Russian Orthodox holiday and Zaitsev said he would not be working because he is Russian Orthodox. Hernandez had called Zaitsev who authorized him

to work that Monday. After Elattar's injury, he could not call Zaitsev because he does not answer the phone on religious holidays. Consequently, Hernandez did not ask Zaitsev on Monday if he had hired Elattar. He relied on what Mahir told him about Zaitsev hiring him. Hernandez saw Elattar on the job site only once, on the Monday he fell. Zaitsev paid Hernandez for his work on Monday. Hernandez had explained to Elattar where he could and could not step on the roofing area. Unfortunately, when Elattar bent over he stepped on insulation and fell. (Hernandez).

5) Haworth works for the State of Alaska as an occupational safety and health inspector (AKOSH). Anchorage Fire Department called him to Elattar's accident scene on July 23, 2018; he arrived around 10:33 AM. Over two consecutive days, Haworth did a work-site investigation, including the storage area, interviewed witnesses and prepared documents related to the accident. Zaitsev was not present "due to a religious holiday" and was not available by email or phone. Haworth identified Hernandez as the "employee in charge at the time." A police officer on the first day directed Haworth to Abraham Gallo who owns both the property and Diamond. Gallo refused to be interviewed or participate in any meetings with Haworth. He directed Haworth to Michael Bullock, Project Manager, who he said had full site authority and was in charge of the entire job. Bullock said Elattar was not working for him. Haworth noted, "After speaking with employees, it came out [Elattar] was a friend of a worker for LXS who was on site, and he was working to help out." Haworth considered Elattar an employee because he was brought to the site by an employee, was given access to the roof and was working side-by-side with Defendant's employees. He further found supervisors and project engineers "with full site authority," were present and did not tell Elattar he could not work, to stop working or to leave. Haworth noted Defendant had no written safety policies or programs, no enforcement policies and lacked a "good safety culture." (Haworth; AKOSH Narrative Report, July 31, 2018).

6) On July 24, 2018, Haworth returned to the job site to speak to Zaitsev, who said Elattar was not supposed to be on site and was not his employee. Zaitsev had been on the roof multiple times with his workers while not wearing fall protection and told Haworth he "took the most dangerous spot so they wouldn't have to." Zaitsev repeatedly claimed his employees should not have been working when Elattar was injured but said he was aware they often work without permission, with no consequences. Haworth concluded Zaitsev's communication with Elattar was "inadequate." No fall protection was being used or enforced while employees worked at height and Defendant provided no fall protection training. (*Id.*).

7) On November 6, 2018, Claimants requested temporary total, partial and permanent total disability benefits, permanent partial impairment benefits, medical care and related transportation costs, interest, attorney fees and costs and a penalty for late-paid compensation against Defendant and Fund. (Claim for Workers' Compensation Benefits, November 6, 2018).

8) On November 17, 2018, Zaitsev sent Claimants' attorney a letter stating:

> This is LXS Carpentry, LLC
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> I'm Alexis K. Zaitsev the owner of this company. I never hired this man called Ezzeldin Elattar so he is not my employee. There are people walking onto this property asking for work daily. I am not the owner of this property or building same as the concrete company, plumbers, excavator or electricians etc. I'm just a framer doing my part of the job.
>
> There is a no trespassing keep out private property signs on the premises. Therefore I'm not responsible for each one that comes by. (Letter, November 17, 2018).

9) On November 26, 2018, Fund's adjuster called adjuster Lori McFarland to advise Elattar had been injured, the alleged employer had no insurance and Diamond may be the contractor-over. McFarland called the division and spoke to staff member Elizabeth Pleitez. Pleitez recorded:

> Lori McFarlan[d] w/ Alaska National Ins called to find out some information regarding this case. Lori stated that Alaska Insurance is the Insurer for the Contractor for the project which EE was working on. I gave her some of the pleadings information that we received. I also let her know to be a party to case she needs to send it in writing by letter or email to all parties. Gave her parties information. (ICERS, November 26, 2018).

10) On December 4, 2018, Claimants requested temporary total, partial and permanent total disability benefits, medical care and related transportation costs, interest, attorney fees and costs and a penalty for late-paid compensation against Diamond. (Claim for Workers' Compensation Benefits, December 4, 2018).

11) On December 4, 2018, Claimants also sought an order joining Diamond and its insurer as the contractor-over. (Petition, December 4, 2018).

12) On December 20, 2018, Diamond non-opposed Claimants' petition to join their claims against Defendant and Diamond. (General Contractor (AS 23.30.045(a)), Abraham Gallo dba Diamond Construction's Non-Opposition to Mr. Elattar's Petition to Join, December 20, 2018).

13) On December 20, 2018, Diamond denied it employed Elattar and noted Zaitsev also denied employing him. It contended November 26, 2018, was the first notice Diamond had of Elattar's injury and Diamond's potential liability as a contractor-over. It contended Zaitsev's claim Elattar was not his employee was a defense to Claimants' claim under the Act and neither party had provided any evidence to prove or disprove an employee-employer relationship. Diamond asserted its right and duty to investigate Elattar's employee status and claim. Notwithstanding its contention that Claimants refused to participate in its investigation, Diamond had already begun providing disability and medical benefits to Elattar. It reserved its right to assert additional affirmative defenses as applicable. Diamond denied owing any penalties or attorney fees. (General Contractor (AS 23.30.045(a)), Abraham Gallo dba Diamond Construction's Answer to Mr. Elattar's Workers' Compensation Claim Dated 12/20/18, December 20, 2018).

14) On July 24, 2019, Claimants formally requested a hearing on their claim against Defendant. (Affidavit of Readiness for Hearing, July 24, 2019).

15) On July 30, 2019, Claimants informally asked for a hearing on their claims against both Defendant and Diamond. Diamond objected, noting Claimants' formal hearing request asked for a hearing only on their claim against Defendant. The designee agreed and declined to set a hearing on the claim against Diamond. Claimants and Defendant agreed on an October 24, 2019 hearing on the claim against Defendant only. (Prehearing Conference Summary, July 30, 2019).

16) On August 5, 2019, Claimants formally requested a hearing on their claim against Diamond. (Affidavit of Readiness for Hearing, August 5, 2019).

17) On August 9, 2019, Claimants' counsel sent the designee a letter requesting modification of the "June 11, 2019" prehearing conference summary. They wanted the hearing request filed against Defendant to also apply to their claim against Diamond. (Letter, August 9, 2019).

18) On September 26, 2019, Diamond opposed Claimants' informal request to add the claim against Diamond as an issue for the October 24, 2019 hearing. It cited Claimants' earlier failure to file a formal hearing request on their claim against Diamond, as grounds for objecting. (General Contractor's Opposition to Employee's September 6, 2019 Petition, September 26, 2019).

19) On October 7, 2019, the designee again rejected Claimants' request to add their claim against Diamond as an issue for the October 24, 2019 hearing, citing Diamond's renewed objection. The designee set a separate hearing on the claim against Diamond for December 4, 2019. (Prehearing Conference Summary, October 7, 2019).

20) On October 16, 2019, Claimants filed their initial cost bill totaling $5,636.51, which included $3,227.09 and $475 for Jill Friedman. (Affidavit of Robert J. Bredesen, October 16, 2019).

21) On October 16, 2019, Claimants filed and served a witness list with Mousa and Miller and their contact information and a summary of their hearing testimony. Their testimony conformed to the brief statement on Claimants' witness list. (Employee's Witness List, October 16, 2019).

22) At hearing on October 24, 2019, Claimants renewed their request to hear both claims at the same hearing; Diamond renewed its objection. The panel issued an oral order relying on the prehearing conference summaries and declined to address the claim against Diamond. (Record).

23) Zaitsev, who speaks several languages, has been in America for 15 years. He testified he has a formal hiring process: he copies Social Security cards and identification; completes a W-4 form; withholds taxes (except for Hernandez who needed to be paid every day in cash); and provides W-2 forms. He said his employee hiring procedure was: to give potential workers three days to obtain what he requested, like identification and required clothing for safety. If they show up within three days with what he requested, Zaitsev hires them. The person then works with Zaitsev for one week to make sure they understand safety before they are hired. He hired Hernandez about five weeks before the injury, but they were working on a different job. When asked if he recalled stating in his deposition that on the injury date he had no employees, Zaitsev said he had two employees that day, Mahir and Hernandez. Mahir had probably worked 10 days prior to the injury. "When the incident happened," Zaitsev said he decided he could no longer pay his employees cash. He was asked to explain the following testimony from his deposition:

> Q. Why did you hire employees for the first time the day after the injury?
>
> A. I hired -- I knew Maher [sic], and he told me his sad story. His wife left him and all this stuff. So that's what time I met him back. I have not spoke to the guy for years. So he show up at the job site and -- because he find out this guy fell. I guess they know each other. (Videotaped Deposition of Alexis Zaitsev, April 1, 2019)

Zaitsev attributed this inconsistency to a "miscommunication" at his deposition. When pressed on it, he could not explain the above-quoted testimony. Zaitsev said, in respect to his deposition testimony, he "officially" hired Hernandez on the accident date because prior to that time, for about five weeks, he paid him in cash because Hernandez "did not want to be on paper." Zaitsev told

Hernandez he could no longer do that. He has never tried out a potential employee for work and not hired them. (Zaitsev).

24) Zaitsev agreed he spoke to Elattar about a week before the injury. Elattar approached the job site while he was operating a forklift; Zaitsev asked what he wanted. Elattar said Mahir had brought him and he wanted a job. Zaitsev said he told Elattar "give me a week and I will think and see if we have room." According to Zaitsev, Elattar said "thank you" and left. In his view, a person is not "hired" until they are "tried out." Zaitsev admitted he authorized Hernandez to work on Saturday by himself. Zaitsev said he clearly told Hernandez and Mahir not to show up on Monday because it was a holiday; he cannot explain why they showed up. Nevertheless, he paid Hernandez and Mahir for their work on Monday. (*Id*.).

25) Examples of supplies Zaitsev said he would tell a potential employee to obtain would include steel-toed shoes, kneepads, tool-belt with tools, safety glasses, hardhat and a safety vest. He is Russian Orthodox and he has over 60 observed holidays including "Israel holidays," which he also respects. His religion prohibits him answering the phone on holidays. Zaitsev pays his potential employees for their tryout period. In Zaitsev's view, he told Elattar to return in a week to push him away nicely and if he came back this would show he was responsible and might possibly be hired. Zaitsev recalls Elattar's English was "not so well" when he was talking to him a week before the injury. In his view, neither Mahir nor Hernandez was "in charge" of the work on site, meaning if somebody saw something that needed to be done, they should just do it and not fight over who is "in charge." Zaitsev was in charge of hiring. However, he admitted that on the injury date, Hernandez was in charge because he had more experience, having worked there for five weeks, compared to Mahir's two weeks on the job. Zaitsev attempted to walk this testimony back and suggested Hernandez was not "in charge" on the injury date. He spoke with Hernandez after the injury and according to Zaitsev, Hernandez told him he asked Mahir "who is this guy," referring to Elattar, and Mahir said "Alex is supposed to hire him." Hernandez did not say he told Elattar to leave the job site. According to Zaitsev, Hernandez said he did not want to work with either man because Zaitsev had specifically told Hernandez not to go on the roof, and when Mahir showed up, Mahir said "let's go on the roof." Hernandez did not tell Mahir or Elattar to get off the roof. According to Zaitsev's discussion with Hernandez, Mahir and Hernandez discussed whether Elattar should be present or should they wait for Zaitsev to show up. To Zaitsev's understanding, the two men were arguing about it and Mahir wanted to try Elattar out before

Zaitsev showed up to prove he was a good worker. Zaitsev stated, "That's how I see it on my side." He also said he talked to Mahir after the accident. According to Zaitsev, Mahir told him he brought Elattar to the worksite to try him out. Mahir told Zaitsev that Elattar said Zaitsev was going to try him out and Mahir thought Monday was the day. Mahir did not say he told Elattar to leave the job site. (*Id.*).

26) Zaitsev was asked to explain another statement from his deposition testimony:

> Q. Did you know before the injury that [Elattar] was friends with Maher [sic]?
> A. No.
> Q. Did you hire other people from that community to work with you?
> A. No. That's the first guy I want to try out.
> Q. Ellatar was?
> A. Yeah. (Videotaped deposition of Alexis's Zaitsev, April 1, 2019, at 51-52).

Zaitsev explained Mahir was the first guy he hired from the Muslim community and Elattar would have been the second guy, had he been hired. When pressed to explain the above-referenced quote from his deposition testimony, Zaitsev said the question "confused" him and he was nervous and did not understand everything. According to Zaitsev, he is safety-minded and tries to keep his workers safe on the job. In his view, it would have been simple for Hernandez or Mahir to tell Elattar to come back the next day when he would be there. Hernandez told Zaitsev he felt responsible for the injury. Zaitsev said, "I don't know why they even allowed him to go on the roof." He contended they should have gone on the roof only when Zaitsev was present. Had Elattar been wearing a harness, he would have been safe. Normally, his workers use harnesses, which are kept in the tool storage trailer for which Hernandez had the lock code. To Zaitsev's understanding, on the injury date the three men had not actually started working but were merely on the roof preparing to go to work when Elattar fell. (*Id.*).

27) When asked what he authorized Hernandez to do on Saturday while working by himself, Zaitsev equivocated. First he said Hernandez was installing strips on the roof on which the insulation would be placed. When it was pointed out this would be high in the air and dangerous, Zaitsev said there was a man lift on site. When asked if Hernandez was using the lift, Zaitsev was not sure what he was doing but he was authorized to work on the walls and ceiling. (*Id.*).

28) Zaitsev admitted it was his intention to try Elattar out if he showed up as directed, had Zaitsev been there. He clarified to say had he been there, and Elattar showed up, he would have given him three days to do the normal things he would ask of a potential employee, and if he did those things,

he would have tried him out for one week working alongside him. He does not pay workers for the three-day tryout period, because he does not consider them employees yet. (*Id*.).

29) He agreed he had no workers' compensation insurance on the date Elattar was injured. Zaitsev admitted he never discussed not working on Monday with Hernandez because he forgot to call him and tell him not to work on Monday. He thinks Elattar wanted to get hurt so he would not have to work. Zaitsev admitted he built a local mosque for the Muslim community. (*Id*.).

30) Zaitsev said he told Gallo on July 23 that he had workers' compensation insurance; on July 24, he found out he had none when Bullock asked him to produce the certificate of insurance. Bullock never asked him for a certificate of insurance to prove he had coverage when he first started on Diamond's job, about four weeks prior to Elattar's injury. (*Id*.).

31) Miller has known Elattar since about 2002. On July 20, 2018, the Friday before the Monday work injury, Elattar came to a party at Miller's home. Elattar told Miller he was going to go to work for a "very, very nice guy" at a construction site for a guy named "Alex" who had done work on a mosque. Elattar was supposed to get jeans, T-shirts and certain hand tools, which he had, but he needed to buy additional clothes and safety boots to begin work on Monday. (Miller).

32) After the injury and once he became Elattar's legal guardian, Miller did not know what to do to help him. Medical providers were trying to push Miller to send Elattar "here or there." He hired nurse case manager Jill Friedman for assistance. Friedman helped Miller find an appropriate place in Colorado to treat Elattar's injuries. (*Id*.).

33) He knows Mahir, who is Elattar's friend. Miller has spoken to Mahir several times and every time he speaks with him, Mahir tells a different story; thus, he finds Mahir untrustworthy. For example, Mahir initially told him Zaitsev threatened to fire him if he testified. He told Miller on the injury date that Zaitsev had hired Elattar and they went to the job site together and he fell and got hurt. When Miller subsequently asked Mahir if he would so testify, Mahir declined fearing Zaitsev's reprisals. Another time the men spoke, Mahir said he would testify since Zaitsev had already fired him. (*Id*.).

34) At the beginning, Miller was not familiar with Paradigm; he is now familiar with it. He never told his attorney that he did not want to speak with Paradigm; he declined to speak to anyone without his attorney present. Miller was aware that on November 28, 2018, Diane Davis on Diamond's behalf reached out to Miller's attorney and wanted to meet with him to discuss Elattar's case. Miller said he would not go without his attorney. Miller was evasive when asked if he knew

he and his attorney together could meet with Paradigm in December 2018, to discuss Elattar's case. He gave his attorney authority to do whatever was best for Elattar; however, he decided to keep Friedman on for Elattar's best interests. (*Id*.).

35) Mousa has known Elattar for about 11 years and they are close friends. He saw Elattar the night before his accident. Elattar told Mousa he quit driving cabs and was to begin a new construction job the following morning. He planned to work for about two months before returning to Egypt to visit his family and was going to be paid $20 per hour working possibly 10 hours a day. Elattar told Mousa he had purchased clothing necessary for his new job including jeans, a shirt and shoes; Mousa cut his hair because Elattar wanted to look nice on his first day on the job. He did not describe for whom he was going to be working or a specific job. Mousa also knows Mahir, who lives in Anchorage. (Mousa).

36) Diamond agreed if this decision found Elattar was Defendant's "employee," all benefits to which he may be entitled flow from that finding and Diamond would be responsible for his benefits. It insisted on cross-examining Miller in detail about Friedman because, after a date certain, Diamond's insurer started paying benefits, which it contends rendered Friedman's services unnecessary. Claimants contended they sought attorney fees and costs against Defendant at this hearing but acknowledged that as a matter of law Diamond's liability was vicarious. (Record).

37) All parties stipulated Elattar is permanently totally disabled, the medical care he has received to date has been reasonable, necessary and work-related, his ongoing medical care and treatment are reasonable and necessary and he is not able to testify given his head injury. (*Id*.).

38) Harvey is a supervisor with Alaska National. Harvey said that on November 26, 2018, a Wilton adjuster contacted Alaska National about this case. Lori McFarland, the previous adjuster, was assigned to it. On November 27, 2018, McFarland called Bredesen four times to discuss the matter and reached out to the state to get AKOSH reports. McFarland called again on November 28, 2018; Bredesen did not return her calls until November 29, 2018. He told McFarland he would send an injury report and claim. According to Harvey, the carrier had no information at this point other than Elattar's name. (Harvey).

39) Harvey said Paradigm handles medical management for catastrophic injuries. It acts as Alaska National's agent. In her opinion, there would be no need for a nurse case manager once Paradigm became involved. Paradigm's job is to find the best place possible for an injured worker's acute care; "they do everything from start to finish." Harvey knows Paradigm has a

relationship with Craig Hospital, and Craig is Alaska National's go-to hospital for serious injuries. On November 28, 2018, two days after Alaska National knew about the injury, it reached out to Paradigm. Alaska National signed a contract with Paradigm to provide services to Elattar for two years. They picked up payment for all medical benefits and no medical benefits in this case were paid with any reservation-of-rights. Harvey does not believe it is unreasonable for an injured worker's family to have independent advice about medical care in a case like Elattar's. (*Id*.).

40) Alaska National's normal practice is to investigate a claim for compensability, medical needs and billing issues. Harvey said Alaska National does not investigate claims with an intent to deny them but rather, to help the injured worker. There have never been any denials in this case. In her view, the meeting Harvey wanted with Miller was not to investigate claim compensability; rather, it was to find out details about his marital status to facilitate benefit payment. However, at some point Alaska National wanted to investigate the case; she agreed November 26, 2018, when Wilton made Alaska National aware of the case, is when they wanted to investigate compensability. In Harvey's opinion, it would be reasonable for a client to want representation but only if there were disputes in a case. However, in this instance, there were no disputes so Miller did not need an attorney, in her view. She contends Bredesen was invited to attend each meeting. (*Id*.).

41) Diane Davis at the carrier's request initiated a meeting on November 28, 2018, with Bredesen. On December 4, 2018, Alaska National requested a meeting, with Bredesen present, with Elattar's family. On January 9, 2019, Bredesen allowed Paradigm to meet with Miller. Alaska National has still not had direct contact with Miller or other family members because Bredesen will not allow it. (*Id*.).

42) Claimants contend Elattar had an employee-employer relationship with Defendant. They rely primarily on the *Childs* case. Claimants contend Zaitsev admitted he and Elattar had a conversation about employment and he told Elattar to return in a week. If Elattar returned a week later, Zaitsev said he would assess if he met his hiring process. Claimants contend the formalized hiring process is not necessary to form an employment contract. Elattar moved forward after his discussion with Zaitsev and followed clear directions he received from him and took steps necessary to show he had been hired. He bought necessary clothing as Zaitsev required and showed up at starting time as directed. Claimants contend the parties specifically agreed to $20 per hour. In their view, Zaitsev mistakenly begins "employment" after a tryout period, contrary to the law. Claimants contend Zaitsev has credibility issues. Nevertheless, Zaitsev admitted he

intended to employ Elattar; Elattar agreed, there was consideration and the parties' actions imply an intent to be bound. Claimants contend there was an express oral contract for hire. Alternately, Claimants contend there was an implied hiring contract based on circumstantial evidence, or Elattar was trying out for a job. In their view, the most compelling evidence in this case is the fact Elattar was working on the roof with Defendant's other employees at the time he fell. There would have been no other reason for him to be on the roof but for his employment. (Record).

43) Claimants contend they have a right to be represented before speaking to an agent for an adverse party. In their view, before Alaska National paid or agreed to pay anything on this case, they wanted to speak to Miller without Bredesen. Claimants contend this disrespects the attorney-client relationship. They contend Diamond's attempt to force mediation was simply a way to discuss the matter with Miller, sans his lawyer. (*Id*.).

44) Claimants request statutory attorney fees. As for costs, Miller testified he benefited from Friedman's advice and Harvey admitted it was reasonable for Miller to hire a case manager. (*Id*.).

45) Claimants contend the parties agreed Elattar is unable to testify, so hearsay may be relied upon under board and evidence rules. They rely primarily on Zaitsev's admissions. (*Id*.).

46) Diamond contends there is no non-hearsay evidence supporting an employee-employer relationship and the board cannot rely solely on hearsay to support a conclusion. Therefore, Diamond contends there is no express employment contract. It contends there is no implied contract because Zaitsev merely followed his normal process to kindly get rid of people and possibly evaluate them for future employment if they came back and demonstrated reliability. Diamond contends Claimants' tryout argument fails because Zaitsev was not present to try Elattar out on the injury date. They further contend Claimants' belief he had been hired, alone, does not create an employment contract. (Record).

47) As for attorney fees and costs, Diamond contends its first contact with Claimants' attorney was adversarial. It contends Bredesen did not contact Alaska National and provide information to see if the matter could be resolved amicably. Diamond contends this case is simply "all about attorney fees." It contends the hearing actually placed Claimants' right to benefits more at question than it was before Bredesen became involved in litigating the matter. Diamond contends Alaska National started paying benefits only because "it was the right thing to do." It contends had Claimants' lawyer simply returned calls from Alaska National's adjuster, and expressed his

demand to be present during any interviews, it would not have been a problem. Diamond contends it cannot unilaterally "cut off benefits." (*Id*.).

48) Zaitsev contends he never hired Elattar as an employee. He contends he cannot be responsible for everybody who comes on his job site especially if they get injured. Zaitsev contends there are signs all over the job site saying "authorized people only," and concedes Elattar was authorized to return in one week only, but not when he was not present. (Record).

49) Fund concurs with Claimants' brief on the relevant issues. (Record).

50) On November 1, 2019, Claimants filed their supplemental cost bill claiming $681.80 against Defendant, including $625 for services rendered by Friedman but not including her testimony, which she did not give at hearing. (Affidavit of Robert J. Bredesen, November 1, 2019).

51) Claimants' total legal costs for prosecuting their claim against Defendant are $6,318.31. (Inferences drawn from the above).

52) Disputed issues including the employee-employee relationship were moderately complex. Bredesen's evidence preparation, hearing brief and hearing presentation were helpful to the panel. Defendant denied liability, failed to provide board-ordered discovery but did not vigorously litigate the claim, though it was assisted by Diamond's counsel. The benefit range at issue is significant, ranging from zero dollars up to life-time permanent total disability and medical care for Elattar, which will be substantial. (Experience, judgment and inferences 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. . . .

In general, 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).

However, "when an employer exposes potential employees to risks inherent in a tryout period and the applicant is under his direction or control, any injury resulting during such a period is compensable as a matter of law." *Id.* at 315. Thus, in cases falling under the "tryout exception" to the normal rule requiring a hiring contract, no implied or express contract is required: "By utilizing his services and by controlling the time, manner and location of his work, the Lodge knowingly allowed Childs to act on its behalf, performing many of the job-related skills for which he was being considered." And, since the Act is primarily interested in the question when the risks of employment begin to operate, "it is appropriate, quite apart from the strict contract situation, to hold that an injury during a tryout period is covered, when injury flows directly from employment activities or conditions." *Id*. at 314.

> **AS 23.30.070. Report of injury to division.** (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall file with the division a report setting out
> . . . .
>
> (f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.
>
> **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 v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). Credibility is not examined here. *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).

> **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. . . .

In *State v. Cowgill*, 115 P.3d 522 (Alaska 2005), the Alaska Supreme Court 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 employee 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 23.30.155. Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, in a format prescribed by the director. . . .

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

. . . .

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

. . . .

(p) An employer shall pay interest on compensation that is not paid when due. . . .

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 45.065. Prehearings. . . .

. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

8 AAC 45.070. Hearings. . . .

. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

8 AAC 45.120. Evidence . . . .

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

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. The following costs will, in the board's discretion, be awarded to an applicant:

. . . .

(17) other costs as determined by the board.

Evidence Rule 804. Hearsay exceptions -- Declarant unavailable. (a) **Definition of unavailability**. Unavailability as a witness includes situations in which the declarant

. . . .

(4) is unavailable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity. . . .

. . . .

(b) **Hearsay Exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) *Other exceptions*. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

ANALYSIS

1) Was the oral order denying Claimants' request to have their claims against Defendant and Diamond heard at the same time correct?

Claimants initially filed a formal hearing request only on their claim against Defendant and Fund. When Claimants tried to add their claim against Diamond as an issue for the October 24, 2019 hearing, Diamond objected. Claimant subsequently filed a formal hearing request on the Diamond claim. Again, Diamond objected to hearing the claims together. The designee at prehearing conferences declined to expand October 24, 2019 hearing to include the claim against Diamond. At hearing, Claimants renewed their request to have both claims heard. An oral order denied Claimants' request. In general, prehearing conference summaries limit the issues for hearing to those in dispute "at the end of the prehearing." 8 AAC 45.065(c). The claims and issues set for

hearing are stated in the summary once the conference is over. If there are "unusual and extenuating circumstances," additional claims or issues may be heard. 8 AAC 45.070(g). Given the above factual findings and conclusions, and these rules, the oral order denying Claimants' request to add an additional claim against a different party to the issues at hearing was correct.

2) Did Zaitsev hire Elattar and create an employee-employer relationship?

Claimants contend Zaitsev hired Elattar, created an employee-employer relationship as defined in Alaska law and Elattar was not trespassing when he was injured. AS 23.30.010(a). Fund agrees with Claimants' position on this issue. Zaitsev contends he never hired Elattar and he should not have been at the job site at all, implying he was trespassing. This creates a factual dispute to which the presumption analysis applies. AS 23.30.120(a)(1); *Meek*. Without regard to credibility, Claimants raise the presumption with Zaitsev's deposition testimony admitting he hired Elattar and with Mousa's and Miller's testimony stating, respectively, Elattar was starting a new construction job the following Monday and a man named "Alex," who had built a local mosque, was going to be his employer. *Cheeks*; *Wolfer*; *Resler*. Without regard to credibility, Defendant rebuts the presumption with Zaitsev's testimony at hearing that he did not hire Elattar. *Tolbert*; *Resler*. The presumption having been rebutted, Claimants must prove an employee-employee relationship by a preponderance of evidence. *Saxton*; *Steffey*.

To be eligible for benefits under the Act for Elattar's injuries, Claimants must prove Elattar was an "employee" and Defendant was his "employer" as defined in the Act. AS 23.30.395(19), (20). Before an Employer-Employee relationship arises for workers' compensation purposes, an express or implied employment contract must exist. *Alaska Pulp Corp*. A contract may be oral or written and is not difficult to create. An express contract requires an offer encompassing its essential terms, unequivocal acceptance by the offeree, consideration and an intent to be bound. An implied employment contract results from manifestation of consent by one party to another that the other shall act on his behalf and subject to his control, and consent by the other to so act. *Childs*.

Claimants rely primarily on admissions in Zaitsev's deposition testimony. In it, Zaitsev was asked if he had ever hired other people from the local Muslim community to work for him, Zaitsev said no and said Elattar was "the first guy I want to try out." At hearing, Zaitsev tried to walk this

testimony back contending the deposition question confused him and he really meant to say Mahir was the first person from the Muslim community that he hired and Elattar would have been the second, had he actually hired him. While his testimony regarding Mahir was inconsistent and equivocal, Zaitsev admitted at hearing he had already hired Mahir, so it could not have been Mahir he was going to "try out." Zaitsev's deposition testimony, in response to a clear question, should not have been confusing and is more credible than his contrary hearing testimony. AS 23.30.122; *Smith*. Zaitsev speaks several languages fluently, appeared calm at hearing and expressed himself in English well. There is no reason to suspect he would have been more nervous at a discovery deposition than he was at a hearing deciding his liability. His clear and unequivocal deposition testimony is an admission Zaitsev intended to, and did, hire Elattar to try out for a job. This is consistent with Elattar's statements to Miller and Mousa.

Elattar saw Miller three days before the work injury and told Miller he was going to work for "Alex" who had previously built a community mosque. At hearing, Zaitsev admitted he had built a local mosque. Elattar told Miller he was supposed to obtain clothing and tools, which he had, but he still needed to purchase additional clothing such as safety boots to begin work the following Monday. The day before his injury, Elattar told Mousa he had quit driving cabs and was beginning a new construction job the next morning. He was going to be paid $20 per hour and had purchased required clothing for his new job, including work shoes. Elattar wanted a haircut for his first day on the job. Zaitsev conceded his hiring process included telling potential employees to obtain certain tools and clothing for the job. Hernandez said Zaitsev hired Hernandez with an oral agreement for $20 per hour. This is consistent with what Elattar told Miller and Mousa about his hiring experience with Zaitsev. *Childs*.

Diamond contends all evidence supporting an employee-employer hiring contract is hearsay, which, absent direct evidence, cannot form the basis for a decision. 8 AAC 45.120(e). Claimants rely mostly on Zaitsev's admissions supported to some extent by Hernandez's testimony. Further, since the parties stipulated Elattar is unavailable to testify because he has a serious head injury, his otherwise hearsay statements are exceptions to the general hearsay rule because he is an "unavailable declarant." Evidence Rule 804(a)(4), (b)(5). Mousa and Miller were listed on Claimants' witness list with a brief summary of their expected testimony, which comported with

their testimony. Their contact information was provided and this notice gave Defendant and Diamond an adequate opportunity to meet their testimony. Evidence Rule 804(b)(5). Under the circumstances, Elattar's conversations with Miller and Mousa are evidence on which responsible persons would rely in conducting serious affairs. *Rogers & Babler*; 8 AAC 45.120(e). Mousa's and Miller's testimony is credible and is given considerable weight. AS 23.30.122; *Smith*. Their hearsay testimony is the best evidence Claimants could provide given Elattar's physical condition. Diamond contends the best evidence would come from Mahir, who Claimants decided not to call as a witness because he was "untrustworthy." There is no evidence Mahir participated in or overheard the hiring discussion or was even present when Zaitsev and Elattar met one week before the injury and discussed employment. Mahir's absence on this issue is not material to this decision. Further, any party could have subpoenaed Mahir, but did not.

Zaitsev's inconsistent testimony casts shade on his credibility. Notwithstanding Zaitsev's expressed hiring policy, which supposedly included obtaining identification and providing paperwork for his employees, Hernandez said he completed no paperwork when Zaitsev hired him. This belies Zaitsev's assertion about his "normal" hiring policy and is consistent with how he hired Elattar. Zaitsev told Haworth that Elattar was not supposed to be on site. At hearing, Zaitsev said Elattar was authorized to come back a week following their conversation. In his deposition, Zaitsev said he had no employees on the injury date. At hearing, he admitted he had two, Hernandez and Mahir. Zaitsev at deposition said he hired Mahir the day after Elattar's injury. At hearing, he said Mahir had worked on the project for about 10 days before the injury. Zaitsev stated he hired Hernandez "officially" on the injury date. He also said he was not present on the injury date because it was a religious holiday and he does not answer the phone on such days; Zaitsev would have neither seen nor talked to Hernandez to hire him that day. Zaitsev said he provided a certificate of insurance to Diamond, which could not be true because Defendant did not have workers' compensation coverage when it began working on the Diamond project. Zaitsev said no one from his company was supposed to be working on Monday, July 23, 2018, and he made this clear to Mahir and Hernandez. Zaitsev also admitted he forgot to call Hernandez and tell him not to show up for work that Monday. He said the men should not have been working at height when he was not present. Nevertheless, Zaitsev authorized Hernandez to attach strips to the roof while working alone the prior Saturday. He first said he pays his potential employees for

their tryout periods. After considering the possible ramifications of this statement, Zaitsev later said he does not pay people for tryouts because he does not consider them "employees" yet. He said he told Gallo on June 23, 2018 that he had insurance. He also said he was not present on the worksite on that date and did not use the telephone because it was a religious holiday; he could not have spoken to Gallo that day. In an effort to support his position that he never hired Elattar, Zaitsev said his company values safety and he would never allow Elattar to climb around on the roof without first training him in safety procedures. Yet, Officer Evans and AKOSH investigator Haworth noted Hernandez, Mahir and Elattar were wearing no safety equipment and none was in sight on the injury date. Zaitsev said Hernandez could get into the storage trailer, which is the only place safety devices could have been on site, if Defendant had them at all. Hernandez and Mahir on the scene told Evans they never use safety harnesses and there were none. While Zaitsev presented himself as safety minded, Haworth found Defendant had no safety equipment on site and Zaitsev provided no fall protection training. It is difficult, at best, to believe anything Zaitsev said at hearing, and his testimony is given very little weight. AS 23.30.122; *Smith*.

Zaitsev admitted Elattar requested employment and he intended to employ him. Elattar agreed to the consideration, which was $20 per hour and both parties' actions imply an intent to be bound. Zaitsev told Elattar what to purchase to prepare for the work; Elattar bought those required items and appeared on the job site as directed. There was no confusion on Elattar's part about what each party intended. These facts evince an express oral hiring contract and created an employee-employer relationship. *Childs*; AS 23.30.395(19), (20). It is probable Zaitsev hired Elattar and forgot that the day Elattar was supposed to show up for his tryout period was a religious holiday, just as he admittedly forgot to call Hernandez and tell him not to work on Monday. *Rogers & Babler*. Hernandez, Defendant's agent in charge at the job site in Zaitsev's absence, began Elattar's tryout, and Elattar was injured.

Alternately, in addition to the express oral contract, the evidence shows Zaitsev and Elattar had an implied employment contract. *Childs*. Zaitsev said Elattar's English was not very good, implying perhaps he misunderstood. Diamond contends Elattar's belief he been hired is insufficient to create an employee-employer relationship under the Act. But Zaitsev, upon whom Diamond relied, is not credible. AS 23.30.122; *Smith*. Zaitsev at hearing admitted Elattar was specifically

authorized to return to the job site the following week. While he contends this was done to politely get rid of Elattar and see if he would return, and then consider trying him out, Zaitsev also admitted he intended to try out Elattar as an employee. Zaitsev's statements to Elattar manifested his consent that Elattar would act on his behalf, subject to his control. Elattar obtained necessary work items precisely as Zaitsev requested, returned to the worksite, began working and was injured when he fell from the roof. Zaitsev reluctantly admitted Hernandez was in charge of the worksite on the injury date. Neither Hernandez nor Mahir told Elattar to leave the job site until they could consult with Zaitsev the next day when he would answer his phone. Hernandez did not say Elattar took it upon himself to get up on the roof. It is inconceivable that Hernandez and Mahir would allow Elattar to climb onto the roof at a commercial construction project and begin working without their consent. *Rogers & Babler*. Hernandez admitted showing Elattar how to mark and install insulation. He was in charge and was Zaitsev's agent. While Hernandez was instructing him, Elattar fell. Thus, Claimants have alternately demonstrated Elattar and Zaitsev had an implied oral contract for hire. *Childs*.

Based on the above analysis, Claimants have met their burden of proving Elattar and Zaitsev had an express or implied oral hiring contract and that on the injury date, Elattar was Defendant's "employee" and it was Elattar's "employer." They proved Elattar was not a trespasser. *Childs*; AS 23.30.395(19), (20). Defendant does not suggest Elattar was an independent contractor when he fell, so this decision need not address that issue. The parties stipulated Elattar is permanently totally disabled and his past and ongoing medical care is necessary and reasonable. There is no question the injury arose out of and in the course of Elattar's employment with Defendant. Therefore, Defendant is liable for Elattar's past and future permanent total disability benefits as well as his past and ongoing medical bills and related transportation expenses. AS 23.30.010(a).

Alternately, even were there no express or implied oral contract found in this case, Elattar's injury would still be covered under the Act under the "tryout exception." When injured, Elattar was on the roof of a commercial building where Hernandez, Defendants' agent in charge of the work at the time, was showing him how to mark and install insulation. It is undisputable this was Defendants' business and work purpose on the date in question. Hernandez knowingly allowed

Elattar on the roof and he was performing job-related skills for the position for which he was trying out when he fell. His injuries flowed directly from "employment activities or conditions." *Childs*.

3) Are Claimants entitled to penalties against Defendant?

Defendant first knew Elattar fell on the injury date, because Hernandez, Defendant's agent in charge at the time, saw him fall. It also knew when Haworth interviewed Zaitsev on July 24, 2018. Defendant did not timely file and serve an injury report or controversion notice and has never paid any benefits to Elattar or on his behalf. AS 23.30.070(a); AS 23.30.155(a). Claimants seek two penalties: One for Defendant's failure to timely file an injury report; and another for neither timely controverting nor timely paying Elattar benefits. AS 23.30.070(f); AS 23.30.155(e). Though Defendant may have questioned the employee-employee relationship, nothing prevented Zaitsev from timely filing an injury report while also offering the defenses raised in his November 17, 2018 letter. Therefore, because Defendant never filed an injury report, it will be ordered to pay an additional award equal to 20 percent of all amounts unpaid when due, including medical and indemnity. AS 23.30.070(f).

Similarly, Defendant had a legal duty to either pay benefits to the person entitled to them after Elattar's fall, or controvert the right to benefits. AS 23.30.155(a). The first installment of disability benefits became due 14 days after Defendant knew of Elattar's injury, which was July 23, 2018. Ongoing disability benefits were due every 14 days thereafter. AS 23.30.155(b). Defendant could have filed a controversion notice while still offering the same defenses Zaitsev raised his November 17, 2018 letter. It is undisputed it did not; it also paid no disability or medical benefits. Therefore, Defendant will be directed to pay a 25 percent penalty on the value of all benefits to which Elattar was entitled under the Act, which Defendant did not pay within seven days after those benefits became due, including medical and indemnity. AS 23.30.155(e).

4) Are Claimants entitled to interest, attorney fees and costs against Defendant?

Interest on benefits not paid when due is mandatory. AS 23.30.155(p). Defendant will be ordered to pay interest on all medical and indemnity benefits not timely paid when due.

On November 17, 2018, Zaitsev expressly denied Elattar was his employee and implicitly denied Defendant owed any benefits for his work injury. Claimants hired Bredesen to represent their interests against Defendant. Bredesen investigated the case, filed a claim, performed discovery, filed a helpful hearing brief and represented his clients well at hearing. His services resulted in this decision finding a hiring contract and an employee-employer relationship between Elattar and Zaitsev. This decision found Defendant liable for all benefits under the Act to which Elattar may be entitled. Claimants prevailed on all their claims against Defendant. They request statutory minimum attorney fees on all past and ongoing benefits. While Defendant never filed a formal controversion notice, Zaitsev's failure to pay any benefits, along with his November 17, 2018 letter, were a controversion-in-fact. Thus, attorney fees can be awarded under AS 23.30.145(a). The resulting benefits to Elattar including permanent total disability and likely lifelong medical care are significant. *Rogers & Babler*. Claimants' request for past and ongoing statutory minimum attorney fees against Defendant on all benefits awarded in this decision will be granted. *Cowgill*.

Claimants also request litigation costs. Defendant did not directly address this claim but accepted assistance, and implicitly adopted arguments, from Diamond's attorney. Diamond contends Claimants did not need Friedman's services and her related costs should not be awarded. It contends Alaska National was ready, willing and able to provide the same services through Paradigm, and Friedman's services were duplicative. However, Harvey conceded it was reasonable for Miller to obtain assistance in finding appropriate treatment for Elattar's injury. Neither Defendant nor Diamond cited authority stating an injured worker or his guardian do not have a right to obtain assistance from someone like Friedman. She was the "retained expert" referenced in the cost bill. *Rogers & Babler*. There is no legal prohibition against hiring a non-medical expert. Claimants filed a statement listing each cost claimed and an affidavit stating the costs were correct and incurred in connection with the claim. 8 AAC 45.180(f)(17). Miller explained the connection and his testimony was credible. AS 23.30.122; *Smith*. There being no other objection to the requested costs, which are reasonable, Claimants' request for a cost award will be granted and Defendant will be ordered to pay Claimants $6,318.31 ($5,636.51 + $681.80 = $6,318.31) in litigation costs.

CONCLUSIONS OF LAW

1) The oral order denying Claimant's request to have his claims against Defendant and Diamond heard at the same time was correct.
2) Zaitsev hired Elattar and created an employee-employer relationship.
3) Claimants are entitled to penalties against Defendant.
4) Claimants are entitled to interest, attorney fees and costs against Defendant.

ORDER

1) Claimants' November 6, 2018 claim against Defendant is granted.
2) Claimant has been permanently and totally disabled from his work injury with Defendant since July 23, 2018. Defendant shall pay permanent total disability benefits to Miller on Elattar's behalf as his guardian and conservator from June 23, 2018, through the present and continuing until Elattar is medically stable and no longer disabled.
3) Defendant shall pay all past and ongoing work-related medical bills directly to the medical providers.
4) Defendant shall pay statutory interest to Miller on Elattar's behalf as his guardian and conservator on all past permanent total disability benefits. Defendant shall pay to Elattar's medical providers statutory interest on all past work-related medical care in accordance with the law.
5) Defendant shall pay to Miller on Elattar's behalf as his guardian and conservator and to Elattar's medical providers a 20 percent statutory penalty under AS 23.30.070(f) and a 25 percent statutory penalty under AS 23.30.155(e) on all benefits under the Act that were not paid within 14 days of their due date, in accordance with this decision, the Act and applicable regulations.
6) Defendant shall pay Bredesen statutory minimum attorney fees on the value of all permanent total disability benefits to which Elattar is entitled, beginning July 24, 2018, and continuing, on all past and future medical care for his work injury, and on interest and penalties awarded herein.
7) Defendant shall pay Bredesen costs totaling $6,318.31.

Dated in Anchorage, Alaska on November 27, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Robert C. Weel, Member

/s/
Justin Mack, Member

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

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 Ezzeldin Elattar, claimant v. LXS Carpentry, LLC, defendant; Benefits Guaranty Fund, insurer / defendants; Case No. 201816325; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on November 27, 2019.

/s/
Nenita Framer, Office Assistant