ALASKA WORKERS' COMPENSATION BOARD

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

JUAN BARRAGAN, Employee, Claimant, v. PIZZA EXPRESS, Employer, and UMIALIK INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201907027 AWCB Decision No. 20-0114 Filed with AWCB Juneau, Alaska on December 23, 2020

Juan Barragan's (Employee's) July 30, 2019 claim was heard on October 13, 2020 in Juneau, Alaska, a date selected on July 9, 2020. A July 9, 2020 prehearing conference gave rise to this hearing. Attorney Robert Bredesen appeared and represented Employee, who appeared and testified. Attorney Michelle Meshke appeared and represented Pizza Express and Umialik Insurance Co. (Employer). Witnesses included Mary Barragan and Ronald Henson, Ph.D., who testified for Employee and Hector Barragan, Olive Carrazco, Brent Burton, M.D., Melody Shepard, M.D., and Robbie Sullivan who testified for Employer. The record remained open to receive supplemental briefs and closed after deliberation on November 24, 2020.

ISSUES

Employer contends Employee was intoxicated when he was injured at work and his intoxication was the proximate cause of his work injury. It contends it should not be equitably estopped from

asserting intoxication as a defense because it could not have reasonably foreseen Employee would consume alcohol in excess of the drink limit set by employment policies. Employer also contended it should not be equitably estopped from asserting the defense because it did not have knowledge Employee was severely intoxicated in the workplace because he began drinking before returning to work, hid his drinking at work and was a chronic alcoholic who could become severely intoxicated without appearing so to those who knew him best. Employer requests an order barring compensation due to Employee's intoxication.

Employee contends he was not intoxicated when he was injured at work. He contends the blood alcohol test administered by the emergency room was flawed and provided an unreliable result. Employee contends intoxication was not the proximate of his work injury. He contends worn and wet carpeted stairs and placement of the metal cart at the bottom of the stairs were the proximate cause of his work injury. Alternatively, Employee contends Employer should be equitably estopped from asserting intoxication as a defense because Employer allowed drinking on its premises and provided the alcohol and the worn and wet carpeted stairs and metal cart contributed to the work injury. He requests an order denying Employer's request to bar compensation under AS 23.30.235(2).

1) **Is Employee barred from receiving benefits under AS 23.30.235(2)?**

Employee contends he is entitled to an award of past medical and transportation costs paid by Medicaid and has standing to bring claims on behalf of their medical providers. He contends his medical providers billed Medicaid because Employer controverted benefits and served its May 30, 2019 controversion notice upon his medical providers. Employee contends a medical provider is required under federal rules to return funds received from Medicaid when a third-party is ordered to pay the medical bills. He contends the purpose of workers' compensation is to pass the costs of workplace injuries onto consumers through insurance and requiring Employer to pay medical costs in accordance with the Alaska Worker's Compensation Act (Act) is consistent with that purpose. Employee contends requiring Employer to pay the medical providers directly is not "balance billing" because he is not being billed for an amount in excess of the Medicaid copay and the amount paid by Medicaid. He contends AS 23.30.097 entitles medical providers to payment for services in accordance with the Alaska workers' compensation

fee schedule. Employee contends medical providers have an independent right to payment for medical services which cannot be extinguished without due process and neither the medical providers nor Medicaid were joined as parties. He requests an order directing Employer to pay his medical providers pursuant to the Act and ordering provider reimburse Medicaid for transportation costs.

Employer contends Employee lacks standing to raise claims on behalf of past medical providers that accepted payment from Medicaid. It contends medical providers cannot charge more than what Medicaid pays once they agree to provide treatment except for authorized copays. Employer contends medical providers are prohibited from "balance billing" by federal law. It contends Employee's claim for medical costs is moot because Employee's medical providers accepted Medicaid compensation as payment in full for services rendered and the Medicaid lien was released. Employer requests an order denying Employee's claim for past medical benefits.

2) Is Employee entitled to an award of past medical benefits and transportation costs?

Employee contends he is entitled to disability benefits.

Employer contends Employee is not entitled to any disability benefits because he is barred from receiving compensation under AS 23.30.235(2). It requests an order denying disability benefits.

3) Is Employee entitled to an award of disability benefits?

Employee contends he is entitled to permanent partial impairment (PPI) benefits as he was assessed a 20 percent rating. He requests an order awarding PPI benefits.

Employer contends Employee is not entitled to PPI benefits as he is barred from receiving compensation under AS 23.30.235(2). It requests an order denying PPI benefits.

4) Is Employee entitled to PPI benefits?

Employee contends Medicaid is entitled to interest on the funds it paid Employee's medical providers for treatment of the work injury. He contends his medical providers are entitled to

interest on the difference between what the Act would have paid for treatment and the amount Medicaid paid. He request an order awarding his medical providers and Medicaid interest.

Employer contends neither Medicaid nor the medical providers are entitled to interest as Employee is barred from receiving compensation under AS 23.30.235(2). It requests an order denying interest.

5) **Is Employee entitled to an award of interest?**

Employee contends he is entitled to penalties. He contends relying on the statutory intoxication defense constitutes a mistake of law if Employer is estopped from asserting it and penalties are due under AS 23.30.155(e). Employee contends penalties are also due under AS 23.30.070 because Employer failed to timely report his injury. He contends he should be awarded the full penalty because the medical providers were compensated for their services by Medicaid and he was prejudiced by Employer's denial because it required him to litigate his case, interfered with his medical treatment and his injuries were severe. Employee requests an order awarding penalties.

Employer contends Employee is not entitled to penalties as he is barred from receiving compensation under the Act due to his intoxication. It requests an order denying penalties.

6) **Is Employee entitled to penalties?**

Employee contends he is entitled to attorney's fees and costs under AS 23.30.145(a). He requests an award of statutory minimum fees.

Employer contends Employee is not entitled to attorney's fees and costs as he is barred from receiving compensation under AS 23.30.235(2). It requests an order denying attorney's fees and costs.

7) **Is Employee entitled to attorney's fees and costs?**

FINDINGS OF FACT

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

1) On May 3, 2019, Employee's found him unresponsive at the bottom of a tall flight of stairs in the back of Pizza Express where he worked; he had been drinking upstairs with his friends. The fall was reportedly unwitnessed and it was unknown how far he fell. Employee had a history of alcohol abuse. (Sitka Fire Department, Patient Care Report, May 3, 2019).

2) On May 3, 2019, Employee arrived at the emergency room by ambulance for a fall which resulted in a loss of consciousness:

> He was drinking with his family and friends tonight and was leaving the family restaurant to go home. He was standing in the middle of the staircase, seemed to lose his balance, and fell backward. He was found at the bottom of the staircase, unconscious, breathing, bleeding from the back of the head. There was a metal cart at the bottom of the staircase that had been damaged by his fall. EMS arrived to find him unconscious at the bottom of flight of 20 stairs.

Employee was comatose; his family said he drank to excess on a daily basis. (Dr. Shepard, emergency room report, May 3, 2019). A head computerized axial tomography (CT) found an acute subarachnoid and subdural hemorrhage, posterior subdural hemorrhage over the convexities measuring up to 12 mm in thickness, comminuted, depressed fracture of the posterior calvarium, and a depression up to 6 mm of fracture fragments. (CT report, May 3, 2019).

3) On May 3, 2019, at 23:36 Employee's alcohol level was 329 mg/dL. He tested negative for other drugs. The "Alcohol" Comment stated, "A result of <3 mg/dL is considered negative by this methodology." The "Tox Screen Note" Comment stated:

> Collection of urine specimens for Drugs of Abuse screening does not follow "chain of custody" protocol; results are intended only for care of the patient. This Drug Screen panel detects a select number of drugs at variable concentration, and provides only preliminary analytical test results. A list of drug concentrations detected by this panel is available on the Laboratory's intranet website under the heading, "Urine Toxicology Screening Panel." If confirmatory urine Tox testing is required, order the appropriate test. Please be aware that confirmatory results may differ from laboratory Drug Screen results due to the more sensitive and specific methodologies used by the reference laboratory. For example, a negative reference laboratory result on a substance (or analogous substance) first reported as positive by the SEARHC laboratory's Drug Screen may indicate the SEARHC laboratory's result was a false positive due to cross reactivity, interfering substances, or some other cause. (Toxicology Report, May 3, 2019).

4) On May 4, 2019, Employee was transferred from Sitka Mount Edgecomb Hospital to Alaska Trauma & Acute Care Surgery, LLC. He sustained severe injuries the day before around 23:30 hours after falling down stairs. The fall was reportedly witnessed by other intoxicated friends who called emergency services. EMS observed Employee unconscious at the bottom of a flight of 20 stairs. His history was not available due to his level of consciousness and intubation. A head CT found acute bilateral subdural bleeds measuring five millimeters in the largest thickness in the left posterior parietal area high convexity, bilateral subarachnoid bleeds, minimally displaced fracture throughout the parietal bones bilaterally, separation of the sagittal suture posteriorly and bilateral scalp hematomas more on the left. Employee was admitted to the intensive care unit. (Steven Floerchinger, M.D., History and Physical Exam, May 4, 2019).

5) On May 28, 2019, Employee was diagnosed with traumatic brain injury (TBI), bilateral subdural hematoma, sagittal sinus thrombosis, agitation, right hemiparesis and alcohol use disorder and acute intoxication at the time of the fall. (Shari Morgan, M.D., Progress Note, May 28, 2019).

6) On May 30, 2019, Employer reported Employee was injured on May 3, 2019, when he fell down stairs and hit his head on a mental cart, causing a TBI. The date Employer first knew of the injury was May 3, 2019, and the date the claim administrator first knew was May 16, 2019. (First Report of Occupational Injury or Illness, May 30, 2019).

7) On May 30, 2019, Employer denied all benefits contending Employee's injuries were proximately caused by his intoxication. It was served upon Providence Hospital in Anchorage, Sitka Hospital and the medical case manager. (Controversion Notice, May 30, 2019).

8) On May 30, 2019, Dr. Morgan noted Employee was unable to go to the Craig Institute for rehabilitation because workers' compensation denied benefits. Instead, she hoped he improved enough to be accepted in the hospital's inpatient rehabilitation facility. (Morgan, progress note, May 30, 2019).

9) On May 31, 2019, Employer withdrew its May 30, 2019 controversion. (Notice of Withdrawal of Controversion, May 31, 2019).

10) On June 6, 2019, Employer denied all benefits contending Employee's injuries were proximately caused by his intoxication. (Controversion Notice, June 6, 2019).

11) On June 13, 2019, Employee was discharged from the hospital to the inpatient rehabilitation unit to receive physical therapy, occupational therapy and speech-language pathology. (Morgan, progress note, June 13, 2019).

12) On June 13, 2019, Jim Lane, an insurance carrier adjuster, interviewed Ms. Carrazco. Ms. Carrazco stated Employee cooks pizza and works from 9:00 a.m. to 2:00 p.m. and 4:00 pm to closing. (Carrazco Recorded Statement, June 13, 2015 at 5). Employee was not drinking during the day or during his shift. (*Id*. at 6). After 9:00 p.m. but before 10:00 p.m. Renato Mojarro, Octavio Saenz Holgvin and Employee were drinking beer and then Employee asked for wine so she gave him a little cup. (*Id*. at 7). They were drinking upstairs. (*Id*. at 8). Ms. Carrazco did not know if anybody witnessed the fall. (*Id*.). She was in the office with Hector when Employee fell. (*Id*.). Ms. Carrazco had no idea what Employee's blood alcohol content was when he fell. (*Id*.). She did not know if Employee had beer, she only gave him wine. (*Id*. at 9). Ms. Carrazco gave the other guys a pitcher of beer. (*Id*. at 9-10). She was doing paperwork and was not paying attention to them. (*Id*. at 11). Ms. Carrazco thought Employee had a drinking problem because he was always drinking after work but he did not drink to excess where he would be drunk. (*Id*.). If they went downstairs to get a drink she would not know. (*Id*. at 13). Ms. Carrazco did not see Employee fall; he fell after she told everybody to leave for the night after her paperwork was done. (*Id*.). Her husband told her Employee fell and she went to the top of the stairs and saw Mr. Saenz on Employee's left so she told Hector we need an ambulance. (*Id*. at 13-14). Hector went down the stairs and told her to call an ambulance so she did. (*Id*. at 14). Ms. Carrazco pushed Employee to eat before he started drinking because he had not eaten that day but he said he was not hungry. (*Id*. at 15).

13) On June 13, 2019, Jim Lane interviewed Hector Barragan. He stated his policy was one free meal per shift, no drinking during a shift, but drinking was permitted on premises in the past. (Hector Barragan Recorded Statement, June 13, 2015 at 4-5). There were a few times Hector gave employees a free drink but when he was not there, employees were supposed to pay for a drink. (*Id*. at 5). The employees were supposed to drink upstairs in the break room. (*Id*.). They cannot pour drinks for themselves, they are supposed to ask a server or Ms. Carrazco. (*Id*. at 5-6). Hector was in the office when Employee fell. (*Id*. at 7). The dining area closed at 9:00 p.m. and the pizza delivery area closed at 10:00 p.m. (*Id*.). He saw Mr. Mojarro, Mr. Saenz, Mr. Carrazco, and Ms. Carrazco, who was finishing up paperwork. (*Id*.). Employee had a glass of

wine and the other guys were having a glass of beer but he did not see a pitcher. (*Id*. at 8). Hector knew Employee drank. (*Id*.). He never saw Employee visibly under the influence of alcohol at work. (*Id*. at 9). Someone yelled Employee fell down, he thought it was Mr. Mojarro or Mr. Saenz. (*Id*. at 10). Employee was at the bottom of the stairs unconscious. (*Id*.). Hector "heard" he fell down from halfway up the flight of stairs going down but he did not know what happened because he did not see it. (*Id*.). He told Ms. Carrazco to call the ambulance right away. (*Id*.). Everyone was leaving and the guys starting walking down the stairs around 11:15 p.m. (*Id*. at 11). Employee was wearing black dress shoes that night. (*Id*. at 12). Hector considers everybody that drinks one or two drinks every day an alcoholic. (*Id*.). He does not know if Employee is a heavy alcoholic or a little alcoholic because he does not live with him. (*Id*.). It was hard to tell whether Employee was very intoxicated or if he was just having a drink or two by observing him because he always makes "a lot of fun and jokes." (*Id*. at 13).

14) On June 13, 2019, Jim Lane interviewed Jesus Carrazco, who stated he went to Pizza Express to pick up his wife. (Jesus Carrazco Recorded Statement, June 13, 2015 at 2). Mr. Carrazco had one beer after he arrived and then his wife was ready to leave. (*Id*. at 3). He did not see Employee fall because he was in the bathroom. (*Id*.). Mr. Carrazco went to pick up his wife at about 10:00 p.m. and the accident happened at about 11:00 p.m. (*Id*. at 4). He could not tell if Employee, Mr. Saenz or Mr. Mojarro were drunk but they had been drinking. (*Id*. at 5). Mr. Carrazco did not know why Employee was going down the stairs and could not say what happened. (*Id*. at 6). He did not see anything in Employee's hands. (*Id*.). Someone screamed to call the police because Employee was on the floor. (*Id*. at 8).

15) On June 13, 2019, Jim Lane interviewed Mr. Saenz; Vanessa De La Torre translated. (Saenz Recorded Statement, June 13, 2015). He worked from 1:00 p.m. to close as a cook for Employer. (*Id*. at 3). Mr. Saenz did not work close to Employee on the day of the accident because he was working at a different station. (*Id*. at 4). He never saw Employee drinking alcohol at his station. (*Id*.). It was a busy day so Mr. Saenz focused on his work. (*Id*.). He saw Employee drinking after the shift ended. (*Id*.). Employees are provided one free meal per shift and alcohol can be purchased. (*Id*. at 5). Sometimes Employee would bring a pitcher of beer from downstairs. (*Id*.). They drink after work most Fridays. (*Id*. at 6). Mr. Saenz did not see Employee fall but Employee was going down the stairs when he fell. (*Id*. at 7-8). He was going to give Employee a ride home and they were getting ready to go home. (*Id*. at 8). Mr. Saenz did

not know what caused Employee to fall but the stairs may have been slippery. (*Id*.). Employee made two trips up and down the stairs that night to get beer. (*Id*. at 9). Employee was so happy all the time so Mr. Saenz does not know if he was drunk. (*Id*. at 10).

16) On June 13, 2019, Jim Lane interviewed Ms. Mojarro; Anthony Suarez translated. (Mojarro Recorded Statement, June 13, 2015). Mr. Mojarro worked with Employee. (*Id*. at 3). He drank beer with Employee. (*Id*. at 4-5). Mr. Mojarro bought a 16 ounce beer from the gas station on his break and drank it after work. (*Id*. at 5-6). He did not see Employee drinking while making food or cooking. (*Id*.). Employee was drunk. (*Id*. at 7-8). Employee started drinking between 8:30 and 9:00 p.m. and he was a little drunk but not really drunk. (*Id*. at 8-9). After work Mr. Mojarro drinks one or two beers he cannot drink beer from the restaurant so he buys them from the gas station. (*Id*. at 9-10). The night Employee fell, the restaurant was closing, everything was done and they were turning out the lights. (*Id*. at 10-11). Mr. Mojarro thought Employee fell because he was walking too fast but he did not look very drunk. (*Id*. at 11-12).

17) On July 17, 2019, Dr. Burton, an occupational toxicologist, performed a records review employer's medical evaluation (EME). He opined the 329mg/dL serum alcohol level corresponded to a whole blood measurement at 0.28 g/dL. Dr. Burton stated:

> There are no structural or environmental factors described that could have contributed to falling down the stairs. There are also no medical issues described in the medical records that may have led to falling down the stairs. Thus, [Employee] was fully responsible for the behavior that resulted in falling down the stairs. . . In the absence of any external factors that contributed to falling down the stairs, it must be concluded that [Employee's] alcohol intoxication was most likely the sole cause of his fall down the stairs.
>
> The measured serum alcohol and corresponding whole blood alcohol level at 0.28% represents severe alcohol intoxication and associated impairment. The impairment that occurs at a level of this magnitude dramatically increases the risk of falling, even on flat ground. Negotiating a stairway or any obstacles becomes much more difficult due to the cognitive and motor impairment caused by alcohol intoxication.
>
> It is noted by one of the physicians in the medical records that [Employee] had a problem with chronic alcoholism. Although some tolerance occurs as a result of experience with alcohol, a blood alcohol level of 0.28% invariably results in severe intoxication with impaired perception and motor responses that are uncoordinated. (Burton EME report, July 17, 2019).

18) On July 29, 2019, Employee said his memory, speech and strength were improving. However, he felt fatigue and his balance and gait were still off. Employee's wife noted he complained of mild right-sided headaches. A head CT scan revealed increasing bilateral subdural hemorrhages, right larger than left, with increased density also more significant on the right than the left. Benjamin Rosenbaum, M.D., recommended Employee go to the emergency room due to the significant increase of the subdural hematomas. He went to the emergency room and was admitted to the hospital. (Rosenbaum medical report, July 29, 2019; CT report, July 29, 2019; Ryan Corrick, M.D., emergency room report, July 29, 2019).

19) On July 30, 2019, Employee sought temporary total disability (TTD), temporary partial disability (TPD), permanent total disability (PTD) and PPI benefits, a compensation rate adjustment, medical and transportation costs, penalty for late paid compensation, interest and attorney's fees and costs. (Claim for Workers' Compensation Benefits, July 30, 2019).

20) On July 31, 2019, Dr. Rosenbaum performed bilateral burr holes for bilateral chronic subdural hematomas. (Rosenbaum Operative Report, July 31, 2019).

21) On August 3, 2019, Employee was discharged from the hospital. (Sophie Walsh, PA-C, Discharge Summary, August 3, 2019).

22) On August 16, 2019, Employer denied all benefits contending Employee's injuries were proximately caused by his intoxication based upon Dr. Burton's EME report. (Controversion Notice, August 16, 2019; Answer to Employee's Workers' Compensation Claim, August 16, 2019).

23) At deposition on November 11, 2019, Ms. Barragan testified she married Employee in April 1985. (Mary Barragan Deposition, November 11, 2019 at 5). She heard about Employee's work injury from his niece at about 9:00 a.m. on May 4, 2019, because his niece got a text from Employee's brother. (*Id*.). Employee was already in Anchorage and was in critical condition. (*Id*. at 6). Ms. Barragan occasionally drinks a glass of wine with Employee but not very often. (*Id*. at 6). He worked six days a week but the days were always different. (*Id*. at 13). Sometimes Employee would go into work early and had a couple hours break in the middle of the day. (*Id*.). He probably had a drink, either beer or wine, when he got home from work. (*Id*. at 13). She remembered Employee drinking with his brother and getting drunk. (*Id*. at 13-14). Ms. Barragan did not think he had a drinking problem before the work injury. (*Id*. at 14). He would have a glass of wine at the end of the night and he went out maybe once a month or every

few months or so with his friends. (*Id*. at 14). Employee was a drinker but he did not normally go overboard. (*Id*. at 15).

24) At deposition on November 11, 2019, Hector Barragan testified he owns, manages and supervises Pizza Express. (Hector Barragan Deposition, November 11, 2019 at 4). Employee is his older brother. (*Id*. at 5). On May 3, 2019, Hector worked until 8:00 p.m. and left. (*Id*. at 7). He came back to get something to eat around 10:00 p.m. (*Id*.). No drinking is allowed during shifts. (*Id*.). Employees are verbally told that. (*Id*. at 8). Hector did not have any knowledge of Employee drinking during his shift. (*Id*.). He knows Employee well and can tell when he has had a significant amount to drink because his attitude, his humor, the way he moves his hands and the way he speaks is different when he is under the influence. (*Id*. at 9). After the restaurant closes, employees are allowed to have "a drink or so" with their employee meal. (*Id*. at 10). There is no strict rule on how much alcohol they can have but the business closes between 10:00 p.m. and 10:30 p.m. and everyone leaves at 11:00 p.m. so they can only drink one or two beers after work. (*Id*.). Most days Hector leaves early and Ms. Carrazco, the manager, closes the restaurant. (*Id*. at 11). He did not recall seeing Employee intoxicated or under the influence of alcohol during his shift. (*Id*.). Only employees trained for serving alcohol are allowed to touch it and serve it, including the manager, waitresses and Hector. (*Id*. at 12). Employee drank outside of work. (*Id*.). When asked if Employee had a problem with drinking excessively, Hector replied, "he was a little bit more than drinking than the normal. I cannot really testify for him but he looked – he had a little bit too much that if he – I don't know. He didn't seem to be completely sober" when he returned around 10:00 pm. (*Id*. at 13). He saw Employee drinking a little bit of wine and saw he was a little under the influence. (*Id*.). Hector offered Employee some of the meal he cooked so he could sober up a little but he refused it. (*Id*.). When he first saw Employee his wine glass was empty and after Hector cooked his meal, Employee's glass was full so he probably went down and got a glass of wine. (*Id*. at 14). It was never okay for Employee to serve himself alcohol. (*Id*. at 15). Ms. Carrazco finished her paperwork and he went to his office to get his things together and he heard her scream Employee just fell down the stairs. (*Id*. at 16). Hector did not think anyone saw Employee fall except maybe Mr. Mojarro. (*Id*.). He checked on Employee and tried to pick him up and told Ms. Carrazco to call 911. (*Id*.). He followed the ambulance in his truck and called his brother Oscar. (*Id*. at 16-17). Both he and Oscar went to the hospital. (*Id*. at 17). Hector told the hospital staff Employee fell down the

stairs. (*Id*.). Mr. Mojarro said Employee missed a step and fell down but Mr. Mojarro did not go to the hospital. (*Id*.). Hector went to Anchorage and stayed 15 days with Employee. (*Id*. at 19-20). He talked to Ms. Carrazco and asked her to put a report together for him about the accident and she never did. (*Id*. at 20). Mr. Mojarro told Hector he had a bottle of alcohol in the back from the liquor store. (*Id*. at 21). Employees stayed after work and had drinks once or twice a week on a regular basis. (*Id*. at 22). Employee worked from morning until 2:00 p.m. and then from 4:00 to 9:00 p.m. (*Id*. at 23). The dining area, sandwiches and Mexican area closed at 9:00 p.m. and pizza is cooked and delivered until 10:00 p.m. (*Id*.). Employee was reliable and showed up on time. (*Id*. at 24). The restaurant has two levels, upstairs has the kitchen, front area, office and restrooms. (*Id*. at 25). A metal cart is always at the bottom of the stairs and the waitresses put dirty dishes on the stainless steel cart. (*Id*. at 26). Employee got off at 9:00 p.m. that day. (*Id*. at 29). If employees wanted more than one or two complimentary drinks, they had to pay for it. (*Id*. at 31). They keep the register open until 10:00 p.m. (*Id*.). A couple of other employees have fallen down the stairs when it gets really wet outside because the delivery drivers go up and down the stairs. (*Id*. at 35). He did not remember the stairs being wet that night. (*Id*.).

25) At deposition on November 11, 2019, Ms. Carrazco testified she is the manager at Pizza Express. (Carrazco Deposition, November 11, 2019 at 4-5). Employee worked six days a week from 9:00 am to 2:00 p.m. and 4:00 p.m. to closing. (*Id*. at 5-6). He worked in the kitchen. (*Id*.). Ms. Carrazco gave Employee four ounces of wine and a pitcher of beer for the guys after 9:00 p.m. (*Id*. at 6-7). The kitchen line closed at 9:00 p.m. and the pizza line closed at 10:00 p.m. (*Id*. at 7). Lupe cooked pizza until 10:00 p.m. (*Id*.). Employees can drink after work or with their meal but they cannot drink while working. (*Id*. at 8). Ms. Carrazco did not provide any other wine or beer that night. (*Id*. at 9-10). The employees were not allowed to pour themselves alcohol because they were not trained for Training for Alcohol Professional Service (TAPS). (*Id*. at 10). She never saw Employee drinking during his shift. (*Id*.). After the kitchen line closed at 9:00 p.m., Ms. Carrazco had to do paperwork, so she was going up and down the stairs and was waiting for the pizza delivery driver. (*Id*. at 11-12). She never saw Employee or any of the employees go downstairs to refill their alcohol. (*Id*. at 12). Ms. Carrazco offered Employee food because he told her he had not eaten. (*Id*.). She saw Employee intoxicated outside of work. (*Id*. at 13). Ms. Carrazco did not see Employee fall. (*Id*. at 14). She told

everybody to go home and went to the office to speak to Hector. (*Id*.). Ms. Carrazco's husband came to pick her up and told her that Employee fell and she told Hector. (*Id*. at 14-15). On Friday she usually waits until 11:00 p.m. before closing because she waits on the pizza delivery driver to return. (*Id*. at 17). Ms. Carrazco never saw Employee drunk or impaired at work. (*Id*. at 18). She did not remember any employee buying a drink that night. (*Id*. at 19). Employees cannot buy alcohol after the register is closed. (*Id*. at 21). Ms. Carrazco closed the register while she was waiting for the last delivery driver to return. (*Id*.). Employee was not supposed to serve himself alcohol but he probably did. (*Id*. at 23). She did not see him serve himself alcohol. (*Id*.).

26) At deposition on November 11, 2019, Mr. Saenz testified he cooks Mexican food at Pizza Express and has known Employee for 10 years. (Saenz Deposition, November 11, 2015 at 5-6). Employee worked on the pizza side of the kitchen and delivers food. (*Id*. at 6). He can see Employee while working as he is about 10 feet away. (*Id*.). Lupe worked with Employee on the pizza side. (*Id*.). Mr. Mojarro was washing dishes in the kitchen. (*Id*. at 7). Mr. Saenz normally worked 12:00 to 9:00 or 10:00 p.m. (*Id*.). Employee came in that evening at 4:00 or 4:30 p.m. (*Id*. at 8). He never saw Employee drink during his shift, only after finishing work. (*Id*.). Employees are not allowed to drink alcohol during their shift but sometimes the boss gives them a pitcher of beer when they start cleaning after the restaurant closes. (*Id*.). Ms. Carrazco brought them a pitcher of beer and Employee brought another one. (*Id*.). Mr. Saenz believed Employee had one glass of wine and two beers. (*Id*.). He was not allowed to serve himself alcohol and he never paid for drinks after work. (*Id*. at 9). Unusually they have one or two beers and then everyone goes home on Fridays or Saturdays but not every Friday or Saturday. (*Id*.). No one brings alcohol in from outside the restaurant and Employee never bought alcohol and brought it in the kitchen while working. (*Id*.). Mr. Saenz stayed about an hour after work and then it was time to go home. (*Id*. at 10). Normally Ms. Carrazco or Hector decides it was time to leave. (*Id*.). He was planning on giving Employee a ride home the day of the accident because he thought Employee had already drank more than normal. (*Id*.). Employee told him he was a little bit tired and they live "on the same way" so he told him he would give him a ride home. (*Id*. at 10-11). Mr. Saenz did not see Employee drink more than two beers and a cup of wine and did not see him drinking while working. (*Id*. at 11). Employee did not seem intoxicated or drunk because he could drink 10 beers and still have the same facial expression. (*Id*.). He has seen

Employee drink more on other occasions outside of work and he has never seem him at work looking the way he looks after drinking more than 10 beers. (*Id*). Mr. Saenz did not see Employee fall down the stairs but saw him at the bottom of the stairs. (*Id*. at 11-12). He heard something fall on the floor but did not hear Employee yell or scream. (*Id*. at 12). Mr. Saenz did not see anyone with Employee on the floor. (*Id*.). He believes he was the first person to see Employee because he was the first to get to his side. (*Id*. at 13). Mr. Mojarro was with Mr. Saenz that night. (*Id*.). Employee had on one or two occasions brought beer at the gas station and they drank it after work. (*Id*.). It takes 30 minutes to one hour to clean the kitchen. (*Id*. at 14). The beer was brought to them after they cleaned. (*Id*. at 15). Employee used to go downstairs to get more alcohol. (*Id*. at 15). Mr. Saenz did not remember the stairs being wet or slippery that night but "there is water around all the time" because it rains a lot in Sitka and employees go up and down the stairs with deliveries 20 to 30 times per day, they take out the trash and they wash dishes upstairs. (*Id*.). The carpet on the stairs is very old and deteriorated. (*Id*.). He has never slipped and fallen on the stairs but his co-workers have in the past. (*Id*. at 16).

27) At deposition on November 11, 2019, Employee testified he cooked pizza at Pizza Express but could also cook Mexican food. (Employee Deposition, November 11, 2019 at 14-15). Lupe cooked most of the Mexican food and Mr. Mojarro was the dishwasher. (*Id*.). Employee does not remember the day he fell down the stairs. (*Id*. at 15). Hector told him not to drink at work but employees drank when they got off work. (*Id*. at 16). Employee also got a free meal after work. (*Id*.). Mr. Saenz sometimes ordered drinks but sometimes Employee took drinks. (*Id*.). Wine was his favorite but he also drank beer. (*Id*. at 17). Mr. Saenz and Employee would drink on the weekend but not every night. (*Id*.). When asked how much he drank after work, Employee said he drank sometimes one glass of wine and the "last time" he probably had four. (*Id*. at 17-18). Once he picked up a couple tiny bottles of whiskey at the gas station. (*Id*. at 18). The waitresses and Ms. Carrazco can pour drinks but sometimes he poured his own. (*Id*. at 20-21). Employee did not drink on his breaks but he drank after close. (*Id*. at 21). Before employees drink, the refrigerators, counter and floors must be cleaned, which takes about a half hour. (*Id*. at 22). He stayed an hour or two after work to drink. (*Id*. at 22-23). They got out of the kitchen sometimes later than 9:00 p.m. and then Ms. Carrazco did the books. (*Id*. at 23). After she finishes the books they have to leave. (*Id*.). The dining room table used by employees

to eat and have drinks is upstairs. (*Id*. at 28). The kitchen is also upstairs. (*Id*.). Employee remembered falling down the stairs once before when delivering four pizzas and he ended up on his knees to save the pizzas. (*Id*. at 30-31). He was never told by a medical professional he had a drinking problem and he did not think he had a drinking problem. (*Id*. at 34-35). Employee has never been intoxicated at work. (*Id*. at 35). Before the work injury he drank two times a week. (*Id*.). Sometimes Employee goes downtown with his friends to a bar. (*Id*. at 35-36). Sometimes he drinks wine with his wife. (*Id*. at 36).

28) On November 25, 2019, Employee reported his ambulation was not back to baseline and he had difficulty with memory and word finding. A November 14, 2019 head CT demonstrated persistent bilateral frontal region subdural blood products slightly improved compared to the September 16, 2019 CT. Employee was advised to follow up in two months with an updated head CT. (Rosenbaum, progress note, November 25, 2019).

29) On January 7, 2020, Steven Jozwiak, Ph.D., issued a psychological assessment based upon evaluations of Employee from January 2 to January 4, 2020. He diagnosed a diffuse TBI with loss of consciousness for an unspecified duration and major neurocognitive disorder due to the TBI. Dr. Jozwiak found lower than expected visual-motor coordination, significant cognitive slowing and significant deficits in short-term memory and processing speed, likely representing a decline from pre-injury cognitive functioning based on his work history and scores during testing. He referred Employee for further assessment of speech and language therapy and occupational therapy. (Jozwiak psychological report, January 7, 2020).

30) On January 30, 2020, Employee reported occasional tickling like sensation in his head and his ambulation was not back to baseline. His January 22, 2020 head CT scan revealed persistent probably subacute subdural hemorrhages over the frontal lobes bilaterally slightly smaller and less dense than on his previous scan. It would likely take additional time for the subdural hematomas to resolve and it was possible they may not completely resolve. Employee was referred to physical therapy for his balance concerns and was recommended to follow up in three months with an updated head CT. (Rosenbaum, progress note, January 30, 2020).

31) On February 7, 2020, Dr. Henson issued a report after reviewing Dr. Burton's EME report, medical records and Employee's, Hector's, Ms. Barragan, Mr. Saenz and Ms. Carrazco depositions. He concluded the blood alcohol test conducted by the hospital was not forensically reliable because there are many issues associated with a single point in time test using a serum

sample. For example, (1) the result was a single point value even though there was opportunity for additional testing, (2) there was no measure of uncertainty provided for the result, (3) the test results had a disclaimer it was "for medical purposes only," (4) there was no information regarding skin preparation, (5), lactate and lactate dehydrogenase interference can significantly affect clinical results using the serum test performed by the hospital, (6) there was no information regarding the tube used for the test and whether it was subject to recall, (7) there was no chain of custody, and (8) there is no ability to have the sample retested. The serum test is used to determine whether there is "alcohol onboard" at the time of collection but is not used to determine to a reasonable degree of scientific certainty alcohol intoxication. Dr. Henson concluded the 0.28 blood alcohol concentration was not supported by any mental or behavioral manifestations associated with alcohol intoxication. He contended no evaluation was performed to determine physical and mental impairment due to alcohol consumption. Dr. Henson stated Dr. Burton's contentions are based only upon a clinic serum alcohol sample and absent the value, no one would have concluded alcohol intoxication caused Employee to fall down the stairs. He argued Dr. Burton concluded alcohol intoxication was the proximate cause of Employee's work injuries based upon an implication the serum value proves intoxication. Dr. Henson opined it cannot be determined that alcohol intoxication was contributory to the fall and subsequent injuries because absent the serum test result, there is no supporting evidence of mental and physical manifestations to support the result. (Henson Report, February 7, 2020).

32) At deposition on February 12, 2020, Dr. Burton testified routine laboratory studies in the emergency department for trauma patients often include alcohol level. (Burton Deposition, February 12, 2020 at 7). There are procedures in place to ensure the blood taken from the patient is tied to the patient. (*Id*.). A band is placed on the patient's wrist and it has a hospital number and the band is scanned and tags are made for any blood test to ensure it matches the patient and the result. (*Id*. at 7-8). The procedures are in place to ensure the test results match the patient because the result can determine the medical procedures taken. (*Id*. at 8). Employee's blood alcohol level was 0.28. (*Id*. at 9). For Employee to achieve a blood level that high would require extensive experience with alcohol and he would have some tolerance to alcohol. (*Id*. at 11). However, at a level that high, virtually everyone would be severely impaired regardless of tolerance. (*Id*.). Dr. Burton expected Employee would have impaired motor responses, like difficulty grabbing a handrail, perceiving the depth of steps and making an appropriate response.

(*Id*. at 12). But the impairments may not be observable. (*Id*.). Employee was severely intoxicated at the time of the fall due to his blood alcohol level. (*Id*. at 13, 15). Intoxication describes impairment in perception, thinking and ability to perform motor responses. (*Id*. at 14). In operating a motor vehicle, impairment is defined as anything over a 0.08, even if the person does not appear intoxicated or does not have any observable impairments because at that level, the ability to perceive the environment and make judgments about the environment is impaired and is compounded by an inability to appropriately execute the proper motor response. (*Id*.). Simply walking can be a challenge for someone with a blood alcohol level of 0.28. (*Id*.). The variability discussed by Dr. Henson in his report would be very minor and would not affect the level of this magnitude. (*Id*. at 15-16). A significant difference can occur if someone has severe anemia or very thick blood but the blood alcohol level is so high in this case it would not be a significant difference. (*Id*. at 16). The blood test used on Employee tested only the serum or liquid part of the blood where the whole blood method using gas chromatography in a crime lab would test lower because it tests the head space of the entire sample. (*Id*.). Over the 30 years or so Dr. Burton has been comparing hospital samples to crime lab samples, he has found they are always consistent, indicating both techniques are appropriate for measuring the blood alcohol level. (*Id*. at 16-17). The hospital test is equally as reliable as a whole blood test. (*Id*. at 17). He disagreed with Dr. Henson's conclusion Employee's blood alcohol level could not have been 0.28 since he did not appear drunk because patients can have very high alcohol levels and not appear intoxicated. (*Id*. at 17-18). There have been a few studies showing it is unreliable to rely on visible signs of intoxication, one was in the Journal of Emergency Medicine. (*Id*. at 18). Dr. Burton disagrees with Dr. Henson's statement that more than one blood sample is necessary. (*Id*. at 19). Disclaimers on testing results are included to keep hospital staff from getting involved in forensic issues. (*Id*. at 20). When Employee came in to the emergency room, his blood was drawn as a medical test to determine whether he was intoxicated or not. (*Id*.). It has been theorized that lactate will interfere with the test using the enzymatic method the hospital used and if someone has a severe injury and goes into shock and lactate is released in the blood. (*Id*. at 22-23). Dr. Burton researched the issue and found it made no difference in blood alcohol level results in studies. (*Id*. at 24). Most hospitals use isopropyl alcohol, Betadine or iodine to swab in preparation for a blood draw to test alcohol levels as using alcohol to clean the skin could taint the test. (*Id*. at 24). Studies have shown the only time using alcohol in preparation for a blood

draw affected the blood alcohol level was if a vacuum tube was used, a pool of alcohol was left on the skin and the needle was pulled out while still aspirating; and the difference was very small, one milligram per deciliter. (*Id*. at 24-25). Dr. Burton looks at the blood alcohol level to determine whether intoxication caused the injury and Employee's level was sufficient to cause impairment. (*Id*. at 27). When there is "no environmental explanation for the fall," then "alcohol intoxication would at least the measure or the sole cause of the fall." (*Id*. at 28). If Employee missed a step while walking down the stairs, it would be consistent with alcohol intoxication. (*Id*. at 29). Based on Employee's weight and the fact he got off work at 9 p.m. and the fall happened around 11 p.m., Dr. Burton concluded he consumed 14 servings of alcohol. (*Id*. at 30). If witnesses testify Employee only consumed up to three servings of alcohol, he must have started consuming alcohol before 9 p.m. (*Id*. at 31). Dr. Burton did not assess whether Employee's head injury was a result of striking the cart at the bottom of the stairs or something else. (*Id*. at 34-35). The National Highway Transportation Administration publishes the best standardized, objective measure of intoxication, which is what he used to determine Employee was severely intoxicated. (*Id*. at 39-40). Employee would have to have a lot of experience with alcohol to get to 0.28 and still maintain any sort of consciousness. (*Id*. at 50). According to medical guidelines, a person must drink more than five drinks per day, every day to be classified with an alcoholic use disorder. (*Id*.). When determining whether Employee was a chronic alcoholic, Dr. Burton would consider the test results more reliable than the history of drinking behavior provided in the medical record. (*Id*. at 51). "[D]rinking histories are notoriously inaccurate, one has to rely on the hard data to form a reasonable conclusion." (*Id*. at 51-52).

33) On April 30, 2020, Employee said he was slowly getting better with time. His mind was working well but his body often became fatigued after a few hours of activity. His April 22, 2020 head CT demonstrated further slight reduction in subdural fluid and blood products. Employee was recommended to follow up in four months with an updated head CT. (Rosenbaum, progress note, April 30, 2020).

34) On May 1, 2020, the State of Alaska claimed a Medicaid lien upon any sum Employee receives from a third-party for medical assistance provided until May 1, 2020, for treatment of injuries sustained on May 3, 2019, in the sum of $170,454.46. The letter informed Employer the state has statutory assignment, lien, and subrogation rights arising out of the Medicaid payments

made on behalf of Employee and welcomed participation in settlement negotiations to resolve any issues surrounding its lien and reimbursement rights. (Letter, May 1, 2020).

35) On June 6, 2020, Employer denied all benefits contending Employee's injuries were proximately caused by his intoxication based upon Dr. Burton's EME report and his injury, condition and disability did not arise out of or in the course and scope of employment. (Amended Controversion Notice, June 6, 2020).

36) On June 24, 2020, Employer amended its answer to Employee's July 30, 2019 claim by contending Employee's injury, condition and disability did not arise out of or in the course and scope of employment. (Amended Answer to Employee's Workers' Compensation Claim, June 24, 2020).

37) On June 30, 2020, Employee filed exhibits including pictures of Pizza Express. Bates Number 00112 is a picture of a stainless steel metal cart at the bottom of the stairs in Pizza Express. The cart has three shelves and the top shelf is bent in a downward "v" shape. Bates Numbers 00108 and 00126 are pictures of the stairs taken from the bottom. The stairs are covered in a gray patterned carpet; the carpet is discolored and appears black in very middle of the steps. There are little to no carpet fibers left in the middle of the stairs. Bates Number 0104 includes a picture of the stair case taken from the top. There is railing on both sides of the stairs and the metal cart takes up half the width of the stairs at the bottom landing. (Exhibits, Affidavit of Service, June 30, 2020; Observation).

38) On July 1, 2020, Employee filed a print-out from timeanddate.com with historical weather information for May 3, 2019. It indicates there was light rain and drizzle throughout the day on May 3, 2019, including light rain at 10:07 p.m. (Notice of Intent to Rely, July 1, 2020).

39) On July 8, 2020, Employer requested a Social Security offset pursuant to AS 23.30.225(b), contending Employee's reduced weekly rate was $175.77 after the offset. (Petition, July 8, 2020; Memorandum in Support of Petition for Social Security Offset, July 8, 2020).

40) On September 4, 2020, Employee reported he was doing well and had no concerns. Employee's nurse coordinator stated they were planning on setting up supported employment with a modified activities schedule. Dr. Rosenbaum recommended Employee continue to abstain from alcohol and have an updated head CT in one year. (Rosenbaum progress note, September 4, 2020).

41) On September 18, 2020, Employee agreed Employer is entitled to the Social Security offset and his weekly rate should be $175.77 during weeks he collects both workers' compensation and Social Security Disability. (Employee's Answer to Petition, September 18, 2020).

42) On September 18, 2020, Michael Villanueva, Psy.D., ABPP-CN, a neuropsychologist, examined Employee for an EME. He found no indications of significant impairment in verbally based reasoning or visual spatial reasoning skills but found Employee's auditory attention span and working memory, an executive function, was on a more likely than not basis impaired and different compared to preexisting abilities. Employee demonstrated difficulties holding information in his mind and performing mental calculations. However, his executive deficits were quite mild. Employee's ability to learn and remember verbally provided information was below normal limits, within the mildly impaired range. He had mild difficulties overall with visual spatial organization. Dr. Villanueva opined Employee reached medical stability after reviewing his current examination results to those obtained in January 2020. He assessed a 20 percent PPI rating. The treatment Employee received, including speech and occupational therapy, was reasonable and necessary from a neuropsychological standpoint. The speech therapy once a week was reasonable and necessary. Ongoing care would reasonably assist him with participating in a reemployment plan or returning to work in some capacity. (Villanueva EME Report, September 18, 2020).

43) On October 5, 2020, Employee filed an affidavit of counsel and itemization of costs incurred from July 31, 2019 to May 5, 2020, totaling $3,905.19. (Affidavit of Counsel, October 5, 2020).

44) At hearing on October 13, 2020, Employee testified the main kitchen is upstairs and the main dining room is downstairs in the restaurant. The dining area and the kitchen closed at 9:00 p.m. and then clean up would begin. The pizza line stayed open until 10:00 p.m. on Fridays and Saturdays. It normally takes 20 to 30 minutes to clean the kitchen. Most days Employee made pizza. If he delivered pizza he would work later, until 10:30 to 11:00 p.m. The steel cart is still left at the bottom of the stairs. It was damaged when he fell down the stairs. The waitresses leave dirty dishes from the main dining room on the cart for the kitchen staff. Wine and beer is served downstairs at a station next to the dining area. Drinking was not allowed when employees were working. Employee remembered drinking beer right before close while cleaning the kitchen on a few occasions but employees were not allowed to drink while working. Employees were allowed to drink after work, they did so once or twice a week. He never poured

alcohol for himself during working hours. It would not be possible for Employee to serve himself during work hours without coworkers observing him taking the alcohol. He does not remember the night of the work injury. It would not be possible for Employee to work in the kitchen while drunk, he would not be able to keep tickets straight or make pizzas correctly because it was a busy kitchen. There are two ovens for baking pizzas and there is no way he could do his job while drunk. Sometimes after customers left at closing Employee served himself alcohol but when the restaurant was open to customers he did not. Ms. Carrazco is the only one who can serve alcohol after close. Employee remembered stopping and buying small bottles of alcohol at the gas station once when he delivered pizza for a month but he never drank alcohol while delivering pizzas. Mr. Mojarro probably drank at work, he was the dishwasher and worked by himself. Hector told him once he could not drink while working. (Employee).

45) At hearing on October 13, 2020, Ms. Barragan testified Employee never needed alcohol intervention or treatment. He was a drinker; he would drink with his friends but she would never call him an alcoholic or a chronic alcoholic. There were stressful times in the past when Employee drank more. He is a super hard worker and proud of his hard work. No one ever told Ms. Barragan that they thought Employee had a drinking problem. They live in a small one bedroom trailer and there is no way he could hide drinking alcohol. Ms. Barragan never found alcohol hidden in the house or empty containers. She does not think it is possible for Employee to be drinking as much as Dr. Burton opined. Someone would have noticed he was drunk. Ms. Barragan learned about the injury the next morning. His niece came over at about 9:00 a.m. and told her Uncle Oscar sent her a message Employee had an accident. Ms. Barragan was quite shocked. She first heard Employee called an alcoholic by the claims adjuster. He had never been diagnosed as an alcoholic, had any issues with alcohol or had to go to the doctor. Ms. Barragan has never been able to determine how the label chronic alcoholic got into his medical record at the time of the work injury. Someone must have said it to the fire department and doctors at the hospital at the time of the injury. Employee is slowly and gradually improving. (Ms. Barragan).

46) At hearing on October 13, 2020, Dr. Henson testified he has been involved in drug and alcohol related investigations for over 40 years. He started as a police officer specifically trained in drugs and alcohol and worked undercover for a period of time. Dr. Henson moved into other arenas and became an instructor in 1986 at the University of Illinois and worked at the police

academy. In 1988 he was put in charge of the drug and alcohol testing and investigation program until 1993-1994. Dr. Henson worked as an independent consultant while working on his advanced degrees. In the early 2000s, he started a drug and alcohol testing laboratory for workplace environment and federal regulations. Dr. Henson sold the laboratory when he became in professor at Iowa Wesleyan College and remained as a consultant with the laboratory. He switched to online teaching when his consultant work took over his schedule and interfered with his ability to teach as a professor. Now Dr. Henson works exclusively as a consultant in civil and criminal cases and employment and arbitration hearings. He reviewed Mr. Mojarro's statement after he wrote his report and it did not change any of his opinions. Comparative testing of multiple tests taken over time can ferret out inaccuracies and unreliability with tests. There can be a variety of reasons why a test may be inaccurate. In this case there is a single test with no behavioral observations supporting its result. There was no other evidence, other than the blood test performed at the emergency room, to support the conclusion Employee was impaired due to alcohol. Serum alcohol testing was used to test Employee's blood. It separates the blood serum from the whole blood sample. The test performed by the hospital looks for chemical interaction and reaction in the process of the testing. It is a quick test which is why hospitals use it instead of waiting hours to get results. A higher level specificity testing called gas chromatography mass spectrometry testing is used by police and law enforcement and results take several hours. Emergency departments are looking to determine whether an individual has alcohol "on board" to make treatment decisions. The testing becomes an issue when using the results in the legal arena as a forensically reliable result and it does not meet the standard. The gold standard testing in blood alcohol testing uses whole blood and gas chromatography mass spectrometry to make determinations on reliability and reduce possible inference from volatile compounds. Forensic custody also involves chain of custody, proper sealing of specimens, printed labeling and adding preservatives to ensure the specimen integrity for testing in the pre-analytical process. An alcohol skin swab is common in the clinical setting to prepare to take the blood specimen and forensic testing kits use non-alcoholic skin swabs. There have been mass recalls on forensic testing kits which compromised the reliability and integrity of the specimen. Dr. Henson finds disclaimers on hospital records all the time. In this case, the disclaimer stated the result does not have a chain of custody which should be used in a court setting. Trauma can cause a cross reactivity with lactic acid, a known condition that can interfere with the results of

the blood alcohol test. It is helpful to have a second test using forensic level testing to make a comparison to test result from the emergency room as irregularities can occur. For example, an alcohol based swab can cause a blood serum test to be falsely positive. Dr. Henson opined it cannot be proven with a reasonable degree of certainty that Employee was impaired when he fell down the stairs. He acknowledged Dr. Burton's conversion from mg/dL to g/dL was a "good average conversion" and that motor skills, vision and critical judgment would be impaired at a 0.28 blood level. Dr. Henson was not aware of any specific hospital procedure regarding the test completed in this case. He would not rely on the blood serum test conducted by the hospital alone to determine whether an individual was impaired. He found Mr. Mojarro's statement to be inconsistent and unreliable because he stated Employee was drunk at one point and at another stated Employee did not look drunk. (Dr. Henson).

47) At hearing on October 13, 2020, Dr. Burton testified the hospital disclaimer refers to the urine and alcohol tests and the reason the disclaimer is included is because it is intended for treatment and evaluation for medical issues. The police and law enforcement have a different method to analyze drug and alcohol. It does not mean that one test is better or more accurate than another. Legal issues come into play rather than the validity of the lab tests. The hospital uses a serum test for blood alcohol level but law enforcement is required to use a whole blood method. The results are expected to be different but it is a simple matter to convert one result to the other. Dr. Burton always converts the hospital blood serum level to the whole blood method. The blood serum test tends to be 15 percent higher than the corresponding whole blood method so there is a standard conversion factor to correlate the results. The tests are equally reliable. Dr. Burton conducted a study comparing whole blood, breathe and serum levels and if you make the proper conversion, all of the techniques are reliable. In the majority of drunk driving cases that he has seen, observations of the driver prior to the crash rarely indicate visible signs of intoxication. The absence of visible signs of intoxication is not a predictor of intoxication or blood alcohol level. Dr. Burton relies on the laboratory testing and the test performed by the hospital is just as reliable as law enforcement testing. In many ways there are more safeguards at the hospital in the sampling, identification, labeling, transportation and handling of the specimen. If the hospital blood serum test was not reliable it would not be used because it is used to make life and death decisions. It would be unconscionable to use a test that cannot be relied upon. Dr. Burton started out in emergency medicine for the first 10 years of his practice and he transitioned

into medical toxicology, leading ultimately to occupational toxicology. Someone who does not drink much will experience the effects of alcohol in a much more profound way. Dr. Burton has seen patients with a blood alcohol level barely over 0.08 barely conscious because they do not have any tolerance. A person can become somewhat tolerant and learn to avoid showing visible signs of intoxication. The 0.28 level indicates significant alcohol impairment but does not predict degree of impairment. Some people appear to seem normal if they have experience with alcohol. It is not unusual that Employee's blood alcohol level was that high but did not show any obvious signs of impairment. A drinking history is notoriously unreliable and persons with alcohol use disorder or alcoholism can go to great lengths to hide consumption, including hiding bottles, concealing bottles and consuming alcohol before a social event and continuing consuming alcohol after the social event. The best comparison for impairment when taking blood alcohol level into account is the ability to operate a motor vehicle, which Dr. Burton acknowledged requires some skills beyond walking down stairs. The risk of crashing with 0.08 blood alcohol concentration is five times higher than a sober person, at 0.28 it is somewhere around 100 times greater. Cognitive impairments, difficulty with perception, recognizing features in the environment and executive function for decision making are impaired at higher levels of blood alcohol concentrations. Walking requires balancing and walking down stairs requires more balance. Alcohol impairs the ability to judge the body's position in space and execute motor functions, like grabbing a handrail. Dr. Burton opined a blood alcohol concentration of 0.28 indicates severe impairment. Next, he evaluated the environment and found there were no environmental factors that would unavoidably result in the accident, so he concluded the alcohol was the proximate cause of the accident. Multiple samples are not required to have a reliable blood alcohol test result. Dr. Burton opined Employee would have had to consume 14 servings of alcohol to get to 0.28 if he started drinking after work. If Employee only consumed three or four drinks after work, he must have started drinking earlier to have a blood alcohol concentration that high. There are rarely clinical indications in the emergency department which would call for multiple blood alcohol tests. Hospital laboratories are audited to ensure the tests are accurate or reliable or they are not certified to carry out those types of tests. The fact no one testified they saw Employee consume 14 servings of alcohol does not mean the blood alcohol concentration result was incorrect. Impairment can predicted by blood alcohol concentration but not behavior. People can carry out activities they are

comfortable with and practiced in completing without observable behaviors indicative of alcohol intoxication. Social behavior like talking louder, laughing, joking and walking faster do not indicate alcohol intoxication. (Dr. Burton).

48) At hearing on October 13, 2020, Ms. Carrazco testified she is the manager at Pizza Express. She has known Employee since the 1990s. Ms. Carrazco was working on May 3, 2019. Employee was making pizza. Hector left for a few hours. The employment policy is one complimentary drink after work. Only the TAPS servers are allowed to serve alcohol. She served Employee at 9:30 p.m. with a little cup of wine, not even eight ounces, and a pitcher of beer for Mr. Saenz and Mr. Mojarro. Employee was talkative. Ms. Carrazco did not know whether he had anything else to drink that night because she was waiting for the last delivery driver and finishing paperwork. She was going up and down the stairs many times to do the paperwork. Ms. Carrazco did not notice the stairs were wet that night and did not experience trouble negotiating the stairs. She went back upstairs after the delivery person came back and finishing the last of the driver's tickets for tips. Employee and the other guys were at another table and he was talking too loud. He was drunk and she did not serve him any more alcohol. Ms. Carrazco did not ever see Employee look intoxicated at work before. She was trained to look for signs of intoxication for her TAPS training. Employee was not allowed to serve himself alcohol because no one can get any drinks without her or Hector's permission. Ms. Carrazco told Employee to eat. She saw Employee drunk in the past outside of work. Ms. Carrazco knew Employee drank but not every day. She did not see Employee fall. All employees knew drinking was only permitted after closing. Ms. Carrazco never saw Employee serve himself alcohol at work. She works at the alcohol station downstairs next to the dining room during her shift. Employee finished his shift at 9:00 to 9:15 p.m. Ms. Carrazco provided Employee alcohol at about 9:30 p.m. She went to the upstairs office after she got Employee a drink. But Ms. Carrazco kept going up and downstairs to help until about 10:30 p.m. She noticed Employee was talking too loud and his face was red, he was drunk. But Ms. Carrazco was not paying attention to see whether he served himself alcohol. She did not remember testifying at deposition that she never saw Employee drunk at work. Ms. Carrazco never told anyone that Employee was a chronic alcoholic. He did not make mistakes while cooking that night or during any other shift. She did not believe someone could work while drunk in the kitchen without making mistakes and getting fired. Ms. Carrazco's opinion regarding Employee's drinking was

affected by the blood alcohol test result. She is aware Employee testified he served himself alcohol which made her believe he was hiding his drinking. (Ms. Carrazco).

49) At hearing on October 13, 2020, Hector Barragan testified he owns Pizza Express. Employee is his older brother. On May 3, 2019, he left at 7:00 p.m. and he came back around 9:30 p.m. The work policy is no drinking during work. When employees are hired, they are told they cannot drink while working. Hector told Employee not to drink at work. Only employees trained to serve alcohol may serve alcohol and employees are not allowed to serve themselves. He told Employee he was not to serve himself alcohol. After work employees are allowed one beer or wine. Hector came back around 9:30 p.m. to make himself a meal in the kitchen. He saw some of his employees drinking in the second level. Hector did not know how much they were drinking. He encouraged Employee to have a meal. Hector ate with the employees and went into his office. He told everyone to go home. Hector was there when the ambulance came and he called his other brother. He believes the fire department was told Employee had a history of alcohol abuse by the other employees because a police officer questioned them. Hector went to the emergency room but did not speak with anyone about Employee's drinking. He did not see any employee intoxicated at work before Employee was injured. Employee drank on a regular basis, almost every day he had a few drinks after work. Hector found a couple empty beer containers at work in the trash a few times and knew at least one of his employees was drinking them. He went to Anchorage and stayed 15 days with Employee. Hector called his insurance agent the Thursday after the accident and reported Employee's work injury. Mr. Mojarro told Ms. Carrazco after the injury that alcohol from the gas station was brought into work. A couple people have slipped on the stairs before, Hector could not remember if the stairs were wet. He did not think employees could serve themselves drinks during working hours without being seen by other staff. Hector knew Employee served himself drinks on one or two occasions after closing. He never reprimanded Employee for serving himself because he was his older brother and he has a lot of respect for him. Hector would never fire Employee and would never make him pay for drinks. He is close to Employee. Hector tried to cut Employee off that night, told him to stop drinking as much as he was drinking and tried to get him to eat. Employee did not want to eat anything. He saw Employee pouring himself a "good sized" glass of wine when he returned to work. His employees were already "under the influence" when he returned. Hector confirmed seeing Employee's wine glass refilled later that night so he knew

Employee had served himself wine. Employee was a reliable worker, he arrived on time and did not make mistakes. Hector was not sure how much Employee drank the night of the accident but it was enough to be "a little intoxicated." He told Employee not to serve himself and to ask him or Ms. Carrazco for drinks. Hector thinks Employee felt comfortable enough to serve his own alcohol because they are close family and Employee knew he would never fire him. (Hector Barragan).

50) At hearing on October 13, 2020, Dr. Shepard testified her title is "hospitalist" and she has a medical degree. She was on duty May 3, 2019, and she examined Employee when he came to the emergency room. Employee was unconscious and not responding to any stimuli. Dr. Shepard understood Employee fell backwards down the stairs and hit his head at work. The ambulance crew had intubated him in the field. His family arrived shortly after Employee arrived and they provided a little more context to her. Dr. Shepard recalled she learned of alcohol being involved when his family arrived. His family told her he had been drinking and was a daily alcohol user. Dr. Shepard could not recall exactly who told her but she remembered at least one of his brothers was there. She relied upon Employee's family to tell her his name and birth date because he was unconscious. When samples are taken for laboratory tests in the emergency room, a bracelet the patient is wearing is scanned; the bracelet contains at least two identifying information with bar code. A nurse or lab personnel identifies the patient, collects the blood sample and labels the samples before it is sent to the lab. Dr. Shepard recalled a blood alcohol serum test indicated a level in excess of 300 which indicated there was "quite a bit" of alcohol in Employee's system. She relies on the lab when determining medical treatment in the emergency room and it is critical that the test is reliable. There was no indication that the blood test in Employee's case was unreliable. The only laboratory test Dr. Shepard knew had issues with false positives was urine drug screenings, they are "notorious for false positives" depending upon medications people are taking. The medical disclaimer on Employee's test results do not apply to the blood alcohol test. Dr. Shepard had time to question Employee's family about the circumstances surrounding his drinking. No one told her how much Employee drank that night. If his family told her he only had three or four glasses of wine, his treatment would not have changed in any way. Dr. Shepard does not believe errors in a hospital lab are common, but it is something that can happen. Any test is capable of producing an error. If a lab result falls well outside of expectation, it would be rerun. Dr. Shepard believed it is an overstatement to say

hospital testing errors are common. She finds the hospital lab results to be reliable. (Dr. Shepard).

51) At hearing on October 13, 2020, Ms. Sullivan testified she is a claims adjuster for Umialik Insurance Company and she was assigned to Employee's claim. Ms. Sullivan received an acknowledgement of the claim on May 16, 2019, when it was reported telephonically and she received a task to contact the insured, injured worker and medical provider. Hector reported the injury telephonically on May 16, 2019, to a support specialist with Western National named Tammy Hjelm. The report of injury was reported electronically. (Ms. Sullivan).

52) At hearing on October 13, 2020, Employer filed a print out of weather history for Sitka, Alaska on May 3, 2019. It indicated it rained 0.11 inches. (Hearing Exhibit 1, October 13, 2019).

53) On October 14, 2020, the State of Alaska offered to release the Medicaid lien for $26,097.72 upon negotiation of a check from Employer. (Letter, October 14, 2020).

54) On October 30, 2020, Employee filed an itemization of the Medicaid Lien which stated Medicaid was billed $763,538.60 and paid $173,984.77 for medical and transportation costs. (Medicaid Lien Itemization, October 30, 2020).

55) On October 30, 2020, Employee filed an affidavit of counsel itemizing his costs incurred from October 8 to October 15, 2020, which totaled $7,818.22. (Affidavit of Counsel, October 30, 2020).

56) In general, the Act's fee schedule provides higher payments to medical providers than Medicaid's fee schedule for most medical procedures. (Experience, judgment, observations).

57) The carpet on Employer's stairs is very deteriorated and threadbare, especially in the middle of the steps. The carpet appears very smooth, with no traction, which makes it slippery while walking down the stairs, even without liquid from rain, dirty dishes and food,. (Experience, judgment, observations).

PRINCIPLES OF LAW

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. . . .

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 23.30.030. Required policy provisions.** A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
> . . . .
>
> (4) The insurer will promptly pay to the person entitled to them the benefits conferred by this chapter, including physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and all installments of compensation or death benefits awarded or agreed upon under this chapter. The obligation of the insurer is not affected by a default of the insured employer after the injury, or by default in giving a notice required by this policy. The policy is a direct promise by the insurer to the person entitled to physician's fees, nurse's charges, fees for hospital services, charges for medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and hospital supplies, charges for burial, compensation or death benefits, and is enforceable in the name of that person. . . .

In *Sherrod v. Municipality of Anchorage*, 803 P.2d 874, 875 (Alaska 1990), the Alaska Supreme Court cited AS 23.30.030(4) and stated the employer was "directly liable to health-care providers for treatment of work-related injuries."

In *Barrington v. Alaska Communications Systems Group, Inc.*, 198 P.3d 1122 (Alaska 2008), a chiropractor who provided medical services to the injured worker filed a claim after the board approved a settlement between the injured worker and the employer, which intended to pay for past medical expenses without requiring payment directly to the providers and without providing notice to the health care providers. The Court reversed the denial of the chiropractor's claim and held the chiropractor had a cognizable property interest in filing an independent claim for payment that was entitled to due process protection. *Id*. at 1132. It recognized AS 23.30.097(f) could foreclose the chiropractor's ability to sue the injured worker and due process required his joinder. *Id*. at 1133.

Rambo v. Veco, Inc., AWCB Decision No. 11-0167 (November 23, 2011), held injured employees have standing to bring claims on behalf of their medical providers.

> **AS 23.30.070. Report of injury to division.** (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall file with the division a report . . . .
>
> (f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.

The term "compensation" includes medical benefits. *Williams v. Safeway Stores*, 525 P.2d 1087 (Alaska 1974).

> **AS 23.30.097. Fees for medical treatment and services.** (a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. . . .
>
> (d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later. . . .
>
> (f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter.

. . . .

> **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;
> . . . .
>
> (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 .
> . . .

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). Credibility is not weighed here. *Resler v. Universal Services Inc.*, 778 P.2d 1146 (Alaska 1989). In the second step, to rebut the presumption, an employer must present substantial evidence that either (1) a something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). The defendant has the burden to overcome the presumption with substantial evidence to the contrary. "Substantial evidence" is such "relevant evidence" as a "reasonable mind might accept as adequate to support a conclusion." *Tolbert,* 973 P.2d 603, 611-12 (Alaska 1999). Credibility is not examined at the second step either. *Resler*. If an employer fails to rebut the raised presumption, the injured worker is entitled to benefits based solely on the raised but unrebutted presumption. *Williams v. State, Department of Revenue*, 938 P.2d 1065 (Alaska 1997). In the third step, if the defendant's evidence rebuts the presumption, it drops out and the claimant must prove his claim by a preponderance of the evidence. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The evidence is weighed, inferences drawn and credibility determined. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

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

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision No. 087 (August 25, 2008).

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

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the court stated the AS 23.30.120 presumption does not apply to attorney fee amounts or reasonableness. It further held the board must consider all factors set out in Alaska Rule of Professional Conduct 1.5(a) when determining a reasonable attorney fee and either make findings related to each factor or explain why that factor is not relevant. *Rusch* also held attorney fee reasonableness is not a factual finding but is a discretionary exercise.

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it,

> without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

In *Harp .v ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992), an employee argued she was entitled to a penalty under AS 23.30.155(e) because while the employer had filed a controversion, it had no valid reason for doing so. The Court held that a controversion must be filed in good faith to protect an employer from the penalty. Citing *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37 (Alaska 1974), the Court explained, "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed."

Moretz v. O'Neill Investigations, 783 P.2d 764, 766 (Alaska 1989), required a workers' compensation insurer to pay interest to the injured worker on medical benefits paid by a third-party insurer. *Moretz* rejected the carrier's claim that the injured worker would be "unjustly enriched" if he were to receive interest on third-party payments because he did not make them; the court decided if anyone had been "unjustly enriched" it was the carrier by "delaying payment" of the injured worker's medical benefits. This case was decided before the legislature

adopted AS 23.30.155(p) and the board implemented 8 AAC 45.142(b). The penalty provision in AS 23.30.155(e) applies to medical benefits. *Childs v. Copper Valley Electric Association*, 860 P.2d 1184 (Alaska 1993).

> **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 AS 23.30.235(2), the employee must be (1) "under the influence of drugs" in the sense that the (2) employee's mental or physical faculties must be impaired by use of drugs, and (3) 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).

In *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993), the Alaska Supreme Court held the Alaska Workers' Compensation Board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights. It said equitable estoppel elements include "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Id*. The court concluded, "A finder of fact could not reasonably find that a person in the position of Van Biene could reasonably interpret Wausau's conduct as amounting to an implied communication that no social security offset would be required. At best, such conduct subsequent to Gerke's conversation and letter indicates only neglect or an internal mistake." The Court relied significantly on the fact Wausau apprised Van Biene both orally and in writing that workers' compensation benefits would be offset in the event she received social security survivor's benefits, and no representations were made by Wausau to Van Biene that it would not seek to offset social security survivor's benefits in the event that she received such payments. *Id*. at 589.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and

(3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

8 AAC 45.142. Interest. . . .

(b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee or, if deceased, to the employee's beneficiary or estate;
. . . .

(3) on late-paid medical benefits to

(A) the employee or, if deceased, to the employee's beneficiary or estate, if the employee has paid the provider or the medical benefits;

(B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or

(C) to the provider if the medical benefits have not been paid.

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

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

According to *Larson's Workers' Compensation Law,* "[w]orkers' compensation is a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product." 1 *Larson's Workers' Compensation Law*, pg. 1-1. The Alaska Supreme Court, in *Alyeska Pipeline Service Co. v. DeShong*, 77 P.3d 1227, 1234-1235 (Alaska 2003), agreed and affirmed the board's award of TTD benefits condition upon the claimant's repayment of unemployment compensation benefits:

> The purpose of the workers' compensation system is to "compensate the victims of work-related injury for a part of their economic loss." Under this system, each employer is required to have workers' compensation insurance to cover its potential compensation costs, resulting in the employer and the consumers of its goods bearing much of the financial cost of the system. (footnotes omitted).

The evidence used to establish intoxication varies in *Larson's* and may include witness observation of the injured worker's consumption, conduct and behavior and blood test evidence:

> Several points are well established: proof of intoxication does not follow from evidence of any single one of the following: that the claimant had a few drinks, nor that there was a small of liquor on the claimant's breadth, nor that the claimant was in possession of a half-empty bottle of whiskey, nor that the claimant enjoyed a general reputation as a heavy drinker. But a combination of some of these, particularly if supported by evidence of the conduct of an intoxicated person, may establish intoxication. . . . (3 Larson, Workers' Compensation Law, §36.01[1], P36-2 (2015).)
>
> If an autopsy or blood test is available, evidence of blood or brain alcoholic content is generally admissible, as against the argument that it is unconstitutional self-incrimination. . . .
>
> To be acceptable as evidence, the taking of the blood tests must conform at least to certain minimum standards to ensure their accuracy. Thus, the blood must be positively identified. . . . The time interval between the injury and the administration of the test must not be too great. The sample of blood must be

> adequate, and the equipment must be correct and must not have been recently cleaned with alcohol. And a qualified person must testify as to the circumstances surrounding the taking of the sample.
>
> However, most courts do no insist upon full compliance with the standards required for admissibility in a court of law. Thus, a test has been accepted although proof of proper calibration of the equipment has not been offered, and although the person taking the sample was not among those specifically authorized by law to draw blood. (3 Larson, Workers' Compensation Law, §36.01[2], P36-3 to 36-5 (2015).)
>
> Although evidence of blood alcohol level is an increasingly common feature of death cases presenting the intoxication defense, there are so many variables in these cases, including the decedent's own capacity, the presence of absence of other *indicia* of intoxication, the contribution of other causal factors in producing the accident, and the wide range of degree of causal relation of the intoxication to the accident required by state statutes, that the cases emphatically cannot be lined up on either side of some percentage figure with any expectation that those above the figure will be noncompensable and those below compensable. (3 Larson, Workers' Compensation Law, §36.01[3], P36-8 to 26-9 (2015).)
>
> When the facts have presented, in addition to the intoxication, a special source of hazard bearing upon the accident, courts have frequently, but by no means always, held that the intoxication was not the proximate cause. Thus, when there was evidence both that the claimant was intoxicated and that the wheel of his car had broken, the broken wheel, not the intoxication, was held to be the "cause" of the overturn of the car. When the janitor fell down some cellar steps while intoxicated, and there was some evidence of snow and ice on the steps and danger due to lack of a railing, the condition of the steps, not the intoxication, was held the proximate cause. (3 Larson, Workers' Compensation Law, §36.03[3][b], P36-26 (2015).)
>
> In the successful cases noted in the preceding subsection, there was typically something abnormal in the environment that added to the hazard. If this is not so, the result may well be that the intoxication defense fails. (3 Larson, Workers' Compensation Law, §36.03[3][c], P36-27 (2015).)

According to *Larson's*, an employer may be estopped from asserting the statutory intoxication defense:

> Even in a case which the intoxication defense might otherwise apply, the employer may be estopped to assert it if the employer helped to cause the episode. In a California case, the general manager, aware of the decedent's weakness for alcohol, took him to a bar and later to a tavern, having drinks at both places. The

court adopted the view that, when the employer permits intoxication or other dangerous practices among employees, the results are industrial injuries. The concept of a safe place of employment was also invoked, with the statement that "to send an intoxicated employee on a busy highway in a company car is not furnishing him with a safe place to work."

In an Ohio case, the employee contended her very employment involved the consumption of alcohol with patrons at her employer's bar. She sustained injuries in an automobile accident after she left work one evening. At the time of the accident, she had a blood alcohol level of .3, which was more than three times the legal limit.

The trial court concluded that the employee's intoxication was voluntary, that she was accordingly disqualified from receiving workers' compensation benefits. The appellate court disagreed. Serving alcohol was so much a part of the employee's job that the employer could not serve the drinks and then disclaim any responsibility for them. The employee was instructed to encourage the patrons to spend as much money as possible. The employer had a clear profit motive in allowing its employees to drink with patrons. This practice created a "zone of danger" within which the employee became caught up. The relationship between her job, the consumption of alcohol, and the employer's condoning of the activity could not be separated. So long as the injury occurred within a reasonable time of her departure from her workplace, the employee was entitled to compensation benefits from the employer.

A familiar application of the employer-participation principle is seen in the cases involving parties, including Christmas parties, sponsored to some degree by the employer. A typical example is the California case of *McCarty v. Workmen's Compensation Appeals Board* [527 P.2d 617 (California 1974)]. The decedent was killed while driving home from the office Christmas party. The employer regularly permitted parties after hours on the premises at which drinking took place, with the drinks paid for by the employer. Some business was talked on these occasions, but the court concluded that the customary nature of this practice was adequate to establish work connection, without the aid of this possible employer-benefit argument. The employer was estopped to raise the defense of intoxication, since it had tolerated and even encouraged the drinking.

Indiana and New Hampshire have gone further held that the employer's mere knowledge of the intoxication coupled with its permitting the employee to continue to work in this condition is in itself sufficient to destroy the defense. Maine specifies by statute that, for the employee's intoxication to be a defense, it must be unknown to the employer at the time of the injury, unless the employer knows that the employee is habitually intoxicated at work.

Note, however, that the employer will not ordinarily be estopped to interpose the intoxication defense by a mere showing that it knew that the employee drank

> heavily, or that it had knowledge of the employee's drinking on previous occasions; it must be shown that the employer had knowledge of the drinking at the time of the injury. (3 Larson, Workers' Compensation Law, §36.03[6], P36-32 to 36-34 (2015).)

The Alaska Supreme Court held in *Alaska Airlines v. Darrow*, 403 P.3d 1116 (August 25, 2017), "The compensation for impairment is awarded independent of earning capacity and for a different type of loss than the later permanent disability compensation, which depends on a worker's inability to earn wages." In other words, PPI payments are not disability benefits.

> **42 USC §1396a. State plans for medical assistance**. (a) **Contents.** A State plan for medical assistance must--
>
> . . . .
>
> (25) provide--
>
> . . . .
>
> (C) that in the case of an individual who is entitled to medical assistance under the State plan with respect to a service for which a third party is liable for payment, the person furnishing the service may not seek to collect from the individual (or any financially responsible relative or representative of that individual) payment of an amount for that service (i) if the total of the amount of the liabilities of third parties for that service is at least equal to the amount payable for that service under the plan (disregarding section 1396*o* of this title), or (ii) in an amount which exceeds the lesser of (I) the amount which may be collected under section 1396*o* of this title, or (II) the amount by which the amount payable for that service under the plan (disregarding section 1396*o* of this title) exceeds the total of the amount of the liabilities of third parties for that service;

> **42 CFR §447.15. Acceptance of State payment as payment in full.** A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual. The provider may only deny services to any eligible individual on account of the individual's inability to pay the cost sharing amount imposed by the plan in accordance with § 447.52(e). The previous sentence does not apply to an individual who is able to pay. An individual's inability to pay does not eliminate his or her liability for the cost sharing charge.

In *Public Health Trust of Dade County v. Dade County School Board*, 693 So.2d 562 (1996), a child was severely injured when he was hit by an automobile. A medical provider billed

Medicaid for $1,374,956.19 and Medicaid paid $295,819.17. The child's mother sued a third party for negligence and the medical provider filed a lien in the suit for the difference between the amount billed and the amount Medicaid paid. The parties in the suit reached a settlement which provided a $500,000 payment to the medical provider to release the lien. The medical provider brought suit against the child's mother and a third-party tortfeasor for impairment of its lien due to alleged misrepresentations during settlement negotiations but the district court granted the mother's and the third-party tortfeasor's motion for summary judgment. The provider appealed and the Court of Appeals affirmed. It held the state statute that permitted excess third-party benefits collected by the provider to be applied to the provider's charges exceeding the Medicaid payment was preempted by 42 CFR 447.15.

In *Pearson v. CP Buckner Steel Erection Co.*, 348 N.C. 239 (1998), an employee was injured and was awarded reasonable and necessary medical expense under the workers' compensation act. The employer reimbursed Medicaid but refused to pay the medical providers the difference between the fees allowed under workers' compensation and the amount paid by Medicaid. The medical provider moved to intervene and appear to collect the difference. The employer was ordered to pay the difference, the employer appealed and the state court of appeals reversed. The medical provider appealed and the North Carolina Supreme Court reversed. It held the state workers' compensation act was not preempted by Medicaid federal laws because it was possible to comply with both the federal and state law as it did not obstruct the purpose of the federal regulation to protect patients from having to pay more for medical services since the medical provider sought payment from the employer. *Pearson* rejected the argument the medical providers were paid in full under 42 USC §447.15 because it would allow employers to substitute the Medicaid reimbursement rate for the workers' compensation fee schedule for medical expenses and permit a financial windfall in savings by denying liability for work-related injuries.

Lizer v. Eagle Air Med. Corp., 308 F.Supp.2d 1006 (2004) held federal Medicaid statutes 42 CFR §447.15 and 42 USC §1396(a)(25)(C) preempted an Arizona health-care provider lien statute which permitted a health care provider to assert a state lien against an accident victim's uninsured motorist settlement proceeds for the different between the amount billed and the

amount Medicaid paid. The state statute conflicted with the purpose of Medicaid, which is to protect covered individuals from having to pay more for medical services than the amount paid by Medicaid. *Lizer* reasoned,

> Permitting providers to charge the balance of their bill to entities which are liable to the patient ultimately results in the patient recovering less from the liable entity. Congress passed the balance billing prohibition in order to protect eligible patients from having to pay additional sums for services already compensated by Medicaid. The accompanying regulation was passed in order to ensure that this purpose was carried out by preventing providers from intercepting funds on the way to a patient. (*Id*. at 1009).

In *Smallwood v. Central Peninsula General Hosp.*, 151 P.3d 319 (Alaska 2006), a Medicaid patient sought injunctive relief and a declaratory judgment finding a hospital's practice of balance billing violated state and federal Medicaid statutes, Unfair Trade Practices Act and due process clauses of federal and state constitutions when the hospital billed the patient and assigned its claim for debt to a third-party who filed a smalls claims action against the patient. The hospital counterclaimed for the unpaid balance on the patient's account and the patient appealed. The Court held Medicaid recipients are the intended beneficiaries of the prohibition on balance billing by medical providers contained in the provider agreement between hospital and Medicaid and a recipient may enforce the prohibition as a third-party beneficiary of the provider agreement and the prohibition.

Under federal preemption doctrine, which derives from the Supremacy Claus, state law is preempted when it "conflicts with . . . federal law to the extent that (a) it is impossible to comply simultaneously with both or (b) the state regulation obstructs the execution of the purpose of the federal regulation." *Interior Reg'l Hous. Auth. v. James*, 989 P.2d 145, 149 (Alaska 1999) (quoting *In re J.R.B.*, 715 P.2d 1170, 1172 (Alaska 1986)).

In *Hiborik v. Westside Flooring*, LLC, AWCB Decision No. 20-0074 (August 31, 2020), Medicaid paid for the injured workers' work-related medical care before a decision and order found his claim compensable. *Hiborik* ordered the employer to pay the employee's providers for his compensable medical care in accordance with the Alaska worker's compensation fee schedule. It adopted the employee's contention that medical providers who accepted Medicaid

should be paid pursuant to the Act and then be required to reimburse Medicaid because federal law requires medical providers to reimburse Medicaid and public policy considerations and the statutes and regulations supported the contention. *Hiborik* reasoned public policy supported the order because limiting reimbursement to Medicaid would create an inappropriate incentive for employers to controvert claims because Medicaid pays less than the Act's fee schedule. It held the Act requires an employer to pay medical bills for work injuries directly to the medical providers when Medicaid already paid the bills.

> **7 AAC 105.250. Payment from other sources.** When payment is received by a provider from a recipient, relative, recipient's estate, health insurance, or other source, for a covered service that has been or will be paid for by the department, the provider must refund or credit to the department an equivalent amount, up to the department's liability, or the provider will be subject to recoupment under 7 AAC 105.260.
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> **7 AAC 105.260. Recouping an overpayment.** (a) An overpayment occurs when the department pays a provider
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> . . . .
>
> (5) for a service paid for by another source, or a service eligible for payment by another source;
>
> (b) The department may
>
> (1) recoup an overpayment from a provider, without notice to the provider other than as provided by (c) of this section, by reducing future payments to the provider until the overpaid amount has been offset; or
>
> (2) arrange with the provider the terms of the provider's repayment of the overpayment.
>
> **7 AAC 160.200. Third-party resources.** (a) The department will pay for a service, prescription drug, or supply only to the extent it is a covered service under AS 47.07.030 and 7 AAC 105 - 7 AAC 160 and only after the recipient has made full use of any other third-party resources available to pay for that service, prescription drug, or supply. A third-party resource includes
>
> (1) workers' compensation under a law or plan of the United States or a particular jurisdiction;

> (b) If a provider treats a recipient for an injury that the provider has reason to believe may have been caused by another individual, institution, corporation, business, or public or private agency, the provider shall notify the department of that belief at the time of billing. The department will evaluate this information to determine if there is potential for legal action, recovery from a settlement, or payment from a third-party resource. The department will not delay payment to the provider pending an evaluation. . . .
>
> **42 CFR § 433.316 When discovery of overpayment occurs and its significance. (a)** ***General rule.*** The date on which an overpayment is discovered is the beginning date of the 1-year period allowed for a State to recover or seek to recover an overpayment before a refund of the Federal share of an overpayment must be made to CMS.
>
> **(b)** ***Requirements for notification.*** Unless a State official or fiscal agent of the State chooses to initiate a formal recoupment action against a provider without first giving written notification of its intent, a State Medicaid agency official or other State official must notify the provider in writing of any overpayment it discovers in accordance with State agency policies and procedures and must take reasonable actions to attempt to recover the overpayment in accordance with State law and procedures.

ANALYSIS

1) Is Employee barred from receiving benefits under AS 23.30.235(2)?

Employer contends Employee's impairment due to the consumption of alcohol was the proximate cause of his work injury. Employee contends he was not impaired and the worn and wet stairs were the proximate cause of his work injury. This creates a factual dispute which the presumption of compensability analysis will be applied. AS 23.30.120(a)(1), (3); *Meek*.

Employee contends the worn and wet stairs and the metal work cart caused his work injury. He provided pictures of the stair case showing the carpet is deteriorated and that the metal cart was placed directly at the bottom of the stair case, taking up half of the width of the stairs at the bottom landing, weather information documenting rain and testimony regarding past falls by Employee and other staff. Employee also presented expert testimony stating the blood test form the emergency room was not enough proof that his consumption of alcohol caused impairment and that any impairment caused the work injury. Without regard to credibility, this evidence

establishes a preliminary link and raises the presumption he was not impaired and his work injury was not caused by his intoxication. *Cheeks*; *Resler*.

Employer contends the blood test result from the emergency room proved Employee were severely intoxicated, and presented expert testimony that his severe intoxication caused his work injury. Without assessing credibility, the evidence is sufficient to rebut the presumption. *Huit*; *Tolbert*; *Resler*.

In the final presumption step, evidence is weighed and credibility is determined. *Steffey*. Employer has the burden of proving the affirmative defense that Employee's intoxication was the proximate cause of his injury. AS 23.30.235(2); *Parris-Eastlake*. It must prove Employee's mental or physical faculties were impaired by alcohol and his impaired condition proximately caused the injury by a preponderance of the evidence. *Id*. There is no dispute Employee consumed alcohol at work on May 3, 2020. The parties dispute how much alcohol Employee drank and whether it was enough to impair his mental or physical faculties. Employee does not remember how much he drank. Based on statements and testimony from Employee, Hector, Ms. Carrazco, Mr. Carrazco, Mr. Mojarro, and Mr. Saenz, Employee drank beer and wine on May 3, 2020, from about 9:30 to 11:15 p.m. *Rogers & Babler*. There is no information in the record regarding the alcohol concentration of the drinks Employee consumed and no way to determine the actual number of drinks he consumed.

The only evidence in the record concerning Employee's impairment is testimony from coworkers and his emergency room blood alcohol test result. Ms. Carrazco first stated she never saw Employee drunk at work and then testified at hearing he was drunk. She acknowledged learning Employee's emergency room blood alcohol results influenced her opinion regarding whether he was drunk. Ms. Carrazco's testimony that Employee was drunk is not credible because it was influenced by the blood test result. AS 23.30.122; *Rogers & Babler*.

Hector said it was hard to tell if Employee was drunk in his statement. Then, at deposition Hector testified he could tell whether Employee was drunk and that he "did not seem completely sober" and he was "a little under the influence" so Hector offered him a meal to help him "sober

up." At hearing, Hector testified he tried to cut Employee off that night, told him to stop drinking as much as he was drinking and tried to get him to eat. He admitted he is very close to Employee and holds him in high regard. It is believable Hector's statements regarding Employee's impairment changed over time because he was initially reluctant to make unfavorable statements about his brother. Hector's testimony regarding Employee's impairment at hearing is credible. *Id*.

Mr. Mojarro's statement indicates he thought Employee was "a little drunk" but "not very drunk." This is consistent with Hector's testimony and is credible. *Id*. Mr. Saenz first stated he did not know if Employee was drunk and he was going to give him a ride home and then he testified at deposition he was going to give Employee a ride home because he drank too much. Mr. Saenz's deposition testimony is convincing because he consistently stated he was going to give Employee a ride home that night and it makes sense for Mr. Saenz to provide Employee a ride home if he was too intoxicated to drive. *Id*.

Employer also relies on the emergency room blood alcohol test result of 0.28 percent to prove Employee was impaired. Employee contends the emergency room blood test should not be relied upon to determine Employee was intoxicated because there was no chain of custody, it used a serum enzymatic test instead of gas chromatography, a second sample was not taken for retesting, the test had a disclaimer, there was no measure of uncertainty for the test and there was no information regarding the skin preparation for the test or the tube used.

This decision and order is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided by the Act. AS 23.30.135(a). There is no specific standardized blood alcohol concentration test requirement in the Act. Drs. Shepard and Burton credibly testified the serum enzymatic test is critical when treating patients in the emergency room because medical treatment decisions depend on its result so the test must be reliable. AS 23.30.122; *Smith*; *Moore*. Dr. Henson acknowledged the serum enzymatic test is used in clinical settings in his report and that the conversion used by Dr. Burton was acceptable. Neither a chain of custody nor a measure of uncertainty is required under the Act. Dr. Shepard credibly testified regarding the testing procedures, including that a nurse or laboratory technician

drew the blood for the test and the steps taken to ensure the result was linked to Employee's sample. AS 23.30.122; *Smith*. The interval between the injury and the blood test was short because the test was taken at 11:36 p.m. and Employee fell around 11:15 p.m. *Larson's*; *Rogers & Babler*. There is no evidence in the record that the tube used for testing Employee's blood was faulty or the subject of recall. The disclaimer Dr. Henson used to discredit the blood alcohol test was associated with the drug screen, which was a urinalysis, and not the blood alcohol test. *Rogers & Babler*. There is no requirement for a second blood sample and test under the Act. The failure to obtain an additional sample for testing does not prove the emergency room test was unreliable. The serum enzymatic test performed by the hospital is credible and reliable evidence of Employee's blood alcohol concentration at the time of the work injury. *Rogers & Babler*; *Smith*; *Moore*; *Larson's*. Drs. Henson and Burton agreed a person's mental or physical faculties would be impaired at a blood alcohol concentration of 0.28 percent. Based on the statements and testimony provided by Hector, Mr. Saenz, and Mr. Mojarro and the emergency room blood alcohol test result, Employer proved by a preponderance of the evidence Employee was impaired on May 3, 2020. AS 23.30.235(2); *Rogers & Babler*.

Employer relies on Dr. Burton's opinion to contend Employee's intoxication was the proximate cause of his work injury. Employee was severely injured when he fell down the flight of stairs at work and struck the metal cart. Employee does not remember falling down the stairs and his fall was unobserved. Dr. Burton concluded there are no structural or environmental factors described that could have contributed to falling down the stairs so he opined the proximate cause of Employee's fall was intoxication. However, there is testimony in the record from Employee, Mr. Saenz, Hector and Ms. Carrazco indicating employees have fallen down the stairs, especially when they are wet from dishes, trash and delivery drivers entering the building when it rains. Weather reports from May 3, 2020, indicated it rained that day and shortly before the accident happened. Furthermore, pictures of the stairs prove the carpet is much deteriorated. Dr. Burton's conclusion there were no environmental factors that could have contributed to Employee falling down the stairs ignores the weather reports, witness statements and photographic evidence. His opinion is not credible. AS 23.30.122; *Smith*. The carpet on the stairs is threadbare and worn, especially in the middle of the steps. The carpet appears extremely smooth with little traction. Slipping on the deteriorated carpet caused Employee to slip and fall.

The preponderance of the evidence is the deteriorated and possibly slippery stairs were the cause of Employee's work injury. Employer failed to meet its affirmative defense and prove impairment was the proximate cause of his work injury. AS 23.30.235(2); *Rogers & Babler*. Therefore, Employee is not barred from receiving compensation under AS 23.30.235(2).

Alternatively, even if Employer proved Employee's impairment was the proximate cause of his work injury, it should be equitably estopped from raising the intoxication statutory defense. Equitable estoppel requires assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Van Biene*. Employer contends Employee's concealed consumption of alcohol during his shift in violation of Employer policy precludes application of equitable estoppel. Mr. Mojarro and Mr. Saenz stated they did not see Employee drink while working the night Employee was injured. Ms. Carrazco admitted Employee would not have been able to successfully complete his job duties if he drank while working and he successfully completed them the night of the work injury. The preponderance of the evidence is Employee did not drink alcohol during his shift, rather he consumed Employer-provided alcohol after he finished working. *Rogers & Babler*.

Even if Employee drank while working, Employer regularly permitted employees to drink alcohol after hours on premises upstairs at the dining room table used by employees to eat and have drinks and provided them alcohol. Therefore, Employer not only tolerated but encouraged drinking alcohol on premises. *Larson's*. Based upon Hector's testimony at hearing, he knew Employee served himself alcohol to excess on May 3, 2020, because he observed (1) Employee's impairment when he arrived somewhere between 9:30 and 10:00 p.m. to make a meal and (2) that Employee's wine glass was refilled when he finished making a meal. Instead of stopping Employee's alcohol consumption, for example by directing him to leave, he permitted Employee to continue to consume alcohol on premises when he observed Employee was already impaired. While Hector may have told Employee not to serve himself alcohol in the past, he did not enforce the rule because he never disciplined or fired Employee for doing so, even on May 3, 2020, the night Employee was injured when he knew Employee had been drinking. Such encouragement and the failure to enforce its own rule amounted to an implied representation that Employer would not hold it against Employee if he drank alcohol and would not deprive him of

his job or benefits. *Van Biene*; *Rogers & Babler*. Employee relied on Employer's implied conduct and based upon these facts, it was reasonable for Employee to do so. *Id*.

Employee was prejudiced by this reliance because he was severely injured at work on Employer's premises while impaired by alcohol provided by Employer. He fell down the deteriorated carpeted stairs used to exit the building while leaving to go home sometime around 11:15 p.m. and struck a metal cart kept at the bottom of the stairs. The deteriorated carpeted stairs and placement of the metal cart at the bottom of the stairs were a special source of hazard created by Employer. Therefore, Employee is not barred from receiving compensation under AS 23.30.235(2). *Van Biene*; *Rogers & Babler*.

2) Is Employee entitled to an award of medical benefits and transportation costs?

Employee contends his medical providers and Medicaid should be compensated pursuant to the Act for medical and transportation costs. He provided a Medicaid lien itemization, which shows Medicaid was billed $763,538.60 and paid $173,984.77 for medical and transportation costs. Employee requests an award of past and continuing medical benefits and transportation costs, including past medical and transportation costs paid for by Medicaid. He contends the provider should be paid pursuant to the Act and the provider should reimburse Medicaid. Employer contends Employee has no standing to assert a claim on behalf of his providers, payment under the Act is preempted by federal law and the issue is moot because it settled the Medicaid lien.

Employer must pay all compensation "directly to the person entitled to it" and compensation includes medical benefits. AS 23.30.030(4); AS 23.30.155(a); *Sherrod*; *Williams*. Medical providers have a property interest in filing a claim for payment. *Barrington*. Injured workers have standing to bring claims on behalf of their medical providers. *Rambo*. Therefore, Employee has standing to assert a claim on behalf of his providers.

Employer contends 42 CFR §447.15 and 42 USC §1396a(a)(25)(C) preempt the Act statutes requiring it to pay medical providers and Medicaid when Medicaid pays for work-related medical treatment. Medical providers must accept the amounts paid by Medicaid as payment in full and cannot seek payment for bills exceeding the Medicaid allowed charges *from patients*. 42

CFR §447.15; 42 USC §1396a(a)(25)(C); *Smallwood*. Medical providers cannot seek to collect payment from patients for services paid for by Medicaid, even when a third-party is liable for payment and the patient receives settlement proceeds from the third-party. 42 USC §1396a(a)(25)(C); *Lizer*. Employee is not seeking an order allowing his medical providers to collect or seek payment from him from an award or settlement agreement for services paid for by Medicaid; he is seeking an order directing Employer to pay medical providers pursuant to the Act and to reimburse Medicaid for transportation costs.

This case is distinguishable from *Lizer* and *Public Health Trust of Dade County* because the medical providers are not seeking payment of the balance between the amount the Act would pay for the medical services and the amount Medicaid paid from Employee. This case is also different from *Lizer* because awarding Employee past medical benefits under the Act in this case would not reduce the amount Employee would receive because the provider and Medicaid are entitled to the payment for medical services, not Employee. AS 23.30.030(4); AS 23.30.155(a); *Sherrod*; *Williams*. The medical providers accepted the Medicaid payment as payment in full because it did not seek payment from Employee under the Act, which is also prohibited under the Act's fee schedule. AS 23.30.097(f). Thus, requiring Employer to pay for medical benefits to the medical provider and Medicaid pursuant to the Act does not contradict the federal laws because it is possible to comply simultaneously with state and federal laws in this case. *James*. It also does not obstruct the execution of the purposes of the federal regulation to prevent medical providers from collecting payment for bills in excess of the amount Medicaid paid from patients. *Id*. Therefore, the Act is not preempted by federal law. *Id*. Employee is entitled to an award of medical and transportation benefits under the Act which were paid for by Medicaid. Employer will be ordered to pay for Employee's past medical and transportation costs and for continuing medical and transportation benefits pursuant to the Act.

The parties disagree how the past medical and transportation costs paid by Medicaid should be paid for by Employer. Employee contends the decision should order Employer to pay his provider's pursuant to the Act and the providers should reimburse Medicaid consistent with *Hiborik*. Employer contends it settled Medicaid's lien so the issue of past medical and transportation costs paid by Medicaid is moot. However, Employer provided evidence of

negotiations on Medicaid's subrogation, assignment and lien rights but did not provide evidence it accepted Medicaid's offer and paid the amount in exchange for a release by Medicaid. Employer must pay all compensation "directly to the person entitled to it" and compensation includes medical benefits. AS 23.30.030(4); AS 23.30.155(a); *Sherrod*; *Williams*; *Hiborik*. In general, the Act's fee schedule provides higher payments to medical providers than Medicaid's fee schedule for most medical procedures. *Rogers & Babler*. Therefore, Employee's medical providers are entitled to compensation for work-related medical and transportation costs pursuant to the Act. *Pearson*; *Hiborik*. Therefore, the issue of past medical and transportation costs paid by Medicaid is not moot.

Ordering Employer to pay Employee's medical providers pursuant to the Act's fee schedule, efficient and predictable delivery of medical benefits to Employee at the reasonable cost to Employer as it is determined in the Alaska fee schedule. AS 23.30.001(1); AS 23.30.097(a). Not requiring an employer to pay medical providers pursuant to the Act shifts the cost of workers' compensation to federal tax payers and not the consumers of goods and services as is intended by workers' compensation insurance. *Larson's*. Requiring an employer to pay pursuant to the Act's fee schedule prevents an employer from substituting the Medicaid reimbursement rate for the workers' compensation fee schedule which prevents an employer from receiving a financial windfall in savings by denying liability for work-related injuries. *Pearson*. Additionally, a medical provider must repay Medicaid for medical services paid for by Medicaid when the provider receives payment under the Act. 7 AAC 105.250; 7 AAC 105.260; 7 AAC 160.200; 42 CFR §433.16. Therefore, this decision adopts the reasoning in *Hiborik* requiring Employer to pay Employee's providers who accepted payment from Medicaid for his compensable medical care in accordance with the Alaska worker's compensation fee schedule and then requiring the provider to reimburse Medicaid. Employee is entitled to award of past and continuing medical and transportation costs. Employer will be ordered to reimburse Employee's medical providers pursuant to the Act's fees schedule for past work-related medical costs.

The Medicaid lien itemization shows Medicaid paid for travel costs for Employee's past medical care. It shows the date of travel and the costs incurred. Employer has not argued the costs were

unreasonable or that the means of travel were inefficient. 8 AAC 45.084. Employer is liable for past medical transportation costs paid for by Medicaid in accordance with the Act. It will be ordered to reimburse Medicaid pursuant to the Act for past work-related medical transportation costs.

Employer disputed Employee's entitlement to continuing medical and transportation benefits solely under AS 23.30.235(2). As determined above, Employee shall not be barred from receiving compensation under AS 23.30.235(2). Employer will be ordered to pay for continuing work-related medical and transportation benefits pursuant to the Act.

3) Is Employee entitled to an award of disability benefits?

Employee sought TTD, TPD and PTD benefits from May 4, 2019 and continuing. Employer disputed Employee's entitlement to disability benefits solely under AS 23.30.235(2). As determined above, Employee shall not be barred from receiving compensation under AS 23.30.235(2). Employer will be ordered to pay disability benefits from May 4, 2019 to the present pursuant to the Act.

4) Is Employee entitled to PPI benefits?

Employee sought PPI benefits based upon Dr. Villanueva's September 18, 2020 EME report which provided a 20 percent rating. Employer disputed Employee's entitlement to PPI benefits solely under AS 23.30.235(2). As determined above, Employee shall not be barred from receiving compensation under AS 23.30.235(2). Employer will be ordered to pay the 20 percent PPI rating. *Darrow*.

5) Is Employee entitled to an award interest?

Interest under the Act is mandatory. AS 23.30.155(p). Employee is entitled to interest on all disability benefits paid as a result of this decision from the date of each installment. 8 AAC 45.142(b)(1). Medicaid is entitled to interest from Employer on the work-related medical costs it paid to Employee's providers to compensate for its loss of use of its money and to prevent Employer's unjust enrichment. AS 23.30.155(p); 8 AAC 45.142(b)(3)(B); *Moretz*.

In general, the Act's fee schedule provides higher payments to medical providers than Medicaid's fee schedule for most medical procedures. *Rogers & Babler*. Employee's medical providers also lost the use of the difference between the amount the Act would pay them for the medical services and the amount Medicaid paid them and now must pay them under the Alaska fee schedule. Therefore, Employee's medical providers are entitled to interest on the difference between what Medicaid paid them and the amount which should have been paid under the Alaska fee schedule. AS 23.30.155(p); 8 AAC 45.142(b)(3)(C); *Moretz*. Employer shall pay providers and Medicaid interest in accordance with this decision.

6) Is Employee entitled to penalties?

Employee sought a 20 percent penalty for a late-reporting penalty on all past benefits which were unpaid when due. AS 23.30.070(f). An employer must file a report of injury within 10 days of the date it had knowledge of the injury and that the employee was alleging the injury arose out of and in the course of the employment. AS 23.30.070(a). The purpose of AS 23.30.070(a) is to ensure timely reporting of injuries. When Employee was injured, he was transported to Anchorage for medical treatment. Hector knew the accident occurred on May 3, 2019, and he flew to Anchorage and stayed with Employee for 15 days. He reported the injury 13 days later on May 16, 2019, to his insurance agent. Ms. Sullivan, the claims adjuster, knew about Hector's report of injury on May 16, 2019, when she received an acknowledgement of the claim. The insurance carrier electronically filed a report of the injury on May 30, 2019, 14 days after it knew about the injury. Hector is Employee's brother and they are very close. Employee was severely injured. It is understandable that Hector reported the injury three days late while dealing with the severe injury of a close family member. *Rogers & Babler*. However, no explanation was provided for the 14 day delay in the electronic report once the insurance carrier was informed of the injury. AS 23.30.030(3).

"Compensation" under the Act includes medical benefits. *Williams*. A penalty applies only to medical benefits "that were unpaid when due." Medical benefits are due within 30 days after the date Employer received the provider's bill or a completed report, whichever is later. AS 23.30.097(d). The first installment of disability benefits became due 14 days after Employer knew of Employee's work injury, which was May 3, 2019. AS 23.30.155(b). Ongoing disability

benefits were due every 14 days thereafter. *Id*. Employer controverted benefits first on May 30, 2019. It withdrew the denial on May 31, 2019, and did not controvert again until June 6, 2019, and did not pay any disability benefits. Therefore, Employer failed to pay the first installment of disability benefits when it was due. AS 23.30.155(b).

Employee contends he should be paid the penalty under AS 23.30.070(f) because he was prejudiced by Employer's denial as he was forced to litigate and it interfered with his medical treatment. His injuries were very severe. The May 30, 2019 medical record shows the rehabilitation treatment Employee received was affected by the denial. Employee's argument is persuasive. The statute expressly allows a discretionary penalty paid to Employee as well as any "other person entitled to compensation by reason of the employee's injury." *Id*. The insurance carrier shall be ordered to pay Employee a 20 percent penalty of all amounts unpaid when due, including medical and indemnity benefits.

Additionally, Employer's erroneous conclusion that Employee's intoxication barred benefits constituted a mistake of law. *Harp*; *Stafford*. Therefore, Employee is entitled to an award of 25 percent penalty on all benefits awarded in this decision. AS 23.30.155(e). This penalty under AS 23.30.155(e) must be paid directly to the party to whom the unpaid installment was to be paid. Medical providers are the party to whom medical benefits are paid. Employer will be directed to pay to the medical providers directly a 25 percent penalty on the Alaska fee schedule value of the medical bills to the extent Employee provided this information and Employer did not pay the bills within seven days after payment was due in accordance with the Act. *Childs*.

7) Is Employee entitled to attorney's fees and costs?

Employee sought an award of statutory minimum attorney's fees under AS 23.30.145(a) and costs. Employer disputed Employee's entitlement attorney's fees and costs solely under AS 23.30.235(2). As determined above, Employee shall not be barred from receiving compensation under AS 23.30.235(2). Employee's attorney's representation in this case was essential in obtaining substantial benefits for Employee and his providers. His legal services helped defend against the statutory intoxication defense, obtain a large amount of past medical costs to date,

ongoing medical care, transportation costs, past and continuing disability benefits, PPI benefits and interest and penalties, all of which were controverted. AS 23.30.145(a).

The statutory presumption of compensability does not apply to attorney fee amounts or reasonableness. *Rusch*. Employee seeks statutory minimum attorney's fees; Employer has not contended the fees or costs sought are unreasonable. Reasonable and necessary costs may be awarded to a claimant if the costs relate to the issues upon which he prevails at hearing. 8 AAC 45.180(f). Employee sought costs totaling $11,723.41 ($7,818.22 + $3,905.19 = $11,723.41) in his affidavits. He will be awarded actual costs of $11,723.41 and statutory minimum fees under AS 23.30.145(a).

CONCLUSIONS OF LAW

1) Employee is not barred from receiving compensation under AS 23.30.235(2).
2) Employee is entitled to an award of medical and transportation benefits.
3) Employee is entitled to disability benefits.
4) Employee is entitled to PPI benefits.
5) Employee is entitled to interest.
6) Employee is entitled to penalties.
7) Employee is entitled to attorney's fees and costs.

ORDER

1) Employee's July 30, 2019 claim is granted.
2) Employer shall pay Employee's medical providers directly for all medical services incurred for his work injury, in accordance with the medical fee schedule and this decision.
3) Employer is ordered to reimburse Medicaid pursuant to the Act for past work-related transportation costs.
4) Employer is ordered to pay for continuing work-related medical and transportation benefits pursuant to the Act.
5) Employer is ordered to pay Employee disability benefits from May 4, 2019, and continuing pursuant to the Act.

6) Employer is ordered to pay Medicaid interest on the work-related medical and transportation costs it paid.

7) Employer is ordered to pay Employee's medical providers interest on the difference between what Medicaid paid them and the amount which should have been paid under the Act.

8) The insurance carrier is ordered to pay Employee a 20 percent of all amounts unpaid when due, including medical and indemnity benefits in accordance with the Act and this decision.

9) Employer is ordered to pay a 25 percent penalty on all disability benefits.

10) Employer is ordered to pay to the medical providers directly a 25 percent penalty on the Alaska fee schedule value of the medical bills to the extent Employee provided this information and Employer did not pay the bills within seven days after payment was due in accordance with the Act.

11) Employer is ordered to pay Employee's attorney statutory fees under AS 23.30.145(a) and costs totaling $11,723.41.

Dated in Juneau, Alaska on December 23, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley Austin, Member

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

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

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30

days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of JUAN BARRAGAN, employee / claimant v. PIZZA EXPRESS, employer; UMIALIK INSURANCE CO., insurer / defendants; Case No. 201907027; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified US Mail on December 23, 2020.

/s/
Krystal Gray, Workers' Compensation Technician