ALASKA WORKERS' COMPENSATION BOARD

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

VIRGIL A. ADAMS, Claimant, v. O&M ENTERPRISES and THE MICHAEL A. HEATH TRUST, Uninsured Employer, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, and WILTON ADJUSTMENT SERVICE, INC., Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201113128 AWCB Decision No. 15-0094 Filed with AWCB Anchorage, Alaska On August 31, 2015

The Alaska Workers' Compensation Benefits Guaranty Fund's (the Fund) January 22, 2015 petition to dismiss Virgil Adams' (Claimant) claims was heard on July 28, 2015 in Anchorage, Alaska. The hearing date was selected on April 9, 2015. Virgil Adams appeared and was represented by attorney Charles Coe. Michael Heath (Heath) appeared in person and testified on behalf of himself and also O&M Enterprises (O&M). Assistant Attorneys General Siobhan McIntyre and Aesha Pallesen appeared and represented the Fund and its adjusters, Wilton Adjustment Service, Inc. (Wilton). Joanne Pride appeared in person and represented Wilton. Velma Thomas appeared telephonically as Fund administrator. Witnesses included Andrew Smith and Charles Bates, who appeared telephonically for Claimant. Andris Antoniskis, M.D., appeared telephonically for the Fund. The record closed when the panel met to deliberate on July 31, 2015.

ISSUES

The Fund listed toxicologist Andris Antoniskis, M.D., as a hearing witness. Claimant objected to the Fund's use of a toxicologist to establish an intoxication defense under AS 23.30.235(2), classifying him as non-permitted "expert" witness. Claimant contended Dr. Antoniskis should not be allowed to testify, because he is not the type of examiner contemplated by AS 23.30.095.

The Fund's witness list stated Dr. Antoniskis was anticipated to testify as to his review of Claimant's medical records and Claimant's alleged intoxication on the injury date. The Fund contended Dr. Antoniskis should be allowed to testify.

Heath did not take a position on Dr. Antoniskis' testimony. An oral order issued allowing Dr. Antoniskis to testify with respect to Claimant's alleged intoxication on the injury date.

1) Was the oral order allowing Dr. Antoniskis to testify with respect to Claimant's alleged intoxication correct?

The Fund contends Claimant was not an employee of either Heath or O&M and is therefore not entitled to benefits under the Act. The Fund contends no contract for hire existed between Claimant and Heath or O&M. Alternately, if a contract for hire is found between Claimant and Heath or O&M, the Fund contends Claimant was an independent contractor and not an employee.

Claimant contends he was an employee of Heath or O&M for almost two years preceding the August 18, 2011 injury. Claimant contends he was hired by Michael Heath to perform regular work on a property located on Snow Bear Drive in Anchorage, owned by the Michael A. Heath Trust (the Trust). Claimant contends he was injured while performing roofing work in the course of employment for Heath or O&M.

Heath contends Claimant was not employed by either Heath or O&M. Heath did not argue with respect to the Trust's ownership or control of the property or alleged employees.

2) Was there an employer-employee relationship?

The Fund contends even if a Claimant is found to be an employee, his claim is barred due to intoxication being the proximate cause of his injuries. The Fund relies on the reports and testimony of first responders and emergency room personnel, as well as testimony by a toxicologist, to show the injury was proximately caused by Claimant's consumption of alcohol and cocaine just prior to the injury.

Claimant contends even if he consumed alcohol or cocaine on the injury day, his consumption was not in amounts which would have caused him to be injured. Claimant contends his injury was caused by cribbing under a ladder which came loose, and not his intoxication.

Heath did not take a position with respect to the intoxication defense. Heath had previously stated in a letter to the Division that Claimant was intoxicated at the time of the injury.

3) Was intoxication the proximate cause of Claimant's injury?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On August 18, 2011, Claimant was injured while doing roofing and construction work. Claimant fell from a ladder, was unable to move after the fall, and paramedics were called by workers on the job site. The Providence Alaska Emergency Department chart note states:

> Virgil Adams is a 47 y.o. male. He was roofing while intoxicated and with cocaine in his system. Stated the ladder lost its footing and he feel backwards off the roof of a house where he was trying to find a leak around the chimney. He did not lose consciousness but noted immediate change in the feeling in his legs and was unable to move. When he arrived in the ER he had no sensation distally and has actually regained some of that. . . .
>
> Social history: Single, works as a carpenter part time, smokes 1-2 packs a day and drinks daily and uses cocaine when it is available. . . .
>
> Assessment: Severe T12 burst fx with spinal stenosis and cord compression with incomplete spinal cord lesion. . . .
>
> Plan: The recommendation is that he go to the operating room tonight for emergent laminectomy and posterior spinal stabilization. . . . (PAMC Emergency Department Chart, Susanne Fix, M.D., August 18, 2011).

2) Claimant arrived at the emergency department at 5:18 P.M. Claimant's blood was drawn at 6:01 P.M. and showed an alcohol value of .049. (PAMC Emergency Department Report, August 18, 2011).

3) On August 30, 2011, Claimant filed a timely report of injury stating he injured his back and was hospitalized when "a ladder slid out from off the roof, fell 40 ft., first hitting his back, then bouncing off and hitting the ground (with railroad ties) folding in half backwards." The form states the workplace injury occurred "on Employer's premises." (Report of Injury, August 30, 2011).

4) On September 20, 2011, Claimant filed a workers' compensation claim, naming his employer as "Michael Heath O&M Enterprises." The claim states Claimant was injured when "cribbing came out from under ladder while on roof, ladder slid off roof, hit back on railroad ties." The claim stated Heath was uninsured at the time of the injury, and sought to join the Fund as a party. The claim lists the employer's address as **** Snow Bear Dr., Anchorage, Alaska 99516. (Workers' Compensation Claim, September 20, 2011).

5) On January 5, 2012, the claims administrator for Wilton filed a controversion, which controverted all benefits and stated:

> Compensation benefits are not payable under AS 23.30.235(2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.
>
> Per medical records from Providence Alaska Medical Center and dated 08/30/11, "Mr. Virgil Adams is an 47 yo white male carpenter from Anchorage who was roofing while intoxicated and with cocaine in his system on 08/18/11." (Controversion, January 5, 2012).

6) On January 16, 2013, Mr. Heath filed a letter styled, "Notice of Compensation Fraud." The letter states, in relevant part:

> I Michael Heath (O&M Enterprises), hereby state that Virgil Adams have [sic] never work for O&M Enterprises. Furthermore, no request was ever made to hire Virgil Adams to be an employee for O&M Enterprises or Michael Heath Trust. At the time of alleged incident Virgil Adams was intoxicated at Michael Heath's home at said alleged incident. (Letter, January 16, 2013).

7) On March 15, 2013, toxicologist Andris Antoniskis, M.D., reviewed Claimant's medical records for an employer's medical examination (EME). Dr. Antoniskis notes the medical records he received were incomplete. Dr. Antoniskis states:

> On review of the records, it is very difficult to determine timeframes of the exact time of his injury, his arrival in the emergency room, and the times of collection of the urine samples and blood testing that was done. This complicates the forensics of attempting to determine levels of impairment, particularly from his alcohol use. . . .

Concerning Claimant's level of impairment at the time of the injury, Dr. Antoniskis makes inferences from the records provided, but states these are uncertain, due to incomplete records. (Antoniskis EME Report, March 15, 2013).

8) On October 9, 2013, Claimant filed and served a subpoena duces tecum and notice of records deposition, both directed and addressed to the law firm of Davis & Mathis, P.C., as the Trust's records custodian. The subpoena requested "…any and all legal documents, trust documents, tax returns, financial reports, notes, research, and statements used in the preparation of the Michael A. Heath trust." The notice of records deposition did not state its subject matter. (Subpoena and Notice, October 9, 2013).

9) On August 15, 2013, Claimant filed a petition to join the Michael A. Heath Trust as a party. The petition was served upon the Michael A. Heath Trust at Heath's address, P.O. Box ****** Anchorage, AK 99516. (Petition, August 15, 2013).

10) No answer was filed to Claimant's August 15, 2013 petition. (Record).

11) On November 8, 2013, the Trust, through the Mathis law firm, filed a petition and brief to quash the notice of records deposition and subpoena duces tecum and for a protective order. (Petition, November 8, 2013).

12) A statutory deed shows Michael Heath conveyed a quitclaim interest to the Michael A. Heath Trust, giving all right, title, and interest Michael Heath had in certain real property in Bear Valley to the Trust. The deed states, in relevant part:

> The Grantor, MICHAEL A. HEATH, a single man, of P.O. Box ******, Anchorage, AK 99524, for an in consideration of the sum of TEN DOLLARS ($10.00), and other valuable consideration to Grantor in hand paid, CONVEYS and QUITCLAIMS to MICHAEL A. HEATH, Trustee of the TRUST AGREEMENT OF MICHAEL A. HEATH, dated the 8th day of January, 2007,

> and the Successor Trustees thereunder of P.O. Box ******, Anchorage, AK 99524, Grantee, all right, title and interest, if any, which Grantor has in and to that certain real property situate in the Anchorage Recording District, Third Judicial District, State of Alaska, more particularly described as follows:
>
> Lot Six (6), Block Three (3), BEAR VALLEY, according to the official map and plat thereof. . . . (Exhibit to Claimant's August 1, 2014 Hearing Brief).

13) On November 15, 2013, Michael Heath testified at his deposition:

> Q: Okay. In 2011, you're saying your occupation is real estate? Is that correct?
>
> A: Probably so.
>
> Q: Okay. And what do you mean by -- so far as being in real estate, are you talking about sales of real estate or are you talking about management of real estate?
>
> A: We're talking about buying, selling, and renting.
>
> Q: Okay. So that was your occupation in 2011?
>
> A: 2011, yeah. It could have been. Yeah.
> . . . .
>
> Q: Well, let me ask you this. In 2011, you were doing business as O&M Enterprises?
>
> A: I've always done business as O&M Enterprises. Everything I do is part of O&M Enterprises. . . . (Heath Deposition at 54-56, November 15, 2013).

14) Heath also testified that in 2011, he owned a rental property in New York City, in the Bronx borough. Heath owned the property individually, but his mother managed it day-to-day. (*Id.* at 20-24; Register of City of New York Property Transfer, Fund's Hearing Exhibit C).

15) O&M Enterprises' license is listed with the Division of Corporations as a partnership issued August 27, 1997, and expired December 31, 1998. The current license status is "expired." The business line listed is "real estate, rental and leasing." (Claimant Hearing Exhibit 8).

16) On August 8, 2014, *Adams v. O&M Enterprises et al.*, AWCB 14-0109 (August 8, 2014) (*Adams I*) addressed the Trust's November 8, 2013 petition to quash a notice of records deposition and subpoena duces tecum and for a protective order. Finding the Trust had not received notice, *Adams I* continued the hearing and ordered:

1. The designee is directed to issue notice of the September 3, 2014 prehearing to all parties, including the Trust's attorneys, Davis & Mathis, P.C., at the address listed on its November 8, 2013 petition.

2. The Trust's representative is directed to file an appearance in the event it intends to represent the Trust in this case. . . . (*Adams I* at 6).

17) No appearance has been filed on behalf of the Michael A. Heath Trust. (Record).

18) On November 20, 2013, attorney Steven Smith filed his appearance on behalf of "Michael Heath d/b/a O&M Enterprises." (Notice of Appearance, November 20, 2013).

19) On October 9, 2014, *Adams v. O&M Enterprises et al.*, AWCB 14-0136 (October 9, 2014) (*Adams II*) ordered:

1. The Michael A. Heath Trust, and the Mathis law firm as records custodian, is directed to produce the trust, all filed tax documents, and all records concerning any interest in real property held or operated by the Trust.

2. The Michael A. Heath Trust, and the Mathis law firm as records custodian, is directed to produce any records concerning payroll, employment taxes, and any information concerning any and all employees the Trust has or is now employing either directly or through businesses owned or operated by the Trust.

3. Claimant's October 9, 2013 Notice of Records Deposition, addressed to Davis & Mathis, P.C. is quashed. (*Adams II* at 12).

20) On October 30, 2014, the Mathis Law Firm sent Claimant's attorney a letter stating it is providing the following records pertaining to the Michael A. Heath Trust: the trust, filed tax documents, records concerning any interest in real property held by the Trust, and any and all records concerning payroll, employment taxes, and information concerning employees the Trust has or has had either directly or through businesses owned or operated by the Trust. (Letter, October 30, 2014).

21) The Michael A. Heath Trust agreement lists Michael Heath as trustor and trustee. The Trust's schedule of assets lists only the Snow Bear property. (Trust Agreement of Michael Heath, Fund's Hearing Exhibit M).

22) On December 8, 2014, attorney Steven Smith filed his withdrawal of appearance on behalf of Michael Heath d/b/a O&M Enterprises. (Notice of Withdrawal, December 8, 2014).

23) On January 22, 2015, the Fund filed a petition to bifurcate the issues in this case. The brief in support of the Fund's petition stated:

> Before the Board can decide whether Mr. Adams is entitled to any compensation benefits, the Board will need to decide (1) whether Mr. Heath was an employer under the Alaska Workers' Compensation Act, (2) whether Mr. Adams was an employee under the Act, and (3) whether Mr. Adams' intoxication at the time of his accident on August 18, 2011 bars his claim pursuant to AS 23.30.235. . . . (Fund's Brief, January 22, 2015).

24) On April 6, 2015, *Adams v. O&M Enterprises et al.*, AWCB 15-0039 (April 6, 2015) (*Adams III*) decided bifurcation was appropriate and ordered:

> 1. The Fund's January 2[2], 2015 petition is granted in part.
>
> 2. The issues of whether the Alleged Employers are employers under the Act, whether Claimant was an employee, and whether intoxication was the proximate cause of Claimant's injuries will be heard at an initial hearing. If necessary, a second hearing will be held to determine Claimant's eligibility for specific benefits. (*Adams III* at 7).

25) On July 7, 2015, Dr. Antoniskis completed an addendum EME report. This report notes more records had been received, including records containing times when first responders arrived on the injury scene, when Claimant was admitted to the emergency department and when his blood was drawn. Dr. Antoniskis opined:

> Knowing that the blood alcohol level at the time of injury now being approximately 71.5 milligrams per deciliter, one can extrapolate that [Claimant] would have had an impairment of balance and speech, reaction time, and judgment at a blood alcohol level of 71.5 milligrams per deciliter. His risk of injury and falling would have been significantly increased because of his blood alcohol level, and if he would not have been under the influence of alcohol, his likelihood of having fallen would have been significantly reduced. A blood alcohol level of 80 milligrams per deciliter is considered impaired enough for it to be illegal to drive a motor vehicle. Commercial drivers are only allowed to have a blood alcohol level of 40 milligrams per deciliter or less to operate a commercial vehicle. . . .
>
> Therefore, as previously stated, I feel that [Claimant's] injuries are in large part due to his impairment related to his blood alcohol level and his likelihood of having sustained injuries would have been significantly reduced if he would not

> have been under the influence of alcohol at the time of his injury. (Antoniskis Addendum EME Report, July 7, 2015)

26) Claimant testified: He has never owned a business. He has never held a business license. He met Heath through a mutual acquaintance, Andre Clark, approximately two years prior to the instant injury. Claimant's first job working for Heath was building a garage at the Snow Bear property, where he was one of several tradesmen working. Heath initially asked Claimant to bid on various jobs, which Claimant refused to do, since he has no experience bidding on construction projects, and did not know how this process works. Claimant did not continuously work for Heath, but would do occasional, recurring jobs for "months at a time," but always at Snow Bear. One on occasion, a "stop work" order was placed at Snow Bear by the municipality; to remedy the problem, Heath took Claimant to city offices where Heath payed the fee or fine, "did all the talking," and handled the paperwork so work could resume. At no time did Claimant have authority to hire or fire the other workers on the job site. Claimant's work for Heath included carpentry, roofing, soffit and carpet work. On a typical day, Heath would personally pick up Claimant and bring him to the job site. In 2011, Heath paid Claimant $25 per hour, with payment made typically in cash daily or at most every three days. The hours were irregular and on an "as needed" basis, rather than a set weekly schedule. Claimant observed various people living in rooms at Snow Bear, which Claimant believed to be tenants, with various arrangements for rent payments. Heath kept a recording studio at the Snow Bear property, and Heath would occasionally invite Claimant to hear recordings of music produced there. Claimant and Heath never had a written contract for any work. Heath provided nearly all the tools, except for Claimant's hand tools and tool belt. When additional tools were needed, Heath purchased them. Claimant felt at all times he was "just another worker" on the site out of several, with no supervisory or decision-making authority at any time. Heath would also occasionally do some of the building work alongside the hired workers. Heath generally directed the manner and method of completing the work at Snow Bear. Claimant believes he was hired by Michael Heath, not O&M Enterprises or the Heath Trust. Claimant did not complete or file tax documents for work done for Heath in 2011. (Claimant).

27) Concerning the injury day, Claimant testified: Heath picked him up and drove him to Snow Bear to do some work on a chimney, which had been leaking rainwater. The cribbing supporting a ladder to the roof had been in place for two weeks and Claimant had climbed the ladder many

times during that period; therefore, Claimant felt he had no reason to inspect the cribbing before ascending on that occasion. As he climbed the ladder, the cribbing gave way, the ladder fell, and Claimant fell with it. Claimant did not lose his balance, he simply went tumbling down with the ladder as it fell. Claimant drank two beers prior to the fall, and was on his third. Claimant took cocaine right before ascending the ladder. Heath was aware people were drinking on the jobsite, and often provided alcohol to workers. Heath provided Claimant with the cocaine. (*Id.*).

28) Claimant's testimony was consistent, direct, and unequivocal. (Experience, judgment, observations, and inferences from all of the above). Claimant is credible. (*Id.*).

29) Andrew Smith testified: At the time of Claimant's injury, he was a firefighter and paramedic. He was one of the first responders on the scene, dispatched by the 911 call center. Soon after arriving, Smith administered the painkiller fentanyl. Because fentanyl can adversely react in a person's body with alcohol, Smith first had to determine Claimant had not consumed enough alcohol to cause an interaction. Smith did this by speaking with Claimant while observing his movements, eyes and breath. Smith determined Claimant was not intoxicated, and that it was safe to administer fentanyl on the scene. It is a regular part of Smith's job to deal with intoxicated individuals, and he is required to make such a determination daily, although he concedes the determination is subjective, rather than based on rigorous, objective criteria. (Smith).

30) First responders' at the scene of the injury reported: "Pt. admits to having consumed 3 beers today. . . . Smell of alcoholic beverage on breath/about person. Patient admits to alcohol use." The report states they arrived on the scene at 4:34 P.M. The signature is illegible. (Anchorage Fire Department Prehospital Care Report, August 18, 2011).

31) Dr. Antoniskis testified: He is an internal medicine and addiction specialist. He conducted two separate reviews of Claimant's medical records, including first responders' and emergency room reports. Using these records, and applying the principles of blood alcohol metabolism, Dr. Antoniskis extrapolated Claimant's blood alcohol level was .071 at the time of the injury. Dr. Antoniskis opined this level of intoxication would have played a "large part" in impairing Claimant's judgment, balance, and physical coordination at the time of the injury. Dr. Antoniskis conceded he had no way of knowing when Claimant drank his last beer, or the strength of the beers. (Antoniskis).

32) Regarding the level of impairment caused by Claimant's consumption of cocaine just prior to the injury, Dr. Antoniskis was less certain, and was unable to give a concise opinion on that point. (*Id*.; Experience, judgment, observations).

33) Dr. Antoniskis could not say with certainty whether Claimant's blood alcohol level was still rising at the time his blood was drawn, or had begun to decline. Factors such as the strength of the beer Claimant drank, amount of food in his stomach, and his tolerance for alcohol, are all variables which would affect the level intoxication at the time of the injury. Dr. Antoniskis' opinion on the amount of alcohol in Claimant's body, and his level of impairment is, at best, an educated guess. Different individuals will experience different levels of impairment from consuming the same number of alcoholic drinks, depending on tolerance. Some people would be unable to maintain balance or complete tasks requiring motor skills, while others might perform with little or no visible impairment. (*Id.*).

34) Although Claimant had alcohol and cocaine in his system at the time he fell from the ladder, intoxication was not the reason for the fall. Loose cribbing supporting the ladder gave way, which caused Claimant to fall and which would have caused anyone to fall. (Claimant; Experience, judgment, observations).

35) Heath testified: He moved to Alaska in 2000. Heath's formal educational background includes architectural and civil drafting as well as mechanical drawing. Using these skills, Heath drew the engineering diagram for the entire Snow Bear property, which workers used during construction. His primary business interest is music production and promotion. O&M Enterprises is his only business. Initially, O&M was meant to be a janitorial business, but those plans fell through. O&M then became the vehicle for Heath's music production and promotion interests. O&M has not done an actual music or promotion job since probably 2000. Heath does not do any O&M business from his home; he would meet such clients at a library or restaurant. O&M did no business and had no income in 2011. O&M has never had employees. While other people lived at Snow Bear, Heath did not collect cash rent from all of them, though from others he did. Heath could not say whether he rents the home from the Michael A. Heath Trust. Heath has many construction tools of his own at Snow Bear. Most of the work done at Snow Bear was done by Heath's friends, who were not paid for the work. Previously, Heath had hired what he termed a "contractor" to work on the chimney at Snow Bear. Heath acknowledges Claimant was at Snow Bear on the day of the injury, but does not know why he was there and could not recall

the subject of any discussions with Claimant that day. Heath maintained Claimant never worked for him at Snow Bear for compensation. (Heath).

36) Heath's testimony was evasive, contradictory, and equivocal. For example, Heath testified at his November 15, 2013 deposition that O&M Enterprises was in business in 2011 in the field of real estate, but at hearing testified it was not in business that year, and that real estate would not have been its business. When asked where the physical location of O&M would have been in 2011, Heath refused to answer. Heath declined to answer many questions concerning his business ventures and the Heath Trust. Heath refused to answer what type of business O&M was in 2011. Heath claimed to have no idea who owns the Snow Bear property. Claimant's and the Fund's hearing exhibits included many photos of individuals purportedly working at Snow Bear. When shown these photos, Heath refused to identify the people or even say what the people in the photos were doing. Heath would neither confirm nor deny the pictures were of Snow Bear. (Heath; Experience, judgment, observations, and inferences from all of the above).

37) Heath is not credible. (Experience, judgment, observations, and inferences from all of the above).

38) Robert Donerson is Heath's acquaintance. Donerson testified via deposition: He has known Heath for about 20 years. He was living at Snow Bear at the time of Claimant's injury for about two years. He recalls paying Heath rent on a monthly basis, $1,400 per month. (Donerson Deposition at 12-13, February 18, 2014). Regarding construction work he observed at Snow Bear, Donerson testified:

> Q: Okay, the people that would come over and do work, do you know if they were paid by Mr. Heath?
> . . . .
>
> A: They probably all got paid, yeah.
> . . . .
>
> Q: Well, they weren't -- in other words, these guys weren't working out of the goodness of their heart, from what you could see?
> A: Oh yeah. Yes sir. Yes.
>
> Q: Okay, and when you say "yeah" that's you know, you assume they got paid?
>
> A: Right. I assume they got paid, yeah.

> Q: In other words, it wasn't like -- back East, where you have a barn raising, right?
>
> A: Right. . . . (*Id.* at 29-30).

39) Charles Bates lives in Bear Valley, near the Snow Bear property, and is an acquaintance of Heath and Claimant. Bates testified: He has done dirt and gravel hauling work for Heath at Snow Bear using a dump truck provided by Bates. Bates observed Claimant working at Snow Bear on jobs such as framing and roofing prior to Claimant's injury. On one particular occasion, Bates recalled Claimant doing framing work on a garage being erected at Snow Bear. Bates does not know what Heath does for a living, or whether the people working at Snow Bear were being paid. After completing hauling work for Heath, Bates would send Heath an invoice, which Heath would pay. (Bates).

40) At the hearing's conclusion, Heath stated he had received a full chance to present his argument and obtain a fair hearing, and that he understood the proceedings. (Heath).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> >
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> > . . . .
> >
> > (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.

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 the need for medical treatment of an employee if the disability . . . of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> **AS 23.30.045. Employer's liability for compensation**. (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180-23.30.215. . . . If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor, as applicable. . . .
>
> (f) In this section,
>
> > (1) "contractor" means a person who undertakes by contract performance of certain work for another but does not include a vendor whose primary business is the sale or leasing of tools, equipment, other goods, or property;
> >
> > (2) "project owner" means a person who, in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work;
> > . . . .

The purpose of AS 23.30.045(a), known as the "contractor-under" provision, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers. Subsection (a) also aims to forestall evasion of the Alaska Workers'

Compensation Act by those who might be tempted to subdivide their regular operations among subcontractors, thus escaping direct employment relations with the workers and relegating them for compensation protection to small contractors who fail to carry compensation insurance. *Thorsheim v. State*, 469 P.2d 383 (Alaska 1970). Likewise, when a contractor-employed claimant is injured and the contractor does not secure payment of workers' compensation benefits to that employee, the project owner may be held liable. *Trudell v. Hibbert*, 272 P.3d 331 (Alaska 2012).

"The relationship of employer-employee can only be created by a contract, which may be express or implied. Once created, the relationship cannot be changed to substitute another employer without the employee's consent." *Selid Construction Company v. Guarantee Insurance Co*., 355 P.2d 389, 393 (Alaska 1960). In *Alaska Pulp v. United Paperworkers' International Union*, 791 P.2d 1008 (Alaska1990), the Alaska Supreme Court held:

> . . . APC argues . . . the Board erred by not applying the 'relative nature of the work' test to determine . . . employee status. We adopted this test to distinguish between employees and independent contractors for the purpose of determining whether an individual is an 'employee,' and thus eligible for workers' compensation benefits. . . . (Citation omitted). However, both relationships presuppose a contractual undertaking. Therefore, in the absence of a contract for hire, the Board was not required to make this distinction. (*Id*. at 1012).

In *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1989), a pilot was injured in an automobile accident while allegedly employed by a hunting lodge. He filed a workers' compensation claim and the board denied coverage. On appeal, the Alaska Supreme Court reversed and set forth the appropriate test for a contract for hire, express or implied. *Childs* noted the board correctly recognized "that before an employee/employer relationship exists under the Act, an express or implied contract of employment must exist." (*Id*. at 312). *Childs* further held while a "formalization of a contract for hire is not the controlling factor" in determining whether an employment contract exists, a hiring contract is still necessary. An "express contract" requires an offer encompassing its essential terms, unequivocal acceptance by the offeree, consideration and an intent by the parties to be bound. (*Id*. at 313). 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 to so act." (*Id*. at 314). The parties' words and actions should be given such meaning "as reasonable persons would give them under all the facts and circumstances present at the time in question." (*Id*.).

The Alaska Supreme Court said in *Anchorage Roofing Co. v. Gonzales*, 507 P.2d 501, 503 (Alaska 1973), "If an affirmative defense to the claim is asserted by the employer, then he has the burden of proof as to such defense."

> **AS 23.30.082. Workers' compensation benefits guaranty fund.**
> . . .
>
> (c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter. . . .

> **AS 23.30.095. Medical treatments, services, and examinations.**
> . . .
>
> (e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. Unless medically appropriate, the physician shall use existing diagnostic data to complete the examination. Facts relative to the injury or claim communicated to or otherwise learned by a physician or surgeon who may have attended or examined the employee, or who may have been present at an examination are not privileged, either in the hearings provided for in this chapter or an action to recover damages against an employer who is subject to the compensation provisions of this chapter. If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's

> compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . .
>
> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
>
> (2) sufficient notice of the claim has been given;
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
>
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). An injured employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). Witness credibility is of no concern in this step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413,417 (Alaska 2004).

As for the second step of the analysis, to rebut the presumption under former law, the employer's substantial evidence had to either 1) provide an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the injury, etc.; or 2) directly eliminate any reasonable possibility that employment was a factor in causing the injury, etc. In contrast, under

the new statutory causation standard, the employer may rebut the presumption by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. To do so, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 09-0186 at 6-7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

In *Ashwater-Burns v. Huit*, AWCAC Decision No. 13-016 (March 18, 2014), the Commission discussed the board's citing of *Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992), which pre-dated the 2005 amendments to the Act, for the proposition that "[a]n employer has always been able to rebut the presumption of compensability with an expert opinion that the claimant's work was probably not a substantial cause of the disability." *Id.* at 942. Updating this pronouncement in keeping with the 2005 amendment providing that employment must be the substantial cause of the disability for it to be compensable, the *Huit* held an employer can rebut the presumption with an expert opinion that employment was probably not the substantial cause of the claimant's disability. *Huit* at 14-15.

The Alaska Supreme Court has held "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Miller v. ITT Arctic Services.*, 577 P.2d 1044 (Alaska 1978).

If the board finds the employer's evidence is sufficient, in the third step the presumption of compensability drops out, the employee must prove his case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom* at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Id.*

The presumption does not apply to an issue if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1244 (Alaska 2005). The presumption analysis does not apply to "every possible issue in a workers' compensation case." *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010).

> **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 findings are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007).

> **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
> . . . .
>
> (2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.

The Alaska Supreme Court has held that, for an injury to be "proximately caused by the employee being under the influence of drugs" within the meaning of subsection .235(2), the employee must be "under the influence of drugs" in the sense that the employee's mental or physical faculties must be impaired by use of drugs, and the employee's impaired condition must proximately cause the injury. A common example would be a worker whose judgment or coordination becomes impaired by consumption of drugs and who consequently suffers a

traumatic injury. *Parris-Eastlake v. State of Alaska, Dept. of Law*, 26 P.3d 1099, 1104 (Alaska 2001).

> **AS 23.30.395. Definitions**. In this chapter,
> . . . .
>
> (19) "employee" means an employee employed by an employer as defined in (20) 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 45.890. Determining employee status.** For purposes of AS 23.30.395(19) and this chapter, the board will determine whether a person is an employee" based on the relative-nature-of-the-work test. The test will include a determination under (1) - (6) of this section. Paragraphs (1) and (2) of this section are the most important factors, and at least one of these two factors must be resolved in favor of an "employee" status for the board to find that a person is an employee. The board will consider whether the work

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

> (A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;
>
> (B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;
>
> (C) has the right to extensive supervision of the work then there is a strong inference of employee status;
>
> (D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;
>
> (E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and

> (F) and person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

(2) is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;

(3) can be expected to carry its own accident burden; this element is more important than (4) - (6) of this section; if the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;

(4) involves little or no skill or experience; if so, there is an inference of employee status;

(5) is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;

(6) is intermittent, as opposed to continuous; if the work is intermittent, there is a weak inference of no employee status.

ANALYSIS

1) Was the oral order allowing Dr. Antoniskis to testify with respect to Claimant's alleged intoxication correct?

Claimant relies on *Phillips v. Billikin*, AWCB Decision No. 14-0060 (April 24, 2014) for his proposition that a party can be prohibited from calling expert witnesses. But *Phillips* dealt with an employee's unlawful change of attending physician under AS 23.30.095(a) by hiring a medical expert outside the law's limitations, not expert witnesses generally. The claimant in *Phillips* conceded he hired Thomas Gritzka, M.D., as a medical expert. After discussing the sequence of physician changes and referrals, *Phillips* found, as a matter of law, Dr. Gritzka was an unlawful change of physician and ordered exclusion of his medical reports under 8 AAC 45.082(c). *Phillips* did not, as Claimant urges, set out a rule limiting expert witness testimony in general for cases under the Act. *Phillips* is therefore distinguishable.

Here, the Fund listed Dr. Antoniskis on its hearing witness list, including a description of the anticipated subject matter and substance of his testimony. 8 AAC 45.112. Dr. Antoniskis was not a generic, hired "expert witness." Instead, he was selected by the Fund as an EME under AS 23.30.095(e) to give an oral or written opinion after examining Claimant's medical records. 8 AAC 45.082(b)(3). The Fund has the same rights as an alleged employer. AS 23.30.082(e). Therefore, Dr. Antoniskis was a permissible EME and the oral order allowing him to testify was correct. *Id.*

2) Was there an employer-employee relationship?

The first step in determining whether there was an employer-employee relationship is to find whether there was a hiring contract between Heath and Claimant. *Selid*. Without a hiring contract, there can be no employer-employee relationship. *Childs*. Without an employer-employee relationship, Heath is not an "employer" and can have no liability to Claimant under the Act. AS 23.30.045; AS 23.30.395(20).

a) Was there a contract of hire?

Claimant contends there was a hiring contract making him Heath's "employee." AS 23.30.395(19). Heath maintains there was no such relationship. This creates a factual

dispute to which the presumption of compensability applies. AS 23.30.120; *Rockney*; *Sokolowski*.

Claimant testified he worked on a recurring basis at the Snow Bear property and that he was Michael Heath's employee. Charles Bates testified he recalled Claimant doing framing work on a garage being built at Snow Bear. Without regard to credibility, this evidence establishes a preliminary link and raises the presumption Claimant was an employee. *Cheeks*; *Ugale*.

Heath said there was no employment agreement between Heath and Claimant. Heath's argument is that Claimant was a volunteer at Snow Bear. As credibility is not considered in the second step of the presumption analysis, this testimony is adequate to rebut the presumption and shift the burden back to Claimant. *Runstrom*. Claimant must now prove there was a contract of hire between himself and an employer by a preponderance of the evidence. *Saxton*.

In the presumption analysis' third step, evidence is weighed and credibility determined. *Ugale*. Because many material facts are in dispute, this case turns on witness credibility. It is important to point out Heath did not argue Claimant was an independent contractor; rather, he simply contends Claimant did not work for payment at Snow Bear at all. However, because Heath's testimony was evasive, contradictory, and equivocal, he is not credible and his testimony gets minimal weight. AS 23.30.122; *Smith*. On the other hand, Claimant's testimony was consistent, direct, and unequivocal. *Rogers.* Claimant is credible and his testimony receives significant weight. *Id.*

A contract for hire may be written or oral, and it may be express or implied. *Selid.* While a formalization of a contract for hire is not the controlling factor in determining whether an employment contract exists, a hiring contract is still necessary. *Childs.* In order to determine whether a contract existed, factors surrounding the creation of the relationship are examined. *Id.* An "express contract" requires an offer encompassing its essential terms, unequivocal acceptance by the offeree, consideration and an intent by the parties to be bound. *Id.* 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 to so act." *Id.* The parties' words and actions should be given such meaning "as reasonable persons would give them under all the facts and circumstances present at the time in question." *Id.*

Here, Heath paid Claimant $25 per hour, with payment made typically daily or at most every three days. While the hours were irregular and on an "as needed" basis, rather than a set weekly schedule, Claimant credibly testified he worked on many recurring occasions for Heath at Snow Bear, always doing some type of building or construction work. Heath initially invited Claimant to bid on various jobs. Although Claimant declined to bid, this fact very strongly supports a finding the parties intended to enter into a contractual relationship. *Rogers*. Claimant credibly testified he believed he was hired by Michael Heath. Heath's contention that Claimant was a volunteer, or that he was working for free, is not supported by the evidence. *Id.* Claimant and Heath never had a written contract for any type of work. However, the weight of credible evidence supports finding Heath and Claimant had an implied, oral hiring contract for Claimant to work for Heath at the Snow Bear property on an at-will basis. AS 23.30.135; *Selid*; *Childs.*

b) Was Claimant an independent contractor, or an employee?

The next step is to apply the "relative nature of the work" test to determine whether Claimant was an independent contractor, or an employee. 8 AAC 45.890; *Alaska Pulp.* Because there are factual disputes on this issue, the presumption of compensability analysis applies. AS 23.30.120; *Rockney*; *Sokolowski*.

Claimant testified he was Michael Heath's employee, and not an independent contractor. Without regard to credibility, this evidence establishes a preliminary link and raises the presumption Claimant was an employee, and not an independent contractor. *Cheeks*; *Ugale*.

Heath said there was no employment agreement between Heath and Claimant. As credibility is not considered in the second step of the presumption analysis, this testimony is adequate to rebut the presumption and shift the burden back to Claimant. *Runstrom*; *Saxton*.

In the presumption analysis' third step, evidence is weighed and credibility determined. *Ugale*.

As above, Heath's testimony is not credible and is given minimal weight. AS 23.30.122; *Smith*. Claimant's testimony, on the other hand, is credible and is given significant weight. *Id.* Claimant testified he has never owned a business or held a business license. Claimant was one of several other tradesmen working at Snow Bear, with no authority to hire or fire other workers. Claimant had little or no right to exercise control over the work, and performed as directed by Heath. Because there was no contract for a particular duration or task, Claimant was an at-will employee, with the ability to terminate the relationship at any time. Other than a tool belt and basic hand tools, Heath provided all the major tools for accomplishing the work. Claimant was paid on an hourly rate, rather than by the job. When a "stop work" order was placed by the municipality, Heath took Claimant to city offices where Heath resolved the issue so work could resume. At no time did Claimant have authority to hire or fire the other workers on the job site. When additional tools were needed, Heath would personally purchase them. Claimant felt at all times he was "just another worker" on the site out of several, with no supervisory or decision-making authority at any time. The factors set forth under 8 AAC 45.890(1) support a finding Claimant was an employee, rather than independent contractor.

Heath testified in his November 15, 2013 deposition his business is buying, selling, and renting of real estate. The expired business license for O&M also lists real estate as its business. Heath stated everything he does, he does as O&M. In 2011, Heath also owned a rental property in New York City, from which he collected rent. Considering Heath was collecting rent from the Snow Bear property, his rehabilitation and repair of Snow Bear to maintain its marketability falls within Heath's and O&M's regular business. Therefore, under 8 AAC 890(2) there is a weak inference of employee status.

Claimant credibly testified he has never owned his own business, and has always worked for others. He was earning only $25 per hour at Snow Bear. Therefore, he cannot be expected to carry his own accident burden. 8 AAC 45.890(3). Under this factor, there is a strong inference of employee status. *Id.*

Carpentry, roofing, soffit, and carpet work are generally considered skilled trades. Claimant's work involved a relatively high amount of skill and experience. This factor weighs in favor of independent contractor status. 8 AAC 45.890(4).

While the exact hours and schedule of Claimant's work at Snow Bear are impossible to determine on this record, the weight of the evidence shows Claimant worked continuously, though irregularly, rather than on a specific job. This factor weighs slightly in favor of employee status. 8 AAC 45.890(5), (6). Considering all the evidence, Claimant was at all times an employee at the Snow Bear property, rather than an independent contractor, under the factors listed in 8 AAC 45.890. *Id.*

c) Whose employee was Claimant?

As above, Heath testified in his deposition his business is buying, selling, and renting of real estate. The expired business license for O&M lists real estate as its business. Heath also testified everything he does, he does as O&M. There is no evidence Claimant was an employee of the Michael A. Heath Trust. Therefore, Claimant was an employee of Michael Heath doing business as O&M Enterprises at the time of the injury. AS 23.30.135; *Rogers*.

3) Was intoxication the proximate cause of Claimant's injury?

Claimant contends he fell from the ladder and was injured because cribbing supporting the ladder gave way, causing him to fall. The Fund contends Claimant's injury was caused by his intoxication from cocaine and alcohol. Because the issue of whether intoxication was the proximate cause of Claimant's injury creates a factual dispute, the presumption of compensability analysis will be applied. AS 23.30.120; *Rockney*; *Sokolowski*.

Claimant conceded he had consumed alcohol and cocaine just prior to the injury, but insisted his fall was not caused by his intoxication, but rather by the loose cribbing. Without regard to credibility, this evidence establishes a preliminary link and raises the presumption Claimant's injury was not caused by his intoxication. AS 23.30.120(4); *Cheeks*; *Ugale*.

Heath did not argue with respect to the intoxication issue. The Fund presented the opinions and testimony of Dr. Antoniskis, which stated Claimant's level of intoxication at the time of injury was sufficient to impair his judgment, balance and coordination. The Fund also called a first responder, who noted the smell of alcohol on Claimant's breath. Blood tests in the emergency department showed Claimant had alcohol in his system hours after the injury. As credibility is not considered in the second step of the presumption analysis this evidence is adequate to rebut the presumption. *Runstrom*; *Saxton*.

In the presumption analysis' third step, evidence is weighed and credibility determined. *Ugale*. Heath and the Fund have the burden of proving their affirmative defense under AS 23.30.235(2), that Claimant's injury was proximately caused by intoxication. *Id.* Claimant challenged Dr. Antoniskis' blood alcohol level extrapolation during cross-examination. Claimant argued Dr. Antoniskis' extrapolation is, at best, an educated guess. Dr. Antoniskis' EME reports are thorough and remain unchallenged. However, his testimony on the degree of impairment Claimant would have experienced from the combined effects of cocaine and alcohol are less clear. AS 23.30.135; *Rogers*. While Dr. Antoniskis could clearly testify as to the effects of alcohol on a person's level of impairment generally, he could not say with certainty to what degree Claimant was actually impaired when he fell or whether or how his alcohol or drug use on the injury date contributed to his fall. Factors such as the strength of the beer Claimant drank, amount of food in his stomach, and his tolerance for alcohol, are all variables which would affect the level impairment at the time of the injury, to which Dr. Antoniskis could not definitively speak. Further, there is no evidence alcohol or drug impairment played any role in the failed cribbing that caused the ladder on which Claimant was standing to fall. There is no logical connection. Therefore, Dr. Antoniskis' opinions are not dispositive on this issue and are given less weight. *Id*; AS 23.30.122; *Smith*.

The Act requires not only a mere showing an injured worker was intoxicated at the time of the injury, but that intoxication was the "proximate cause." AS 23.30.235(2). For an injury to be proximately caused by an employee being under the influence of drugs or alcohol within the meaning of subsection .235(2), the employee must be under the influence in the sense that his mental or physical faculties are impaired, and the impaired condition proximately caused the

injury. *Parris-Eastlake*. The example given by the Alaska Supreme Court is that of an employee whose judgment or coordination becomes impaired by consumption of drugs and whose traumatic injury is a direct consequence of that impairment. *Id.*

Here, Claimant testified the cause of his fall was not that he lost his balance or slipped, but rather that the entire ladder fell when cribbing supporting it gave way. Although Claimant had alcohol in his system at the time he fell from the ladder, impairment from drugs or alcohol was not the reason for the fall. The weight of the evidence supports a conclusion that loose cribbing supporting the ladder gave way, which would have caused anyone to fall. AS 23.30.135; *Rogers*. Therefore, intoxication was not the proximate cause of Claimant's injury at the Snow Bear property. *Id.*; *Parris-Eastlake*.

Finally, Claimant's attorney requested leave to file a statement of attorney's fees and costs. The Fund objected and the chair orally declined Employee's request, as attorney's fees was not an issue listed for the June 11, 2015 hearing. *Simon*. Claimant may file a claim for attorney's fees and costs. If the parties cannot resolve this issue, Claimant may request a hearing.

CONCLUSIONS OF LAW

1) The oral order allowing Dr. Antoniskis to testify with respect to Claimant's alleged intoxication was correct.

2) There was an employer-employee relationship.

3) Intoxication was not the proximate cause of Claimant's injury.

ORDER

1) The Alaska Workers' Compensation Benefits Guaranty Fund's January 22, 2015 petition to dismiss Virgil Adams' claims is denied.

2) Claimant was an employee of Michael Heath doing business as O&M Enterprises at the time he was injured on August 18, 2011.

3) Employee's claim for attorney's fees and costs is not ripe.

Dated in Anchorage, Alaska on August 31, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

_____
Amy Steele, Member

_____
Rick Traini, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Virgil A. Adams, employee / claimant v. O&M Enterprises, employer; and the Alaska Workers' Compensation Benefits Guaranty Fund / defendants; Case No. 201113128; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 31, 2015.

_____
Pamela Murray, Office Assistant