ALASKA WORKERS' COMPENSATION BOARD

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

SAMUEL AMOS, Employee, Claimant, v. DAVID E. TIDWELL, TRAVIS PLAMBECK, AND PLAMBECK FLOOR CUSTOMS, INC., Employers, and UMIALIK INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201916954 AWCB Decision No. 21-0102 Filed with AWCB Fairbanks, Alaska on November 4, 2021

Travis Plambeck's March 12, 2020 petition to dismiss Samuel Amos's November 25, 2019 claim against him, David Tidwell's July 28, 2020 petition to dismiss Samuel Amos's November 25, 2019 claim against him, and the designee's January 12, 2021 issue to determine "all appropriate parties in this case," was heard in Fairbanks, Alaska on September 2, 2021, a date selected on August 9, 2021. An August 9, 2021 stipulation of the parties gave rise to this hearing. Attorney Keenan Powell appeared and represented Samuel Amos (Amos), who also appeared and testified on his own behalf. Attorney Stacy Stone appeared and represented the Alaska Workers' Compensation Benefits Guaranty Fund (Fund). David Tidwell (Tidwell) appeared, represented himself and testified on his own behalf. Attorney Adam Sadoski appeared and represented Plambeck Floor Customs, Inc. (PFCI) and Umialik Insurance Company, its insurer. Attorney Rebecca Holdiman Miller appeared and represented Travis Plambeck (Plambeck), who also appeared and testified on

behalf of himself and PFCI. Other witnesses included Plambeck's wife, Tabitha Plambeck, and Tidwell's friend, Glenn Bressette, who testified on behalf of PFCI. The record closed at the hearing's conclusion on September 2, 2021.

ISSUES

Plambeck contends, since he is neither an employer nor a project owner under the Workers' Compensation Act, Amos's November 25, 2019 claim against him should be dismissed.

Amos alternatively contends Plambeck was either an employer, a project owner or a general contractor, so his November 25, 2019 claim against Plambeck should not be dismissed.

The Fund primarily contends Tidwell and PFCI were Amos's employers, but it also suggests Plambeck may be liable to Amos for compensation as a project owner. It neither expressly supports nor opposes the dismissal of Amos's November 25, 2019 claim against Plambeck.

Tidwell contends Amos accepted work as a "cash job," which he likened to hiring someone from Facebook to shovel snow from a sidewalk, so his claim against Plambeck should be dismissed.

PFCI neither expressly supports nor opposes the dismissing Amos's November 25, 2019 claim against Plambeck.

1) Should Amos's November 25, 2019 claim against Plambeck be dismissed?

PFCI contends Amos was not its employee, and since the project on which Amos was working did not have any connection to its business or industry, it should be dismissed as a party to litigation.

Amos primarily contends Tidwell and Plambeck were his employers, but he also contends PFCI may have been a contractor, so it should not be dismissed as a party to litigation.

The Fund contends Tidwell was Amos's general employer, who lent Amos to PFCI, as a special employer, so PFCI should not be dismissed as a party to litigation.

Tidwell agrees with PFCI and contends, since Amos was not PFCI's employee, it should be dismissed as a party to litigation.

Plambeck neither expressly supports nor opposes dismissing PFCI as a party to litigation.

2) Should PFCI be dismissed as a party to litigation?

Tidwell describes the shop project on which Amos was injured as a "buddy deal" and characterizes his involvement with the project as "a friend helping a friend." He contends Amos came to help him "on his own recognizance," and since he did not hire Amos in any capacity, Amos's claim against him should be dismissed.

Amos relies on a statutory provision to distinguish himself as an employee, as opposed to an independent contractor, and contends, "Because he is an 'employee,' someone was his employer." Since Tidwell hired him and supervised his work, he contends the "evidence is strongest" that Tidwell was his employer, so his claim against Tidwell should not be dismissed.

The Fund contends, since Tidwell hired Amos to assist in the shop's construction and supervised his work, Tidwell was Amos's employer so Amos's claim against Tidwell should not be dismissed.

Plambeck neither expressly supports nor opposes dismissing Amos's claim against Tidwell.

PFCI neither expressly supports nor opposes dismissing Amos's claim against Tidwell.

3) Should Amos's November 25, 2019 claim against Tidwell be dismissed?

FINDINGS OF FACT

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

1) On October 21, 2019, Amos was injured when he fell from the roof of a structure being constructed at 2150 Peede Road in North Pole, Alaska, which is Plambeck's personal residence.

Amos sustained injuries to his bilateral wrists and one elbow. (Amos Claim, November 25, 2019; Plambeck Affidavit, December 3, 2020).

2) The structure that was being constructed is described as a 30' x 36' and 16' tall shop that has two garage doors and two lean-to car ports. (Plambeck).

3) On November 25, 2019, Amos claimed workers' compensation benefits arising from his October 21, 2019 injuries. He named Tidwell and Plambeck as his employers and stated:

> Samuel Amos was hired by Travis Plambeck and David Tidwell as part of a crew to construct a shop on Mr. Tidwell's premises. On the third or fourth day of work, Samuel Amos fell through the roof while working, fractured both wrists and one elbow and may have sustained a TBI.

He stated he filed his claim because his employers claimed they were uninsured and his claim also named the Fund as a defendant. (Powell Entry of Appearance, November 25, 2019; Amos Claim, November 25, 2019).

4) On December 10, 2019, attorney Adam Sadoski entered his appearance as attorney for "the Employer, TRAVIS PLAMBECK AND DAVID TIDWELL, and its workers' compensation Insurer, UMIALIK INSURANCE COMPANY . . . ." (Sadosky Entry of Appearance, December 10, 2019 (caps in original)).

5) On December 16, 2019, attorney Sadoski controverted benefits on behalf of Plambeck and Tidwell, contending Amos was not an Employee of PFCI, Amos' injuries did not arise in the course of any employment with PFCI, there was no employment relationship between Amos and PFCI, or any employment relationship between Amos and Plambeck, or Amos and Tidwell, in their personal capacities. (Sadosky Controversion Notice, December 16, 2019). Attorney Sadoski amended his entry of appearance to indicate he was acting as counsel for PFCI and its insurer. (Sadosky Amended Entry of Appearance, December 16, 2019). He also answered Amos's claim on behalf of PFCI, contending PFCI was a flooring company owned in part by Plambeck and clarifying his law firm represented only PFCI and its insurer and did not represent Plambeck or Tidwell individually. The answer also stated,

> The activity in which Mr. Amos was engaged at the time of injury was in no way connected to Plambeck Floor Customs, Inc. The work consisted of constructing a shop on Mr. Plambeck's personal property that was to be used exclusively for personal reasons. The property on which the injury occurred does not contain any space dedicated to or used in any significant manner for conducting the business of

> Plambeck Floor Customs, Inc. . . . Employee's injury . . . did not arise out of or in the course of any employment with Plambeck Floor Customs, Inc. Mr. Amos was assisting a family friend of Mr. Plambeck-David Tidwell-on a project at the personal property of Mr. Plambeck. There was no employment relationship between either Plambeck Floor Customs, Inc. or Mr. Plambeck personally and David Tidwell, no employment relationship between David Tidwell and Mr. Amos, and no employment relationship between Mr. Amos and either Plambeck Floor Customs, Inc. or Mr. Plambeck.

(PFCI Answer, December 16, 2019).

6) On December 17, 2019, PFCI's insurer completed a First Report of Injury (FROI). In the "Accident Description" portion of the report, it wrote:

> AND DAVID TIDWELL AS PART OF A CREW TO CONTRUCT A SHOP ON MR. TIDWELL'S PREMISES. . . . INSURED CLAIMS THIS PROJECT WAS NOT RELATED TO THEIR BUSINESS IN ANYWAY [sic], THIS WAS THEIR PERSONAL HOME AND THE CLAIMANT IS NOT AN EMPLOYEE OF THEIR BUSINESS. THIS PERSON WAS NOT HIRED BY THE INSURED, BUT WAS BROUGHT OVE [sic] SAMUEL AMOS CLAIMS HE WAS HIRED BY TRAVIS PLAMBECK[.]

(Insurer FROI, December 17, 2019) (caps in original).

7) On December 18, 2019, PFCI sought dismissal of Amos's claim against it as an employer on the basis his claim had no relation to its business. (PFCI Petition, December 18, 2019).

8) On January 6, 2020, Amos answered PFCI's December 18, 2019 petition, stating he did not file a claim against PFCI, "[h]owever, it is noted that the [Fund] apparently was not served with [PFCI's] petition and may have a position regarding it." (Amos Answer, January 6, 2019).

9) On January 21, 2020, the Fund answered Amos's November 25, 2019 claim and controverted benefits, contending the claim failed to "satisfy all the conditions necessary" and lacked "sufficient grounds" for him to collect benefits. (Fund Controversion Notice, January 21, 2020).

10) On February 6, 2020, Amos requested a hearing on his November 25, 2019 claim. (Amos Affidavit of Readiness for Hearing, February 6, 2020).

11) On February 12, 2020, Amos filed evidence, including copies of text messages sent between him and Tidwell on October 16, 2019, October 18, 2019, October 19, 2019 and October 21, 2019. In those messages, Tidwell asks Amos, "When do you wanna [sic] start framing this shop[?]" The messages also contain references to Tidwell dropping off a tool bag; Tidwell asking Amos, "Are you coming to north pole[?]"; Tidwell instructing Amos, "Do not set or move anything besides

getting the truck set up and ready"; Tidwell admonishing Amos, "Don't be late"; Amos replying, "Going to be a little"; Tidwell asking Amos, "Where's my . . . air compressor[?]"; Tidwell informing Amos he was going to run home and get his air compressor because he needed to get work done; and a discussion of starting "a little earlier tomorrow." (Amos Certificate of Service, February 12, 2019; observations, unique facts of the case and inferences drawn therefrom).

12) On February 14, 2020, PFCI opposed a hearing on Amos's November 25, 2019 claim because of "significant confusion over the proper parties to the action." It contended its December 18, 2019 petition to dismiss should be heard before Amos's claim. (PFCI Affidavit in Objection, February 14, 2020).

13) On March 12, 2020, Plambeck sought dismissal of Amos's claim against him as an employer on the grounds Amos was not his employee. (Plambeck Petition, March 12, 2020).

14) On March 31, 2020, Amos opposed a hearing on Plambeck's March 12, 2020 petition to dismiss, contending Plambeck was liable for workers' compensation benefits since he was the project owner and his contractor, Tidwell, failed to pay compensation. (Amos Opposition, March 31, 2020).

15) On April 21, 2020, the parties agreed to a bifurcated hearing on PFCI's and Plambeck's petitions to dismiss. (Prehearing Conference Summary, April 21, 2020).

16) On July 1, 2020, Amos, Tidwell, Plambeck, PFCI and the Fund agreed to dismiss PFCI as a party. The stipulation contained the following caveat: "The terms of this Stipulation do not prevent any party from seeking joinder of PFCI as an employer in the future in the event evidence is discovered or developed suggesting Mr. Amos was working within the course and scope of employment with PFCI when he was injured on October 21, 2019 . . . ." The designee approved the parties' stipulation the following day. (Parties' Joint Stipulation for Dismissal, July 1, 2020).

17) On July 2, 2020, Plambeck filed Tidwell's paycheck stubs from PFCI, a credit union account history and copies of text messages sent between Plambeck and Tidwell. (Plambeck Affidavit of Service, July 2, 2020). Many of the messages were in small font, and are blurry, faint and illegible. (Observations). One message authored by Tidwell to an unidentified recipient states, "He did not hire Sam And [sic] this has nothing to do with the flooring company[.] [T]his was a buddy deal . . . ." (Plambeck Affidavit of Service, July 2, 2020; observations, unique facts of the case and inferences drawn therefrom). PFCI contends the recipient was Amos's girlfriend. (PFCI Hearing Brief, January 29, 2021). Another message authored by Plambeck to an unidentified recipient

states, "They somehow think I hired Sam. I did not hire Sam. He was helping you and he keeps calling me saying that he was working with me." (Plambeck Affidavit of Service, July 2, 2020; observations, unique facts of the case and inferences drawn therefrom). PFCI contends the recipient was Tidwell. (PFCI Hearing Brief, January 29, 2021).

18) On July 15, 2020, Plambeck averred Tidwell was a flooring installer for PFCI and had no duties outside the installation of flooring for PFCI. He hired Tidwell to construct an outbuilding on his and his wife's personal property to create a space in which he could pursue hobbies and interests outside of work. The interior of the structure was intended for wood working, metal working, automotive restoration and maintenance, and storage of personal outdoor power equipment. The building has two carports attached to accommodate a motorhome and a boat during the winter months. None of the equipment he intended to store in the outbuilding had ever been used in PFCI's business. (Plambeck affidavit, July 15, 2020).

19) On July 21, 2020, Amos and the Fund agreed to dismiss Amos's claim against Plambeck and cancel the hearing on Plambeck's March 12, 2020 petition to dismiss. The stipulation provided a signature line for Tidwell, who did not sign the document. (Stipulation to Dismissal of Travis Plambeck and Cancellation of the July 23, 2020 Hearing, July 20, 2020; observations).

20) On July 23, 2020, the designee did not approve the proposed stipulation dismissing Plambeck but rather continued the hearing on Plambeck's March 12, 2020 petition until a later date and requested specific legal briefing and documentary evidence from the parties. (Tilly letter, July 23, 2020).

21) On July 24, 2020, Glenn Bressette averred he was acquainted with Tidwell and was present at the Peede Road property on the date of Amos's injury. He was there to assist Tidwell as a volunteer in constructing the shop. Bressette also included his "understanding[s]" concerning the shop's construction and its purpose. He also described the events surrounding Amos's fall. (Bressette Affidavit, July 24, 2020).

22) On July 28, 2020, Tidwell sought dismissal of Amos's claim against him as an employer on the basis Amos was not his employee. (Tidwell Petition, July 28, 2020). Amos was the only party to oppose Tidwell's petition. (Observations).

23) On July 31, 2020, Tidwell provided informal discovery responses and stated he was employed by PFCI from June 1, 2019 through March 15, 2020, and had never been employed by

Plambeck as an individual. Regarding the construction project on which Amos was injured, Tidwell wrote:

> 2. . . . . Mr. Plambeck inquired about Mr. Tidwell's experience and knowledge of erecting large buildings. Mr. Plambeck asked Mr. Tidwell if he wouldn't mind lending a helping hand to help erect a shed on Mr. Plambeck's personal property at Peede Rd[.] in his spare, free time and if he had any friends that wouldn't mind helping out too. Mr. Tidwell did not have any scheduled work through Plambeck Floor Customs, Inc. from 11/16/2019 through 11/31/2019 [sic] and agreed to help Mr. Plambeck as a friend. Mr. Tidwell gave suggestions and physically helped Mr. Plambeck on the procedures of erecting the shed, hauling products and trash to and from Peede Road.
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> 3. Mr. Plambeck generously gave Mr. Tidwell $3,000.00 in cash, as not only a thank you, but also as a "friend helping a friend" during the holiday season because he knew Mr. Tidwell had no scheduled work through Plambeck Floor Customs, Inc. Mr. Plambeck was very grateful and appreciative of not only Mr. Tidwell's knowledge and guidance, but also for Mr. Tidwell's willingness to volunteer his personal free time and acquaintances to physically help.
> . . . .
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> 6. There were no contracts for employment of Mr. Tidwell except for the dates and times he was on the clock for Plambeck Floor Customs, Inc. which is reflected on the pay stubs provided. Mr. Plambeck highly suggested the project at Peede Road be started and completed as soon as possible before winter.
> . . . .
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> 8. . . . . Mr. Tidwell, Mr. Bressette, & Mrs. Tidwell are willing to testify that they personally know and witnessed Mr. Tidwell's generosity towards Mr. Amos and his significant other during this time. Mr. Tidwell has a huge heart and chose to give Mr. Amos cash, food, and marijuana from the dispensaries multiple times before Mr. Tidwell even had knowledge of Mr. Plambeck's desires to erect a building at his personal residence. Mr. & Mrs. Tidwell also agreed to give Mr. Amos their beloved family dog in hopes of helping Mr. Amos and his significant other cope and heal from their tragic loss. Mr. Tidwell also gave Mr. Amos' significant other rides to & from appointments and bought her and Mr. Amos fast food during these trips. Mr. Tidwell states he was not keeping a tab of what was spent or given to Mr. Amos because during the time, Mr. Tidwell's mind set was of that he was helping a friend during severe hardship. Mr. Tidwell guestimates a minimum of $1,300.00, not including the family pet, was spent/given to Mr. Amos and his significant other before and after the accident.

> 9. Mr. Plambeck gave Mr. Tidwell $3,000.00 in cash on October 13th, 2019. Mr. Plambeck was the acting general contractor who purchased all materials for the project[.]

Tidwell explained Amos had shown up unannounced at his house and "vaguely explained that he had been dealing with some hardships . . . and was completely desperate for work." Amos "begged" Tidwell's wife to let Tidwell know Amos "was at rock bottom and in need of companionship, food, and money to pay piling up bills." Before he left, Amos "reiterated that if there was 'ANYTHING' he could possibly do for 'ANY TYPE' of compensation that it would be 'a life saver.'" (Tidwell discovery responses, July 31, 2020 (caps in original)).

24) On August 6, 2020, Amos was planning on testifying at the hearing on Plambeck's petition to dismiss. His anticipated testimony included:

> [H]is history of working for David Tidwell. His history of working for Mr. Tidwell on a prior Plambeck Custom Flooring project known as 'the Borne project," the formation of his agreement to work for Mr. Tidwell on the Plambeck shop project, his agreement with Mr. Tidwell regarding payment, Mr. Tidwell's supervision of his labor, Mr. Plambeck's supervision of his labor, Mr. Plambeck's presence at the shop construction site, the presence of another Plambeck Flooring employee at the shop construction site, his fall . . . .

(Amos Witness List, August 6, 2020). Amos contended he was withdrawing from the agreement to dismiss Plambeck as a party. He now contended evidence had recently come to light showing Plambeck was a project owner or contractor who subcontracted to Tidwell who in turn hired him. Amos also contended the evidence showed PFCI benefitted from the project; Plambeck had sent a permanent, full-time, PFCI employee to the job site to help with construction and Tidwell had planned to split the $3,000 payment from Plambeck with Amos. He also contended documents showed PFCI paid for construction materials for the project. (Amos Hearing Brief, August 6, 2020).

25) On August 19, 2020, the hearing on Plambeck's March 12, 2020 petition to dismiss was continued so the parties could undertake further discovery. (Prehearing Conference Summary, August 19, 2020).

26) On November 3, 2020, Tidwell sought to join an unspecified employer as a party. (Tidwell Petition, November 3, 2020). An event entry in the agency's database a day later indicates Tidwell

was seeking to join PFCI. (Incident Claims and Expense Reporting (ICERS) event entry, November 4, 2020).

27) On November 10, 2020, Amos answered Tidwell's November 3, 2020 petition, contending he was employed by Tidwell and Tidwell was either a project owner or a subcontractor hired by PFCI. He further contended, "There is evidence that shows Plambeck Flooring paid for materials used on the project," and "[t]here is a dispute as to whether this evidence is sufficient to support a conclusion that Plambeck Flooring was a project owner or contractor in relation to this project." Amos did not oppose a hearing to determine the respective liability of the parties. (Amos Response to Travis Plambeck's November 3, 2020 Petition to Join Plambeck Floor Customs, Inc., November 10, 2020).

28) On November 13, 2020, PFCI opposed a hearing on Tidwell's July 28, 2020 petition to dismiss Amos's claim against him, contending, since it was previously dismissed as a party, it would need to undertake additional discovery, including taking Tidwell's deposition, before Tidwell could be dismissed as a party. (PFCI Affidavit of Opposition, November 13, 2020). The Fund also opposed a hearing on the same grounds. (Fund Affidavit of Opposition, November 16, 2020).

29) On November 19, 2020, Tidwell provided the Fund responses to its discovery requests, which included six and one-half months of semi-monthly paystubs from his employment at PFCI. His hourly rate appears to have been $40 per hour and the paystubs covered the following periods:

Pay Period	**Hours Worked**	**Amount Paid**
6/1/2019-6/15/2019	61:14	$2,449.33
6/16/2019-6/30/2019	49:40	$1,986.67
7/1/2019-7/15/2019	69:38	$2,785.33
7/16/2019-7/31/2019	87:26	$3,497.33
8/1/2019-8/15/2019	103:48	$4,152.00
8/16/2019-8/31/2019	108:18	$4,332.00
9/1/2019-9/15/2019	33:09	$1,326.00
9/16/2019-9/30/2019	**189:03**	**$7,562.00**
10/1/2019-10/15/2019	65:06	$2,604.00
10/16/2019-10/30/2019	(no paystub)	

11/1/2019-11/15/2019	58:18	$2,332.00
11/16/2019-11/30/2019	98:15	$3,930.00
12/1/2019-12/15/2019	106:27	$4,258.00

Tidwell contended the paycheck for the period September 16, 2019 through September 30, 2019 in the amount of $7,562.00 was his "normal" paycheck for work completed for PFCI, though he did not remember at what locations the work was performed. He denied the paycheck represented any advanced payment for work done on the shop's construction. Even though he did not receive a paycheck for the pay period of October 16, 2019 through October 30, 2019, Tidwell understood he was still an employee of PFCI and Plambeck was still his boss. Tidwell attached a receipt from Lowe's, which he contended showed Plambeck used a PFCI business credit card to purchase $417.58 of materials for the shop's construction. He also attached an invoice from the Fairbanks Truss Company, which he contended may have been paid with PFCI's business credit card. The invoice shows a $2,500 deposit was paid with a Visa card on October 8, 2019, and a $2,556 balance due was paid with a Visa card on October 24, 2019. Other documentation Tidwell provided included was a written estimate from Lowe's for 80 "OC LIFETIME OAK AR ES" at a cost of $2,284.80, as well as screenshots showing that same order was "SOLD" on October 11, 2019, and would be picked-up on October 17, 2019. PFCI was listed as the "CONTACT" on the estimate and as the "CUSTOMER" in the screenshots. (Tidwell Notice of Filing Evidence regarding Joinder of Plambeck Floor Custom's, Inc., December 3, 2020; observations and inferences drawn therefrom).

30) On November 23, 2020, the Fund did not oppose Tidwell's November 3, 2020 petition to join PFCI as a party because Tidwell had asserted he was being paid by PFCI for his work on the project and the evidence may support PFCI was either an employer or project owner. (Fund Non-Opposition to Tidwell's Petition to Join Plambeck Floor Customs, Inc., November 23, 2020). PFCI opposed Tidwell's November 3, 2020 petition to join it as a party because there was no evidence it employed either Tidwell or Amos at the time the injury occurred. (PFCI Answer, November 23, 2020).

31) At a November 30, 2020 prehearing conference, the designee instructed the parties to file evidence she thought would assist a panel in determining the issues presented. She was intending to determine Tidwell's November 3, 2020 petition to join PFCI at the next prehearing conference.

PFCI contended, dependent upon the designee's determination, a further hearing may be required on Tidwell's petition to join. The designee also set a January 21, 2021 hearing date for Amos's November 25, 2019 claim and Plambeck's March 12, 2020 petition to dismiss him as a party. (Prehearing Conference Summary, November 30, 2020).

30) On December 3, 2020, PFCI indicated it would be seeking a continuance for the hearing on Tidwell's November 3, 2020 petition to join it as a party because it was seeking documents to show Tidwell was not an employee of PFCI and Plambeck paid for construction materials with his "private" funds. (Sadoski email, December 3, 2020).

32) On December 3, 2020, Plambeck averred he is an owner of PFCI and part-owner of the property on which Amos was injured. PFCI is a business that primarily sells and installs various types of flooring. Tidwell was employed by PFCI on a project-by-project basis since the beginning of June 2019. He and his wife, Tabitha Plambeck, hired Tidwell to construct an outbuilding on their personal property. They paid him $3,000 in cash, which was withdrawn from their personal savings account. Materials purchased for the project include lumber, trusses and roofing materials, which were paid for with his personal credit card. Tidwell did not pay for any materials related to the project. The Lowe's estimate Tidwell presented, which is dated July 24, 2020, is not a receipt for project materials purchased in 2019. Tidwell obtained the estimate in PFCI's name in October 2019 from his friend at Lowe's; however, these materials were not paid for with a PFCI account or business credit card. Tidwell's paystub for the period September 16, 2019 through September 30, 2019 represents work Tidwell did for PFCI installing hardwood flooring, which is more difficult, and takes more time, to install. Use of the structure at 2150 Peede Road has provided no income to himself or his wife. The sole purpose of the structure was for storage of personal items and space for personal hobbies. No PFCI materials have been stored in the structure and there has not been any benefit to PFCI as a result of the building's construction. Building materials for the structure were not claimed on PFCI taxes. Neither he nor PFCI paid Amos. Plambeck did not personally know Amos and did not hire him. He was unaware of Amos until he was notified there had been incident while building the structure on his property. Plambeck and his wife were not aware Amos was on the "Borne" job with Tidwell until about four to six months after Amos fell. They paid only Tidwell for the "Borne" job, which was to have been performed only by Tidwell. (Plambeck Affidavit, December 3, 2020).

33) On December 7, 2020, Plambeck averred the credit card number shown on the October 19, 2019 Lowe's receipt indicates PFCI's corporate card was used to purchase $417.58 in materials. He thought it was likely he erroneously used the company card since it is similar in appearance to his personal card. (Plambeck Affidavit, December 7, 2010).

34) At a December 8, 2020 prehearing conference, Tidwell contended he was an employee of PFCI; Plambeck was his boss; PFCI ordered materials for the project on which Amos was injured; and PFCI purchased some of the materials used in construction. He further contended he did not hire Amos in any capacity. PFCI contended text messages show Plambeck did not hire Amos; Tidwell previously signed a stipulation releasing PFCI from litigation; the use of the PFCI credit card on Lowe's receipt was an accidental use due to the similarity in appearance of the business and personal credit cards; all other construction materials appear on Plambeck's personal credit card except for a single charge of about $400. PFCI also contended "anyone" could have put PFCI's name on the Lowe's estimate and no benefit to PFCI from the shop's construction has been discovered. PFCI contended Plambeck paid Tidwell directly in cash for his work on the construction project and there was no evidence it was the employer of either Tidwell or Amos. Amos contended a full panel hearing with testimony was necessary to determine the proper parties to the case. He contended there was sufficient evidence to create a presumption the construction was a PFCI project; Plambeck was a general contractor or project owner under the applicable statute; and Tidwell was either a contractor hired by Plambeck or a subcontractor hired by PFCI. Plambeck contended he and PFCI are "one in [sic] the same" and both should be released from litigation. He also contended there is no evidence PFCI or he hired Amos. The Fund contended Tidwell had continuously worked for PFCI, excepting only one pay period, and just before the shop's construction, Tidwell was paid approximately twice his normal amount. It contended only one $3,000 payment for the construction project "seemed off," and an explanation should be heard by a panel, with an opportunity for cross-examination by the parties, so a "classical weighing of material testimony" could occur. It contended a hearing should be held to determine whether Tidwell was employed on PFCI's payroll at the time of construction and whether he was being paid by the job or the size of the project. The designee granted Tidwell's November 3, 2020 petition to join PFCI based on "inconsistent assertions/evidence/information" in the case. (Prehearing Conference Summary, December 8, 2020).

35) On December 30, 2020, PFCI sought a review of the designee's decision to join it as a party. (PFCI Petition, December 30, 2020).

36) At a January 12, 2021 prehearing conference, Plambeck's March 12, 2020 petition to dismiss Amos's claim against him, and Tidwell's July 28, 2020 petition to dismiss Amos's claim against him, were scheduled for hearing on August 5, 2021. On her own motion, the designee also added another issue: "a determination re: all appropriate parties in this case." (Prehearing Conference Summary, January 12, 2021).

37) On March 26, 2021, Tidwell sought to withdraw his November 3, 2020 petition to join PFCI as a party. (Tidwell Petition, March 26, 2021).

38) On March 29, 2021, PFCI contended Tidwell's March 26, 2021 petition "eliminates the underlying basis of [it's] joinder," and requested the hearing record be re-opened. (PFCI Petition, March 29, 2021). PFCI never requested a hearing on its petition. (Observations).

39) On May 10, 2021, *Samuel Amos v. David E. Tidwell, Travis Plambeck and Plambeck Floor Customs, Inc.,* AWCB Decision No. 21-0041 (May 10, 2021) (*Amos I*), decided the designee did not abuse her discretion in joining PFCI as a party. (*Amos I*).

40) On July 12, 2021, David Tidwell testified his current occupation is carpenter. (Tidwell dep., July 12, 2021 at 6). He and his wife formerly operated a remodeling business for four years. (*Id*.). It closed around 2016. (*Id*.). Tidwell had worked for PFCI since late 2018 or 2019 and continued to work for it for another "couple of jobs" after Amos was injured. (*Id*. at 7-8). He installed flooring for PFCI and was paid "piecemeal." (*Id*. at 8-9). "Piecemeal" is type of hourly rate and his hourly rate would be different from job-to-job, depending on job size, type of flooring, and the amount of prep work required. (*Id*. a 10). One paycheck for $7,562 was higher than the rest because it was for a large job with a lot of floor prep. (*Id*. at 11). Tidwell is familiar with Travis Plambeck's property at 2150 Peede Road and is not aware of any PFCI activities occurring there. (*Id*. at 13-14). He became involved with working on the shop project because Plambeck's contractor "fell through" so Plambeck asked him to help with it. (*Id*. at 15). Tidwell told Plambeck, "Sure, I'll come help you." Plambeck offered him $6,000 cash for his help in return. (*Id*.). He and Plambeck went to the same high school and he had known Plambeck a long time, so he told Plambeck he would help him. Tidwell had previously helped Plambeck with his house, the trim in his bathroom and a problem with the taillights on his van, (*id*. at 17), but was never paid for that work, (*id*. at 37). "Anything I could do to help him," he stated. He asked, "If a friend

asked you for help, what would you do?" (*Id*.). The days on which Tidwell was working on the shop's construction, he was not working for PFCI because Plambeck had cleared a spot on his schedule to help with the shop project. (*Id*.). Compared to the normal amount he would earn working for PFCI, he "lost money" by agreeing to help Plambeck build the shop, but he agreed to help because "Travis needed help." (*Id*. at 17-18). Tidwell continued, "Just as a friend. I worked for Travis. You know, I like my job, I like Travis, and Travis needed my help. If somebody needs help, you go help them. It's not really that big of a deal. I had a job to go back to." (*Id*. at 18). He never had any indication the shop was to be used for PFCI business. (*Id*.). Plambeck paid Tidwell $3,000 for the work he did. (*Id*. at 19). Plambeck paid him in cash. He was never paid in cash for his work with PFCI. (*Id*.). Rather, PFCI would pay him by check every two weeks. (*Id*.). Tidwell described his relationship with Samuel Amos:

> Met him through a friend. He could never keep a job, always getting fired, never on time, always needed help. Numerous times, I've helped him out with side work because he had no money. I know his wife, I gave him my dog, come over to the house all the time. We have several mutual friends. Once again, small town.

(*Id*. at 20). He has known Amos for about seven years. Tidwell gave an example of the type of job he would find for Amos:

> I had him come and sweep and clean floors and stack flooring boxes on one of Travis's jobs that I was doing through Travis. I paid him out of my pocket to come help me, because he showed up on my door crying, he had some personal problems, and it was the only thing I was doing at the time, and I felt bad for him. I had to give him gas money to make it there and buy his lunch because he didn't have any money.

(*Id*. at 21). The Plambecks were not aware of Amos helping him on that job; and they did not pay Amos, he did. Tidwell explained, "But, that was all I could do at that particular time to help him." (*Id*. at 21-22). Amos has also worked at Tidwell's house, in his yard and went to work "underneath" him at Wilson & Wilson Construction. (*Id*. at 22). When Plambeck told him he was going to need more help on the shop project, he brought Amos over. (*Id*.). Amos had never been an employee of PFCI. Tidwell described Amos's fall from the top of the shop. (*Id*. at 23-24). He met Glenn Bressette through a friend of his who works with Bressette at Eielson Air Force Base. (*Id*. at 29). Bressette came to help him on the shop project because Bressette "was my friend."

(*Id*.). Regarding the text message describing the project as a "buddy deal," he explained he was friends with both Amos and Plambeck, so Amos came to help him help Plambeck. (*Id*. at 31). The shop project did not have anything to do with PFCI. (*Id*. at 31-32). Tidwell filed his petition to join PFCI "out of panic," and explained "What do I do? Everyone has a lawyer, everyone's lawyer is affiliated with all the other lawyers. I don't have a lawyer. Talked to a few people, seemed like a good idea, then – I was very ill-educated on this whole process and it was unnecessary." (*Id*. at 32). It was unnecessary to file the petition because the shop project never had anything to do with PFCI, "this is Travis personally." *(Id*. at 32-33). Tidwell's work has also included doing side-jobs for people who called him, like Plambeck called him. (*Id*. at 38-39). A couple of the projects were done as favors for homeowners after they asked. *(Id*. at 39). He would be paid in cash for these side-jobs. (*Id*.). Tidwell stopped working for PFCI a short time before beginning work for Merriman Construction on March 31, 2020. He described how he became employed by PFCI: He was working for Byler Construction laying floors at the time and ran into Plambeck at the North Pole Subway. Plambeck told him, if he ever got sick of working where he was at to give him a call because PFCI had lots of work. (*Id*. at 43-44). Tidwell called Plambeck and Plambeck put him to work right away. (*Id*. at 44). He described in detail the $6,000 cash payment Plambeck offered him:

> Q: And what was the $6,000 to cover?
>
> A: My time helping him and Samuel's and just, anybody, please come help me, because that's not even close to the going rate, so - -
>
> Q: Did you discuss the amount of hour that you were to spend on it . . . ?
>
> A: Does anybody help their friends anymore? There was no certain amount of the hours, there was nothing discussed, it was, yeah, I'll come help you.
> . . . .
>
> Q: Was $6,000 the amount that was anticipated?
>
> A: It was one of the numbers we talked about, yes.
>
> Q: What were the other numbers that were talked about?
>
> A: When Travis first asked me if I could help him because his contractors never showed up, I gave him what I felt was a fair number, but it wasn't - - it wasn't close to six. And Travis told me that the contractor he had lined up

to do the project for him was going to do it for that price, and my initial response was, you should keep calling him, Travis.

Q: What was the number that you felt was fair?

A: More than that.

Q: Did you give him a number?

A: As a friend, yes.

Q: What was the number, as a friend?

A: I couldn't even tell you off the top of my head, but I know it was more than that.

Q: So you initially told Travis that you would, for an amount - -

A: One second. My friend price, cash, would have been between 10 to $12,000, and that's just a rough math. That was two years ago. With the way the economy and everything has gone, that's not a relevant price right now.
. . . .

Q: Okay, I'm sorry. You gave him a price, you gave Mr. Plambeck a price of 10 to $12,000 to do what?

A: To rough-frame his detached garage.

Q: And was that something you were going to do yourself?

A: Well, it would have been something I would have done legitimately for that price.

Q: Was that something - - to do that project, would you have needed to hire someone to also work with you?

A: No. I would have called in another contractor friend of mine and went in there with his whole crew and done it in a short period of time.

Q: But that - - it sounds like that sort of hypothetical, because that 10 to $12,000 price didn't happen, and you talked about a $6,000 price or - -

A: No.

Q: - - anticipated $6,000.

A: I said that Travis told me his previous contractor that he was waiting on was going to charge him around six, and I told him he should con - - he should keep calling that guy until he gets a hold of him, because that's just - - that's not worth it. And when Travis did not get a hold of him, he asked me again, and I said yes, I will come help you for that.

(*Id*. at 51-54). Tidwell also described getting help from Amos:

Q: Okay. Did Mr. Plambeck ask you to hire others to work on the shed project.

A: He told me I was going to need help.

Q: And - - I'm sorry?

A: He told me I was going to need help, can you find someone. I told him yes.

Q: And did he ask specifically for Mr. Amos, or he left it to you who you would hire to assist in building the shed?

A: He told me he was not going to be there the whole time, that I would need help, and I said, hey, I know a guy hurting for work, he would come over there and work for cash.

Q: And that was Mr. Amos?

A: Yes.

Q: Did you tell Mr. Plambeck that you would be hiring Mr. Amos?

A: For some reason, when you say hire, it doesn't sound correct or fitting to the situation. Sam Amos came over and helped me on his own recognizance. He was not hired, he was not employed. He would be the same thing as picking someone up off of Craig's List or Facebook; hey, come shovel my - - walkway, my driveway. That is what cash work is. That's also why Amos was told not to go up on the roof.

Q: Did Mr. Plambeck ask you to hire others in addition to Mr. Amos, or was it left to you how many people should help you on the building?
. . . .

A: No, Travis asked me to get help. That's exactly what I stated. That's what he said. I found help. I called another buddy to come help with this buddy deal.

(*Id*. at 54-55). About two weeks after working on the shop project, Tidwell returned to his "more customary duties" at PFCI. (*Id*. at 56). He never finished working on the shop project and Plambeck paid him $3,000, which represented a partial payment of the $6,000 that was originally agreed upon. (*Id*. at 56-58). Tidwell asked Amos to help with the shop project: "I said, hey, my buddy Travis needs help, are you still broke, do you still want to make some side money? He said yes." (*Id*. at 62). He was asked about the amount Amos was to be paid:

> Q: And what was the agreement as to how Mr. Amos would be paid?
>
> A: A portion, percentage. I don't know. Sam was not an employee. Sam - - any time came to help me anywhere other than Wilson & Wilson Construction, I just paid him what I could, and it's because he was calling me, asking me.
>
> Q: So the question was was there an agreement as to what he would be paid?
>
> A: Yes, a portion or a percentage, like I said the first time.
>
> Q: But you didn't mention any dollar amount?
>
> A: No. It's really hard to tally when you have to give someone gas money every day or buy their lunch, buy marijuana for them. It's how - - how do you keep track of this when your so-called friend in need, when you're - - I mean, if I didn't give him gas money, he wouldn't be able to come back, and then he'd call me wanting me to come get him.

(*Id*. at 62-63). He said to Amos, ". . . hey, we're going to frame a garage, if you want money, you can come help." (*Id*. at 63). Tidwell was also asked about being paid for helping friends:

> Q: . . . . Now, there were several times when you've been asked about money on these various arrangements that you've had when your helping friends, and you haven't - - a lot of times, you haven't been able to remember, so can you tell me what it is - - when you're doing these jobs helping friends, what is it that's important to you; is it the money or is it something else?
>
> A: I would only go out of my way like this for a friend, I would never do it for someone I don't know.
>
> Q: And so its fair to say that the money just really hasn't been that important to you?

> A: If the money was that important to me, I never would have put up with Sam. I never would have been over there framing that garage, I never would be involved in any of this.

(*Id*. at 81-82).

41) PFCI characterized Tidwell's descriptions of his relationship with Amos "as one based on Mr. Amos consistently asking for help in the form of work, money, food and drugs." (Employer's Hearing Brief, August 3, 2021).

42) On July 15, 2021, PFCI filed a bank statement showing Plambeck paid the $2,264.80 Lowe's order and the $2,556 balance due at the Fairbanks Truss Company with his personal credit card. (PFCI Affidavit of Service, July 15, 2021; inferences drawn therefrom). PFCI also filed a bank statement showing $3,000 was withdrawn from a savings account on November 13, 2019. (PFCI Affidavit of Service, July 15, 2021). PFCI contends the statement is from Plambeck's personal account and the $3,000 withdrawn was used to pay Tidwell. (PFCI Hearing Brief, August 3, 2021). Included with PFCI's filings was a December 7, 2020, "To Whom It May Concern" letter from Plambeck's accountant indicating she planned to "account for" a $415 Lowe's charge on PFCI's credit card when she prepared PFCI's 2019 tax returns. (PFCI Affidavit of Service, July 15, 2021). Numerous work orders corresponding to Tidwell's pay periods were also included. (*Id*.; observations). Each work order details jobs Tidwell completed during the pay period by customer name. (*Id*.). The total amounts shown on the work orders correspond to the dollar amounts reflected on Tidwell's paystubs. (Observations). An October 1, 2019 work order lists four jobs in the amounts of $4,634, $882, $720 and $1,326. (*Id*.).

43) On July 27, 2021, PFCI filed a simple drawing of a 30' x 36' structure with two garage doors as evidence. (Affidavit of Service, July 27, 2021; observations). The words "Plambeck house shop – Powered by Measure Square" appear in the lower right-hand margin of the drawing. (Observations).

44) On July 27, 2021, Amos testified he obtained his general education diploma (GED), (Amos dep., July 27, 2021 at 12-13), and a certificate in basic, structural welding, (*id*. at 15-16). He then earned a certificate from the Tulsa Welding School. (*Id*. at 16). Amos's work history includes cooking and cleaning in restaurants, (*id*. at 31, 34); performing maintenance on fleet vehicles, (*id*. at 43); changing tires, (*id*. at 53); doing basic oil changes, (*id*. at 54); performing structural and big tank welding, (*id*. at 44); working as a welder's helper, (*id*. at 50); welding plastic tanks, (*id*. at 61-

64); building log cabins, (*id*. at 64-67); welding at a mine (*id*. at 69); and performing residential construction (*id*. at 73-75). In 2019, he worked from Wilson & Wilson Construction and Greer Tank and Welding. (*Id*. at 20). Tidwell getting him hired at jobs was a "[p]retty normal thing." (*Id*. at 25-26). Amos's and Tidwell's relationship was "built off of work" and Tidwell getting him jobs. Tidwell got him hired at Wilson & Wilson. (*Id*.). He first met Tidwell two or three weeks before beginning work at Wilson & Wilson. (*Id*. at 57). Tidwell did not pay Amos directly for his work at Wilson & Wilson. (*Id*. at 58). Tidwell did pay him directly for a flooring job he and Tidwell did at Darryl Borne's mother-in-law's house. (*Id*.). They completed that job and Tidwell gave Amos some money a week later. (*Id.*). He currently works at an auto parts store. (*Id*. at 77). He described how he became involved with Tidwell building the shop: "Tidwell came over to my house. He said, [H]ey. My boss needs to get this shop built. Do you want to help me build it? And I said, Okay." (*Id*. at 92). Tidwell said he would pay Amos "like 2,500 bucks at the end of the job." (*Id*. at 93-94). He has never met Travis or Tabitha Plambeck. (*Id*. at 96). Later Amos stated had never met Tabitha Plambeck and assumed he met Travis Plambeck one time while working on the shop because Tidwell told him it was Travis Plambeck who was telling them "what needs to go where and why." (*Id*. at 142-43). He never signed any employment paperwork for PFCI. (*Id*. at 96, 145). Amos never applied for a job at PFCI. (*Id*. at 153). He was never paid for helping at Plambeck's shop job. (*Id*. at 98, 153). A guy wearing a Plambeck Flooring shirt and driving a truck with Plambeck sticker on the side helped stand up a wall to the shop. (*Id*. at 96; 100; 135). Amos assumed the guy was a PFCI employee. (*Id*. at 100-101). He also described his fall from the roof while unhooking a load of trusses. (*Id*. at 101). Since the injury, people try to get him to work under the table, but he is adamant about not working under the table. (*Id*. at 117). Prior to the injury, he had worked under the table on and off. (*Id*.). "Under the table" means a job where he is paid in cash, not with a check. (*Id*. at 121-122).

45) On July 30, 2021, Robert Buck testified, he is an independent adjuster who works for Wilton Adjustment Services in Anchorage. (Buck dep., July 30, 2021 at 5-6). He was asked to take photographs of all the buildings located at 2150 Peede Road in North Pole and, specifically, a "new metal type structure building" that had been constructed. (*Id.* at 6). When Buck inspected the interior of the large metal building, he observed some personal belongings in the building but no "commercial-type" property. *Id*. at 7. He then took photographs at PFCI, where he did not see

any personal property, but did see business property. (*Id*. at 7-8). He saw no evidence the flooring company conducted business at 2150 Peede Road. (*Id*. at 8).

46) On August 5, 2021, the hearing on Plambeck's March 12, 2020 petition to dismiss Amos's claim against him; Tidwell's July 28, 2020 petition to dismiss Amos's claim against him; and the designee's issue to determine "all appropriate parties in this case," was continued because Tidwell had a sick child at home and he needed to take her to the hospital. (Record).

47) In his August 3, 2021 Hearing Brief, Amos contended the following evidence showed Plambeck "may" be liable as an employer: Plambeck and PFCI paid for the shop's construction materials; Plambeck visited the project and supervised construction every day; Plambeck employed a PFCI employee, Tidwell, to supervise the project; and Plambeck sent another PFCI employee to work on the project. He also contended the following evidence supported his contention Plambeck "may" be liable as a project owner: Plambeck hired Tidwell to help him construct the shop; Tidwell was a PFCI employee; and Plambeck paid Tidwell $3,000, which was intended to compensate Tidwell and Amos for their services. Amos contended, "If Mr. Tidwell was not an employer, as his July 28, 2020 petition claims, then he was a contractor. If Mr. Tidwell was a 'contractor,' then Mr. Plambeck would be a 'project owner' if the project was in the course of his business or a general contractor." Amos contended the following evidence supports his contention Plambeck "might" be liable as a general contractor: Plambeck was an owner of PFCI; Plambeck hired Tidwell to help him build the shop; Tidwell was a subcontractor to build the shop because he was paid a flat rate without regard to the number of hours or workers involved and the money was withdrawn from Plambeck's personal account; and PFCI and Plambeck purchased construction materials. He further contended, "if the Board finds that David Tidwell is a contractor, then there is evidence to support a finding that he was subcontracted by Travis Plambeck, who was acting as his own general contractor through PFCI." Amos contended the following evidence supports his contention Tidwell was an employer: Tidwell agreed to hire Amos to work on the shop in exchange for money; Tidwell controlled Amos's work; and Tidwell provided an air compressor. (Amos Hearing Brief; August 3, 2021).

48) At hearing, Plambeck testified his home address is 2150 Peede Road. His occupation is small business owner. His business address is 1997 Badger Road in North Pole. Plambeck is vice president of PFCI, where he manages the day-to-day business operations. He spends the majority of his time at work bidding on jobs, scheduling installations and managing the business's

warehouse. PFCI's business involves flooring sales and installations. The business does not do anything other than flooring. The business started in 2009. He and a helper started doing carpet installations out of a van in 2001. He had no business location. Then the business grew to include a showroom and more employees and they formed PFCI. The business does not do foundation work, framing, drywall, siding, windows, doors, roofing or painting. Tabitha Plambeck is president of the company. She "does admin," he does bidding, sales and scheduling. Plambeck has an admin who helps him do his paperwork for the commercial side, and an admin who does the paperwork for the residential side. They have a "warehouse guy," two to three in-house installers and some subcontractors who operate their own flooring business and do installations. Tidwell was an in-house installer for PFCI. Tidwell was on the company payroll and was not a licensed subcontractor. Tidwell was paid "piecework." Piecework involves being paid by the square foot and the amount of pay depends on the type of material being installed. The three pieceworkers with the company have been there different amounts of time and there is a "pecking order." Job assignments depend on seniority, the skill set of the pieceworker and the type of material being laid. Plambeck and Tabitha Plambeck are the only people who hire employees for PFCI. There is no foreman position. Pieceworkers cannot hire anyone to help them. The issue of helpers has come up in the past and this has always been PFCI's policy. Plambeck described his personal residence. He lives in a three-to-four bedroom house on five acres. The house is about 3000 square feet. His residential property also includes a shed, a conex, and now a shop. Plambeck uses the shop to pursue hobbies, which include working on an old Chevy pickup truck, a river boat, and welding and woodworking in the winter. They also have some chickens, a green house, and maintain gardens in the summer. No PFCI business is conducted at his home. No equipment or flooring material is kept there. Plambeck also described PFCI's facilities: It has a 40' x 86' showroom, a 40' x 50' annex. He has plenty of room to park vehicles and store flooring material. Light tools are stored in the main building's mezzanine and heavy tools, like 400-pound demo machines, are stored in the warehouse. Plambeck met Tidwell when Tidwell was working for another contractor. He later hired Tidwell at PFCI. He knew Tidwell had knowledge of foundation, drywall and framing work. Plambeck explained Tidwell's paystub for September 16, 2019 to September 30, 2019 pay period. The "quantity" on the paystub looks like hours but is actually square-footage. He also explained Tidwell's October 1, 2019 work order for this pay period, which shows a large job at the top and smaller jobs towards the bottom. Plambeck

remembers the large job. "It was a big job." Tidwell was never authorized to hire employees for PFCI. Plambeck also described the shop project on which Amos was injured. The shop is 30' x 36' and 16' tall. It has two garage doors, one 10' x 14' and the other 8' x 8'. There are two lean-tos on the shop for his boat and recreational vehicle. The intended purpose of the shop was to provide Plambeck with heated space where he could pursue his hobbies. The shop was never intended to be used for the flooring business. He designed the shop and made a sketch of it. The sketch was filed as evidence on July 27, 2021. Tidwell used the sketch to make a "takeoff" list of materials needed to build the shop. The original plan was to have a framer, named Andrew, build the shop, but Andrew got a big job in Southeast Alaska so he could not build it. Tidwell became involved with the project through "shop talk" at work. Plambeck asked Tidwell to build the shop and Tidwell said yes. Andrew was going to charge $6,000 to build the shop. Plambeck did not pay Tidwell $6,000 for his work on the shop because they "got busy." He instead paid Tidwell $3,000. Plambeck did not remove Tidwell from the PFCI work schedule to build the shop. Rather, Tidwell was never on the PFCI work schedule because there was no work. Tidwell had only been with PFCI for six months, while the other pieceworker had been with PFCI for two to three years, so the other pieceworker had seniority. Plambeck estimates it cost him $60,000 to $70,000 to build the shop and he took out a home equity loan to build it. PFCI never paid for materials to build the shop. The $400 charge on PFCI's credit card was accidental since its appearance is identical to Plambeck's personal credit card. One card says "Travis Plambeck," the other card says "Travis Plambeck, Plambeck Floor Customs." Plambeck's accountant is going to "fix" the erroneous use of the PFCI card. Plambeck uses the shop, the flooring company does not. His shop does not benefit PFCI. Plambeck did not know who Amos was until Amos fell off his roof. Amos never worked for PFCI but he later learned Amos had been on a PFCI jobsite. PFCI never hired Amos. Amos never applied for a job at PFCI. Amos called him about one month after his fall and wanted compensation. He has had flooring work done at his house before where he paid "his guy" and a subcontractor for the work. He has also done some flooring work at his house himself. Plambeck did not make any openings in Tidwell's work schedule at PFCI. Tidwell's availability was the result of a wintertime slowdown in work. Tidwell could have made more money installing flooring than helping him build the shop. Tidwell was just there to help him out as a "buddy deal." Glenn Bressette, whose nickname is "Biscuit," was also a friend of Tidwell. He never knew Bressette until after Amos's accident. After Amos fell, Bressette helped Tidwell on the shop build along

with another guy called "Slim." Plambeck did not expect Tidwell to work on the shop alone. He thought Tidwell would have help. Plambeck left the help up to Tidwell. He was aware Tidwell did more than flooring and had other side-jobs. Tidwell never completed construction on the shop, so Plambeck hired someone else to finish it. "Joe," PFCI's "warehouse guy," delivered some follow-up lumber after Tidwell had gathered materials from his take-off list. Joe did not work on the shop. (Plambeck).

49) Based on Plambeck's affect while testifying, and because his testimony is consistent with independently established facts and other witnesses' testimony, he is credible. AS 23.30.122.

50) At hearing, Tabitha Plambeck testified she does PFCI's payroll and bookkeeping. She explained how payroll taxes are computed when paying piecework and her interactions with State "Wage and Labor" on the issue. A paystub showing 189.5 hours does not mean the worker worked that number of hours. It's just a figure to properly account for payroll taxes. Pieceworkers usually make four to five-thousand dollars every two weeks. She remembers the large job on Tidwell's October 1, 2019 work order. It involved laying flooring on stairs and other "add-ons," like prep work. The amount is not unusual for commercial properties but it was a high amount for a residential property. The job involved laying 1600 square feet of laminate flooring. She never talked to Tidwell about the shop project and she would never schedule Tidwell off work to do a personal project for her and her husband. If a PFCI employee were injured, she would tell them to go to the doctor because they "have workers' comp." She does not know Amos. Amos never worked for PFCI. She would have known if Amos had worked for PFCI, and she even went back and checked old records. She spoke to Amos one time on the telephone. PFCI has installed flooring at their personal residence and she paid the company as a customer. The $3,000 payment to Tidwell came from her personal bank account. (Tabitha Plambeck).

51) Based on Tabitha Plambeck's affect while testifying, and because her testimony is consistent with independently established facts and other witnesses' testimony, she is credible. AS 23.30.122.

52) At hearing, Glenn Bressette testified his occupation is an Alternate Station Manager at Eielson Air Force Base, which involves supervising people loading and unloading military aircraft. His nickname is "Biscuit." He has been to the Plambeck's residence on Peede Road "a handful" of times while he was helping Tidwell construct the shop. Bressette saw no flooring materials at the house or in the storage shed. He has been in Alaska two years and met Tidwell, who has been

like a brother to him, through a mutual friend. Bressette has a lot of "downtime" from his regular job and wanted to learn a trade. He did not get paid for helping Tidwell on the shop but rather was just learning from Tidwell. Bressette described the circumstances of Amos's fall while hoisting trusses. He saw no commercial purpose for the shop and never discussed the purpose of the shop with Plambeck. (Bressette).

53) At hearing, Tidwell testified he never thought he had authority to hire employees for PFCI and he never told Amos he had authority to hire employees for PFCI. He never told Amos he was a foreman with PFCI. Plambeck did not ask him, as his boss at PFCI, to build the shop. Tidwell did not think he would be fired from PFCI had he refused to help build the shop. He did not expect to be covered by workers' compensation insurance while building the shop. The other PFCI employee, "Joe," was at the Peede Road residence about eight minutes to help lift a wall and then he left. Joe did not deliver any construction materials. Tidwell was not authorized to have Amos at the PFCI "mother-in-law house" job. He and Amos never discussed employment at PFCI. He and Amos did not have a contract. Amos was "nothing but help" on the shop construction. Tidwell described the shop construction project as "a friend helping a friend," and "a buddy deal."

54) At hearing, Amos testified he has lived in the Fairbanks, North Pole area for 30 years. Tidwell hired him to work on the shop's construction. He believed he was working for either Plambeck or for PFCI. Amos thought he was working for Plambeck because Tidwell asked him if he wanted to work for his boss. In 2017, Tidwell was a foreman for Wilson & Wilson and Tidwell hired him. Amos also helped Tidwell on the PFCI "mother-in-law" house job. He assumed Tidwell was authorized to hire him for that job and Tidwell paid him in cash. In October 2019, he was in between jobs and looking for part-time work. Tidwell said he would pay him a lump sum for helping construct the shop after the job was done; then, Tidwell said he would pay him hourly. Amos has never been paid for his work on the shop by anyone. He does not have an Employer Identification Number (EIN). He is not a licensed contractor. Amos does not carry workers' compensation insurance. He assumed Tidwell was a foreman while constructing the shop. Tidwell primarily supervised him while building the shop. Tidwell instructed Amos on when he should show up to work. He saw Plambeck one time when there was a discrepancy concerning the size of a door. Amos refused to answer if he has worked many jobs for short time periods where he was paid "under the table." He stated he has worked under the table in the past.

Amos never had any conversations with PFCI about working for them. He never applied for a job at PFCI. Tidwell was his only contact at PFCI. (Amos).

55) During its closing argument at hearing, PFCI's attorney rhetorically asked, "Hasn't everyone made a charge on the wrong card?" (Record).

PRINCIPLES OF LAW

The board may base its decisions not only on direct testimony 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 23.30.045. Employer's liability for compensation.** (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215. If the employer is a subcontractor and fails to secure the payment of compensation to its employees, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor. If the employer is a contractor and fails to secure the payment of compensation to its employees or the employees of a subcontractor, the project owner is liable for and shall secure the payment of the compensation to employees of the contractor and employees of a subcontractor, as applicable.
> . . . .
>
> (f) In this section,
>
> (1) "contractor" means a person who undertakes by contract performance of certain work for another but does not include a vendor whose primary business is the sale or leasing of tools, equipment, other goods, or property;
>
> (2) "project owner" means a person who, in the course of the person's business, engages the services of a contractor and who enjoys the beneficial use of the work;
>
> (3) "subcontractor" means a person to whom a contractor sublets all or part of the initial undertaking.

Searfus v. Northern Gas Company, 472 P.2d 966 (Alaska 1970), involved whether the "master-servant" control test or Professor Larson's "relative nature of the work" test should be used to

determine employee status for application of the exclusive remedy provision of the Alaska Workers' Compensation Act (Act). Beginning its analysis, the Alaska Supreme Court observed:

> Most jurisdictions define 'employee' as a servant in the master-servant sense. Alaska's present compensation act treats some persons as 'employees' who are not servants and excludes some servant from the category of employee. For example, an uninsured subcontractor's employees are considered employees of the contractor, though they are not servants of the contractor; [citing AS 23.30.045(a)] part-time baby sitters, cleaning persons, and harvest help are not treated as employees, though they may be servants in the common law sense [citing AS 23.30.230].

(*Id*. at 968). The Court consulted Professor Larson's treatise on workers' compensation law for guidance:

> Professor Larson states that the theory of compensation legislation is that the costs of all industrial accidents should be borne by the consumer as part of the costs of the product. From this principle, Professor Larson infers that 'the nature of the claimant's work in relation to the regular business of the employer' should be the test for the applicability of workmen's compensation, rather than the master-servant test of control . . . .

(*Id*. at 969). It then quoted directly from Professor Larson:

> It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection.

(*Id*.) (citing 1A A. Larson, The Law of Workmen's Compensation s 43.51, at 633 (1967)). The Court held Professor Larson's "relative nature of the work" test should be applied instead of the "master-servant" control test to determine whether an injured worker is an "employee" for workers' compensation purposes. Subsequent to *Searfus*, the Court again applied Professor Larson's "relative nature of the work test" to affirm board's finding that an injured worker was an independent contractor, and not an employee entitled to workers' compensation benefits. *Ostrem v. Alaska Workmen's Compensation Board*, 511 P.2d 1061 (Alaska 1973).

Kroll v. Reeser, 655 P.2d 753 (Alaska 1982), involved a property owner, Kroll, who was a serviceman with a cable TV company. In his spare time, he was constructing a four-plex apartment building on a lot he owned. The building was to consist of three one-bedroom apartments and living quarters for Kroll and his family. When the original building contractor fell behind schedule, Kroll hired an unlicensed general contractor and his sons to do the framing and exterior work. One of the sons, Reeser, inured himself on the job and filed a claim for workers' compensation benefits. The workers' compensation board ruled Reeser had been Kroll's employee as defined by the Workers' Compensation Act. The Superior Court affirmed. *Id*. at 754-55.

On appeal to the Alaska Supreme Court, the parties disputed whether the board had properly applied Professor Larson's "relative nature of the work test," which to Court adopted in *Searfus* and elaborated upon in *Ostrem*. However, the Court noted the "relative nature of the work" test is to distinguish between an employee and an independent contractor but that test was not useful here, where the question was not whether Reeser was an employee, since he is "obviously an employee," but rather whether he was employed by his father or Kroll. *Id*. at 755-56. *Id*. at 756.

> The determination of whether [Reeser] was an "employee" under the *Searfus-Ostrem* test requires a threshold determination of whether Kroll was an "employer" within the ambit of the Workers' Compensation Act. . . . Thus, only if it is determined that Kroll acted as an employer in the course of his construction activities may [Reeser] reasonably be said to have been engaged in work which was a 'regular part of the employer's regular work.'

Id. at 756-57. The Court held the board had failed to give proper weight to the statutory limitation "in connection with a business or industry." *Id*. at 757 (quoting a portion of statutory definition of "employer").

> In Larson's terms, the policy question is whether Kroll's construction activity, either by itself or as an element of his rental activities, was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or was the construction activity simply a cost-cutting shortcut that was basically a *consumptive* and not a *productive* role played by Kroll.

Id. (emphasis in original). It concluded, "the threshold issue of whether Kroll's construction activity was sufficient to establish his status as an employer must also be remanded to the Board for further clarification." *Id*.

In *Nichols v. Napolilli*, 29 P.3d 242 (Alaska 2001), the Napolillis owned a 40-acre farm, which they operated as a small business, though both of the Napolillis worked full-time jobs unrelated to the farm. The farm sold animals, eggs, hay and farm equipment. The Napolillis deducted farm related business expenses on their federal income tax return and listed the business in the phone book and a farm products directory. *Id*. at 245.

Mr. Napolilli built a two-story log cabin on the property near the Napolillis' primary residence. To obtain assistance with farm labor, the Napolillis established a "rent-for-chores" exchange. Various tenants would live rent-free in the cabin in exchange for performing various chores. One of those tenants, Nichols, injured her arm and back while living in the cabin. The Napolillis did not have workers' compensation insurance. *Id*.

A trail was held to determine whether Nichols was an employee for the purposes of the Alaska Workers' Compensation Act. *Id*. at 246. The Napolillis characterized the arrangement as a "rental agreement," while the Nichols characterized it as an employment relationship. *Id*. at 252. The trail court concluded Nichols was an employee under the Act. *Id* at 246.

The Alaska Supreme Court found the parties written agreement, which specified the number of hours of labor required each month, a compensation rate for hours worked in excess of the agreement, specific tasks for Nichols to perform and the Napolillis' right to terminate the agreement if the work was not performed to Mr. Napolilli's expectations, was an employment contract, even though it also contained terms commonly found in a residential rental agreement. *Id*. at 252. It also applied the "relative nature of the work test," which considers the nature of the "employee's" work and the relationship of work to the "employer's" business.

> In evaluating the character of the claimant's work, the trier of fact is to consider the degree of skill involved, the degree to which it is a separate calling of business, and the extent to which it can be expected to carry its own accident burden. Concerning the relationship of the claimant's work to the purported employer's business, the trier of fact is to consider how much it is a regular part of the employer's regular work, whether it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job.

Id. at 252 (citing *Searfus*). The Court concluded, the Napolillis' control of the Nichol's work, Mr. Napolilli's extensive supervision of Nichol's work and Mr. Napolilli's provision of tools to Nichols, "[a]mple evidence" to support the trial court's findings that the Nichols was an employee. *Id*. at 252-53. It also cited Professor Larson's treatise with approval, which draws a distinction between consumptive activities, which should not bear the burden of workers' compensation insurance, and productive business activities, which should. "A homeowner who hires someone to perform an odd job for his own benefit is not appropriately considered and employer under the workers' compensation statute. A business, unlike a homeowner, can pass the cost of workers' compensation insurance on to the consumer of the business's service or product." *Id*. at 253. Because the Nichol's work for the Napolillis' farm furthered the farm's business, her work fell within the workers' compensation system. *Id*.

In *Anderson v. Tuboscope*, 9 P.3d 1013 (Alaska 2000), the Court adopted Professor Larson's test to determine whether a special employer is liable for workers' compensation. Under the "special employment" doctrine, temporary agency employees are employees of both the temporary agency and the company to which they are assigned. Under this arrangement, the labor broker is considered a "general employer," and the company is considered a "special employer." When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if:

(a) The employee has made a contract of hire, express or implied, with the special employer;
(b) The work being done is essentially that of the special employer; and
(c) The special employer has the right to control the details of the work.

When all three of the above conditions are satisfied with respect to both employers, both employers are liable for workers' compensation. *Id*. at 1017.

Gaude v. Saunders, 53 P.3d 1126 (Alaska 2002), involved a couple, the Saunderses, who hired workers to build an addition to their home. One of the workers, Gaude, fell from a ladder and was injured. Gaude's claim for workers' compensation benefits was denied by the workers'

compensation board and the ground that Gaude was not an employee within the meaning of the Workers' Compensation Act. The Superior Court affirmed.

The Alaska Supreme Court began by observing "not all persons who are employees within the usual meaning of that term are employees covered by the act." After consulting the statutory definitions of "employee" and "employer," it concluded, the "act thus excludes private common law employees who are employed other than 'in connection with a business or industry.'" *Id*. at 1126-27. Citing its remand in *Kroll*, where it adopted "Professor Larson's distinction between consumptive activities, which should not bear the burden of workers' compensation insurance, and productive business activities, which should," the Court concluded there was no "business or industry" aspect to the Saunders' building project, but rather it was consumptive in nature, since the house was intended to be used only as their family residence. *Id*. at 1127.

In *Trudell v. Hibbert*, 272 P. 3d 331 (Alaska 2012) (petition for rehearing on attorney fees granted, and previous fee award vacated, in *Trudell v. Hibbert*, 299 P.3d 1279 (Alaska 2013)), a claimant filed a lawsuit for workers' compensation benefits against his employer and the owners of a building from which he fell while working on repairs. He alleged the owners of the building, which served as the owners' residence as well as an office for their taxicab business and property rental business, were "project owners" under the Act. The Alaska Supreme Court first decided the trial court incorrectly interpreted the phrase "in the course of a person's business" in the statutory definition of "project owner" to limit project owner liability to instances when a business contracts out its usual work to others. *Id*. at 342. Citing the plain language of the statute, the Court then wrote, "For even if the usual business rule is not a limit on the definition of "project owner," a project owner must still be a business." *Id*. The Court next examined whether the property owners, who rented office space to their cab company, were a "project owner." Instrumental in the Court's decision was the fact that the owners had two profit-making businesses that were able to pass the cost of workers' compensation insurance to customers of their cab and property rental businesses. *Id*. "[The property owners] cannot disavow the commercial nature of the transaction when it does not benefit them." *Id.* at 344. The proper inquiry to determine whether the project was business-related is not the intent of the property owner, but the extent to which the business benefitted from the work. *Id*. at 343. The Court concluded both businesses benefitted from the work: the cab

business benefitted from improvements to its office and the rental business benefitted because it had improved property to rent. *Id*. Consequently, it held the owners were "project owners" under the Act. *Id*. at 344.

In *Kang v. Mullins*, 420 P.3d 1210 (Alaska 2018), Kang resided and ran a massage business in a home she rented from her son. Kang asked a neighbor, Mullins, for help with major home repairs in exchange for a used pickup truck. The Mullins injured his wrist while working on the house and sought workers' compensation benefits. He described the work as "doing [Kang] a favor as a friend trying to help her out." *Id*. at 1212-13. The workers' compensation board decided Kang was Mullins employer for purposes of the Act. *Id*. at 1211-12. The Alaska Workers' Compensation Appeals Commission affirmed the board's decision. *Id*. at 1214.

On appeal to the Alaska Supreme Court, Kang argued she was not Mullin's employer, but rather merely a consumer of the Mullin's construction activity because she was a tenant; she ran a massage business, which was not the type of business where major building repairs are productive activities, such as real estate, construction or property development; and the building was not just used for her business, but as her residence as well. The Supreme Court agreed. *Id*. at 1216.

The Court noted the Board and Commission had failed to distinguish the different roles the Kang played as a businesswoman, tenant, neighbor and friend of Mullins. *Id*. at 1216. As a tenant, the Court concluded, Kang, like the homeowners in *Gaude*, had a consumptive role with respect to the building repairs. *Id*. The Court also held the Commission had failed to properly consider whether the evidence showed that the repair work furthered the massage business, as the farm work did in *Nichols*. *Id*. at 1217. "Nothing in the present case suggests that Mullins was injured performing work that was part of Kang's business. Mullins was not, as Kang points out, performing a massage. Nor was the injury related to the business's day-to-day maintenance activities, like sweeping or cleaning." *Id*. The Court concluded, Mullins had failed to prove he had entered into a contract with the massage business, *id*. at 1216, and added "In fact, Mullins described the repair job as "doing [Kang] a favor as a friend trying to help her out," *id*. at fn 33. It reversed the Commission's decision. *Id*. at 2018.

Adams v. Workers' Compensation Benefits Guarantee Fund, 467 P.3d 1053 (Alaska 2020), involved a property owner who lived in a house, rented part of it and used part of it as a recording studio. The property owner also had a duplex rental in Bronx, New York and had previously owned a trailer in Anchorage. In addition to his Permanent Fund Dividend, the only income sources listed on the property owner's tax return were rental income, "trailer payments," a small amount of interest income and a cancelled debt. A carpenter fell from the roof of the house and was severely injured. He sought workers' compensation benefits. Because the property owner did not have workers' compensation insurance, the Alaska Workers' Compensation Benefits Guaranty Fund was joined as a party. It argued the property owner was not an "employer" as defined by the Workers' Compensation Act. The workers' compensation board found that he was since he was in the "business or industry" of "buying, managing, and selling of real estate." The Alaska Workers' Compensation Appeals Commission, relying on *Kroll*, reversed the board's decision on the basis the work on the property owner's house was a consumptive rather than productive activity. On appeal to the Alaska Supreme Court, the Benefits Guaranty Fund contended the Court recognized in *Kroll* "that owning and renting a handful of residential units does not necessarily amount to a productive business that can pass the cost of workers' compensation insurance to consumers." The Court disagreed and declined to adopt a judicially created rule designating a specific number of rental units as per se consumptive activity. *Id*. at 1162. "There Is No De Minimus Rule Distinguishing, As A Matter Of Law, Consumptive From Productive Roles In Real Estate Rentals," the Court wrote. *Id*. at 1060. The property owner's status as an employer was a question of fact, *id*. at 1062, and the Court found substantial evidence supported the board's decision, *id*. at 1062-64. It reversed the Commission.

In *Lovely v. Baker Hughes, Inc.*, 459 P.3d 1162 (Alaska 2020), three related companies all claimed project owner status in the tort claims brought against them. The Court rejected their arguments and held a "project owner" is only someone who "*contracts with*" a person to perform specific work and enjoys the beneficial use of that work. *Id.* at 1169 (emphasis in original).

> **AS 23.30.082. Workers' compensation benefits guaranty fund.**
> . . . .

> (c) . . . an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. . . .
>
> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter . . . .

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). In *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991), the Alaska Supreme Court held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion in light of the record as a whole. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the

employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994).

If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller*). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

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

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

> **AS 23.30.230. Persons not covered.** (a) The following persons are not covered by this chapter:
> . . . .
>
> (12) a person employed as an independent contractor . . . .
>
> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (20) "employer" means . . . a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;
> . . . .

An express or implied contract of employment must exist for there to be an employer-employee relationship. *Childs v. Kalgin Island Lodge*, 779 P.2d 310; 313 (Alaska 1989) (citation omitted).

8 AAC 45.040. Parties.
. . . .

(j) In determining whether to join a person, the board or designee will consider
. . . .

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest . . . .

ANALYSIS

1) Should Amos's November 25, 2019 claim against Plambeck be dismissed?

The Act prescribes employers are liable to employees for compensation. AS 23.30.045(a). At issue here is who might be an employer liable to Amos. Combined, the issues presented for decision involve Plambeck's, PFCI's and Tidwell's "employer" status under the Act. Since their statuses in these regards raise factual disputes, *Adams*, the compensability presumption applies, *Sokolowski*.

Amos contends, since he was clearly an employee, he must necessarily have an employer. While this may be a logical statement in the abstract, it is not a correct statement of workers' compensation law since the Act expressly excludes certain employees from its coverage. *Searfus*. Conversely, even when a worker is "obviously an employee," a threshold determination may be required to determine whether there was an "employer" "within the ambit of the Workers' Compensation Act." *Kroll*. Thus, not everyone who employs another is an "employer" to which the Act applies. *See id.* (remanded for a determination of whether a property owner's construction activity was sufficient to establish him as an "employer" under the Act).

An "employer" is a person employing one or more persons *in connection with a business or industry*. AS 23.30.395(20). A claimant only needs to adduce some, minimal, relevant evidence linking his claim to employment. *Cheek*s. Yet, it is not initially apparent how Amos attaches the presumption Plambeck was an employer. In fact, he does not contend Plambeck was an employer, only that Plambeck "may" be liable as an employer. Amos makes a number of factual assertions,

which are set forth in this decision's factual findings, but does not articulate how those factual assertions demonstrate Plambeck is an employer.

Regardless, Plambeck and Tidwell have both described how Plambeck engaged Tidwell to help with the shop's construction and, at one point during Tidwell's deposition, he testified Plambeck asked him to get help, and he found help, meaning Amos. Therefore, Amos can attach the presumption there was at least an implied employment contract between himself and Plambeck under a theory he was vicariously hired through Tidwell. *Smallwood*. Viewing Plambeck's evidence in isolation, he rebuts the presumption he was Amos's employer with his hearing testimony the shop is not used in connection with a business but rather for personal pursuits. *Miller*. Amos must now prove that Plambeck was an employer by a preponderance of the evidence. *Koons*.

The Alaska Supreme Court has repeatedly consulted Professor Larson's treatise, which draws a distinction between consumptive activities, which should not bear the burden of workers' compensation insurance, and productive business activities, which should. *Kroll*; *Nichols*; *Gaude*; *Trudell*; *Kang*; *Adams*. "A homeowner who hires someone to perform an odd job for his own benefit is not appropriately considered an employer under the workers' compensation statute. A business, unlike a homeowner, can pass the cost of workers' compensation insurance on to the consumer of the business's service or product." *Nichols* (emphasis added). A homeowner's scenario is presented here.

Plambeck credibly testified at hearing the intended purpose of the shop was to provide heated space where he could pursue his hobbies. Once it was built, he has used it to work on an old Chevy pickup truck and a river boat, as well as for welding and woodworking in the winter. Plambeck has averred use of the shop has provided no income to himself or his wife; the sole purpose of the structure was for storage of personal items and space for personal hobbies; no PFCI materials have been stored in the structure; there have not been any benefits to PFCI resulting from the building's construction; and building materials for the structure were not claimed on PFCI taxes. *Trudell*. Similarly, when the Fund's adjuster, Robert Buck, inspected the shop, he observed some personal belongings in the building but no "commercial-type" property and saw no evidence PFCI

conducted business at Plambeck's residence. *Id*. Likewise, Glenn Bressette, who helped Tidwell construct the shop, saw no flooring materials at Plambeck's house or in his storage shed and saw no commercial purpose for the shop. *Id*. Tidwell, too, testified at his deposition he never had any indication the shop was to be used for PFCI's business. Notwithstanding the exhaustive factual record in this case, neither Amos nor the Fund have adduced any evidence to the contrary. Because the shop was not constructed "in connection with a business or industry," and because shop has only been used for Plambeck's personal hobbies, its construction was a consumptive rather than a productive activity. *Kroll*; *Kang*. Consequently, Plambeck is not an "employer" and Amos's claim against him should be dismissed.

Nevertheless, Amos takes an all-encompassing approach and vaguely alleges Plambeck "may" be liable as a project owner and "might" be liable as a general contractor. His theories in these regards are not any better understood than his theory Plambeck was his employer. The Fund also tepidly suggests Plambeck "may" be liable as a project owner.

The statutory definition of "project owner" is clear: a person who, *in the course of the person's business,* engages the services of a contractor and who enjoys the beneficial use of the work. AS 23.30.045(f)(2). While Plambeck's testimony certainly indicates he has enjoyed the beneficial use of Amos's work, Amos's and the Fund's suggestions that Plambeck may have been a project owner suffer from the same infirmity as Amos's allegation that Plambeck was his employer – the lack of any connection to a *personal* business activity of Plambeck. *Id*. Plambeck was not a project owner, either, and Amos's claim against him should be dismissed.

Finally, Amos contends, there is evidence to support a finding that Tidwell was subcontracted through Plambeck "who was acting as his own general contractor through PFCI." Amos's argument is not understood here either. A "contractor" is a person who undertakes by contract performance of certain work for *another*. AS 23.30.045(f)(1). Amos's suggestion that Plambeck might have been a general contractor fails for two reasons. First, definitionally, Plambeck could not have contracted with himself to build his own shop. Second, any work Plambeck might have undertaken as a contractor would have been on his own behalf and not that of another. In relation to the shop's construction, Plambeck was not a contractor, general or otherwise, and Amos's claim

against him should be dismissed. *Id*. To the extent Amos might be contending Plambeck contracted with his own company, PFCI, to construct the shop, that contention is addressed below.

2) Should PFCI be dismissed as a party to litigation?

Amos contends PFCI supplied plans for the shop, materials for the shop and "some of the labor" in constructing the shop. He contends this evidence shows Plambeck hired his own business, PFCI, to construct the shop, in which case PFCI was his employer, so it should not be dismissed as a party to litigation. He does not specify what evidence shows PFCI supplied plans for the shop and neither is such evidence apparent. Nevertheless, Tidwell provided a Lowe's receipt that he contended showed the PFCI credit card was used to buy $417.58 of material for the shop's construction; a Lowe's estimate and screenshot showing PFCI bought $2,284.80 of material; and an invoice from the Fairbanks Truss Company that Tidwell contends may have been paid for with PFCI's credit card. Though minimal, this evidence is sufficient to attach the presumption that PFCI was an employer. *Cheeks*. Additionally, at his deposition, Amos testified he saw a guy help stand up a wall to the shop who was wearing a PFCI shirt and driving a truck with a Plambeck sticker on the side. Without regard to credibility, Amos's deposition testimony is also sufficient to attach the presumption PFCI was an employer. *Ugale*.

PFCI rebuts the presumption it was an employer with a bank statement showing Plambeck paid the $2,284.80 Lowe's purchase and the balance due on the Fairbanks Truss Company invoice with his personal credit card. It also rebuts the presumption with Plambeck's hearing testimony that PFCI's card was accidently used to pay the $417.58 Lowe's charge. Lastly, PFCI rebuts the presumption with Plambeck's hearing testimony that PFCI's "warehouse guy" did not work on the shop. *Miller*. Amos must now prove PFCI was an employer by a preponderance of the evidence. *Koons*.

It is undisputed that Amos was not directly employed by PFCI. Neither Amos nor the Fund contend otherwise. Instead, they each rely on more elaborate theories for their respective cases against PFCI. Amos contends Plambeck contracted with PFCI to construct the shop, then PFCI subcontracted work on the shop to Tidwell, who hired Amos. Meanwhile, the Fund contends

Tidwell hired Amos and then loaned him to PFCI, who constructed the shop with Amos's help as his special employer.

First, concerning the $417.58 Lowe's charge on PFCI's credit card, PFCI's attorney rhetorically asked during its closing argument at hearing, "Hasn't everyone made a charge on the wrong card?" Given the nearly identical appearances of Plambeck's personal credit card and PFCI's, a single inadvertent charge on the wrong card is entirely understandable, especially given the relatively miniscule amount charged in relation to the scope of the project, which Plambeck credibly estimated cost $60,000 to $70,000. AS 23.30.122; *Rogers & Babler*; *Miller*. The credibility of Plambeck's explanation is further bolstered by his efforts to "fix" the error, as evidenced by the letter from his accountant. AS 23.30.122; *Miller*. Concerning the $2,284.80 Lowe's purchase and the Fairbanks Truss Company invoice, Plambeck has provided bank statements that evidences these purchases were paid by his personal credit card, not PFCI's. *Miller*. He also provided a bank statement showing the $3,000 he paid Tidwell was taken from a personal account. *Id*. Tabitha Plambeck likewise credibly testified at hearing that Tidwell was paid with personal funds. *Id*.; AS 23.30.122. Neither Amos nor the Fund dispute Plambeck's rebuttal evidence concerning these payments.

Some early litigation in this case involved Tidwell's paystub from PFCI for his September 16, 2019 to September 30, 2019 pay period, which showed he was paid considerably more than his usual paycheck. Amos and the Fund have contended this evidence indicates the shop's construction was a PFCI project. However, Tidwell, Plambeck and Tabitha Plambeck convincingly addressed this aberration. *Miller*. At his deposition, Tidwell explained the amount resulted from a large job that involved a lot of floor prep. At hearing, Plambeck explained the "quantity" on Tidwell's pay stub looks like hours but actually represents square footage and contended, "[i]t was a large job." Tabitha Plambeck also referenced Tidwell's October 1, 2019 work order. She was even more specific and explained the job involved laying 1,600 square feet of laminate flooring, including stairs, and involved a lot of "add-ons," like prep work. Collectively, their explanations for Tidwell's larger-than-average paycheck are consistent and credible. AS 23.30.122.

There is also the matter of "Joe," a PFCI employee Amos saw at the job site and who helped stand up a wall to the shop. The testimony is conflicting on what role Joe played. Tidwell testified Joe was at Plambeck's residence about eight minutes, helped lift a wall, then left. He did not drop off any construction material, according to Tidwell. Meanwhile, Plambeck testified Joe was PFCI's "warehouse guy," who delivered some lumber but did not work on the shop. Regardless, any assistance Joe may have rendered is not pivotal for the reasons that follow.

Plambeck credibly testified at hearing PFCI's business involves flooring sales and installations. AS 23.30.122. The business does not do anything other than flooring. *Id*. PFCI does not do foundation work, framing, drywall, siding, windows, doors, roofing or painting. *Id*. Plambeck also described PFCI's physical facilities. It has a 40' x 86' showroom, a 40' x 50' annex. He has plenty of room to park vehicles and store flooring material and tools. *Id*. Plambeck's testimony in these regards remained undisputed at the hearing's conclusion and directly refutes both Amos's and the Fund's theories. PFCI was not Plambeck's contractor because constructing shops is not the type of business it "undertakes." AS 23.30.045(f)(1). Similarly, PFCI was not a special employer because it does not employ people in connection with the "business or industry" of constructing shops. AS 23.30.395(20). Consequently, PFCI should be dismissed as a party to litigation.

3) Should Amos's November 25, 2019 claim against Tidwell be dismissed?

Amos attaches the presumption Tidwell was his employer with his deposition and hearing testimony that Tidwell invited him to help build the shop and offered to pay him a lump sum at the end of the job. *Child*s; *Smallwood*. Viewing Tidwell's evidence in isolation, he rebuts the presumption with his deposition testimony that Amos was not hired and was not employed, but rather helped him build the shop "on his own recognizance." *Childs*; *Miller*. Amos must now prove Tidwell was his employer by a preponderance of the evidence. *Koons*.

An express or implied contract of employment must exist for there to be an employer-employee relationship. *Childs*. Notwithstanding Tidwell's protestations he did not hire or employ Amos, at his deposition he relayed having the following exchange with Amos: "I said, hey, my buddy Travis needs help, are you still broke, do you still want to make some side money? He said yes." He also

testified he told Amos, ". . . hey, we're going to frame a garage, if you want money, you can come help." Meanwhile, at his own deposition, Amos described how he became involved with building the shop: "Tidwell came over to my house. He said, "[H]ey. My boss needs to get this shop built. Do you want to help me build it?" And I said, "Okay." Amos also testified Tidwell said he would pay him "like 2,500 bucks at the end of the job." Tidwell similarly testified his agreement with Amos called for him paying Amos "a portion or a percentage" of the $6,000 Plambeck was going to pay him. Tidwell's own testimony corresponds with Amos's recollection and, in light of the text messages showing Tidwell's supervision of Amos's work on the shop, some species of an employer-employee relationship existed between Tidwell and Amos. *Id*. However, the crux of this inquiry, as with previous ones, is whether the employment was "in connection with a business or industry." *Gaude*.

Similar to *Kroll*, where a property owner hired an unlicensed contractor to do framing and exterior work on a building, Tidwell was also arguably operating as an unlicensed contractor here. In exchange for Plambeck's promise to pay him $6,000, Tidwell undertook the performance of building Plambeck's shop and hired Amos in the process. AS 23.30.045(f)(1). However, as in *Kroll*, Amos's reliance on AS 23.30.230(a)(12) to establish himself as an employee, as opposed to an independent contractor, is misplaced. Since Amos is "obviously an employee," a threshold determination is required whether Tidwell was an "employer" under the Act. *Kroll*. "Thus, only if it is determined that [Tidwell] acted as an employer in the course of his construction activities may [Amos] reasonably be said to have engaged in work which was a 'regular part of the employer's regular work.'" *Id*.

According to Amos, his and Tidwell's relationship was "built off of work" and Tidwell getting him jobs. Meanwhile, PFCI characterized Tidwell's descriptions of his relationship with Amos "as one based on Mr. Amos consistently asking for help in the form of work, money, food and drugs." Tidwell's discovery responses and deposition testimony show this to be fair characterization from his perspective. *Rogers & Babler*. Furthermore, the vast record in this case shows both Amos's and Tidwell's portrayals of their friendship are accurate. *Miller*.

The Court in *Kroll* emphasized the statutory limitation "in connection with a business or industry." AS 23.30.395(20). Though Amos's work at Wilson & Wilson Construction may have been in connection with its business or industry, finding Amos a job at Wilson & Wilson was not in connection with any business or industry of Tidwell. Though Amos's help on the "Borne" job may have been in connection with PFCI's business or industry, paying Amos out of his own pocket for helping him sweep floors on the "Borne" job was not in connection with any business or industry of Tidwell. Buying Amos fast food and marijuana, and giving him gas money, was not done in connection with any business or industry of Tidwell; and certainly, giving Amos the family dog was not done in connection with any business or industry of Tidwell either. Helping Amos earn a few dollars by assisting with shop's construction was not done in connection with a business or industry any more than Tidwell helping Plambeck with his house, the trim in his bathroom or fixing the taillights on his van were done in connection with a business or industry. *Kroll*. The reason Tidwell did all these things is abundantly clear in the record - friendship.

The word "friend" permeates Tidwell's deposition testimony as well as his many unsworn statements. He has repeatedly described assisting Plambeck as a "friend helping a friend," and the shop's construction as a "buddy deal." Tidwell stated he agreed to help Plambeck build the shop because "Travis needed help," and explained, "Just as a friend. I worked for Travis. You know, I like my job, I like Travis, and Travis needed my help. If somebody needs help, you go help them. It's not really that big of a deal. *I had a job to go back to*." (Emphasis added). Tidwell also explained, he was friends with both Amos and Plambeck, so Amos came to help him help Plambeck. Moreover, when Plambeck asked Tidwell to get help with the shop's construction, Tidwell called "another buddy to come help with this buddy deal." The buddy was Amos. Bressette, who was working as a volunteer, also came to help Tidwell work on the shop because, according to Tidwell, Bressette "was my friend." These are a few examples in the record.

Plambeck credibly testified Tidwell could have made more money laying flooring rather than building the shop. Tidwell stated this too. Given Tidwell's "friend price" to Plambeck for building the shop was $10,000 to $12,000, and given that Tidwell agreed to do it for $6,000, and ultimately accepted $3,000, it is thought Tidwell also testified credibly when he was asked about the importance of money:

> I would only go out of my way like this for a friend, I would never do it for someone I don't know. . . . If the money was that important to me, I never would have put up with Sam. I never would have been over there framing that garage, I never would be involved in any of this.

A preponderance of the evidence shows Tidwell helped Plambeck out of friendship rather than "in connection with a business or industry." *Saxton*. Any money that changed hands was purely incidental. *Rogers & Babler*; *Miller*. As Tidwell said, he "had a job to go back to."

As a matter of policy, as well as common sense, friendship is not a route through which the costs of industrial accidents should be channeled. *See Searfus* (quoting Larson) (the costs of industrial accidents should be borne by the consumer as part of the cost of the product); *see also Kang* (injured worker described repair job as "doing a [Kang] a favor as a friend trying to help her out."). Tidwell's "regular work" was his employment as a piecemeal flooring installer at PFCI. Though helping Amos, as well as other friends, like Plambeck, may have been regular activities for Tidwell, they were not in connection with any business or industry of his own, and since Amos's work on the shop was not a regular part of Tidwell's regular work, Tidwell was not an "employer" under the Act. *Searfus*; *Kroll*; *Kang*; AS 23.30.395(2). Accordingly, Amos's claim against Tidwell should be dismissed.

Given the conclusions above, the Fund's status cannot now be ignored. Its sole statutory purpose is to entertain claims from employees who were employed by an "employer" who was either uninsured or otherwise failed to pay compensation. AS 23.30.082(c). Since neither Plambeck, PFCI nor Tidwell are an employer under the Act, the Fund no longer has an interest to protect in this litigation and its presence is no longer necessary for complete relief and due process among the parties. 8 AAC 45.040(j)(2), (3). Therefore, Amos's claim will be dismissed against the Fund as well.

CONCLUSIONS OF LAW

1) Amos's November 25, 2019 claim against Plambeck should be dismissed;
2) PFCI should be dismissed as a party to litigation;
3) Amos's November 25, 2019 claim against Tidwell should be dismissed; and

4) Amos's November 25, 2019 claim against the Fund should be dismissed.

ORDERS

1) Plambeck's March 12, 2020 petition to dismiss Amos's November 25, 2019 claim against him is granted. Amos's claim is dismissed with prejudice.
2) PFCI is dismissed as a party to litigation.
3) Tidwell's July 28, 2020 petition to dismiss Amos's November 25, 2019 claim against him is granted. Amos's claim is dismissed with prejudice.
4) Amos's November 25, 2019 claim against the Fund is dismissed with prejudice.

Dated in Fairbanks, Alaska on November 4, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Sarah Lefebvre, Member

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 SAMUEL AMOS, employee / claimant v. DAVID E. TIDWELL, et al, employers; UMIALIK INSURANCE CO., insurer / defendants; Case No. 201916954; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on November 4, 2021.

/s/
Ronald C. Heselton, Office Assistant II