

Alaska Workers' Compensation Appeals Commission

State of Alaska, Workers' Compensation
Benefits Guaranty Fund,
Appellant,

vs.

Virgil A. Adams, Michael A. Heath d/b/a
O&M Enterprises, and Michael A. Heath
Trust,
Appellees.

Final Decision

Decision No. 252 August 13, 2018

AWCAC Appeal No. 15-029
AWCB Decision Nos. 15-0094, 15-0127,
and 17-0065
AWCB Case No. 201113128

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 15-0094, issued at Anchorage, Alaska, on August 31, 2015, by southcentral panel members Matthew Slodowy, Chair, Rick Traini, Member for Labor, and Amy Steele, Member for Industry; Board Interlocutory Decision and Order on Reconsideration and Modification No. 15-0127, issued at Anchorage, Alaska, on October 27, 2015, by southcentral panel members, Matthew Slodowy, Chair, Rick Traini, Member for Labor, and Amy Steele, Member for Industry; and, Final Decision and Order No. 17-0065, issued at Anchorage, Alaska, on June 6, 2017, by southcentral panel members, Matthew Slodowy, Chair, and Donna Phillips, Member for Labor.

Appearances: Jahna Lindemuth, Attorney General, and Siobhan McIntyre, Assistant Attorney General, for appellant, State of Alaska, Workers' Compensation Benefits Guaranty Fund; Charles W. Coe, Attorney at Law, for appellee, Virgil A. Adams; appellees, Michael A. Heath d/b/a O&M Enterprises, and Michael A. Heath Trust, did not participate in this appeal.

Commission proceedings: Appeal filed November 12, 2015; order staying appeal proceedings issued January 25, 2016; appeal amended July 6, 2017, with motion for stay; motion for stay granted August 18, 2017; briefing completed March 9, 2018; oral argument held May 14, 2018.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. *Introduction.*

This appeal to the Alaska Workers' Compensation Appeals Commission (Commission) involves six decisions from the Alaska Workers' Compensation Board (Board) dealing with various aspects of whether Virgil A. Adams (Mr. Adams) was an employee of Michael A. Heath d/b/a O&M Enterprises (Mr. Heath) and/or the Michael A. Heath Trust (Trust) at the time of his injury.¹ A secondary issue is whether Mr. Adams was intoxicated at the time of his injury. Since Mr. Heath did not have workers' compensation insurance at the time of Mr. Adams' injury, the Alaska Workers' Compensation Benefits Guaranty Fund (Fund) was joined as a party. The Commission, relying in part on the recent Alaska Supreme Court (Court) decision in *Kang v. Mullins*,² reverses the Board's decisions and finds that Mr. Heath was not the employer of Mr. Adams at the time of his accident.

2. *Summary of decisions.*

On August 8, 2014, the decision in *Adams I* ordered a continuance of the August 6, 2014, hearing because the Trust had not received notice. A representative of the Trust was ordered to file an appearance.

¹ The decisions in this matter include: Interlocutory Decision and Order in *Adams v. O&M Enter. and The Michael A. Heath Trust, and Alaska Workers' Comp. Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 14-0109 (Aug. 8, 2014)(*Adams I*); Interlocutory Decision and Order in *Adams v. O&M Enter. and The Michael A. Heath Trust, and Alaska Workers' Comp. Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 14-0136 (Oct. 9, 2014)(*Adams II*); Interlocutory Decision and Order in *Adams v. O&M Enter., The Michael A. Heath Trust and Heath, and Alaska Workers' Comp. Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 15-0039 (Apr. 6, 2015)(*Adams III*); Interlocutory Decision and Order in *Adams v. O&M Enter. and The Michael A. Heath Trust, and Alaska Workers' Comp. Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 15-0094 (Aug. 31, 2015)(*Adams IV*); Interlocutory Decision and Order on Reconsideration and Modification in *Adams v. Heath and O&M Enter., and Alaska Workers' Comp. Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 15-0127 (Oct. 27, 2015)(*Adams V*); and Final Decision and Order in *Adams v. Heath d/b/a O&M Enterprises and Michael A. Heath Trust, and Alaska Workers' Comp. Benefits Guaranty Fund*, Alaska Workers' Comp. Bd. Dec. No. 17-0065 (June 6, 2017)(*Adams VI*).

² *Kang v. Mullins*, 420 P.3d 1210 (Alaska 2018).

On October 9, 2014, in *Adams II*, the Board granted in part and denied in part the Trust's November 8, 2013, petition to quash notice of records deposition and subpoena duces tecum and for a protective order. The Board, in *Adams II*, ordered the Trust to produce the trust, all filed tax documents, all records concerning any interest in real property held or operated by the Trust, any records concerning payroll and employment taxes, and any information concerning any and all employees it has or had directly or through businesses owned or operated by the Trust.

On April 6, 2015, the Board issued *Adams III* in which it ordered hearing issues bifurcated. The issues to be decided at the first hearing were whether the alleged employers were "employers" under the Alaska Workers' Compensation Act (Act), whether Virgil Adams was an employee, and whether intoxication was the proximate cause of his injuries. A second hearing would be set on the merits of Mr. Adams' claim for benefits.

On August 31, 2015, the Board issued *Adams IV* in which it found Mr. Adams to be an employee of Mr. Heath doing business as O&M Enterprises at the time Mr. Adams was injured on August 18, 2011. The Board, in *Adams IV*, found intoxication was not the proximate cause of Mr. Adams' injury.

On October 27, 2015, the Board issued *Adams V*, ordering reconsideration and modification of *Adams IV*. Incorporating the findings of fact from *Adams IV*, the Board held that the "business or industry" of Mr. Heath doing business as O&M Enterprises at the time Mr. Adams was injured was the buying, managing, and selling of real estate. In all other respects, *Adams IV* remained the same.

On June 6, 2017, the Board issued *Adams VI* in which it awarded various benefits to Mr. Adams resulting from his injury on August 18, 2011. The decision also included an award of attorney fees to Mr. Adams' counsel and a penalty on all benefits awarded.

3. *Factual background and proceedings.*³

On August 18, 2011, Mr. Adams was injured at the home of Mr. Heath while doing some roof repairs. He fell from a ladder and was unable to move. The paramedics were called. First responders at the scene of the injury reported: "Pt. admits to having consumed 3 beers today Smell of alcoholic beverage on breath/about person. Patient admits to alcohol use." The report states they arrived on the scene at 4:34 P.M. The signature is illegible.⁴

Andrew Smith testified that at the time of Mr. Adams' injury, he was a firefighter and paramedic and he was one of the first responders on the scene, dispatched by the 911 call center. Soon after arriving, Mr. Smith administered the painkiller fentanyl. Because fentanyl can adversely react in a person's body with alcohol, Mr. Smith first had to determine that Mr. Adams had not consumed enough alcohol to cause an interaction. Mr. Smith did this by speaking with Mr. Adams while observing his movements, eyes, and breath. Mr. Smith determined Mr. Adams was not intoxicated and that it was safe to administer fentanyl on the scene. He conceded the determination is subjective, rather than based on rigorous, objective criteria.⁵

The Providence Alaska Emergency Department chart note stated:

Virgil Adams is a 47 y.o. male. He was roofing while intoxicated and with cocaine in his system. Stated the ladder lost its footing and he feel [sic] backwards off the roof of a house where he was trying to find a leak around the chimney. He did not lose consciousness but noted immediate change in the feeling in his legs and was unable to move. When he arrived in the ER he had no sensation distally and has actually regained some of that⁶

³ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁴ *Adams IV* at 10, No. 30.

⁵ *Id.*, No. 29.

⁶ *Id.* at 3, No. 1.

Mr. Adams arrived at the emergency department at 5:18 P.M. and his blood was drawn at 6:01 P.M. It showed an alcohol value of .049.⁷

On August 30, 2011, Mr. Adams filed a report of injury stating he injured his back and was hospitalized when “a ladder slid out from off the roof, fell 40 ft., first hitting his back, then bouncing off and hitting the ground (with railroad ties) folding in half backwards.” The form states the injury occurred “on Employer’s premises.”⁸

On September 20, 2011, Mr. Adams filed a workers’ compensation claim (WCC), naming his employer as “Michael Heath O&M Enterprises,” and stating Mr. Adams was injured when “cribbing came out from under ladder while on roof, ladder slid off roof, hit back on railroad ties.” The WCC stated Mr. Heath was uninsured at the time of the injury, and Mr. Adams sought to join the Fund as a party. The WCC further listed Mr. Heath’s home address as the place of injury.⁹

On January 5, 2012, the Fund controverted all benefits because:

Compensation benefits are not payable under AS 23.30.235(2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee’s physician.

Per medical records from Providence Alaska Medical Center and dated 08/30/11, “Mr. Virgil Adams is an 47 yo white male carpenter from Anchorage who was roofing while intoxicated and with cocaine in his system on 08/18/11.”¹⁰

On September 24, 2012, Mr. Adams filed an amended WCC seeking the same benefits as his 2011 WCC, but now identifying his employer as Mr. Heath.¹¹

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

I Michael Heath (O&M Enterprises), hereby state that Virgil Adams have [sic] never work for O&M Enterprises. Furthermore, no request was ever

⁷ *Adams IV* at 4, No. 2.

⁸ *Adams II*, at 2, No. 1.

⁹ *Id.* at 2-3, No. 2.

¹⁰ *Id.* at 3, No. 3.

¹¹ *Adams III* at 2, No. 4.

made to hire Virgil Adams to be an employee for O&M Enterprises or Michael Heath Trust. At the time of alleged incident Virgil Adams was intoxicated at Michael Heath's home at said alleged incident.¹²

The Board deemed the "Notice of Compensation Fraud" to be an answer to Mr. Adams' claims.¹³

On August 15, 2013, Mr. Adams filed a petition seeking to join the Trust as an employer,¹⁴ which was served upon the Michael A. Heath Trust at Mr. Heath's post office box.¹⁵ The Michael A. Heath Trust agreement lists Michael Heath as trustor and trustee and the Trust's schedule of assets listed only the Snow Bear property.¹⁶ On October 8, 2013, Mr. Adams filed an Affidavit of Readiness for Hearing on his WCCs.¹⁷

On November 15, 2013, Mr. Heath testified in deposition that his occupation was probably real estate, which he agreed included buying, selling, and renting. He also agreed that real estate was most likely his occupation in 2011. He also agreed he did business as O&M Enterprises and that "[e]verything I do is part of O&M Enterprises"¹⁸ Mr. Heath also testified that in 2011 he owned a rental property in New York City for which his mother did the day-to-day management.¹⁹

The Alaska Division of Corporations, in 1997, listed O&M Enterprises as a partnership and issued a license dated August 27, 1997, which expired December 31, 1998. The status of the license was "expired" and the business was "real estate, rental and leasing."²⁰ Moreover, the last business license for O&M was issued in 2005 and listed

¹² *Adams IV* at 4, No. 6.

¹³ *Adams III* at 3, No. 5.

¹⁴ *Adams IV* at 5, No. 9.

¹⁵ *Id.*

¹⁶ *Id.* at 7, No. 21.

¹⁷ *Adams III* at 3, No. 7.

¹⁸ *Adams IV* at 6, No. 13.

¹⁹ *Id.*, No. 14.

²⁰ *Id.*, No. 15.

the business as “professional, scientific and technical services” with status listed as “inactive.”²¹

The Board heard the discovery dispute over the issues of what documents the Trust was required to produce.²² The Board ordered the Trust to produce tax records and records relating to any interest in real property held or operated by the Trust, along with payroll records.²³ The Trust complied and the statutory quitclaim deed showed Michael Heath conveyed his interest to Michael Heath, Trustee of the Trust Agreement of Michael Heath, in the Bear Valley property. The deed states, in relevant part:

The Grantor, MICHAEL A. HEATH, a single man, of P.O. Box *****, Anchorage, AK 99524, for an [sic] in consideration of the sum of TEN DOLLARS (\$10.00), and other valuable consideration to Grantor in hand paid, CONVEYS and QUITCLAIMS to MICHAEL A. HEATH, Trustee of the TRUST AGREEMENT OF MICHAEL A. HEATH, dated the 8th day of January, 2007, and the Successor Trustees thereunder of P.O. Box *****, Anchorage, AK 99524, Grantee, all right, title and interest, if any, which Grantor has in and to that certain real property situate in the Anchorage Recording District, Third Judicial District, State of Alaska, more particularly described as follows: *****²⁴

On January 22, 2015, the Fund filed a petition to bifurcate three issues and asked for a determination prior to a hearing on the benefits requested by Mr. Adams. The three issues were “(1) whether Mr. Heath was an employer under the Act, (2) whether Mr. Adams was an employee under the Act, and (3) whether Mr. Adams' intoxication at the time of his accident on August 18, 2011 bars his claim.”²⁵

The Board granted the petition in part ordering:

The issues of whether the Alleged Employers are employers under the Act, whether [Mr. Adams] was an employee, and whether intoxication was the proximate cause of [Mr. Adams'] injuries will be heard at an initial hearing.

²¹ Exc. 003.

²² *Adams II*.

²³ *Id.* at 12.

²⁴ *Adams IV* at 5-6, No. 12 (actual location omitted).

²⁵ *Id.* at 8, No. 23.

If necessary, a second hearing will be held to determine [Mr. Adams'] eligibility for specific benefits.²⁶

Mr. Adams testified he met Mr. Heath through a mutual acquaintance, Andre Clark, approximately two years prior to the 2011 injury. Mr. Adams first worked with Mr. Heath building a garage at the Snow Bear property. Mr. Heath initially asked Mr. Adams to bid on various jobs, but Mr. Adams refused contending he had no experience in bidding. Mr. Adams did not continuously work for Mr. Heath, but would do occasional, recurring jobs for "months at a time," always at Snow Bear. At no time did Mr. Adams have authority to hire or fire the other workers on the job site. His work for Mr. Heath included carpentry, roofing, soffit, and carpet work. On a typical day, Mr. Heath would personally pick up Mr. Adams and bring him to the job site. In 2011, Mr. Heath paid Mr. Adams \$25.00 per hour, with payment made typically in cash daily or at most every three days. The hours were irregular and on an "as needed" basis, rather than a set weekly schedule.

Mr. Adams also testified he observed various people living in rooms at Snow Bear, which Mr. Adams believed to be tenants, but with no knowledge as to arrangements for rental payments. He stated that Mr. Heath had a recording studio and would occasionally invite Mr. Adams to hear recordings of music produced there. Mr. Heath provided nearly all the tools, except for Mr. Adams' hand tools and tool belt. Mr. Adams felt he was "just another worker" on the site. Mr. Heath would also occasionally do some of the building work alongside the other workers. Mr. Heath generally directed the manner and method of completing the work at Snow Bear. Mr. Adams testified he believed he was hired by Mr. Heath, not O&M Enterprises nor the Trust. Mr. Adams did not complete or file tax documents for any monies received from Mr. Heath in 2011.²⁷

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

²⁶ *Adams IV* at 8, No. 24.

²⁷ *Id.* at 9, No. 26 (Mr. Adams asserted the tax preparers told him he did not need to declare cash payments for which he had no 1099 tax form. Virgil Adams Dep. Jan. 15, 2013, at 24:20 – 25:14.)

Mr. Adams had climbed the ladder many times during that period; therefore, Mr. Adams felt he had no reason to inspect the cribbing before ascending on the day of the injury. As he climbed the ladder, the cribbing gave way, the ladder fell, and Mr. Adams fell with it. Mr. Adams did not lose his balance; he simply went tumbling down with the ladder as it fell. Mr. Adams drank two beers prior to the fall, and was on his third. Mr. Adams took cocaine right before ascending the ladder. Mr. Adams asserted Mr. Heath was aware people were drinking on the jobsite, and often provided alcohol to workers. He also asserted Mr. Heath provided him with the cocaine.²⁸

Robert J. Donerson, a friend of both Mr. Heath and Mr. Adams, testified in deposition that Mr. Adams came to the house the day before the injury and spent the night drinking and using cocaine with Mr. Donerson. Mr. Donerson said Mr. Adams had provided both the beer and the cocaine.²⁹ Mr. Donerson testified he has known Mr. Heath for about 20 years and he had been living at Snow Bear at the time of Mr. Adams' injury for about two years. He recalled paying Mr. Heath rent on a monthly basis, \$1,400.00 per month.³⁰ Regarding construction work he observed at Snow Bear, Donerson testified that Mr. Heath probably paid the workers.³¹

Kennith Stephens, in deposition, testified he was with Mr. Heath visiting at the time of Mr. Adams' injury, having arrived that morning.³² He did not know Mr. Heath's occupation.³³ He was the person who called 911.³⁴

²⁸ *Adams IV* at 9-10, No. 27.

²⁹ Robert J. Donerson Dep., Feb. 18, 2014, at 35:24 – 36:24; R. 000414-5; Exc. 144.

³⁰ *Adams IV* at 12-13, No. 38.

³¹ *Id.*

³² Kennith Stephens Dep., Feb. 21, 2014, at 10:25 – 11:19; R. 000432; Exc. 161.

³³ Stephens Dep. at 10:23-24; R. 000432; Exc. 161.

³⁴ Stephens Dep. at 20:1-4; R. 000435, Exc. 164.

The Board found Mr. Adams' testimony was consistent, direct, and unequivocal.³⁵ The Board also found Mr. Adams to be credible.³⁶

Mr. Heath testified he moved to Alaska in 2000. Mr. Heath's formal educational background included architectural and civil drafting as well as mechanical drawing. Using these skills, Mr. Heath drew the engineering diagram for the entire Snow Bear property, which workers used during construction. His primary business interest is music production and promotion. O&M Enterprises is his only business. Initially, O&M was meant to be a janitorial business, but those plans fell through. O&M Enterprises then became the vehicle for Mr. Heath's music production and promotion interests. O&M Enterprises had not done an actual music or promotion job since probably about 2000. Mr. Heath did not do any O&M Enterprises business from his home and met any clients at a library or restaurant. O&M Enterprises did no business and had no income in 2011. O&M Enterprises never had employees. While other people lived at Snow Bear, Mr. Heath did not collect cash rent from all of them, though from others he did. Mr. Heath could not say whether he rented the home from the Michael A. Heath Trust. Mr. Heath had many construction tools of his own at Snow Bear. Most of the work done at Snow Bear was done by Mr. Heath's friends, who were not paid for the work. Previously, Mr. Heath had hired what he termed a "contractor" to work on the chimney at Snow Bear. Mr. Heath acknowledged Mr. Adams was at Snow Bear on the day of the injury, but did not know why he was there and could not recall the subject of any discussions with Mr. Adams that day. Mr. Heath maintained Mr. Adams never worked for him at Snow Bear for compensation.³⁷

The Board found Mr. Heath's testimony to be evasive, contradictory, and equivocal. Mr. Heath testified at his November 15, 2013, deposition that O&M Enterprises was in business in 2011 in the field of real estate, but at hearing testified it was not in business that year, and that real estate would not have been its business. When asked where the

³⁵ *Adams IV* at 10, No. 28.

³⁶ *Id.*

³⁷ *Id.* at 11-12, No. 35.

physical location of O&M Enterprises would have been in 2011, Mr. Heath refused to answer. Mr. Heath declined to answer many questions concerning his business ventures and the Trust. Mr. Heath refused to answer what type of business O&M Enterprises was in 2011. Mr. Heath claimed to have no idea who owns the Snow Bear property. The Board found Mr. Heath not credible.³⁸

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

At the hearing's conclusion, Mr. Heath stated he had received ample opportunity to present his argument and obtain a fair hearing, and that he understood the proceedings.⁴⁰

On March 15, 2013, toxicologist Andris Antoniskis, M.D., reviewed Mr. Adams' medical records for an employer's medical examination (EME), and noted the medical records he received were incomplete. Dr. Antoniskis stated:

On review of the records, it is very difficult to determine timeframes of the exact time of his injury, his arrival in the emergency room, and the times of collection of the urine samples and blood testing that was done. This complicates the forensics of attempting to determine levels of impairment, particularly from his alcohol use⁴¹

³⁸ *Adams IV* at 12, Nos. 36 and 37.

³⁹ *Id.* at 13, No. 39.

⁴⁰ *Id.*, No. 40.

⁴¹ *Id.* at 5, No. 7.

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

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

Therefore, as previously stated, I feel that [Adams's] injuries are in large part due to his impairment related to his blood alcohol level and his likelihood of having sustained injuries would have been significantly reduced if he would not have been under the influence of alcohol at the time of his injury.⁴²

Dr. Antoniskis testified he is an internal medicine and addiction specialist. He conducted two separate reviews of Mr. Adams' medical records, including first responders' and emergency room reports. Using these records, and applying the principles of blood alcohol metabolism, Dr. Antoniskis extrapolated Mr. Adams' blood alcohol level was .071 at the time of the injury. Dr. Antoniskis opined this level of intoxication would have played a "large part" in impairing Mr. Adams' judgment, balance, and physical coordination at the time of the injury. Dr. Antoniskis conceded he had no way of knowing when Mr. Adams drank his last beer, or the strength of the beers.⁴³ Regarding the level of impairment caused by Mr. Adams' consumption of cocaine just prior to the injury, Dr. Antoniskis was less certain, and was unable to give a concise opinion on that point.⁴⁴

⁴² *Adams IV* at 8-9, No. 25.

⁴³ *Id.* at 10, No. 31.

⁴⁴ *Id.* at 11, No. 32.

Dr. Antoniskis could not say with certainty whether Mr. Adams' blood alcohol level was still rising at the time his blood was drawn, or had begun to decline. Factors such as the strength of the beer Mr. Adams drank, amount of food in his stomach, and his tolerance for alcohol, are all variables which would affect the level of intoxication at the time of the injury. Dr. Antoniskis' opinion on the amount of alcohol in Mr. Adams' body, and his level of impairment is, at best, an educated guess. Different individuals will experience different levels of impairment from consuming the same number of alcoholic drinks, depending on tolerance. Some people would be unable to maintain balance or complete tasks requiring motor skills, while others might perform with little or no visible impairment.⁴⁵

The Board found that although Mr. Adams had alcohol and cocaine in his system at the time he fell from the ladder, intoxication was not the cause of the fall. Rather the Board found the loose cribbing supporting the ladder gave way, causing Mr. Adams to fall.⁴⁶

The parties agree Mr. Adams sustained serious injuries when he fell from the roof at Mr. Heath's home. Furthermore, all parties agree he has received extensive medical treatment, which has been appropriate to his needs, and agree he will continue to need medical and other assistance through his lifetime.

4. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.⁴⁷ On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁴⁸ The

⁴⁵ *Adams IV* at 11, No. 33.

⁴⁶ *Id.*, No. 34.

⁴⁷ AS 23.30.128(b).

⁴⁸ AS 23.30.128(b).

Commission, when interpreting a statute, adopts “the rule of law that is most persuasive in light of precedent, reason, and policy.”⁴⁹

5. *Discussion.*

The Act describes an employer as “a person employing one or more persons in connection with a business”⁵⁰ In *Kroll v. Reeser*, the Court stated the Board must evaluate and “give proper weight to the statutory limitation to employment relationships ‘in connection with a business or industry.’”⁵¹ The property owner in this case was having work done on a four-plex of which he intended to occupy one unit and rent out the other three. The question that must be asked, the Court said, was whether the construction activity “either by itself or as an element of his rental activities, was a profit-making enterprise which ought to bear the costs of injuries incurred in the business, or was the construction activity simply a cost-cutting shortcut in what was basically a *consumptive* and not a *productive* roll”⁵²

In *Nickels v. Napolilli*, an actual working farm utilized the services of a tenant in furtherance of the work of the farm, which included selling farm products for profit.⁵³ The tenant was an employee since her service around the farm aided in the profit-making activities of the farm. She was an employee and the farm owner was an employer who had an obligation to obtain workers’ compensation insurance.

The Court, in *Gaede v. Saunders*, looked again at the question of whether a homeowner having work done on the home should be considered to be an employer.⁵⁴ The Court found that the work on the Saunders’ home was consumptive and not undertaken with “a view toward producing goods or services for others.”⁵⁵ The Court

⁴⁹ *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

⁵⁰ AS 23.30.395(20).

⁵¹ *Kroll v. Reeser*, 655 P.2d 753, 757 (Alaska 1982) (*Kroll*) (citation omitted).

⁵² *Id.* (emphasis in original).

⁵³ *Nickels v. Napolilli*, 29 P.3d 242, 253 (Alaska 2001).

⁵⁴ *Gaede v. Saunders*, 53 P.3d 1126, 1127 (Alaska 2002) (*Gaede*).

⁵⁵ *Id.*

further noted that this distinction is consistent with other jurisdictions.⁵⁶ Gaede was not an employee and Saunders was not an employer.

In *Trudell v. Hibbert*, the Court found that homeowners who operated a cab business along with a property rental business were indeed employers for purposes of an injury to a construction worker.⁵⁷ The Court found that the Hibberts had “two profit-making businesses that are able to pass on the cost of workers’ compensation insurance to consumers – their cab business and their property rental business.”⁵⁸ The Court further noted that the proper inquiry “is not the intent of the property owner, but the benefit to the business from the project.”⁵⁹ Further, the Hibberts were “sophisticated business owners who were familiar with sales tax and workers’ compensation requirements.”⁶⁰

More recently, in *Kang*, the Court again emphasized that the definition of employer does not mean “*all business or industry is to be considered as covered by the Act.*”⁶¹ Evidence must be produced that demonstrated that the repair work “furthered the business.”⁶² Where the construction or repair might be characterized as a real estate improvement project or maintenance or repairs, it still must be shown that there is a connection to a profit-making activity which ought to bear the costs of injuries.⁶³

The Board, incorrectly in *Adams IV*, looked at the issue as whether Mr. Adams was an independent contractor or employee. Instead, the issue should have been framed as whether Mr. Heath was an employer under Alaska law.⁶⁴ The Board’s focus on whether

⁵⁶ *Gaede*, 53 P.3d 1126, 1127, n.13, citing 4 A. Larson, Workers’ Compensation Law Section 50.21 (1999)(4 Larson’s Workers’ Compensation Law, Section 72.03 (2008).

⁵⁷ *Trudell v. Hibbert*, 272 P.3d 331, 342 (Alaska 2012).

⁵⁸ *Id.*

⁵⁹ *Id.* at 343.

⁶⁰ *Id.* at 344.

⁶¹ *Kang*, 420 P.3d at 1217 (emphasis in original).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See, AS 23.30.395(20); *Kroll*; *Kang*.

Mr. Adams was an independent contractor or an employee caused it to miss the significant issue of whether Mr. Heath was an employer or someone merely repairing his home; whether the work on Mr. Heath's home was consumptive in nature or in furtherance of a profit-making activity. Unlike the Napolillis, there is no evidence the work on Mr. Heath's home benefited any business he may have been undertaking. Also, unlike the Hibberts, there is no evidence Mr. Heath was a sophisticated businessman who should have known to procure workers' compensation insurance for work on his personal home. Rather, his situation is much closer in nature to that of the Gaedes or Ms. Kang.

The substantial evidence in the record as a whole supports the conclusion the work on Mr. Heath's home was consumptive rather than in furtherance of any profit-making activity. The evidence that Mr. Heath was undertaking any business from his home is limited at best. In 2007, Mr. Heath placed the Snow Bear property in a living trust of which he is the trustor, trustee, and beneficiary. The use of a living trust does not appear to be anything more than an estate planning mechanism and, having occurred several years prior to Mr. Adams' accident, could not be construed as an attempt to evade workers' compensation insurance. Moreover, the evidence from Mr. Heath's tax return in 2011 shows that his only source of income came from the rental of a portion of his house on Snow Bear and the rental income from a New York City property which his mother managed.⁶⁵ The tax return showed no other income, whether personal or business.

There was testimony Mr. Heath rented out part of his house to Mr. Donerson and the income from that rental is reflected in his 2011 income tax return. There was no other evidence of people living in the house paying rent to Mr. Heath. Furthermore, the record is devoid of any evidence for any other kind of real estate transaction in 2011. There is no evidence, other than the rental income, that Mr. Heath was in the real estate business. Mr. Heath did not possess a real estate license in 2011 nor was any evidence presented that Mr. Heath ever had a real estate license in Alaska.⁶⁶

⁶⁵ Record 000355-366; Exc. 046-057.

⁶⁶ Record as a whole.

Further, the Board found that neither the Trust nor Mr. Heath, as trustee for the Trust, hired Mr. Adams as an employee.⁶⁷

Mr. Adams testified he believed Mr. Heath ran a business called O&M Enterprises from the house. He also testified Mr. Heath had a recording studio located in the house, but was unable to proffer any evidence of any actual business being done in the recording studio. Mr. Heath testified in deposition that O&M Enterprises started as a janitorial business but later was used for anything. The Board found that it was in the real estate business.⁶⁸ However, the last business license for O&M Enterprises was in 2005 and listed the business as “professional, scientific and technical services.”⁶⁹ Mr. Adams was unable to say he ever witnessed Mr. Heath conducting any kind of business from his home.⁷⁰

While the Board decided that O&M Enterprises was in the real estate business, this finding is not supported by any evidence, let alone substantial evidence in the record as a whole, as shown above. The Board made no finding that Mr. Heath maintained a home office for O&M Enterprises at Snow Bear. The only evidence was that Mr. Heath did not maintain a home office, received all mail at a post office box, and met any potential clients at the library or another public place. Moreover, O&M Enterprises did not have a current business license and the type of business it may have undertaken varied widely from janitorial to entertainment to real estate. However, other than the rental income Mr. Heath received from renting part of his home to Mr. Donerson and rental income from a New York City property, there is no evidence either Mr. Heath or O&M Enterprises was involved in any kind of real estate business. There is no evidence Mr. Heath individually or as owner of O&M Enterprises complied with Alaska law regarding real estate licenses.⁷¹

⁶⁷ *Adams IV* at 26.

⁶⁸ *Id.* at 12.

⁶⁹ Exc. 003.

⁷⁰ Exc. 069, 144, 161, 165; Hr’g Tr. at 91:5 – 92:15, 279:5-6, July 28, 2015.

⁷¹ See, AS 08.88.011 et. seq.

The substantial evidence in the record as a whole indicates the work at Snow Bear was consumptive on the part of Mr. Heath. There is no evidence of any profit-making enterprise undertaken by Mr. Heath through which the cost of workers' compensation insurance could be passed to an end consumer. Thus, Mr. Heath was not an employer as defined by the Act.

The Commission declines to address the issue of the intoxication of Mr. Adams, because the conclusion that Mr. Heath was not the employer of Mr. Adams for purposes of obtaining workers' compensation insurance renders this issue moot.

The Board, in *Adams IV*, erred in deciding Mr. Adams was an employee entitled to workers' compensation benefits by presuming Mr. Heath was an employer under the Act, responsible for procuring workers' compensation insurance. The evidence does not support a finding that Mr. Heath was such an employer and, therefore, *Adams IV* is reversed. Since *Adams IV* is reversed, *Adams V* and *Adams VI* are likewise vacated. Since there is not substantial evidence in the record as a whole to support a finding that Mr. Heath is an employer under the Act, a remand is not necessary. Mr. Adams was not an employee of Mr. Heath pursuant to the Act's definition of "employer" and is not entitled to workers' compensation benefits.

6. Conclusion.

The Board's decisions finding Mr. Heath to be an employer and Mr. Adams to be an employee pursuant to the Act are REVERSED. Mr. Heath is not an employer under the Act. Mr. Adams is not entitled to workers' compensation benefits.

Date: 13 August 2018 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Final Decision No. 252, issued in the matter of *State of Alaska, Workers' Compensation Benefits Guaranty Fund vs. Virgil A. Adams, Michael A. Heath d/b/a O&M Enterprises, and Michael A. Heath Trust*, AWCAC Appeal No. 15-029, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 13, 2018.

Date: August 15, 2018



Signed

K. Morrison, Appeals Commission Clerk