Alaska Workers' Compensation Appeals Commission

Yong Kang, d/b/a Lee's Massage, Appellant, vs. Alexander Mullins and State of Alaska, Workers' Compensation Benefits Guaranty Fund, Appellees.	Final Decision Decision No. 230 October 27, 2016 AWCAC Appeal Nos. 15-023 and 16-001 AWCB Decision Nos. 15-0111 and 15-0158 AWCB Case No. 201508689

Final decision on appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 15-0111, issued at Fairbanks, Alaska, on September 2, 2015, by northern panel members William Soule, Chair, Rick Traini, Member for Labor, and Robert C. Weel, Member for Industry; and, Alaska Workers' Compensation Board Supplementary Order Declaring Default Amount No. 15-0158, issued at Fairbanks, Alaska, on December 9, 2015, by northern panel members William Soule, Chair, Jacob Howdeshell, Member for Labor, and Sarah Lefebvre, Member for Industry.

Appearances: J. John Franich, Franich Law Office, LLC, for appellant, Yong Kang, d/b/a Lee's Massage; Alexander Mullins, self-represented appellee; Jahna Lindemuth, Attorney General, and Siobhan McIntyre, Assistant Attorney General, for appellee, State of Alaska, Workers' Compensation Benefits Guaranty Fund.

Commission proceedings: Notice of Appeal of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 15-0111 filed September 24, 2015 (Appeal No. 15-023); motion for stay filed November 25, 2015 (Appeal No. 15-023); opposition to motion for stay filed December 7, 2015 (Appeal No. 15-023); Notice of Appeal of Alaska Workers' Compensation Board Supplementary Order Declaring Default Amount No. 15-0158, filed January 8, 2016, with Motion for Stay (Appeal No. 16-001); opposition to motion for stay filed January 15, 2016 (Appeal No. 16-001); Order on Motions for Stay issued April 26, 2016; briefing completed June 13, 2016; oral argument held on July 18, 2016.

Commissioners: Michael J. Notar, Philip E. Ulmer, Andrew M. Hemenway, Chair *pro tempore*.

By: Andrew M. Hemenway, Chair *pro tempore*.

1. Introduction.

Alexander Mullins filed a claim for compensation based on an injury incurred while employed by Yong Kang, d/b/a Lee's Massage, to perform work on a structure owned by her son, which she rented and used for her business and as her residence. Following a hearing, the Alaska Workers' Compensation Board (Board) issued a decision concluding that Ms. Kang was Mr. Mullins' employer when he was injured.

On appeal, Ms. Kang argues that the employment was not in connection with a business. We affirm the Board's decision.

2. Factual background and proceedings.[1]

Yong Kang, who goes by the name "Lee",[2] operates a massage parlor that occupies about one-third of a structure in North Pole, Alaska, that is owned by her son,

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[1] We make no factual findings. The Board's purported "Findings of Fact" consist for the most part of a recitation of the contents of the record, summary of the parties' respective positions, and summaries or characterizations of the various witnesses' testimony. The Board's purported "Findings of Fact" do not resolve any conflicts in the testimony as summarized or characterized by the Board. *See Alexander Mullins v. Yong Kang, d/b/a Lee's Massage*, Alaska Workers' Comp. Bd. Dec. No. 15-0111 at 8-13 (Sept. 2, 2015). However, the Board found that Mr. Mullins, while he confuses dates, "is otherwise credible." *Mullins*, Bd. Dec. No. 15-0111 at 14 (No. 44). Moreover, in its "Analysis" the Board specifically credited a witness's testimony, or discredited another's, with respect to certain matters. *See, e.g., id.*, at 20 (rejecting "Yong Kang's testimony and arguments implying Claimant was a volunteer"); 22 ("Yong Kang's testimony that she was 'surprised' . . . is not credible."). As to those matters, we deem the Board to have made findings in accordance with its discussion of the evidence. Otherwise, to the extent the testimony is not conflicting, we deem the Board to have accepted the testimony as establishing the facts testified to. We add context and detail to the Board's findings by reference to the record.

[2] *Mullins*, Bd. Dec. No. 15-0111 at 3 (No. 5); Hr'g Tr. at 142:15-16, Aug. 27, 2015 (Yong Kang).

Benjamin Kang.[3] Ms. Kang also lives in the structure,[4] as does her business partner.[5]

Alexander J. Mullins met Ms. Kang in 2004 through a realtor, when he bought a house about a block from Ms. Kang's residence.[6] Over the course of the years, Ms. Kang and Mr. Mullins became good friends.[7] Mr. Mullins has a full time job as a small engine mechanic,[8] but he is an experienced construction laborer,[9] and, owing to

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[3] *See Mullins*, Bd. Dec. No. 15-0111 at 3 (No. 1), 13 (No. 39); Hr'g Tr. at 102:18-19, 107:5-7 (Benjamin Kang); 115:14-20, 134:4-9, 137:2-19 (Yong Kang). It is undisputed that Ms. Kang operates the business, and that at the time of the alleged injury the structure was owned by her son. *See*, *e.g.*, Hr'g Tr. at 102:18-19, 110:3-15 (Benjamin Kang). According to Mr. Mullins, the structure is a prefabricated building, "an old ATCO type of thing." Hr'g Tr. at 28:4 (Mr. Mullins).

The Board's decision states, "Yong Kang has a massage business in the building, and does not have a construction business." *Mullins*, Bd. Dec. No. 15-0111 at 11 (No. 36). This appears to be a characterization of a portion of Benjamin Kang's testimony. *See* Hr'g Tr. at 107:5-7, 15-17 (Benjamin Kang). The Board characterized Mr. Kang as having testified that "he owns the massage parlor." *Mullins*, Bd. Dec. No. 15-0111 at 11 (No. 36). We have not identified any such testimony; the Board may have meant that Mr. Kang testified that he owned the structure.

[4] *See Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33); Hr'g Tr. at 48-49 (Mr. Mullins); 107:8-11 (Benjamin Kang).

[5] Ms. Kang did not specify the nature of the partnership, but she referred to her partner as a woman. *See* Hr'g Tr. at 119:6, 135:15, 136:7 (Yong Kang). According to the Board's decision, Lee's position at the hearing was that the business was operated as a partnership of Yong Kang and Chong Sik Kim. *See Mullins*, Bd. Dec. No. 15-0111 at 6 (Nos. 26-28). It seems likely that the transcriptionist's phonetic spelling of the partner's name (Jong Sung Kang) was a misspelling of Chong Sik Kim's name.

[6] *Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33); Hr'g Tr. at 12:25 – 13:4, 46 – 48 (Mr. Mullins).

[7] Hr'g Tr. at 49:24-25 (Mr. Mullins); 116:24 – 117:2 (Yong Kang).

[8] *See Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 34); Hr'g Tr. at 27:5-15, 50:23 – 51:1 (Mr. Mullins).

[9] *See Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 34); Hr'g Tr. at 52:5 – 53:3 (Mr. Mullins).

their friendship, he occasionally worked on the structure at Ms. Kang's request, as did his son, Andrew Mullins.[10]

According to Mr. Mullins, Ms. Kang approached him early in 2015 and asked for his help in reroofing the structure, which he initially declined to do, but after about ten minutes agreed to do.[11] Ms. Kang testified that she told Mr. Mullins she needed to have work done on the roof, and that her son was going to do it.[12] Ms. Kang ordered up roofing materials,[13] and on April 30, 2015, Benjamin Kang flew up from his home in Seattle to work on the roof.[14] On May 3, 2015, Benjamin Kang was up on the roof when Mr. Mullins stopped by.[15] Mr. Kang came down off the roof and his mother introduced him to Mr. Mullins, who, when Mr. Kang went to shake his hand, mentioned that he had a broken hand.[16] Mr. Kang testified that he told Mr. Mullins that he didn't

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[10] *See Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 34); Hr'g Tr. at 50:1-23, 57:8-9 (Mr. Mullins).

[11] *Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33); Hr'g Tr. at 13:14 – 14:20, 15:10-21 (Mr. Mullins). In his opening statement, Mr. Mullins indicated that he merely told Ms. Kang that when his nephew came up in the spring, they could talk about doing the job. *See* Hr'g Tr. at 8:2-13 (Mr. Mullins). Ms. Kang, for her part, denied that she solicited Mr. Mullins to do the work. *See Mullins*, Bd. Dec. No. 15-0111 at 12 (No. 38); Hr'g Tr. at 120:21 – 121:3, 122:1-4. (Yong Kang). The Board did not resolve this conflict in the testimony, deeming it immaterial. *See Mullins*, Bd. Dec. No. 15-0111 at 20.

[12] Hr'g Tr. at 122:5-18 (Yong Kang). Ms. Kang did not say when this conversation occurred, except that it was "before my son arrive." Hr'g Tr. at 122:7.

[13] *See Mullins*, Bd. Dec. No. 15-0111 at 22; Hr'g Tr. at 20:2-14 (Mr. Mullins).

[14] *Mullins*, Bd. Dec. No. 15-0111 at 11 (No. 36); Hr'g Tr. at 100:25 – 101:4 (Benjamin Kang); *Mullins*, Bd. Dec. No. 15-0111 at 12 (No. 38); Hr'g Tr. at 119:9-13 ("He just come here to total the roof, roofing."), 133:18-20 (Yong Kang).

[15] *Mullins*, Bd. Dec. No. 15-0111 at 11 (No. 36); Hr'g Tr. at 101:8-10 (Benjamin Kang); *Mullins*, Bd. Dec. No. 15-0111 at 12 (No. 38); Hr'g Tr. at 119:18-25 (Yong Kang).

[16] *See Mullins*, Bd. Dec. No. 15-0111 at 11 (No. 37), 12 (No. 38); Hr'g Tr. at 120:1-2 (Yong Kang). According to Mr. Mullins, he does not shake anyone's hand because he has a "boxer's fracture" of his right hand. *See Mullins*, Bd. Dec. 15-0111 at 11 (No. 37); Hr'g Tr. at 102:6-7, 112:23 – 113:11 (Mr. Mullins).

know anything about roofing,[17] and according to Mr. Kang and his mother, at that time Mr. Mullins offered to help out with the roof.[18] Ms. Kang testified that in exchange, she promised to give Mr. Mullins an old pickup truck that she had paid $1,000 for.[19]

Mr. Mullins' son, Andrew, recruited another man, Donald (D.J.) Ludwig, to work on the project,[20] and the next morning, Monday, May 4, 2015, Andrew Mullins and Donald Ludwig, showed up to work on the job.[21] Ms. Kang agreed to pay them $10 an hour for their work,[22] and, with Mr. Kang, they went to work pulling off the existing shingles.[23] Mr. Kang tore up his hands ripping off shingles, and rather than staying on to work, as he had planned, he left town on May 6, 2015.[24] Mr. Mullins found other people for the job,[25] and the roofing work continued with the assistance of Daniel

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[17] Hr'g Tr. at 101:18-21 (Benjamin Kang).

[18] Hr'g Tr. at 101:22-23 (Benjamin Kang); 120:3-12 (Yong Kang). Mr. Kang testified that Mr. Mullins also mentioned jacking up the structure. Hr'g Tr. at 103:15-17) (Benjamin Kang).

[19] Hr'g Tr. at 120:13-20, 122:20-22, 144:2-5 (Yong Kang). Mr. Mullins testified he had no specific agreement for compensation for the roofing work, and that the pickup truck was offered in connection with the leveling job. *See* Hr'g Tr. at 29:23 – 31:3, 31:14-19, 32:23 – 33:3 (Mr. Mullins).

[20] *Mullins*, Bd. Dec. No. 15-0111 at 10 (No. 35); Hr'g Tr. at 92:11-12, 93:2-7 (Donald Ludwig).

[21] *See Mullins*, Bd. Dec. No. 15-0111 at 11 (No. 36); Hr'g Tr. at 105:17-22, 106:8-21 (Benjamin Kang). Ms. Kang testified Mr. Mullins came with them and characterized them as his workers. *See* Hr'g Tr. at 122:23-24, 123:18-19 (Yong Kang). Elsewhere she testified that Andrew Mullins introduced her to Daniel Ludwig the night before they showed up to work. *See* Hr'g Tr. at 138:19 – 139:5 (Yong Kang).

[22] Hr'g Tr. at 93:19 – 94:2 (Donald Ludwig). Ms. Kang testified the payment arrangement was made at the end of the day, at Mr. Mullins' request. *See* Hr'g Tr. at 123:20 – 124:8 (Yong Kang). She testified she objected to paying, because they were his workers, but Mr. Mullins said he would make it up to her. Hr'g Tr. at 126:18-24 (Yong Kang).

[23] *Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33).

[24] *See* Hr'g Tr. at 106:3-6, 111:11 – 112:11 (Benjamin Kang).

[25] *See Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 34); Hr'g Tr. at 35:16-17, 57:15 – 58:4 (Mr. Mullins). It appears that Andrew Mullins did not stay on the job very long. *See* Hr'g Tr. at 57:10-14 (Mr. Mullins).

Ludwig's uncle, William Ludwig, and Matt Maurer.[26] The workers used a variety of small hand tools, some supplied by Ms. Kang and others their own, but the tools were not of substantial value.[27] Ms. Kang paid the workers directly;[28] she sent William Ludwig and Matt Maurer home when she did not want them working.[29] As Mr. Mullins continued to work at his regular job, he was around only during the evenings, and the work did not progress at a rate satisfactory to Ms. Kang.[30]

During the course of the roofing job, it became apparent to Ms. Kang that the structure needed to be levelled,[31] and she asked Mr. Mullins to level it.[32] Mr. Mullins purchased or otherwise obtained materials and used a welder at his regular workplace to fabricate framework to lift the structure with.[33] He and Matt Maurer dug out under

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[26] *See Mullins*, Bd. Dec. No. 15-011 at 8 (No. 33); Hr'g Tr. at 16:10-23, 17:23 – 18:25 (Mr. Mullins).

[27] *Mullins*, Bd. Dec. No. 15-0111 at 23. *See* Hr'g Tr. at 20:17 – 21:14 (Mr. Mullins); Hr'g Tr. at 95:20-25 (Daniel Ludwig).

[28] *Mullins*, Bd. Dec. No. 15-0111 at 22(1). *See* Hr'g Tr. at 35:14 (Mr. Mullins); 96:7-10, 21-24 (Daniel Ludwig).

[29] *Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 34), 22(1), 23(1B), 23(1C), 24(F). *See* Hr'g Tr. at 58:15-22 (Mr. Mullins).

[30] *See Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 33); Hr'g Tr. at 28:25 – 29:6, 39:21-25, 40:13-19, 51:1 (Mr. Mullins); 126:17-18, 128:6-18, 129:16-20, 146:13-20 (Yong Kang).

[31] *See Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33), 10 (No. 34); Hr'g Tr. at 22:5-15, 23:22 – 24:4, 31:4-13, 67:19-21 (Mr. Mullins).

[32] *See Mullins*, Bd. Dec. No. 15-0111 at 10 (No. 34) ("At some point during the re-roofing Yong Kang was on the roof and noticed it sagged and the decision was made to level the building."); Hr'g Tr. at 19:19-20 ("When we started the roof, she asked us if we'd lift the building. . . ."), 23:10-25 (Mr. Mullins).

[33] *See Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33); Hr'g Tr. at 24:16 – 27:4 (Mr. Mullins).

the structure and set up the framework with a hydraulic jack supplied by Ms. Kang, and in the process of attempting to lift the structure Mr. Mullins injured his right wrist.[34]

Three or four days later, as she had promised, Ms. Kang signed the title to the truck over to Mr. Mullins.[35] However, the next day, May 17, 2015, because Mr. Mullins had failed to insure the vehicle, Ms. Kang took the truck back and in its stead paid Mr. Mullins $500 cash for his work on the structure.[36] After that, Mr. Mullins testified, he and Ms. Kang "flipped out" and he did not return to work on the job.[37] Ms. Kang hired another man, Thomas Hernandez, who finished up the levelling job by early June.[38]

2. Standard of review.

Ms. Kang raises a single issue on appeal: whether the Board erred in concluding that Mr. Mullins was an employee and Ms. Kang an employer, as defined for purposes of the Alaska Workers' Compensation Act (Act), on the date of the alleged injury.[39] To be covered under the Act, an employee must be hired in connection with a business or industry,[40] and Ms. Kang argues that Mr. Mullins did not perform work for Ms. Kang in

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[34] *Mullins*, Bd. Dec. No. 15-0111 at 28. *See Mullins*, Bd. Dec. No. 15-0111 at 8 (No. 33), 10 (No. 34); Hr'g Tr. at 25:11-12, 168:16 – 169:1 (Mr. Mullins). Ms. Kang testified that Mr. Maurer did most of the levelling work. Hr'g Tr. at 148:1 – 149:19 (Yong Kang). Neither party called Mr. Maurer as a witness at the hearing. Daniel Ludwig testified that he left the job after the roofing work was completed. Hr'g Tr. at 94:5-10 (Daniel Ludwig).

[35] *See Mullins*, Bd. Dec. No. 15-0111 at 10 (No. 34); Hr'g Tr. at 61:17-23, 78:23 – 79:10 (Mr. Mullins); 125:17-25 (Yong Kang).

[36] *See Mullins*, Bd. Dec. No. 15-0111 at 9 (No. 33), 10 (No. 34), 12 (No. 38). The receipt, signed by Mr. Mullins references only the roofing work, but Ms. Kang testified it was for all of the work he performed, including leveling the building. *See* Hr'g Tr. at 143:3 – 146:5, 150:14 – 151:12, 152:4-13 (Yong Kang).

[37] *See Mullins*, Bd. Dec. No. 15-0111 at 10 (No. 34); Hr'g Tr. at 33:17 – 34:8, 80:17 – 81:5, 154:1-16 (Mr. Mullins).

[38] *See Mullins*, Bd. Dec. No. 15-0111 at 13 (No. 40); Hr'g Tr. at 108:16 – 109:1 (Benjamin Kang); 159 – 166 (Mr. Hernandez).

[39] *See* Notice of Appeal.

[40] *See* AS 23.30.395(19), (20).

connection with a business or industry.[41] We must uphold the Board's factual findings relevant to the parties' status as employee and employer and as to whether the work performed was in connection with a business or industry if they are supported by substantial evidence in light of the whole record.[42] In this case, Ms. Kang has not asserted that any of the facts as found by the Board lack substantial support in the evidence. On any given set of facts, determining whether a party is an employee or employer and whether the work was in connection with a business or industry are questions of law concerning the scope of workers' compensation coverage.[43] On questions of law, we do not defer to the Board's conclusions. We exercise our independent judgment.[44]

3. Discussion.

Ms. Kang relies on AS 23.30.395(20), which states:

> (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.

She argues that under applicable Alaska Supreme Court precedents, the facts as found by the Board do not support characterizing Mr. Mullins' employment as "in connection with a business or industry" as that phrase is used in AS 23.30.395(20). In *Gaede v. Saunders*,[45] she argues, the court ruled that a common law employment relationship is covered only if the employment is in connection with a business or industry. In light of *Gaede* and two other cases addressing the requirement that employment be "in

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41 Appellant's Brief at 3-8.

42 AS 23.30.128(b).

43 *See*, *e.g.*, *Seville v. Holland America Line Westours, Inc.*, 977 P.2d 103, 105 (Alaska 1999); *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 289, n. 1 (Alaska 1991); *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145, 1148 (Alaska 1989); *M-K Rivers v. Schleifman*, 599 P.2d 132, 134 (Alaska 1979).

44 AS 23.30.128(b).

45 *Gaede v. Saunders*, 53 P.3d 1126 (Alaska 2002) (hereinafter, "*Gaede*").

connection with a business or industry," *Kroll v. Reeser*[46] and *Nickels v. Napolilli*,[47] Ms. Kang argues that the facts of this case do not support a legal conclusion that Mr. Mullins was employed in connection with a business or industry.[48]

The Board's view was that because the premises that were being worked on housed the massage business, and it is necessary for a massage business that the premises in which it is housed not have a leaky roof, the work was "in connection with a business or industry" within the meaning of AS 23.30.395(20).[49] The Board distinguished this case from *Gaede*, because in that case the work consisted of an addition to an existing residential building, while in this case the work consisted of repairs to a structure that was in part being used by Ms. Kang for commercial purposes.[50]

The Board correctly distinguished *Gaede* from this case. In *Gaede*, homeowners hired workers to construct an addition to their home. The employment was in connection with the employer's status as a residential homeowner, not in connection with the employer's activities as a business or industry such as operating a residential rental property. In *Gaede*, the building was not being used for any kind of business purposes. In this case, the structure was in part being used by the employer for business purposes. *Gaede* is not at all on point.

Similarly, *Nickels* is not at all on point. In that case, the employers hired an individual to provide farm labor services. The employers had full-time employment away from the farm, but they also derived income from the farm, selling animals, hay, and farm equipment. They argued that the farm was not a business, but rather was "a lifestyle choice." The court gave short shrift to that argument. The case is entirely

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46 *Kroll v. Reeser*, 665 P.2d 753 (Alaska 1982) (hereinafter, "*Kroll*").

47 *Nickels v. Napolilli*, 29 P.3d 242 (Alaska 2001) (hereinafter, "*Nickels*").

48 Mr. Mullins did not participate in the appeal. At oral argument, the Fund declined to take a position on this issue.

49 *Mullins*, Bd. Dec. No. 15-0111 at 26.

50 *Id.* The Board's decision did not discuss whether *Kroll* or *Nickels* shed any light on the issue raised by Ms. Kang.

unlike this one, in which it is undisputed that Ms. Kang operates a business enterprise and she does not contend that her purported "business" is nothing more than a lifestyle choice.

In *Kroll*, the putative employer, Mr. Kroll, hired Robert Reeser (who was licensed in another state as a general contractor) to assist in the construction of a fourplex, one unit of which the employer intended to occupy as a personal residence while renting out the remainder. Mr. Reeser's son, Donald Reeser, and several other individuals also worked on the project, as did Mr. Kroll. Donald Reeser was injured. It was clear that Donald was an employee, but it was not clear whether the employer was Mr. Kroll or Mr. Reeser.[51] The court recognized that "the issue of whether Kroll was an employer is critical both as a precondition to the application of the Act and as an element of the nature of the work test."[52] The court noted,

> The Board's first obligation is to ascertain the nature of the particular business enterprise in which the injury allegedly occurred, and then to determine whether the work being done by the claimant is a regular part of that business.[53]

Referring to the statutory definition of "employer" and the requirement that employment must be "in connection with a business or industry" the court stated:

> [T]he 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 in what was basically a *consumptive* and not a *productive* role played by Kroll.[54]

The court remanded the case to the Board, and thus *Kroll* affords no definitive answer to whether the facts of this case support the legal conclusion that Mr. Mullins was employed in connection with a business or industry. The most that can be said is that

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[51] *Kroll*, 655 P.2d at 755 ("[I]n this case the question is not whether Donald is an employee or an independent contractor. He is obviously an employee. The question is whether he was employed by his father, or by Kroll.").

[52] *Kroll*, 655 P.2d at 756-757.

[53] *Kroll*, 655 P.2d at 757, note 5.

[54] *Kroll*, 655 P.2d at 757 (italics in original; footnotes omitted).

since in *Kroll* the court did not rule that as a matter of law, entering into a contract with an individual to assist in building a fourplex, three quarters of which is to be used for a business purpose, is a contract made "in connection with a business or industry," *Kroll* is not precedent for the proposition that entering into a contract with someone to work on a structure, only one-third of which is being used for business, is not a contract "in connection with a business or industry." Rather, the court's decision in *Kroll* suggests that when an individual is injured while performing work under such a contract, whether the contract should be considered to be "in connection with a business or industry" depends on the totality of the circumstances, and not merely on the degree to which the structure is used for business purposes.

We turn back, then, to the policy identified in *Kroll* as governing this issue: that employment should be considered to be "in connection with a business or industry" when it is a productive part of a business activity, but not when it is basically consumptive in nature. Ms. Kang would characterize Mr. Mullins' employment as Ms. Kang's attempt to save money on the cost of hiring an individual to perform major maintenance work on a structure in which she resides and which she neither owns nor primarily uses for business purposes (consumptive), rather than as an attempt to contribute to the value of her services as a provider of massages (productive). Ms. Kang's argument reflects the perspective of a business owner who rents a business location and for whom it would make no economic sense to incur the cost of a maintenance project rather than to vacate the premises and find another location from which to operate the business.

Ms. Kang's argument in this regard is at odds with the manner in which maintenance work on business premises is treated in most jurisdictions. Many workers' compensation acts exclude from coverage employment that is not "in the course of the

employer's trade, business or profession,"[55] not "for the purpose of the employer's trade or business" or not "in the usual course of the trade, business, profession, or occupation of the employer."[56] However, even in jurisdictions with that sort of exclusion, which on its face is more restrictive of coverage than our Act's exclusion of employment that is not "in connection with a business or industry," "such ancillary activities as maintenance and repair are . . . generally deemed to be within the course of an employer's usual business."[57] We think it consistent with the general rule that the Act's provision for coverage of work performed "in connection with a business or industry" be similarly construed as including a substantial degree of ancillary activity in the nature of maintenance or repair to business premises. The Board's decision reflects that same reasoning.[58]

But the activities at issue in this case go well beyond routine maintenance or repair. The project included tearing off an existing shingled roof, replacing it with a metal roof, leveling the structure and (according to some testimony) adding siding: this type of project might be characterized as a real estate improvement project rather than as maintenance or repair ancillary to Ms. Kang's massage parlor business. Moreover, there is no evidence that the roof leaks that were the genesis of the project affected the business portion of the premises at all, much less that Ms. Kang had a business purpose for undertaking a major renovation of the structure.

Nonetheless, we conclude that the Board correctly ruled that the contract was made "in connection with a business or industry" within the meaning of

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[55] Thirty-four states have been identified as having this sort of exclusion. 4 Larson's Workers' Compensation Law §72.02[1], note 5 (2000 ed.) (hereinafter, Larson's). This exclusion is distinct from the requirement that an injury occur "in the course of employment," which concerns whether, given that the employment relationship is covered, the injury is covered because it "arose out of and in the course of the employment." AS 23.30.010(a); *see generally* 2 Larson's §§3.01-3.06 (2000 ed.).

[56] *See* 4 Larson's §73.03[3] (2000 ed.).

[57] 4 Larson's §73.03(3) at 73-10 (2000 ed.).

[58] *See supra*, note 49.

AS 23.30.395(20). We do not rely entirely on the connection between Yong Kang's contract with Mr. Mullins and her massage parlor business, however. We also rely on the connection between Yong Kang's contract with Mr. Mullins and Benjamin Kang's real estate rental business. Ms. Kang acknowledges the latter connection, but views it as suggesting that Benjamin Kang, rather than Yong Kang, was Mr. Mullins' employer. She puts it this way: "If anyone employed Mullins in connection with a business or industry (rental property), it was Benjamin Kang, not Yong Kang."[59] But the issue to be decided in this case is not whether Mr. Mullins' employer was Benjamin Kang or was Yong Kang: rather, the issue is whether the employment was in connection with a business or industry.

Benjamin Kang testified that he travelled to North Pole to perform the roof work himself, after his mother told him that it was leaking. According to his testimony, Benjamin Kang was present when Mr. Mullins arrived at the work site, and he acquiesced in Mr. Mullins' undertaking the lead role in the project. Benjamin Kang's involvement in the project establishes a connection to his real estate rental business. What is anomalous about this case is that the putative employer, Yong Kang, hired an individual to perform major construction work on a structure she did not own and which she apparently had no legal obligation to maintain. She may have been motivated to do so by kinship rather than by profit,[60] but that does not lessen the connection between the contemplated project and her son's business enterprise.

4. Conclusion.

Ms. Kang employed Mr. Mullins to perform work on the structure in which she resided and operated a business. Her son, who owned the structure and rented it to her, was aware of and acquiesced in Mr. Mullins' participation in the project. We

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[59] Appellant's Brief, p. 7.

[60] As the court recognized in *Kroll*, employment for a construction project may be covered when the employment is in itself a "profit-making enterprise[.]" *Id.*, 655 P.2d at 577. *See*, *e.g.*, *Black v. Corder*, 399 S.W.2d 762 (Tenn. 1966).

conclude that the employment was in connection with a business or industry. The Board's decision is therefore AFFIRMED.

Date: __*October 27, 2016*____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair *pro tempore*

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, this is a full and correct copy of Decision No. 230 issued in the matter of *Yong Kang d/b/a Lee's Massage vs. Alexander Mullins and State of Alaska, Workers' Compensation Benefits Guaranty Fund,* AWCAC Appeal Nos. 15-023 and 16-001, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 27, 2016.

Date: *October 31, 2016*

Signed

K. Morrison, Appeals Commission Clerk