ALASKA WORKERS' COMPENSATION BOARD

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

STEVEN HIBORIK, Employee, Claimant, v. WESTSIDE FLOORING, LLC, Employer, and AMERICAN FIRE AND CASUALTY COMPANY, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201911330 AWCB Decision No. 20-0007 Filed with AWCB Anchorage, Alaska on February 20, 2020

Steven Hiborik's (Employee) August 30, 2019 claim his injury arose out of and in the course of his employment was heard on January 23, 2020, in Anchorage, Alaska, a date selected on November 20, 2019. An October 30, 2019 hearing request gave rise to this hearing. Attorney Elliott Dennis appeared and represented Employee who appeared and testified. Attorney Stacey Stone appeared and represented Westside Flooring, LLC, and its insurer (Employer). As a preliminary matter, Employer asked the designated chair to recuse himself, a request he refused. The remaining panel members deliberated and denied Employer's disqualification request. An oral order denied Employee's request to strike Employer's witness list and witnesses and his request to strike Employer's hearing brief and exhibits. Ross Walther appeared and testified for Employer. This decision examines the oral orders and addresses the preliminary issue set for hearing, on its merits. The record closed at the hearing's conclusion on January 23, 2020.

ISSUES

Employer contended the designated chair had a conflict of interest and requested his recusal. He declined, and an oral order from remaining panel members denied the disqualification request.

1) Was the oral order denying Employer's recusal and disqualification requests correct?

Employee contended Employer's tardy witness list should be stricken and Employer should not be allowed to call any witnesses because it filed its witness list late.

Employer contended its witness list and witnesses should not be stricken because Employee knew what the witnesses were going to say and he has not been prejudiced by Employer's tardy filing.

2) Was the oral order denying Employee's request to strike Employer's witness list and witnesses correct?

Employee contended Employer's hearing brief and attachments should be stricken and not considered at hearing because they were filed untimely.

Employer contended its hearing brief and attachments should not be stricken and should be considered at hearing because Employee's counsel received them sooner than he would have had Employer mailed them and Employee cannot demonstrate how he has been prejudiced.

3) Was the oral order denying Employee's request to strike Employer's hearing brief and exhibits correct?

Employee contends his June 3, 2019 fall from a roof arose out of and in the course of his employment with Employer. He contends his injury is covered under the Act.

Employer contends the June 3, 2019 fall did not arise out of and in the course of Employee's employment because he was not supposed to be on the job site and went there solely to confront his girlfriend who also worked for Employer.

4) Did Employee's June 3, 2019 injury arise out of and in the course of his employment with Employer?

FINDINGS OF FACT

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

1) The parties agree that on June 3, 2019, Employee, who worked for Employer, fell from a roof of a portable classroom in Wasilla, Alaska and was seriously injured. Employer was reroofing, painting and installing new carpet in the portables. (Employee's Hearing Brief, January 15, 2020; Hearing Brief of Westside Flooring, LLC and Liberty Mutual, January 17, 2020).

2) On June 3, 2019, Matanuska-Susitna Borough paramedics arrived on the scene. Employee said he "was visiting his girlfriend" when he fell from the roof. (Patient Record, June 3, 2019).

3) On July 10, 2019, Employee completed and filed an injury report following surgery and intensive care. (Employee).

4) On several occasions while Employee was hospitalized, Walther came to visit him and at times paid him past wages in cash. Eventually, Employee learned from his physician how serious his injuries were and how long it would take to recover. During his hospitalization, Employee and Walther discussed workers' compensation; Employee said he was going to have to file for benefits; Walther became angry. When Employee was discharged, Walther came to pick him up. While taking him home from the hospital, Walther presented Employee with a "job application" to complete to assist in obtaining workers' compensation benefits. Walther repeatedly told Employee he was "working on" obtaining workers' compensation benefits for him. Employee completed the application packet and gave it to Walther. After Employee went home from the hospital, Walther on three occasions came to his home and paid him $200 cash for "workers' compensation benefits" until the "paperwork went through" for the actual insurance coverage. (Employee).

5) On August 30, 2019, Employee claimed temporary total disability, a compensation rate adjustment, attorney fees and costs, medical and related transportation costs, a late-payment penalty and interest. He described his work injury as "fell descending from roof, broke left hip/ leg and crushed lung." Employee filed his claim because, "no benefits paid by Workers' Compensation insurer." (Claim for Workers' Compensation Benefits, August 30, 2019).

6) Neither Employer nor its insurer answered Employee's claim. (ICERS database).

7) On January 17, 2020, Employer asserted Baker would testify he told Employee not to get up on the roof but Employee ignored him and got on the roof anyway. Employer contended Employee made false or misleading statements to the Social Security Administration concerning his income

and earnings while receiving Social Security Disability and Supplemental Security benefits. (Hearing Brief of Westside Flooring, LLC and Liberty Mutual, January 17, 2020).

8) At hearing on January 23, 2020, as a preliminary matter Employer contended the designated chair had a conflict of interest arising from a 2018 personnel decision that occurred while Stone was on the governor's transition team and requested that the chair recuse himself. Employer conceded it had not filed an affidavit setting forth its grounds for the recusal request. The chair declined to recuse himself and stated he had suspected Stone may have played a role in his "demotion" from Chief of Adjudications to Hearing Officer. The chair said Stone, however, had stated to others that she played no role in the personnel decision and the administration never consulted with her on it. The chair stated any suspicion he had that Stone played some role in his termination as chief was thus unfounded, negating the primary basis for Employer's petition to disqualify him. The chair further noted he holds no grudges, is fair and impartial when hearing and deciding cases, had no conflict of interest in this case, no bias for or against any party or its representative, had not prejudged this case, had no personal or financial interest in it and was aware of no facts showing he had actual bias or prejudgment. The chair stated his recusal from cases involving Stone or her law firm based on Employer's allegations would disrupt the division's workflow given staffing in the Anchorage office and the lack of a full-time Chief of Adjudications. The chair noted Employer's allegations did not meet a preponderance of the evidence or clear and convincing evidence required to support disqualifying a panel member. Lastly, the chair stated he and his panel decided in Stone's law firm's client's favor in *Butcher II*, the case upon which Employer relied to show the chair knew he had a conflict of interest based on similar allegations in that case. The chair declined to recuse himself, turned the matter over to the remaining panel members to decide the disqualification issue, and they declined to disqualify the chair. (Record).

9) Baker has worked for Walther for 21 years and loaned his friend Walther $180,000 for business purposes, which has never been repaid; Walther is now pursuing bankruptcy. He describes Walther as a "poor manager." Baker specializes in commercial floor covering and has only done flooring and playground installations for Walther. After the 2018 earthquake, Baker's work for Employer included refurbishing "portables" for a school in Wasilla. This involved taking metal off the roofs, and laying carpet. On Employee's injury date, Walther called Baker and told him to go work on the portables; Baker's job was to unscrew metal roofing and stack it on the ground; he had never done roofing before. Baker went to the job site that day alone; "Nadia" was working

with him on that job. Walther told Baker he had Employee and Nadia painting the portables. Baker had known Employee years earlier when they worked together but had not seen him for many years. On the injury date, Employee drove up in his van, got out and conversed with Baker, who greeted him with "hey, old man." Both he and Employee looked much older than the last time they met and Baker inferred from Employee's response to his salutation that Employee did not initially recognize him. Employee "seemed upset" and asked Nadia to come down off the roof; Nadia refused. Employee then retrieved a bucket of paint and placed it about halfway between the portables and his van. He then more forcefully spoke to Nadia and said, "Get down here now." When Nadia again refused, Employee climbed the ladder onto the roof. According to Baker, Employee "marched over" to Nadia who "cowered down like she was scared he was going to hit her." Employee did not harm Nadia. Baker never told him to get off the roof. Employee spoke with Nadia, who agreed to get off the roof and talk with him in private. As Employee was leaving the roof to climb down the ladder, he fell. Baker called Walther immediately after the accident on his cellphone; Employee did not want him to call. Baker said Employee and he never talked about the work being done on the roof. However, Baker testified the various portables had different roofing installations. For example, two buildings had the metal nailed on while the third was screwed on. Walther had told him all the buildings' roofs were screwed on. Some roofs had shingles under the metal. Baker never visited Employee in the hospital post-injury, but knew Walther had visited him "like after it first happened." Walther had recently told Baker, "Steve fell off the roof and he [Employee] said you [Baker] told him to get up there." Baker said Walther, in his post-injury conversations with him, never raised any concerns about the accident and did not dispute Employee's reported assertion that "you told him to get up there." Baker had heard that Walther regularly paid employees in cash. He agreed Walther was not the most ethical businessman. For example, he "cuts corners" and fails to pay overtime on certain jobs. Baker assumed Employee came to the portables to retrieve paint as there were "bulk buckets of paint" on site. In Baker's view, Employee had no work purpose for being on the roof and his "purpose was to talk to Nadia or -- I thought he was going to strike her." Walther told Baker that Nadia would meet Baker at the jobsite that day. He does not believe Employee was supposed to be working at the portables that day. Once Employee and Nadia started talking, Baker could see "it wasn't violent then at that point." (Deposition of Daniel Neil Baker, January 20, 2020).

10) Baker's testimony is not entirely consistent with what Employer's brief asserted he would say. Most notably, contrary to Employer's brief Baker did not say he told Employee to not get on the roof. (Deposition of Daniel Neil Baker, January 20, 2020; inferences from the above).

11) Employee has experience in framing, roofing, flooring and painting. Employer hired him to work at school portables in Wasilla doing "everything" including painting and flooring. His girlfriend, Nadia, lived with him for about a year; he obtained employment for her with Employer, primarily doing cleanup around the worksites. Employee assisted Nadia in "getting clean" but when her divorce proceeding began, Nadia became distressed and returned to drugs; Employee became concerned about her welfare. He had loaned Nadia and her ex-husband $5,000. On the Wednesday prior to Employee's injury, Nadia went missing. Employee told Walther to let him know if Nadia showed up to obtain her paycheck and asked Walther to give it to him. When Walther asked why, Employee in an effort to protect Nadia told him half the story, which was the fact Nadia owed Employee $5,000 but had made no payments. About one week prior to his injury, Employee had a discussion with Walther concerning the portables' roofs. When Walther learned Employee had considerable roofing experience, he expressed concern about Employee's amputated toes but told him he would either be doing the roofing or supervising the work. Walther never got back to him about the roofing. On the injury date, Employee completed a project on an eight-plex in Palmer. He called Walther and advised he was done at the apartments and was going to the portables to finish painting the last one. Nadia had assisted him with painting three portables. He asked Walther if he had seen Nadia; Walther said she had come to receive her pay, which Walther had given her. Employee was upset with Walther for giving Nadia her pay because he had to tell Walther the other half of the story, which was that Nadia had an addiction problem, and it was a lot of work "to keep her clean." In subsequent telephone calls that day, Employee calmed down and apologized to Walther for his angry outburst and was ready to return to work. Walther told Employee Nadia "seemed fine" and he in fact had "hired her." Walther refused to tell Employee where Nadia was working. Employee told Walther he could finish painting the last portable in short order and he was going to go there. Walther said, "Okay, goodbye." Employee drove to the portables to pick up material he needed to finish painting the last one and noticed two people on the roof of one portable; he did not initially realize Nadia was one of those people. He stopped near the buildings and began obtaining paint from various portables. Baker was speaking to Employee from the roof but, because Baker had aged and Employee had not seen him for several

years, Employee did not at first recognize Baker. Eventually, he recognized Baker and discussed the roof situation with him from the ground while Baker was on the roof. Employee asked Nadia to come down and talk to him; she refused and told him to "go to hell." He was upset with her. Employee continued his discussion with Baker concerning the roof; Baker told him he knew nothing about roofs. Employee determined he needed to climb up on the roof to find out what was needed to complete the job. Employee asked how hard it was to pull off the metal roofing. Baker and Nadia both explained to Employee the differences they had found in the roofs, associated difficulties with removing them and the various materials they found under the sheet metal. Employee asked Nadia again if she would come off the roof and speak with him; Nadia agreed and told Baker she was going to take a lunch break. Employee proceeded to climb down. As he slid over the edge of the roof to drop down onto the lower level roof where the top of the ladder was resting, his pant leg caught the edge and, while attempting to jerk his leg loose, Employee fell. He did not want to get Walther in trouble for paying him under-the-table, so when the paramedics showed up he told them he had stopped by to give Nadia lunch. Baker and Walther knew almost immediately that Employee had fallen off the roof because Nadia screamed and Baker immediately called Walther. Within two weeks of the injury, Walther visited him in the hospital. (Employee).

12) Employee admitted Walther never told him to go "do the roofs"; he was never specifically instructed to go onto the roof; no one told him not to go onto the roof either. Although he and Walther had discussed Walther's intention to use a different crew to do the roofs, when Employee arrived at the portables on the injury date and found Nadia and Baker working on the roof, he assumed Walther had decided to use his own in-house crew. Given Employee's arguments with Walther in the hospital over workers' compensation, Employee decided to call the Workers' Compensation Division to find out how to pursue benefits. He assumed Walther was taking care of the workers' compensation problem, but something did not "seem right." (Employee).

13) Employee had been on the portables' roofs numerous times while painting the portables, because it was easier to paint the fascia from the roof than it was from the ladders. (Employee).

14) Employee denied climbing on the roof on the injury date with intent to harm anyone. He thinks Baker is one of the most honest people he has met; however, he does not understand why Baker would say there was no discussion between them about the roof the day Employee fell and surmises the only reason Baker would make that statement was to protect Walther and perhaps protect his own interest as part-owner of Walther's business. (Employee).

15) Employee contends he had a dual purpose for being on the roof on his injury date: he climbed on the roof to speak with his girlfriend and to evaluate the roofing situation. He contends his fall from the roof arose out of and in the course of his employment activities because it had a business purpose. Employer contends Employee's sole purpose for being on the roof was to confront his girlfriend. It contends this activity was "personal" and did not arise out of and in the course of his employment. Employer contends the board should rely on Baker's testimony because he has no interest in the outcome. It contends Employee took himself out of the "scope of his duties" when he climbed up on the roof. (Record).

16) Employer went out of business in September 2019. Walther's "general manager" hired Employee and "Jared" "for cash" to lay laminate flooring in a property. He recognized hiring these men "for cash" was not done in the "legit way" but did it to "help them out" for one job. Eventually, Walther hired Employee to lay carpet at the Wasilla portables project. One day, Walther went to the job site and found Nadia present and asked Employee who she was. Employee said Nadia was his girlfriend and she was just there helping out. Walther did not want a person working for him "for free" so Walther put Nadia on the payroll at $10 per hour cash so she could work cleaning up and other duties as assigned. Walther met with Employee in early May 2019 at the portables to discuss the project. They discussed Employee painting and flooring the portables; Walther was going to put "some of his other guys" on the project when they were not installing playgrounds, but Employee was available and anxious to work on the project because it was near his home. Though he did not specifically tell Employee he was in charge of the project, he did not say "he wasn't" either. He told Employee he, Nadia and Jared could work out who did what among themselves. Walther had a discussion with Employee about reroofing the portables around the date the materials for the roofing arrived. Employee told Walther he had done roofing and Walther testified he said "well, you're not doing this," because his Tongan employees would do it. He denied ever telling Employee he was going to think about Employee doing the roof because it was "laborious work." Walther testified the work at the portables project was "winding up," so he sent Employee over to work on an eight-plex. Walther agreed he got numerous texts from Employee on the injury date beginning in mid-morning when Employee asked about receiving Nadia's pay. Employee wanted to know where Nadia was. Nadia had told Walther she no longer wanted to have anything to do with Employee; she was afraid of him. Walther agreed Employee was angry with him because Walther had paid Nadia, and according to Walther, he told Employee to stay

away from her and remain working at the eight-plex and not try to find Nadia. Walther agreed Baker was his "main guy," and on the injury date he told Baker to work on the portable's roof because Baker had nothing else to do. He did not directly tell Nadia to work on the roof. According to Walther, the Tongans had already removed the metal roofing and all Baker and Nadia were doing was "removing screws." He denied telling Employee to not get on the roof and never suspected he would. On the injury date, Baker called from the portables and told Walther that Employee had fallen off the roof. According to Walther, Baker said, "I told him to stay off the damn roof." Walther agreed Employee called him after their earlier texts and apologized for getting angry with Walther. At that time, Walther said he emphatically told Employee specifically to not go to the portables project; his intent was to protect Nadia from Employee. According to Walther, the portables project was the only other job he had going on at the time and in his view it would not take a "rocket scientist" to figure out where Nadia was working. In Walther's opinion, Employee's incident was not a workers' compensation injury because Employee was not supposed to be where he was when he was injured. Walther testified he gave Employee somewhere between $600 and $1,000 post-injury simply because he felt sorry for him. (Walther).

17) Walther agreed Employee was in charge of himself and Nadia. He denied Baker was removing metal roofing on the date Employee fell; in his view, all Baker was doing was removing screws. Baker never called Walther on the injury date until after Employee fell. Walther agreed he obtained additional funding from the school district to remove shingles that were found under the metal roof. On several occasions, Walther commented about an agreement he had with Baker; he would keep Baker busy 40 hours a week paying $45 per hour. "Erik" worked for Walther as a "contract employee," because Erik did not want taxes taken out of his pay; nevertheless, he directed what Erik did and Erik worked for him. He does not know if Erik was covered under Walther's workers' compensation insurance; he has been subject to insurance audits at which time various workers are determined to be employees or not. Walther did not withhold taxes out of Erik's, Employee's, Nadia's or Jared's pay. Walther agreed that as of the injury date, portable number four still needed to be painted though he testified Jared was going to finish it, and did after Employee's injury. Walther never filed an injury report for Employee. When asked if he knew Baker and Nadia were working on the roof on the injury date, Walther said he knew Baker was working there but did not know if Nadia was. He is not sure how Nadia ended up working on the roof that day. Nevertheless, if Baker or Nadia had fallen off the roof, Walther would have filed an

injury report and they would have been covered by his workers' compensation. In his view, Nadia would have been covered because though he did not tell her to go on the roof he did not tell her not to go on the roof either. Walther testified all his employees including the Tongans, Baker, Jared and Nadia were paid "the legit way" at the prevailing wage. (Walther).

18) Walther spoke with Baker and Nadia the day following Employee's injury. According to Walther, Nadia said Employee came up on the roof and was yelling at her and was "pissed." Nadia did not say Employee was trying to hurt her and Walther was not aware of any instances of physical violence by Employee against her. Baker told him Nadia was cowering on the roof when Employee climbed up the ladder. Walther confirmed the paint for the portables, and for building four in particular, was scattered around the project in various buildings. He admitted if Employee on the injury date had been gathering paint together for use on building number four, that would not be inconsistent with his job responsibilities. "Dan [Baker] was my main guy," and everybody on a jobsite would take direction from him. Walther conceded if Employee was finished with the eight-plex job and had gone over to the portables project to paint the last building, he would not have had a problem with that and would not have "run him off the job." He never told Employee to cease working on portable number four. Walther further testified Employee, Nadia and Jared were all paid cash under the table. Employee had keys to the gate for the portables project area so he could get in and work on the project. Walther did not dispute Employee's testimony concerning the job application Walther gave him while driving Employee home from the hospital. (Walther).

19) In rebuttal testimony, Employee said during his conversations and texting with Walther earlier on the injury date, he told Walther he was going to go to the school district portables project and finish painting building number four. He denied Walther told him not to go. Had Walther specifically told him not to go to the portables jobsite, Employee would have gone home because he had not had a day off in a long time. Nadia is the last person Employee would have expected to find on the roofing job. (Employee).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
>
> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
> > . . . .
> >
> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.
>
> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120 (a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. . . .

In *Walt's Sheet Metal v. Debler*, 826 P.2d 333 (Alaska 1992), an injured worker had a work-related spinal fusion operation. A few months later, while publicly intoxicated the worker resisted arrest and displaced the bone graft used in his spinal fusion, requiring additional spinal surgery. His employer controverted on grounds the worker engaged in an intervening cause and negligent conduct, which was responsible for the additional spinal injury. The board held the employee's claim was still compensable, finding the original work injury was responsible for the spinal condition regardless of any aggravation through resisting arrest. On appeal, *Debler* held "mere recklessness" does not constitute willful conduct and resisting arrest did not indicate intent to reinjure his back. Therefore, *Debler* held AS 23.30.235 did not apply in this instance.

In *Temple v. Denali Princess Lodge*, 23 P.3d 813 (Alaska 2001), the Alaska Supreme Court addressed a work-place assault case and affirmed the board's denial of benefits to an employee punched in the face work by another person involved in a love triangle. The court found the worker's performance of his employment obligations did not give his attacker a unique opportunity to attack him. *Temple* further noted, however, that such work-place injuries may be compensable if the employer contributed to the episode by engendering, exacerbating or facilitating the assault.

> **AS 23.30.025. Approval and coverage of insurance policies**. . . .
> . . . .
>
> (b) All policies of insurance companies insuring the payment of compensation under this chapter are conclusively presumed to cover all the employees and the entire compensation liability of the insured employer employed at or in connection with the business of the employer carried on, maintained, or operated at the location or locations as set forth in such policy or agreement. A provision in a policy attempting to limit or modify the liability of the company issuing it is wholly void except as provided in this section. . . .

In *Munz v. Underwriter at Lloyd's*, 336 F.2d 798 (9th Cir. 1964), a workers' compensation insurance carrier sued an employer to recover a judgment against the insurer, after the insurer and the insured employer were found liable for workers' compensation benefits under Alaska law. The employer appealed to federal court. The employer operated an airline; one of its pilots died in an airplane crash. The employer's insurance policy expressly excluded from coverage members of the employer's flying crew. The federal court held the insurer was obligated to make payment to the deceased employee "irrespective of exclusion" and even though the employer had paid no premiums to cover the loss.

> **AS 23.30.030. Required policy provisions**. . . .
> . . . .
>
> (4) . . . The obligation of the insurer is not affected by a default of the insured employer after the injury, or by default in giving notice required by this policy. . . .
>
> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the employer.
> . . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice; . . .
>
> **AS 23.30.110. Procedure on claims**. . . .
> . . . .

> (d) At the hearing the claimant and the employer may each present evidence in respect to the claim. . . .

In *Childs v. Copper Valley Electric Assoc.*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court addressed due process concerns in a case where the claimant contended he did not have adequate time to present rebuttal witnesses at a board hearing. *Childs* noted the claimant has "a right to a hearing" but it need not be "a full, trial-type procedure," the board may place reasonable time limits on his presentation to manage its own docket and "the board's time restrictions do not amount to a due process violation."

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
> (2) sufficient notice of the claim has been given;
> . . . .
>
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

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). Whether the amount of evidence offered to rebut the raised presumption was substantial is a legal question. *Bouse v. Fireman's Fund Insurance Co.*, 932 P.2d 222 (Alaska 1997). "Speculative" evidence is not adequate to rebut the raised presumption. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379 (Alaska 1991). Credibility

is not examined at this step. *Resler*. If the employer fails to rebut the presumption, the injured worker prevails "as a matter of law." *Carter v. B&B Construction, Inc.*, 199 P.3d 1150, 1158 (Alaska 2008).

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 (Alaska 1964). The evidence is weighed, inferences drawn and credibility determined. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000). In *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005), the Alaska Supreme Court held if a factual element relevant to a specific issue is not disputed, the statutory presumption of compensability does not apply.

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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

In a malpractice case, *Snyder v. Foote*, 822 P.2d 1353 (Alaska 1991), the defendant impeached the plaintiff's expert medical witness with evidence showing the physician had testified falsely about his credentials in an unrelated case in a different jurisdiction. The plaintiffs appealed, contending the trial court erred by allowing their primary witness to be cross-examined with hearsay findings made by another judge. The plaintiffs argued the other judge's findings were not admissible because they raised collateral issues and thus were not relevant. The defendants contended using the evidence to impeach the medical expert was proper because "credibility was a material issue." The defendants cited *Hutchings v. State*, 518 P.2d 767, 769 (Alaska 1974) in which the court stated, "The credibility of witnesses is always a material issue." *Snyder* noted the issue in *Hutchings* was witness bias, "an issue which is never collateral." *Snyder* 822 P.2d at 1358. *Snyder* further stated, "Our cases make clear, the *Hutchings* test does not apply to all impeachments by use of collateral evidence." *Id.* *Snyder* noted the physician's false statements in a separate case were relevant only to the extent they implied he had committed previous bad acts. Such evidence would impeach his

testimony in a separate case only so far as to imply he was likely to commit future bad acts in the current trial. *Snyder* reiterated such evidence is normally not admissible. *Id.* *Snyder* reversed and remanded the case finding the trial court's error was prejudicial.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 23.30.235. Cases in which no compensation is payable.** Compensation under this chapter may not be allowed for an injury
>
> > (1) proximately caused by the employee's wilful intent to injure or kill any person; . . .
>
> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.** (a) a person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers compensation insurance premiums . . . Is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, it may be punished as provided by AS 11.46.120 -- 11.46.150.
>
> **AS 23.30.395. Definitions.**
>
> In this chapter,
> . . . .
>
> > (2) "arising out of and in the course of employment" includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities; . . .

An act outside an employee's regular duties undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is furthered, is within the course of

employment. 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §27, at 27-1 (2008). Depending upon the facts, an employee's misconduct may or may not be a deviation from employment. When misconduct involves a prohibited overstepping of the boundaries that define the ultimate work to be done by the claimant, the prohibited act is outside the course of employment. 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §33, at 33-1 (2008). However, when misconduct involves a violation of regulations and prohibitions relating to the method of accomplishing the ultimate work, the activity remains within the course of employment. *Id.* Express prohibitions relating to incidental activities, such as seeking personal comfort, as distinguished from activities that contribute directly to accomplishment of the ultimate work, when violated, are considered a course of employment interruption. *Id.*

Northern Corporation v. Saari, 409 P.2d 845, 846 (Alaska 1966), held:

> It has been held that 'arising out of' and 'in the course of', being used conjunctively, state two separate tests that must co-exist before an accidental injury or death will be compensable, and that proof of one of those elements without proof of the other will not sustain an award (citation omitted). However, we believe that as a practical matter the two tests should not be kept in separate compartments, but should be merged into a single concept of work connection (citation omitted). In other words, if the accidental injury or death is connected with any of the incidents of one's employment, then the injury or death would both arise out of and be in the course of such employment.

In *Anchorage Roofing Company, Inc. v. Gonzales*, 507 P.2d 501 (Alaska 1973), an employee sustained injuries when, while piloting the plane used to transport him to his business-related activity, departed from the direct flight path to the employer's place of business. The injured worker-pilot, who also owned the company, was traveling to Homer, Alaska to give a job estimate and to make temporary repairs to a leaky roof. He was also carrying passengers, two of whom planned to stay in the Homer area to go fishing. The employee deviated three miles from the direct route to search for a small dirt airstrip in anticipation of a future hunting trip. He reduced airspeed and lowered his altitude. During the slow-velocity low-level scanning, the plane crashed. (*Id*. at 503). *Gonzales* held the employee's deviation was insubstantial. In a footnote, *Gonzales* set forth the "personal comfort" doctrine as follows:

> The 'personal comfort' definition encompasses those momentary diversions from an employment which for social and biological reasons, are inextricably bound up with the normal work flow of an individual, such as eating, drinking, resting, washing, smoking, conversing, seeking fresh air, coolness or warmth, going to the toilet, etc.

Id. at 506 n. 19; citing 1 A. Larson, *The Law of Workmen's Compensation* §19.63 (1972).

M-K Rivers v. Schleifman, 599 P.2d 132, 134 (Alaska 1979), a remote site recreation case, cited *Saari* and explained the fundamental principles underlying the workers' compensation system:

> The underlying premise of this system is that liability is based upon the existence of an employment relationship, not upon a determination of culpability (citation omitted). In return for the employee giving up his right to sue the employer in the event that the employer was at fault in causing the injury, the system provides the employee with moderate assured benefits to compensate for loss of earning capacity, not for bodily injury. Therefore, the basic inquiry is whether the injury was substantially caused by, or the result of, the employment relation.

In *Witmer v. Kellen,* 884 P.2d 662 (Alaska 1994), Witmer owned a business, which employed Kellen. Kellen was preparing to drive to a co-worker's home to help the co-worker jump-start his car. Witmer decided to ride along, and stated as his sole reason, "It was just a dreary afternoon. There was nothing doing so I thought, heck, I'll ride over with him if he doesn't object." Witmer conceded he did not plan to assist Kellen in jump-starting the car, and had no business purpose in going for the ride. His expressed reason for riding with Kellen was "to take a break from work." *Id*. at 664. He was injured on this trip. Witmer sued Kellen and Witmer's business for personal injuries arising from the accident. The trial court granted summary judgment for the defendants finding Witmer's injuries arose out of and in the course of his employment, leaving him with workers' compensation as his exclusive remedy. Witmer appealed.

On appeal, Witmer cited former AS 23.30.265(2), now renumbered AS 23.30.395(2), and argued his testimony admitting his reasons for riding with the assistant manager were personal, were dispositive. *Id*. at 665. The court in *Witmer* found, even viewing Witmer's testimony in the light most favorable to him, he could not overcome the strong business connection inherent in his presence in the vehicle with Kellen when the accident occurred. *Witmer* found the plaintiff's decision to accompany Kellen on his job-related errand was both "reasonably foreseeable and contemplated by his employment." *Id*. *Witmer* focused on whether the claimant's presence was

related to his employment. Finding it was, the *Witmer* court affirmed, finding Witmer's automobile accident arose out of and in the course of his employment. *Id*. at 666.

> **AS 44.62.330. Application of AS 44.62.330 – 44.62.630.** (a) The procedure of the state boards . . . listed in this subsection . . . shall be conducted under AS 44.62.330 -- 44.62.630. This procedure, including . . . conduct of hearing . . . and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards . . . listed.
> . . . .
>
> (12) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act. . . .
>
> **AS 44.62.450. Hearings**.
> . . . .
>
> (c) A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. . . .
>
> **8 AAC 45.050. Pleadings**. . . .
> . . . .
>
> (c) **Answers**.
>
> (1) An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A default will not be entered for failure to answer, but, unless an answer is timely filed, statements made in the claim will be deemed admitted. . . .
>
> **8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
> . . . .
>
> (4) . . . requiring a witness list in accordance with 8 AAC 45.112. . . .
> (5) the length,, the date for service of legal memoranda. . . .
> . . . .

(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 45.105. Code of conduct. . . .
. . . .

(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a conflict of interest that is substantial and material; or
(2) shows actual bias or prejudgment.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a personal or financial interest that is substantial and material; or
(2) shows actual bias or prejudgment.

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. . . .
. . . .

(b) if a board panel member determines the member has a potential conflict of interest, the potential conflict of interest must be disclosed to the board panel chair before the hearing.

(c) upon notification by a board panel member of potential conflict of interest under (b) of this section, the board panel chair shall request that the board panel member recuse oneself or refer the matter to the remainder of the board panel to determine if recusal is appropriate.

(d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. . . . If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

In *Butcher v. Federal Express Corp*., AWCB Decision No. 19-0048 (April 12, 2019) (*Butcher I*), Rebecca Holdiman-Miller, an attorney at the same law firm as Stone, sought the instant designated chair's recusal or disqualification from the case. The *Butcher I* board found the employer stated inadequate evidence to support its request and the remaining panel members denied it. In *Butcher v. Federal Express Corp*., AWCB Decision No. 19-0083 (August 7, 2019) (*Butcher II*), the designated chair in the instant case granted Holdiman-Miller's client's petition to dismiss the claimant's request for a medical evaluation, and his claim, and dismissed both.

> **8 AAC 45.112. Witness list.** A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider
>
> (1) the testimony of a party, and
> (2) deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list.

> **8 AAC 45.114. Legal memoranda.** Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must
>
> (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established; . . .

Burke v. Houston-NANA, LLC, 222 P.3d 851, 867 (Alaska 2010), held that the board cannot by adjudication "add requirements to the law that neither the legislature nor the executive branch in its rule-making power chose to add to the Act or regulations, respectively." *Burke* rejected the board's decisional-law practice of adding a "discovery rule" component to an administrative regulation finding the adjudicatory rule "alters the rights of the parties" without the board going through the proper procedure to repeal or amend the existing regulation. (*Id*. at 868).

In *Sherrill v. Tri-Star Cutting*, AWCB Decision No. 95-0118 (May 1, 1995), the board addressed an employer's violation of the "doctor shopping" rule in AS 23.30.095(e). *Sherrill* excluded the medical reports from consideration, holding, "if we are to enforce AS 23.30.095(e), there must be some consequence or sanction imposed for its violation." In *Guys With Tools, LTD v. Thurston*, AWCAC Decision No. 062 (November 8, 2007), at 27, the commission reviewed a case where the board had applied a decades old "exclusionary rule" from *Sherrill* and refused to consider medical evidence offered by the claimant, finding the evidence resulted from an unlawful physician change under AS 23.30.095(a). *Guys With Tools* held, notwithstanding AS 23.30.095(a), (e) and decades of board decisions excluding such medical evidence from consideration, the board lacked legal authority to form a medical record "exclusionary" sanction against parties who made an unlawful physician change. The commission concluded, "If the board wishes to adopt a rule excluding evidence improperly obtained, the board should consult with the department to develop and adopt such a rule by regulation. Until then, we cannot support the blanket exclusion of medical reports solely because the reports were written by physicians chosen in excess of an allowable change."

> **8 AAC 45.116. Opening and closing argument**. Except when the board or its designee determines that unusual and extenuating circumstances exist, the amount of time at hearing for a party's opening and closing arguments, including a statement of the issues, will be a combined total of not more than 20 minutes.

> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1) Was the oral order denying Employer's recusal and disqualification requests correct?

Panel members hearing workers' compensation cases must be fair, impartial and free from actual bias, prejudgment, substantial and material conflicts of interest and must avoid impropriety and the appearance of impropriety. A panel member should recuse himself if he determines he cannot meet these requirements. Parties to hearings have the right to seek a panel member's disqualification on these grounds. AS 23.30.001(4); 8 AAC 45.105(c)(1), (2) and (d)(1)(2); 8 AAC 45.106 (b), (c), (d). The Alaska Workers' Compensation Act is silent on how recusal and

disqualification requests are handled procedurally. The Administrative Procedures Act (APA) therefore applies. AS 44.62.330(a)(12). The APA states a party may request a hearing officer's disqualification by "filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded." AS 44.62.450(c).

Employer conceded it did not file the required affidavit. It contended in its petition, supporting documents and oral argument that the designated chair should recuse himself or be disqualified because he had a conflict of interest resulting from a 2018 personnel decision, which the designated chair suspected may have resulted from Stone's participation in the governor's transition team. *Butcher I*. Employer provided little more grounds, citing attorney-client and executive privileges.

In response, the designated chair explained that he had suspected Stone may have played a role in his "demotion" from Chief of Adjudications to Hearing Officer. The chair further explained Stone had stated to others that she played no role in the personnel decision not to retain the chair as Chief of Adjudications, and that the administration never even consulted with her on the issue. Therefore, the chair stated any suspicion he had that Stone played some role in his termination as chief was unfounded, thus negating the primary basis for Employer's petition to disqualify him.

Furthermore, the chair noted he holds no grudges, is fair and impartial when hearing and deciding cases, had no conflict of interest in this case, no bias for or against any party or its representative, had not prejudged this case, had no personal or financial interest in it, much less a substantial and material one, and was aware of no facts that would show he had actual bias or prejudgment. The chair stated his recusal from any case involving Stone or her law firm based on Employer's allegations would cause a disruption in the division's workflow given current staffing in the Anchorage office and the lack of a full-time Chief of Adjudications. The chair noted Employer's allegations did not meet a preponderance of the evidence, much less clear and convincing evidence as required to support disqualifying a panel member. Lastly, the chair stated he and his panel decided in Stone's law firm's client's favor in *Butcher II*, the case upon which Employer relied to show the chair knew he had a conflict of interest based on similar allegations made in that case.

The chair declined to recuse himself and turned the matter over to the remaining panel members for their decision on disqualification. 8 AAC 45.106(c), (d).

A party seeking to disqualify a panel member for conflict of interest has the burden to show by "clear and convincing evidence," the member has a "substantial and material" conflict or shows actual bias or prejudgment. 8 AAC 45.105(c)(1), (2). To disqualify a panel member to avoid "impropriety or appearance of impropriety," the moving party must show by "clear and convincing evidence" the panel member has a "substantial and material" personal or financial interest or shows actual bias or prejudgment. 8 AAC 45.105(d)(1), (2). The remaining two panel members deliberated and, based on Employer's allegations and the designated chair's response, denied the disqualification request. 8 AAC 45.106(c), (d). The deliberating panel members found Employer offered inadequate evidence to support its disqualification request; the panel properly applied the law and the oral order denying the disqualification request was correct. AS 44.62.450(c).

2) Was the oral order denying Employee's request to strike Employer's witness list and witnesses correct?

Parties have a statutory right to present evidence at hearings. AS 23.30.110(d). However, the right to present evidence is not without limitations. *Childs*. Regulations provide for advance notice to the parties of the evidence, including testimony, opposing parties intend to present. 8 AAC 45.112. The November 20, 2019 prehearing conference summary did not discuss witness lists and did not "require" the parties to file one, even though the summary's boiler-plate lists the witness list regulation, 8 AAC 45.112, which details what must be provided in a witness list is one is required under 8 AAC 45.065. Thus, since the designee did not "require" the parties to file a witness list, and the summary was never modified or challenged by either party, the sanction set forth in the witness list regulation does not apply. 8 AAC 45.065(a)(4). Employee's request to strike Employer's witness list and witnesses was correctly denied.

3) Was the oral order denying Employee's request to strike Employer's hearing brief and exhibits correct?

The designee at the November 20, 2019 prehearing conference directed parties to file their briefs on or before January 15, 2020. Employer filed its brief and exhibits late. Nevertheless, the briefing

regulation does not provide a remedy or sanction for a late-filed brief. 8 AAC 45.114. Late briefs have in the past been stricken even though the Alaska Supreme Court has stated an administrative agency cannot amend, supplement or revise a regulation without going through the formal rulemaking process, if the agency's changes to the existing rule affects the public. *Burke*. Striking a party's brief and exhibits clearly affects that party because it prohibits the panel's consideration of their written arguments and exhibits. The commission has similarly held, in a case where excessive medical opinions were excluded from consideration as a sanction to enforce a statute intended to prevent "doctor shopping," where the statute and regulations had provided no such sanction. *Sherrill*; *Guys With Tools*. If the division wants to provide a sanction for a late-filed brief, it should do so through its rule-making authority and amend 8 AAC 45.114 to add one.

The panel had discretion to waive or modify the designee's order setting a deadline for Employer's brief but could not waive the requirement merely to excuse Employer from failing to comply timely with the law or to disregard it. 8 AAC 45.195. Here, the panel did not waive or modify the brief-filing requirement; it simply noted that had it stricken Employer's brief and exhibits, Stone could have simply read the brief in its entirety into the record as part of Employer's opening and closing arguments. The panel frankly concluded it did not want to hear Employer's entire brief read aloud. In some cases, a party may need their full, allotted 20 minutes for oral argument and may not be able to read their stricken brief into the record. 8 AAC 45.116. Until there is a regulation providing a discretionary sanction or remedy for a late-filed brief, it is best that all parties' arguments are heard and fairly considered. AS 23.30.001(4). This also helps to best ascertain the parties' rights. AS 23.30.135(a). Therefore, for all these reasons the oral order denying Employee's request to strike Employer's hearing brief and exhibits was correct.

4) Did Employee's June 3, 2019 injury arise out of and in the course of his employment with Employer?

Employee filed a claim on August 30, 2019, and Employer never filed an answer. Ordinarily, statements "made in the claim will be deemed admitted" where an employer fails to file an answer. 8 AAC 45.050(c)(1). However, the relevant facts set forth in Employee's claim are not disputed. The parties agree Employee fell from a roof on the date stated in the claim and was injured. Thus, while Employer's failure to file an answer is unusual, it does not resolve the matter at hand.

Without an answer, which often provides greater detail, at the outset it was difficult for the panel to determine the basis for Employer's position. Employer controverted Employee's claim on October 1, 2019, contending (A) Employee did not benefit from the presumption of compensability because his claim "did not arise both out of and in the course and scope of employment," (B) his injury was proximately caused by his intent to injure another, and (C) he failed to give written notice within 30 days of the injury pursuant to AS 23.30.100. In its brief, Employer focused on its contention that Employee was on the roof from which he fell solely for personal reasons; *i.e*., to confront his girlfriend with whom he was angry. These contentions are addressed in order:

(A) Employee is entitled to the presumption of compensability.

To establish a presumption under AS 23.30.120(a), Employee must establish a causal link between his employment and the disability and need for medical treatment. AS 23.30.010(a). This section simply codifies Alaska Supreme Court decisional law stating the same thing. *Cheeks*. The parties agree Employee worked for Employer as its "employee" on the injury date; thus, the employee-employer relationship is not at issue. All Employee needs to defeat Employer's defense is a causal link between his employment and his disability or need for medical treatment. Employee provided one with his testimony that he climbed onto the roof on the injury date for a business purpose -- to speak with Baker about the conditions found on the roof. Therefore, Employee is entitled to the presumption of compensability set forth in AS 23.30.120(a)(1). AS 23.30.010(a).

(B) Employee's injury was not proximately caused by his intent to injure another.

Employee does not claim he was assaulted while on the job, making the assault a work-related injury. *Temple*. Employer contends Employee is not entitled to benefits: (1) because he was engaged in an activity with wilful intent to injure or kill Nadia and therefore his injury comes under an exception where "no compensation is payable," AS 23.30.235(1); and (2) his "activities of a personal nature" while on the roof are excluded from "arising out of and in the course of employment," AS 23.30.395(2). Therefore, *Temple* does not address the issue at hand.

Employer does not suggest something other than the fall from the roof is the substantial cause of his disability and need for medical treatment; rather, it contends Employee simply had no business purpose on the roof and points to reasons (1) and (2), above, to explain why he was up there.

Employee is entitled to benefits under the Act if his disability and need for medical treatment arose out of and in the course of his employment with Employer. AS 23.30.010(a). It is presumed, absent substantial evidence to the contrary, that his claim comes within the provisions of the Act, and his injury was not occasioned by Employee's wilful intention to injure or kill himself or another. AS 23.30.120(a)(1), (4). This decision already determined Employee is entitled to the presumption. Employer does not seem to contend his injury does not come within the Act's provisions. AS 23.30.120(a)(1). Employer concedes Employee was working for it on the injury date and relies on Act provisions AS 23.30.010(a), AS 23.30.235 and AS 23.30.395(2) to deny his claim. Thus, its defenses arise under AS 23.30.120(a)(4), AS 23.30.235 and AS 23.30.395(2).

Without regard to credibility, and for this non-complex, non-medical issue, Employee raises the presumption under AS 23.30.120(a)(4) with his lay testimony that at no time did he intend to harm Nadia on the injury date and did not climb onto the roof for such purpose. *Resler*; *Wolfer*; *Meek*; *Cheeks*. The presumption raised is that his injury was not occasioned by his "wilful intention" to injure or kill himself or another. *Debler*. The burden to produce substantial evidence to the contrary to rebut the raised presumption shifts to Employer. *Tolbert*.

Again without regard to credibility, the only evidence in the record addressing the raised presumption on this issue is Baker's testimony that he did not believe Employee was to be working at the portables that day, Employee yelled at Nadia to come down from the roof and speak with him, and once on the roof Employee "marched over" to Nadia who cringed in fear and Baker thought Employee might strike her; however, once Employee and Nadia conversed Baker realized "it wasn't violent then at that point." Absent from the record is substantial evidence even suggesting Employee willfully intended to injure or kill anyone on the injury date. It is unclear from the record what evidentiary basis Employer had for its §120(a)(4) defense when it controverted Employee's claim. Baker's detailed deposition testimony, however, does not rebut

the raised presumption primarily because it was based on Baker's speculation. Speculation is not adequate to rebut a raised presumption under the Act. *Koons*.

Employee showing up at the worksite unexpectedly, yelling and demanding to speak with Nadia did not create a wilful intent to cause her harm; nor did marching towards her. Nadia's cringing may suggest she was fearful, but without Employee doing or saying something more, this alone does not evidence his wilful intent to injure her. For example, there is no evidence Employee said words to the effect, "If you don't come down here Nadia, I'm going to come up there and hurt you." Similarly, there is no evidence he displayed a weapon or raised his hand to Nadia or gestured as to threaten her with physical violence, according to Baker. Employee had no control over how Nadia reacted; Nadia's reaction cannot be imputed as demonstrating Employee's intent. Employee's anger with Walther did not transfer to Nadia. Walther never said Employee threatened Nadia with any harm. Employee's anger with Nadia did not translate into a wilful intent to harm her. It might have been helpful to hear from Nadia, but neither party called her as a witness.

Neither Baker's nor Walther's account rises to the level of substantial evidence to rebut the presumption. *Koons*. Thus, Employee will prevail on the raised but unrebutted presumption that his injury was not occasioned by his wilful intention to injure or kill himself or another. *Carter*.

Furthermore, Employee's account of how he fell from the roof -- *i.e.*, the proximate cause of his fall, which resulted in his disability and need for medical treatment -- is not disputed; his pant leg got caught on a sharp object as he was attempting to get off the roof and after repeated attempts to jerk his leg free he lost his balance and fell. Given these facts, it is difficult to see how Employee would not prevail solely on the raised but unrebutted §120(a)(4) presumption. *Carter*.

Alternately, if Employer's evidence somehow rebuts the raised presumption, the evidence shows Employee was not involved in a wilful attempt to injure himself or another person as demonstrated by his credible testimony. AS 23.30.122; *Smith*. It is unlikely Employee, who spent a year helping Nadia recover from her substance abuse issues would suddenly develop a desire to harm her simply because she relapsed. There is simply no evidence supporting this theory. *Saxton*; *Steffey*.

This leaves Employer's defense under AS 23.30.395(2), which carves out an exclusion to what "arising out of and in the course of employment" means. Employee contends he had a dual purpose for going on the roof: To observe the roof's condition and to speak with his girlfriend. Employer contends Employee climbed on the roof with the sole purpose of conversing with, or perhaps harming, his girlfriend Nadia, which it contends was an activity "of a personal nature." There is a factual dispute on this issue to which the presumption analysis applies. AS 23.30.120(a); *Meek*. This non-medical issue is not complex; lay evidence is sufficient to raise the presumption. *Wolfer*. Without regard to credibility, Employee raises the presumption with his testimony. *Resler*; *Meek*; *Cheeks*. Again without regard to credibility, Employer rebuts it with Baker's testimony that he did not discuss the roof with Employee that day. *Resler*; *Tolbert*. Employee must prove his injury is not an exception to the definition of "arising out of and in the course of employment" because it is not an activity "of a personal nature," by a preponderance of the evidence. *Saxton*.

All three witnesses in this case have an incentive to not be fully forthcoming. *Rogers & Babler*. Employee obviously wants his benefits; he freely admitted he told the paramedics a half-truth about why he was on the roof. Walther appears to have engaged in dubious business practices and may want to protect himself against claims by his own insurer for misclassifying employee labor. AS 23.30.250(a). Baker, who at first glance appears a neutral and unbiased witness, is Walther's close friend and Walther owes him $180,000 in business loans; he has an incentive to protect his ability to recover this money. *Rogers & Babler*.

Among the three, Employee is the most credible. He gave a consistent explanation in his deposition and at hearing about why he went to the portables project on the injury date to work. He had finished his task at the rental properties, knew one portable still remained to be painted and called Walther to tell him he was going over to the portable to finish it. Once there, Employee from a distance saw two people on the roof, initially not knowing who they were. When he pulled up to the portable, he noticed Nadia was there with another individual, he later learned was Baker, who from the roof, struck up a conversation with him in a familiar tone. Employee at first did not recognize Baker because he had not seen him in many years and Baker looked older than he remembered him. This testimony comports with Baker's similar account. Both Employee and Baker agree Employee asked Nadia to come down off the roof and speak with him and she refused.

Employee's more credible account of what happened next is persuasive: From the ground, he spoke with Baker and Nadia about the roof. This was clearly a business purpose, regardless of whether or not Employee was tasked with doing anything on the roof. Baker and Nadia told Employee they had varying degrees of difficulties removing the metal roofing. Some mental roofing was nailed down while some was screwed down. Baker and Nadia told Employee some of the metal panels had shingles underneath them and some seemed to be glued down and difficult to remove. If Baker's account were true, he would have had no discussion with Employee about the roof on the injury date; Employee would not have had this detailed information about the condition of the metal roofing. There is simply no other way he would have known except by conversing with Baker and Nadia about the roof. Employee's testimony will be given greater weight; Baker's will be given lesser weight on this point. AS 23.30.120(a); *Smith*.

Furthermore, Walther's testimony is inconsistent with both Employee's and Baker's accounts. There is no direct testimony that anyone ever told Employee not to get on the roof. Most notably, Walther testified he rejected Employee's implied offer to remove the metal roofing and hired his Tongan crew to do it instead. Walther said on the injury date all the metal roofing was already removed and all Nadia and Baker were doing on this one-day-only job was removing remaining screws. However, Baker testified his job was to remove the metal roofing and stack it on the ground. Baker's testimony about his job duties on the injury date more closely match what Employee said he found Baker and Nadia doing when he arrived on site. His testimony is given greater weight on this issue as well. AS 23.30.120(a); *Smith*.

Further, Walther's testimony that he specifically told Employee not to go to the portables project on the injury date is not credible. Walther said he told Employee not to go there because he knew Employee was mad at Nadia and he wanted to keep the two apart. However, Walther also admitted he did not even know if Nadia was working at the portables project on the injury date and did not really care. Furthermore, if Walther knew or even suspected Nadia was at the portables project that day, it made no sense for him to emphasize to Employee, who was looking for her, not to go there since, as Walther pointed out, it would not take a "rocket scientist" to figure out that was where Nadia was working. If Walther wanted to protect Nadia from Employee's anger that day, he would not have tipped his hat as to where she was; he would have simply told Employee to go

home. Employee credibly testified that had Walther told him to go home, he would gladly have done so since he was needing a day off anyway. AS 23.30.120(a); *Smith*.

Walther's credibility is further called into question by his actions beginning on the injury date. He filed no injury report even though he had actual knowledge of Employee's serious injury while working at his job site. While Walther may have disputed Employee's entitlement to benefits, there was no readily apparent reason for him not to file an injury report. However, Walther conceded he did not follow legitimate hiring and payroll protocols for several workers, including Employee. It is likely he never reported several workers including Employee to his insurance company as "employees," did not report their payroll and consequently paid no premiums to cover them. This would explain why Walther did not file an injury report and gave Employee a job application to complete and return suggesting Employer had retroactively gone through a formal hiring process to assist in obtaining workers' compensation coverage for Employee. Walther did not dispute Employee's testimony about completing the job application. AS 23.30.250(a).

Employee's account to the paramedics about being on the roof to talk to his girlfriend was not entirely untrue. Once he recognized Nadia on the roof, he did go up on the roof in part to speak with her; he also went on the roof because he is an expert roofer, Baker was not, and Employee wanted to see if there was something he could do to assist in removing the metal roofing. His account of wanting to protect Walther from possible legal issues is tenable. He knew Walther was paying him and several workers under the table and Employee, as he stated, did not want to cause issues for Employer until his learned how long he would be off work. AS 23.30.120(a); *Smith*.

Employer raises credibility issues with Employee. It suggests he lied to the government in respect to his earnings associated with Social Security Disability and Supplemental Security benefits from a previous disability. This is a collateral issue not relevant to the matters reached in this decision. The panel is not informed or familiar enough with Social Security statutes and regulations to decide a collateral issue about whether or not Employee violated a law in respect to his Social Security benefits. *Snyder*; *Hutchings*. Employer further sites credibility issues concerning Employee "hiring" his girlfriend. The facts show Employer had little if any personnel structure or procedures. It is not entirely incorrect for Employee to say he hired Nadia to work for Employer; he is the one

who initially brought Nadia onto the job site and Walther subsequently put her on the payroll. These facts do not diminish Employee's credibility. AS 23.30.120(a); *Smith*.

Given that Employee's factual account is given greater weight than Walther's or Baker's, Employee meets his burden of proof and has demonstrated his June 3, 2019 injury arose out of and in the course of his employment. *Saxton*; *Steffey*; *Witmer*; *Saari*. The work injury did not arise out of activities "of a personal nature away from employer-provided facilities." Thus, his injury in a no-fault compensation system is not excluded from coverage. AS 23.30.395(2); *Schleifman*. It arose out of Employee's reasonably foreseeable, good faith effort to inspect the roof and offer suggestions for removing the metal sheathing, all closely connected to his work, and was done in an effort to move Employer's project forward. *Gonzales*; *Witmer*; *Saari*; 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law* §27, at 27-1 (2008).

Lastly, even if the only reason Employee had gone up on the roof that day was to speak with Nadia, this would not bar his claim for benefits. He clearly had a business purpose for being at the portables site -- to retrieve paint for the last building. "Conversing" with co-workers is common in the workplace and injuries that occur while so doing are normally covered. Conversing, like going to the restroom or getting a drink, is considered part of the "personal comfort doctrine." *Gonzalez*; 2 A. Larson, *The Law of Worker's Compensation*, §§27, 33 (2008). Even if it was reckless for Employee to go up on the roof to talk to his co-worker-girlfriend given his physical impairments, like missing toes, this would not prohibit coverage for a related injury in this no-fault workers' compensation system. *Debler*; *Schleifman*.

(C) Employer had actual knowledge of the injury.

The parties do not dispute the facts relevant to Employer's actual knowledge of Employee's injury. Therefore, the presumption analysis need not be applied. *Rockney*. It is undisputed Employee did not give timely, written notice of his injury to Employer. AS 23.30.100(a). In its hearing brief, Employer contended Baker was its "on-site supervisor" at the injury site; Employee agreed Baker was Employer's "right-hand" man. Failure to give timely written notice does not bar a claim for benefits if "an agent of the employer in charge of the business in the place where the injury occurred" had knowledge of the injury and the employer has not been prejudiced by an employee's

failure to give timely written notice. AS 23.30.100(d)(1). Baker was immediately aware Employee had fallen off the roof. Walther admitted Baker called him immediately and told him Employee had fallen. Therefore, Employer knew immediately that Employee had been injured. The fact Employer later contended Employee was not covered or not entitled to benefits for various reasons is irrelevant to the actual "knowledge" issue. There is no argument or evidence suggesting Employer was prejudiced in any way by Employee's failure to give timely written notice. He received immediate and appropriate medical attention and Walther visited him on numerous occasions in the hospital. Therefore, AS 23.30.100 does not bar Employee's claim.

The Act requires Employer's insurance policy to cover all workplace injuries, even if Employer has violated contractual coverage requirements, defaulted in giving notice of the injury and has not paid premiums for the risk. AS 23.30.025(b); AS 23.30.030(4); *Munz*.

CONCLUSIONS OF LAW

1) The oral order denying Employer's recusal and disqualification requests was correct.
2) The oral order denying Employee's request to strike Employer's witness list and witnesses was correct.
3) The oral order denying Employee's request to strike Employer's hearing brief and exhibits was correct.
4) Employee's June 3, 2019 injury arose out of and in the course of his employment with Employer under AS 23.30.010(a), is not excluded from coverage under AS 23.30.235(1) or AS 23.30.395(2).

ORDER

Employee's June 3, 2019 injury arose out of and in the course of his employment with Employer and is covered under the Act.

Dated in Anchorage, Alaska on February 20, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Kimberly Ziegler, Member

/s/
Bronson Frye, 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 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 Interlocutory Decision and Order in the matter of Steven Hiborik, employee / claimant v. Westside Flooring, LLC, employer; American Fire And Casualty Company, insurer / defendants; Case No. 201911330; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on February 20, 2020.

/s/
Charlotte Corriveau, Workers' Compensation Technician