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 on Remand Decision No. 282 September 30, 2020 AWCAC Appeal No. 15-029 AWCB Decision Nos. 15-0094, 15-0127, and 17-0065 AWCB Case No. 201113128

Appearances: Clyde "Ed" Sniffen, Jr., Acting Attorney General, and Siobhan McIntyre, Assistant Attorney General, for appellant, State of Alaska, Workers' Compensation Benefits Guaranty Fund; Charles W. Coe, Law Office of Charles W. Coe, 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 issued January 25, 2016; appeal amended July 6, 2017; Final Decision No. 252 issued August 13, 2018.

Alaska Supreme Court proceedings: Appeal filed September 11, 2018; Opinion No. 7473 issued July 24, 2020.

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

By: Deirdre D. Ford, Chair.

1. Introduction.

On August 13, 2018, the Alaska Workers' Compensation Appeals Commission (Commission) issued Final Decision No. 252,[1] finding that:

> 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

[1] *State of Alaska, Workers' Comp. Benefits Guar. Fund v. Adams, Heath d/b/a O&M Enter., and Michael A. Heath Trust*, Alaska Workers' Comp. App. Comm'n Dec. No. 252 (Aug. 13, 2018) (*Adams VII*).

> 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 Commission, in reversing the Alaska Workers' Compensation Board's (Board) decision, found that Mr. Heath was not the employer of Mr. Adams at the time of his accident. The Commission did not address the issue of whether Mr. Adams was intoxicated at the time of injury nor whether intoxication was the cause of the injury.

The Commission's decision was timely appealed to the Alaska Supreme Court (Court) on September 11, 2018. On July 24, 2020, the Court issued Opinion No. 7473, which concluded:

> We REVERSE the Commission's determination that Heath was not an employer, and we REMAND to the Commission for consideration of the intoxication issue.[2]

The Court found that Mr. Heath was the employer of Mr. Adams and then asked the Commission to address the issue of whether Mr. Adams was intoxicated at the time of the injury and, if so, whether the intoxication was the proximate cause of his injury. Pursuant to the Court's opinion, the Commission has now reviewed the Board's decision finding that Mr. Adams' intoxication was not the proximate cause of his injury. The Commission, in a split decision, affirms the Board's findings and interpretation of the statute that an employee's benefits are barred only if his intoxication was the proximate cause of his injury.

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[2] *Adams v. State of Alaska, Workers' Comp. Benefits Guar. Fund; Heath d/b/a O&M Enter.; and the Michael A. Heath Trust*, Slip Op. No. 7473, ____ P.3d ____ (Alaska, July 24, 2020) (*Adams VIII*).

2. Factual background and proceedings.[3]

The Commission incorporates the previous findings of fact by the Board and here repeats only those findings necessary to support its review and decision.

On August 18, 2011, Mr. Adams climbed onto the roof of the house owned by Michael Heath through the Michael A. Heath Trust.[4] Mr. Adams was doing roofing and construction work when he fell off the roof.[5] He was admitted to Providence Alaska Emergency Department where he was assessed with "Severe T12 burst fx with spinal stenosis and cord compression with incomplete spinal cord lesion. . . ."[6] Mr. Adams' blood draw at 6:01 p.m. showed an alcohol value of .049.[7]

Mr. Adams testified that on the day of the injury, he drank two beers prior to the fall and was drinking his third beer when he fell. He also admitted to using cocaine right before climbing the ladder to the roof.[8] Mr. Adams also testified the cribbing supporting the ladder was put in place two weeks prior to the date of injury.[9] He had used the ladder many times prior to the day of the injury and did not think he needed to inspect the cribbing.[10] As he was climbing the ladder the cribbing gave way, the ladder slipped, and he fell.[11] The Board found Mr. Adams to be credible.[12]

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[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 v. O&M Enter. and the Michael A. Heath Trust and Alaska Workers' Comp. Benefits Guar. Fund*, Alaska Workers' Comp. Bd. Dec. No. 15-0094 at 3, No. 1 (Aug. 31, 2015) (*Adams IV*).

[5] *Id.*

[6] *Id.*

[7] *Id.* at 4, No. 2.

[8] *Id.* at 9-10, No. 27.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*, No. 28

Andrew Smith, a firefighter and paramedic at that time, testified he gave Mr. Adams fentanyl, after determining Mr. Adams was not intoxicated. He further testified use of fentanyl is contraindicated when the patient is intoxicated.[13] Andris Antoniskis, M.D., on behalf of the employer, reviewed the medical reports from the time of injury.[14] He testified that he calculated, based on the medical reports, that at the time of injury Mr. Adams' alcohol level was .071, and this amount of alcohol played a large part in impairing Mr. Adams' judgment.[15] The Board found Dr. Antoniskis' testimony on Mr. Adams' impairment due to cocaine and alcohol to be less than certain, and since he could not state with certainty how impaired Mr. Adams was at the time of injury, the Board gave his opinion less importance.[16]

The Board further determined that the cribbing holding the ladder was loose. The loose cribbing gave way, causing the ladder to fall. The loose cribbing, not Mr. Adams' use of alcohol and cocaine, caused the ladder to fall. Anyone climbing the ladder would have fallen when the cribbing gave way.[17] Therefore, the intoxication, if any, was not the proximate cause of Mr. Adams' fall and, thus, did not bar his claim for benefits.

3. 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.[18] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather the Commission exercises is independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[19] The Commission, when interpreting a statute, adopts "the rule of law that

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13 *Adams IV* at 10, No. 29.

14 *Id.* at 5, No. 7.

15 *Id.* at 10, No. 31.

16 *Id.* at 11, Nos. 32-33.

17 *Id.*, No. 34.

18 AS 23.30.128(b).

19 AS 23.30.128(b).

is most persuasive in light of precedent, reason, and policy."[20] The Board's determination of findings are "conclusive even if the evidence is conflicting or susceptible to contrary conclusions."[21] The Board has the sole power to determine the credibility of a witness and the weight to be accorded to testimony, both witnesses and medical reports.[22] These findings regarding credibility of witnesses are binding on the Commission.[23]

4. Discussion.

The issue before the Commission on remand from the Court is whether Mr. Adams was intoxicated at the time of his injury and, if so, whether his intoxication was the cause of his injury. The presumption of compensability in the Alaska Workers' Compensation Act (Act) states that it is presumed "in the absence of substantial evidence to the contrary that . . . the injury was not proximately caused by the intoxication of the injured employee." The Act further provides that compensation is not payable to an injured worker if the injury was "proximately caused by intoxication of the injured employee. . . ."[24] The Board analyzed Mr. Adams' claim using the presumption analysis which requires the employer to overcome the presumption with substantial evidence. If the employer provides substantial evidence to rebut the presumption, the employee must prove his claim by a preponderance of the evidence. The Commission reviews the evidence only to determine if the Board's findings are supported by substantial evidence in the record as a whole, even if the evidence is susceptible to contrary conclusions.

Under AS 23.30.120, a claim is presumed to be compensable absent a defense which rebuts the presumption and which an employee is unable to overcome with proof of compensability by a preponderance of the evidence.[25] The presumption analysis is a

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

[21] AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P. 3d 139 (Alaska 2013) (*Sosa de Rosario*).

[22] AS 23.30.122.

[23] *See, Sosa de Rosario*.

[24] AS 23.30.120(a)(3); AS 23.30.235(2).

[25] AS 23.30.120; *See, Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996).

three-step process.[26] The injured worker must first establish a preliminary link showing a connection between the injury and work. Witness credibility is not considered at this step.[27] The Board, at this step, relied on Mr. Adams' admission that he had consumed both alcohol and cocaine prior to climbing on the roof, but that he fell only because the cribbing holding the ladder loosened.[28] The Board found this testimony by Mr. Adams was sufficient to establish the preliminary link and raised the presumption that his fall was not caused by his intoxication.

The Benefits Guaranty Fund (Fund) then had the burden to overcome this presumption with substantial evidence. The Fund needed evidence showing an alternative explanation which excluded work as the substantial cause of the accident, or directly eliminated any reasonable possibility that work caused the injury after weighing the relative causes of the need for medical treatment.[29] The employer's evidence is evaluated by itself and the credibility of the evidence is not considered at this step.[30]

The Board accepted the Fund's evidence through the testimony of its physician, Dr. Antoniskis, that Mr. Adams' level of intoxication at the time of the injury would have been sufficient to impair his judgment, balance, and coordination. The Board also noted the testimony of a first responder to the scene of the accident who noted the smell of alcohol on Mr. Adams' breath. The Board also accepted the evidence from the blood tests in the emergency room which showed Mr. Adams had alcohol in his system several hours after the accident. Substantial evidence is "such relevant evidence as a reasonable

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[26] *See, Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

[27] *See, Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987); *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

[28] *Adams IV* at 26.

[29] *See, Runstrom v. Alaska Native Med. Ctr.*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 (Mar. 25, 2011) (*Runstrom*).

[30] *See, Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

mind might accept as adequate to support a conclusion."[31] The Board found the evidence taken together was sufficient to rebut the presumption of compensability.[32]

Once the presumption of compensability has been rebutted, the injured worker must prove his claim was substantially caused by his employment by a preponderance of the evidence.[33] Credibility and the weight to be accorded to the evidence are determined at this phase of the presumption analysis.[34] The Board found Mr. Adams to be credible in his account of the amount of alcohol and cocaine consumed and in his account of how the accident occurred. The Board discounted the testimony of Dr. Antoniskis because he could not state with certainty the degree to which Mr. Adams "was actually impaired when he fell or whether or how his alcohol or drug use on the injury date contributed to his fall."[35] The Board further concluded, "there is no evidence alcohol or drug impairment played any role in the failed cribbing that caused the ladder on which [Mr. Adams] was standing to fall."[36] The Board concluded that the proximate cause of Mr. Adams' fall was the loose cribbing.

The Board found that Mr. Adams was credible when he contended it was not his intoxication that caused his fall, but rather the unstable cribbing. The Fund presented no contrary evidence to demonstrate that the cribbing had not been loose and did not slip.

The questions for the Commission are whether the Board correctly required more than the intoxication of Mr. Adams as a cause of the accident and whether the Board's analysis is supported by substantial evidence in the record as a whole. The Fund contends the Board erred in not finding Mr. Adams' intoxication to be the cause of the accident. Mr. Adams asserts the Board correctly interpreted the statute as requiring a look at the

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31 *Miller v. ITT Arctic Serv.*, 577 P.2d 1044 (Alaska 1978).

32 *Adams IV* at 27.

33 *Runstrom* at 8.

34 *Saxton v. Harris*, 395 P2d 71, 72 (Alaska 1964).

35 *Adams IV* at 27.

36 *Id.*

facts surrounding the fall and, thus, finding that the loose cribbing was the actual cause of the accident.

The statute in question, AS 23.30.120, states that "in the absence of substantial evidence to the contrary" it is presumed an injury is compensable. The statute further states it is presumed that an injury was not "proximately caused by intoxication of the injured employee. . . ." The plain language indicates that more than an employee's intoxication is required before an injury is to be declared not compensable. Analysis of statutory language begins with the principle that all the language in a statute is there for a reason.[37] Thus, if the Legislature had intended intoxication alone to be a complete defense to a work injury, the Legislature would not have included the language "proximately caused" as a determinant in the decision to deny benefits to an injured worker. Larson notes that statutes which require proximate cause "have been strictly construed."[38]

The Court, in *Parris-Eastlake v. State, Dep't of Law*, stated that an injury is proximately caused by drugs (or here drugs and alcohol) "within the meaning of [AS 23.30.235(2)]" if the employee's mental or physical faculties are "impaired by use of [alcohol and drugs], and the employee's impaired condition" is the proximate cause of the injury.[39] The Court provided an example of such impairment as occurring where the employee's "judgment or coordination becomes impaired by consumption of drugs and who consequently suffers a traumatic injury."[40]

The Commission majority agrees that AS 23.30.120 requires more than the mere intoxication of the injured worker at work to bar the worker's claim. As stated above, the

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[37] *See, e.g., Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1127 (Alaska 2017).

[38] *Larson's on Workers' Compensation*, Section 36.03[3][a] at 36-25; *See, e.g., Smith v. Workers' Comp. App. Bd.*, 123 Cal. App. 763, 176 Cal. Rptr. 843 (1981) where the Board stated that intoxication must be shown to have been the proximate cause or the substantial factor in causing the accident.

[39] *Parris-Eastlake v. State, Dep't of Law*, 26 P.3d 1099, 1104 (Alaska 2001) (*Parris-Eastlake*).

[40] *Id.* (citations omitted).

Legislature, in enacting AS 23.30.120, stated that the intoxication must be the proximate cause of the accident. Further, in AS 23.30.235, the Legislature added that compensation is not payable if the injury was proximately caused by the worker's intoxication. The Court, in *Parris-Eastlake* held that a worker's mental or physical condition must be impaired so as to cause the injury. Here, the Board found Mr. Adams credible when he admitted to the use of beer and cocaine, but also credible when he testified he would not have fallen had the cribbing holding the ladder not been loose causing the ladder to slip. This credibility finding is binding on the Commission and supports the Board's finding that his intoxication was not the proximate cause of his fall. The Board also discounted the testimony of Dr. Antoniskis because he could not state with "certainty" the degree of impairment at the time of the fall. However, no evidence was presented that contradicted Dr. Antoniskis' opinion.[41] Nonetheless, the Board's finding that his opinion is not dispositive is binding on the Commission and supports the Board's conclusion it was not Mr. Adams' intoxication that caused the accident, but the loose cribbing.

The presumption analysis by the Board is supported by substantial evidence in the record as a whole. The Board found that Mr. Adams raised the necessary link between work and his injury. The Board held that Mr. Heath was in the business of buying, selling, and renting real estate. This finding along with Mr. Adams' testimony he was working on the roof on premises owned by Mr. Heath, raised the necessary link between work and injury. The Court agreed that Mr. Heath was the employer of Mr. Adams and that Mr. Adams was an employee at the time of his injury. Mr. Adams was on his employer's premise at the time of the injury. The first prong of the analysis was met.

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[41] While the Commission accepts the Board's finding that Dr. Antoniskis' opinion was not dispositive merely because he did not state it with certainty, this finding disturbs the Commission because the Court has consistently recognized that medical experts' opinions need not be absolute or use certain magic words to constitute acceptable or substantial evidence. See, e.g., *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1189 (Alaska 1993)(an expert's opinion that is not stated is absolute terms is not, necessarily, inconclusive); *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994)(doctors' opinions do not have to be absolute, especially where no contrary medical evidence is provided).

The burden then shifted to the Fund to rebut the presumption that the injury was work related through substantial evidence, here, that the injury was caused by the intoxication of Mr. Adams. The Board found that the evidence by Dr. Antoniskis, the smell of alcohol on Mr. Adams' breath by a first responder, and the blood tests in the emergency room, all combined to be substantial evidence that Mr. Adams was intoxicated at the time of the fall. This evidence is supported by record. Credibility of the evidence is not weighed at this point and the Board accepted this evidence as substantial evidence rebutting the presumption.

The Board then found that on the third prong Mr. Adams proved that his intoxication did not cause the accident and that the loose cribbing was the proximate cause since the loose cribbing caused the ladder to slip. Since the Board found Mr. Adams credible, and the evidence presented was that the cribbing gave way causing the ladder to slip, the Board's conclusion is supported by substantial evidence. The statute requires the intoxication to be the proximate cause. Here, the evidence is that the ladder slipped due to the cribbing giving way. Thus, even though Mr. Adams was undoubtedly impaired by the use of alcohol and cocaine, the evidence is the ladder slipped and he fell due to the loose cribbing giving way. This is supported by the evidence in the record.

The Fund, as does the dissent, contends that Mr. Adams would not have been on the roof nor fallen from the ladder absent his alcohol and cocaine use. Mr. Adams admitted he did not check the cribbing which, had he been sober, he might or might not have done on the day of his fall.. (We do not know the answer to that either way) However, he also asserted he had been on the ladder several times since he first placed the cribbing and the ladder had been fine. Moreover, no one presented any evidence that the ladder slipped for any other reason than the loose cribbing. No evidence was presented that Mr. Adams fell from the roof because his physical/mental condition was impaired by the alcohol/cocaine use. No evidence was presented that he kicked the ladder or that the ladder slipped from any action of Mr. Adams. The evidence is that the cribbing gave way and the ladder slipped causing Mr. Adams to fall. Thus, the evidence is that the proximate cause of the fall was the cribbing giving way and not the intoxication of Mr. Adams.

The Board's decision is affirmed as supported by substantial evidence in the record as a whole and by a correct interpretation of the statute.

5. *Order.*

The Board's decision is AFFIRMED.

Date: __*30 September 2020*___ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed

Michael J. Notar, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

S. T. Hagedorn, Appeals Commissioner, dissenting.

I respectfully dissent from the majority that the "proximate cause" of the injury to Mr. Adams was the cribbing under the ladder he was ascending. In my opinion, his injury was due to his intoxication (alcohol and cocaine) at the time he fell approximately thirty feet. My assessment of the facts conclude that Mr. Adams was impaired to a degree that would affect his judgment and balance, and that his impairment would have been the primary, or proximate cause, to the circumstances that led to his fall and subsequent injuries.

Several sections of the statute are applicable to this analysis. The first statute is AS 23.30.235, involving cases in which no compensation is payable. "Compensation under this chapter may not be allowed for an injury . . . (2) proximately caused by intoxication of the injured employee, or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician".

The other statute applicable to this appeal is AS 23.30.122, involving credibility of witnesses. "The board has the sole power to determine 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 sole reliance of the Board to find Mr. Adams "credible" effectively invalidates the statute as it is written. The statute states no compensation is payable for injuries caused by intoxication or for those influenced by drugs, and such claims will be denied. By his own admission, Mr. Adams testified at hearing he had used cocaine just prior to starting to work on the roof at the job site, drank two beers, and was "working on another," which would indicate he was carrying an open beer up the ladder from which he fell. The Board found Mr. Adams credible when he claimed the cribbing, on which the ladder was situated, collapsed under the ladder after he had ascended approximately thirty feet. The Board found that the proximate cause of the thirty-foot fall was the failure of the cribbing, and not Mr. Adams' consumption of drugs and alcohol before and during his work shift. Again, the finding that Mr. Adams was credible is the only reason this claim is being found compensable by the Board. I understand that the Commission is bound by the finding of Mr. Adams as credible, however, Mr. Adams' clear admission that he was acting contrary to what the statute permits, does not provide a proper outcome as it is written in the statute, for this particular appeal.

The Board's acceptance that Mr. Adams' use of cocaine, and that he was drinking his third beer, was not enough to impair his judgment and balance simply doesn't make common sense, nor does it stand up to scientific scrutiny. If all the facts of Mr. Adams' accident and subsequent injuries had been the same, and had Mr. Adams drank four, six, or more beers, and utilized cocaine, would the Board still have found that drugs and alcohol were not the proximate cause of the injury? Ignoring both logic and scientific evidence in this case, the Board has arbitrarily and capriciously defaulted to their own "experience, judgment, observations". The Board's reliance solely on Mr. Adams' testimony appears on its face illogical and unsupported by the facts. Mr. Adams has workers' compensation benefits to be garnered with a finding that the cribbing failed, and that he was not intoxicated or under the influence of drugs. If the Board concluded that his drug and alcohol use was the proximate cause of the accident, he would receive no benefits. Is there any expectation that he would testify against himself and say that he

was to some degree impaired? The Board concluded, with only the testimony of Mr. Adams, that he didn't lose his balance, his decision making was clear, and that the tumble off the ladder was due to the failure of the cribbing. They stated that Mr. Adams' testimony was consistent, direct, and unequivocal. There were no other eyewitnesses to the accident, so Mr. Adams' testimony of the events that occurred stands alone.

The Fund's medical evaluator, Dr. Antoniskis, calculated that Mr. Adams' blood alcohol level at the time of the accident was .071 and this amount would have been enough for him to have impaired judgment and balance. The Board stated their impression of Dr. Antoniskis was that his calculation was an "educated guess" and that it wasn't definitive. Arguably, all evaluators' or "experts'" opinions are educated guesses. Regardless of "facts" or calculations of Dr. Antoniskis, the Board substituted their own "experience and judgment" and concluded that Mr. Adams was not impaired to the extent that he wouldn't have properly checked the cribbing, and that his drug and alcohol use would not have caused him to have impaired judgment or balance. In my opinion, this simply does not make sense from my own "experience and judgment", as drugs or alcohol, let alone a combination of the two, would have necessarily had some impact on a person's judgment and balance. To say the cribbing alone, which Mr. Adams did not check before climbing the ladder, was the proximate cause of the accident, is substituting judgement that has no basis in science or logic. The statute implies that being under the influence of drugs and/or alcohol bars any workers' compensation benefits. Mr. Adams was not only using drugs and drinking alcohol before his work shift, he was drinking while working on his shift. The Board concluded that since Mr. Adams testified he wasn't impaired and that he was credible in his testimony, that his own statements outweigh science and logic. By relying on Mr. Adams' testimony, and concluding he was credible, the Board failed to apply the clear language of the statute. They substituted their own experience, judgment, and observations, and have come to conclusions and a decision and order which runs counter to statutory language.

In my assessment of the facts, it is clear that Mr. Adams was to some degree impaired, and increasingly impairing himself before and while he was working. Had he not been impaired, would he have checked the cribbing supporting the ladder, which in

the estimation of the Board, was the proximate cause of the accident? Mr. Adams, on page 137 of his testimony, stated that "it (the cribbing) looked fine". (In my estimation, this meant that Mr. Adams assessed the stability of the cribbing on the day of the accident.). "It hadn't moved in two weeks, why would I expect it to move?" "It's a bunch of miscellaneous scraps and if I start messing with it, then I'm going to have to rebuild it." Mr. Adams went on to testify that for safety's sake "I could have, should have, would have. There's many different things that we could have done differently". In my opinion, one of those "things" would not have included using drugs and drinking alcohol before and during his work shift. The statute is clear that alcohol and drugs will negate benefits if an employee is injured on the job. The two words, "proximately caused" are understandably clear in the statute and are key to this appeal, and those words were put in the statute when the statute was enacted, for a reason. However, I don't believe the framers of the statutory language intended to allow the language to be interpreted to discount or negate with testimony of the injured employee, testifying on his own behalf, that some other cause other than drug and alcohol use was the reason for the injury. If this defense on behalf of Mr. Adams is affirmed on appeal, any future claims involving drugs or alcohol could have a similar outcome. Mr. Adams' admission that he was using cocaine and drinking beer on the job should, in my opinion, nullify any benefits that may have accrued to him, and this appeal should be denied. It is not lost in my analysis that had the same set of circumstances played out without the question of drug and alcohol use, there would be no question that workers' compensation benefits would be payable, whether the accident was the failure of the cribbing, or even if Mr. Adams had lost his balance or was in some way responsible for, or contributed to his fall and subsequent injuries.

Lastly, as I alluded to above, how much drugs and alcohol would it have taken for the Board to find that the proximate cause of the accident was due to the use of these substances? The significant point is that he was, by his own testimony, drinking alcohol and using illegal drugs on the job. What level of drug and alcohol use is acceptable? The statute implies none. The Board concluded it was a "line" of cocaine and three beers. Mr. Adams was found to have alcohol in his blood hours after the injury and he tested

positive for cocaine. The treating physician at the hospital an hour and a half after the accident, concluded Mr. Adams was intoxicated. Dr. Antoniskis estimated Mr. Adams had .071 alcohol in his system at the time of the accident. The Board stated that the "claimant conceded he had consumed alcohol and cocaine just prior to the accident, but insisted his fall was not caused by his intoxication, but rather by the loose cribbing". Mr. Adams' insistence that his fall was not caused by his intoxication is predictable and not unexpected as his workers' compensation benefits depend on this finding. However, to me, the Board's conclusion is illogical and unsupportable and makes a travesty of the statute as it is written. The testimony of Dr. Antoniskis is clear, Mr. Adams was impaired at the time of accident, effecting his judgment and balance, and the impairment would have caused him to make himself more prone to an accident. After admission to the hospital, Mr. Adams was found to have a blood alcohol level of .049, hours after the accident. Whether one knows the exact degree of intoxication Mr. Adams was experiencing makes no difference in my mind. Dr. Antoniskis' conservatively estimated the blood alcohol level to be a .071. The fact that he was impaired to any degree is exactly what the statute defines as a case where no compensation is payable.

The intent of the statute is to ensure a quick, efficient, fair, and predictable delivery of indemnity and medical benefits to workers at a reasonable cost. In my opinion, the decision of the Board is neither fair nor predictable. The Court has stated that "substantial evidence" is required to support a conclusion. "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. I don't believe the Board's conclusion meets this criteria, nor is it supported by evidence or reason. The Board accepts Mr. Adams as credible that it was the cribbing, not his drug and alcohol use, that caused him to fall. This credibility finding is the only reason this appeal is being considered as viable. The credibility finding alone makes the Board's conclusions "appeal proof" by both the Commission and the Court. In my opinion, the substitution of the Board's conclusions on the relevant evidence makes the language of the statute, in this case, meaningless. This appeal should be remanded to the Board to

reassess their decision and to discuss in further detail how they concluded it was the cribbing and not Mr. Adams' intoxication that was the cause of the accident.

Date: *September 30, 2020*

Signed
S. T. Hagedorn, Appeals Commissioner

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 Alaska 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, this is a full and correct copy of Final Decision on Remand No. 282, issued in the matter of *State of Alaska, Workers' Compensation Benefits Guaranty Fund v. 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 September 30, 2020.

Date: *October 6, 2020*

Signed
K. Morrison, Appeals Commission Clerk