



ISSUE

The Fund contends *Adams v. O&M Enterprises et al.*, AWCB 15-0094 (August 31, 2015) (*Adams IV*) should be “reconsidered” on two main grounds: 1) *Adams IV* should be styled as “final,” rather than “interlocutory,” and 2) *Adams IV* does not sufficiently analyze who is an “employer” under the Act. The Fund also raises issues about *Adams IV*’s factual findings.

Claimant contends the Fund’s petition for reconsideration is without merit. He contends *Adams IV* offered sufficient discussion and analysis of why Michael Heath doing business as O&M Enterprises was Claimant’s employer under the Act, and the Fund is simply trying to re-litigate this issue. Claimant opposes reconsideration of *Adams IV*.

Neither Michael Heath nor O&M filed a brief or argument in response to the Fund’s petition for reconsideration. O&M’s position is therefore unknown.

**Should *Adams IV* be reconsidered or modified in whole or in part?**

FINDINGS OF FACT

The findings of fact from *Adams IV* are incorporated herein by reference. The following additional facts are undisputed or are established by a preponderance of the evidence:

- 1) On September 24, 2012, Employee through counsel filed an amended claim for various benefits, which is still pending. (Workers’ Compensation Claim, September 24, 2012).
- 2) On April 9, 2015, all parties attended a prehearing conference. The parties stipulated to an oral hearing to be held on July 28, 2015, and the issues for hearing were listed as:
  1. 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.
  2. Workers’ Compensation Benefits Guaranty Fund’s 1/22/2015 Petition to Dismiss. (Prehearing Conference Summary, April 9, 2015).
- 3) On July 28, 2015, an oral hearing was held on the above issues and attended by all parties. (Record).

4) On August 31, 2015 *Adams IV* decided the Fund's January 22, 2015 petition to dismiss Employee's claims. *Adams IV* ordered:

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. (*Adams IV* at 29).

2) On September 11, 2015, the Fund timely filed a petition for "reconsideration" of *Adams IV* and a brief in support. (Petition for Reconsideration, September 11, 2015). The Fund's brief makes the following arguments:

- *Adams IV* should be styled as "final," rather than "interlocutory," because it entirely disposes of the Fund's and O&M's affirmative defenses and therefore entitles Claimant to benefits under the Act.
- *Adams IV* meets the test for "finality" under case law because it fixes the rights of the parties and leaves "no further dispute on a pending claim or petition for the Board to resolve."
- *Adams IV* ends Board proceedings, in part because Claimant may file a claim for attorney's fees and costs and may seek a hearing on that issue.
- Since *Adams IV* rejected defenses available to the Fund and O&M on the merits, the decision should be characterized as final and appealable.
- *Adams IV* concludes Michael Heath doing business as O&M Enterprises is an "employer" under the Act, without "providing any additional analysis." Thus, *Adams IV* should have discussed how O&M is a "business or industry" under the Act.
- Additional bases for finding Claimant was not an employee of Michael Heath or O&M at the time of the alleged injury are that O&M was inactive as a business at the time, O&M was not a real estate business, and there was no home office for O&M at the job site where Claimant was allegedly injured.
- O&M's business license expired five years prior to Claimant's alleged work injury. This contention is supported by the fact that O&M did not earn any income in the year prior to Claimant's alleged injury.

- The Fund argues the weight of the evidence, including witness testimony and depositions, support its contentions on reconsideration. (Fund's Brief in Support of Petition for Reconsideration, September 11, 2015).

3) The Fund's petition alleges both factual errors and legal errors. (Experience, judgment, observations, and inferences drawn from the above).

4) On September 25, 2015, the Board granted reconsideration of *Adams IV* in a letter order:

The Board has considered the Fund's September 11, 2015 petition and has decided to order reconsideration on the written record. AS 44.62.540. No hearing will be scheduled.

Because the Fund filed a brief in support of its September 11, 2015 petition, no additional briefing is required from the Fund. However, Mr. Heath d/b/a O&M Enterprises and Mr. Adams will be given 20 days from the date of this letter to file and serve on all parties an optional response to the Fund's September 11, 2015 petition and brief, not to exceed 15 pages in length. . . . (Letter Order, September 25, 2015).

5) On October 14, 2015, Claimant filed a brief responding to the Fund's September 11, 2015 petition and brief. Claimant opposes reconsideration and his brief makes the following main arguments:

- The Fund's September 11, 2015 petition for reconsideration is simply an attempt to prolong the proceedings, and therefore delay Claimant's receipt of benefits under the Act.
- Delay of the proceedings will enable Michael Heath and O&M to conceal assets and transfer property with the purpose of evading financial responsibility for Claimant's work injuries.
- The Fund is simply attempting to re-litigate issues that were squarely argued and decided in *Adams IV*, after that decision considered six depositions, the testimony of five witnesses and extensive exhibits.
- Benefits have not been paid to Claimant either by the Fund or O&M, and it would take an additional hearing on the merits of the claims to award those benefits. Therefore, *Adams IV* is not a final decision.
- *Adams IV* offered sufficient discussion and analysis of why Michael Heath doing business as O&M Enterprises is an "employer" under the Act, and the Fund is simply trying to re-litigate this issue.

- 6) Neither Michael Heath nor O&M Enterprises filed a brief or argument in opposition to the Fund's September 11, 2015 petition for reconsideration. (Record).
- 7) There has been no Board order in this case ordering Michael Heath, O&M Enterprises, or the Fund to pay Claimant benefits under the Act. (Record; Observations).

PRINCIPLES OF LAW

**AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that

. . . .

(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.

A decision may be based not only on direct testimony and other tangible evidence, but also on "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 23.30.122. 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 23.30.127. Appeals to commission.** (a) A party in interest may appeal a compensation order issued by the board to the commission within 30 days after the compensation order is filed with . . . board under AS 23.30.110. . . .

The Alaska Workers' Compensation Appeals Commission recently held, in *Trident Seafoods v. Saad*, AWCAC Decision No. 213 (July 16, 2015), that the Board's characterization of a particular decision as a "final decision" is not conclusive as to the status of the decision as a final

decision for purposes of an appeal, rather than a petition for review. *Id.* at 2. Citing *Hope Community Resources v. Rodriguez*, AWCAC Decision No. 41 (May 16, 2007), *Saad* affirmed the standard that a Board decision is final for purposes of appeal to the Commission when it “is final as to the appellant’s rights, and leaves no further dispute on a pending claim or petition for the Board to resolve.” *Id.*

*City and Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1971) addressed the scope of discretionary review of administrative proceedings. *Thibodeau* held that a superior court decision, which is made while that court is acting as an intermediate appellate court, which reverses the decision of an administrative agency and remands for further proceedings, is a “non-final order.” However, a party to such a remand may properly invoke the Supreme Court’s discretionary review jurisdiction by filing a petition for review. *Thibodeau* said a superior court order, which reversed and remanded a case to an administrative agency for further proceedings, was not a “final judgment” for appeal purposes, but such fact did not preclude the Supreme Court from reviewing a party’s contentions. *Id.* at 629-630; (*overruling Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027 (Alaska 1972)).

**AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

In the case of a factual mistake or a change in conditions, a party “may ask the board to exercise its discretion to modify the award at any time until one year” after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). AS 23.30.130 confers continuing jurisdiction over workers’ compensation matters. (*Id.*) By comparison and contrast, a petition for reconsideration has a fifteen day time limit for the request and the board’s power to reconsider “expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied.” (*Id.* at n. 36).

**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 in 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 23.30.395. Definitions.** In this chapter,

. . . .

(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. . . .

The Alaska Supreme Court, in *Gaede v. Saunders*, 53 P.3d 1126 (Alaska 2002), recognized not all persons who are employees within the usual meaning of that term are employees covered by the Act. The rationale for this distinction is that a business, unlike a homeowner who hires labor to complete a construction or renovation project, can pass the cost of workers’ compensation insurance on to the consumers of the business’s service or product. *Id.* at 1127. Applying the Act’s definition of “employer,” *Gaede* held the Board must apply the “business or industry” limitation in finding an employer-employee relationship for workers’ compensation purposes. *Gaede* cited Professor Larson:

The policy question is whether [the homeowner’s] construction activity, either by itself or as an element of his rental activities, was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or was the construction activity simply a cost-cutting shortcut in what was basically a consumptive and not a productive role played by [the homeowner]. *Id.*

**AS 44.62.540. Reconsideration.** (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. . . .

The board must give due consideration to any argument or evidence presented with a petition for reconsideration, but is not required to give conclusive weight to new evidence and has power to consider the new evidence against the backdrop of evidence presented at prior hearings. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 957 (July 30, 1982).

**8 AAC 45.150. Rehearings and modifications of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

....

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;

(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

(3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

**8 AAC 57.073. Petitions or cross-petitions for review of interlocutory or other non-final board decisions or orders.** (a) A party may petition or cross-petition the commission, as provided in 8 AAC 57.075, for review of an interlocutory or other non-final board decision or order that is not otherwise appealable under this chapter.

(b) Review will be granted only if the policy that appeals be taken only from final decisions and orders is outweighed because



(1) postponement of review until appeal may be taken from a final decision or order will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship, or other related factors;

(2) the decision or order involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the decision or order may materially advance the ultimate resolution of the claim;

(3) the board has so far departed from the accepted and usual course of proceedings as to call for the commission's review; or

(4) the issue is one that might otherwise evade review, and an immediate decision by the commission is needed for the guidance of the board.

### ANALYSIS

#### **Should *Adams IV* be reconsidered or modified in whole or in part?**

The Fund timely filed a petition seeking “reconsideration” of *Adams IV*. AS 44.62.540. However, the bulk of the Fund’s issues in its petition have already been raised by the parties and decided in *Adams IV*. The Fund argues factual bases, which the Fund contends were not given enough weight, for finding Claimant was not an employee of Michael Heath or O&M at the time of the alleged injury are that O&M was inactive as a business at the time, O&M was not a real estate business, and also that there was no home office for O&M at the job site where Claimant was allegedly injured. The Fund also contends O&M’s business license expired five years prior to Claimant’s alleged work injury, supporting an inference that O&M could not have been Claimant’s “employer.” The Fund argues this contention is supported by the fact O&M did not earn any income in the year prior to Claimant’s alleged injury. Because the Fund alleges *Adams IV* made factual errors, this decision will treat the petition as one for reconsideration and modification. AS 23.30.130; *Rogers & Babler*.

The Fund’s September 11, 2015 brief does not discuss why the Fund could not adequately raise these factual arguments at the July 28, 2015 hearing. *Whaley*. The Fund does not get another “bite at the apple,” and on this basis alone its petition for modification will be denied. AS 23.30.130; 8 AAC 45.150. Alternately, *Adams IV* found the weight of evidence supported finding Michael Heath and Claimant had an implied, oral hiring contract for Claimant to work

for Heath on an at-will basis. *Adams IV* at 23-24. The decision then applied the “relative nature of the work” test to determine whether Claimant was an independent contractor, or an employee. *Id.* at 24-26. After considering the evidence, including witness credibility, *Adams IV* found Claimant was at all times an employee rather than an independent contractor. AS 23.30.122; AS 23.30.135; *Thoeni*; *Smith*. The Fund’s contention it is entitled to “reconsideration” on the employee status issue simply because some of the factors surrounding the employment relationship may be susceptible to contrary conclusions is not a valid basis for reconsideration. AS 23.30.001(1), (2), and (4); AS 23.30.135; AS 44.62.540; *Whaley*; *Lindekugel*. Because the Fund’s contentions as to the employer-employee relationship raise questions of fact already considered and decided in *Adams IV*, they are not a basis for “reconsideration” here. *Id.*

*Adams IV* found Michael Heath’s occupation in 2011, the year Claimant was injured, was buying and selling real estate. *Adams IV* at 6. The decision found Heath also testified that in 2011, he owned a rental property in New York City. *Id.* While the business license was expired at the time Claimant was injured, *Adams IV* found a business license for O&M Enterprises which listed its business line as “real estate, rental and leasing.” *Id.* To the extent *Adams IV* did not determine what the “business or industry” of Michael Heath doing business as O&M Enterprises was at the time Claimant was injured, it will be modified as follows. AS 23.30.130; *Gaede*. Incorporating the findings of fact from *Adams IV*, the “business or industry” of Michael Heath doing business as O&M Enterprises at the time Claimant was allegedly injured was buying, managing, and selling real estate. *Id.*; AS 23.30.001; AS 23.30.135; AS 44.62.540; *Whaley*; *Lindekugel*. The Fund provided no other basis for modification. AS 23.30.130; 8 AAC 45.150.

To the extent the Fund alleges legal error because *Adams IV* should have discussed how O&M is a “business or industry” under the Act, this contention will also be addressed. Alaska Statute 23.30.395(20) defines the term “employer” as used in the Act. This section is construed in conjunction with case law, the remainder of the Act, and the Act’s regulations. *Rogers & Babler*. The Alaska Supreme Court has held a determination must be made whether the work activity at the location where a worker was injured was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or whether the work was basically a consumptive role played by the property owner. *Gaede*. As above, in 2011 the business of

Michael Heath doing business as O&M Enterprises was the buying, selling, and managing of real estate. Michael Heath testified O&M earned no income in 2011. *Adams IV* at 11. Because *Adams IV* found Heath not credible, this factor is not dispositive on the issue of whether the construction project was a business venture, or simply a home-improvement project. AS 23.30.001; AS 23.30.135; *Rogers & Babler*. Because it was a business venture, O&M could pass the cost of workers' compensation insurance on to the consumers of the business's service or product. *Gaede*.

The Fund alleges legal error because *Adams IV* should have been styled as "final" rather than "interlocutory." The Fund also contends *Adams IV* is a final decision because it fixes the parties' rights and leaves no further dispute to be resolved. The Fund contends *Adams IV* entitles Claimant to benefits under the Act. However, at the April 9, 2015 prehearing conference the parties agreed the only issues for hearing were the Fund's January 22, 2015 petition to dismiss, whether Claimant was an employee of O&M under the Act, and whether intoxication was the proximate cause of Claimant's injuries. *Adams IV* did not award benefits to Claimant, nor did it decide work for Michael Heath or O&M was the substantial cause of Claimant's disability or need for medical treatment. Claimant's September 24, 2012 amended claim is still pending on its merits. Therefore, the Fund's argument *Adams IV* entitles Claimant to benefits is without merit and is not a basis for reconsideration. AS 23.30.001; AS 23.30.135; AS 44.62.540; *Whaley*; *Lindekugel*. A party has the right to appeal to the Commission from a "final" decision. AS 23.30.127. However, appellate review by the Commission from an interlocutory decision is at the Commission's discretion and is requested by a party filing a petition for review. 8 AAC 57.073. The Fund may seek the Commission's discretionary review of *Adams IV* and is therefore not without a remedy. *Thibodeau*.

CONCLUSION OF LAW

*Adams IV* will be reconsidered and modified in part.

ORDER

- 1) The Fund's September 11, 2015 petition for reconsideration and modification is granted in part and denied in part.
- 2) Incorporating the findings of fact from *Adams IV*, the "business or industry" of Michael Heath doing business as O&M Enterprises at the time Claimant was allegedly injured was the buying, managing, and selling of real estate.
- 3) In all other respects, *Adams IV* remains the same.

Dated in Anchorage, Alaska on October 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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Matthew Slodowy, Designated Chair

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Amy Steele, Member

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Rick Traini, Member

PETITION FOR REVIEW

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Virgil A. Adams, employee / claimant v. O&M Enterprises, uninsured 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 October 27, 2015.

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Pamela Murray, Office Assistant