

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION)	
FOR FAILURE TO INSURE WORKERS')	
COMPENSATION LIABILITY, and for)	
CIVIL PENALTY)	
)	FINAL DECISION AND ORDER
STATE OF ALASKA, DIVISION OF)	
WORKERS' COMPENSATION,)	
)	AWCB Case No. 700003881
)	
Petitioner,)	
)	
v.)	AWCB Decision No. 13-0116
)	
RONALD LIND d/b/a)	
BEARSKIN CREEK GUIDING)	
SERVICES,)	Filed with AWCB Anchorage, Alaska
)	on September 20, 2013
Respondent.)	
)	

The Division of Workers' Compensation, Special Investigations Unit's Amended Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage, Alaska on May 21, 2013, a date selected on March 27, 2013. Investigator Christine Christensen represented the Special Investigations Unit ("SIU" or "Division") and testified. Neither Ronald Lind nor any representative appeared on behalf of Ronald Lind d/b/a Bearskin Creek Guiding Services ("Mr. Lind," or "Respondent") despite multiple efforts to reach Respondent at the telephone number of record on May 20, 2013 and May 21, 2013. The Division opposed a continuance. The decision was made to go forward in Respondent's absence. The matter proceeded as a two-member panel, a quorum under AS 23.30.005(f). The record closed at the hearing's conclusion on May 21, 2013.

This decision examines the oral order to go forward with the hearing in Respondent's absence, and addresses the merits of SIU's Amended Petition.

ISSUES

SIU contends Respondent was provided notice of this properly scheduled hearing and the hearing should proceed in Mr. Lind's absence. While Respondent's position is unknown, it is presumed it would oppose the hearing going forward in Mr. Lind's absence.

1. Was it proper to proceed with the hearing in Respondent's absence?

SIU contends Ronald Lind d/b/a Bearskin Creek Guiding Services is an "employer" within the meaning of the Alaska Workers' Compensation Act (Act). It contends Respondent failed to provide proof of workers' compensation liability insurance coverage, and operated a business using employee labor during periods when it was not insured for workers' compensation liability. SIU contends Respondent should be assessed a civil penalty for its failure to insure.

While Respondent did not appear at the hearing, in correspondence with the SIU Mr. Lind contended Respondent was not an employer operating a business using employee labor. He contended the individuals performing hunting and guiding services under the auspices of Bearskin Creek Guiding Services were independent contractors, and Respondent is not subject to the Act.

- 2. Is Respondent, Ronald Lind d/b/a Bearskin Creek Guiding Services, an "employer" subject to the Act?***
- 3. Was Respondent subject to and in violation of the requirement to file evidence of compliance with the Act, and if so, for what dates?***
- 4. Was Respondent subject to and in violation of the requirement to insure against workplace injuries, and if so, for what dates?***
- 5. Should Respondent be assessed a civil penalty for failure to insure, and if so, in what amount?***

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1. Bearskin Creek Guiding Services is a sole proprietorship, owned and operated by Ronald Lind. (Business License Detail, Division of Corporations, Business and Professional Licensing, Exhibit 1 at 1.).
2. As a sole proprietor, Ronald Lind is not required to insure himself against workplace injuries. (AS 23.30.239).
3. Respondent was first issued a business license on August 16, 1999. The current business license expires December 31, 2013. The Alaska Division of Corporations business licensing section lists Respondent's official address as a Chignik Lake, Alaska, post office box. (Business License Detail, Division of Corporations, Business and Professional Licensing, Exhibit 1).
4. Mr. Lind is a licensed registered guide-outfitter, assigned License No. R-1011. The Division of Corporations professional licensing section lists a Muldoon Road, Anchorage address for Mr. Lind. (Professional License Detail, Exhibit 1 at 2).
5. This matter came to the attention of SIU following an injury reportedly sustained by Gregory G. Ragan, a licensed assistant guide performing services for Bearskin Creek Guiding Services on October 4, 2011, when it was not insured for work injury liability. (Report of Occupational Injury, AWCB Case No. 2101118525; *Ragan v. Ronald Lind, dba Bearskin Creek Guiding Services*, AWCB Decision No. 13-0041 (April 23, 2013) at 8; NCCI Proof of Coverage Search for Bearskin Creek Guiding Services, Exhibit 9).
6. On November 28, 2011, Mr. Ragan filed a workers' compensation claim against Ronald Lind and Bearskin Creek Guiding Services for the injury sustained on October 4, 2011. (Claim, AWCB Case No. 2101118525; *Ragan v. Ronald Lind, dba Bearskin Creek Guiding Services*, AWCB Decision No. 13-0041 (April 23, 2013)).
7. On January 11, 2012, SIU filed a petition for finding of failure to insure and assessment of civil penalty against Ronald Lind dba Bearskin Creek Guiding Services. The petition and a discovery demand were mailed by certified mail to Respondent at the Chignik Lake address. When the mailed item reached the Chignik Lake post office, it was forwarded to an Anchorage address bearing a 99504 zip code, presumably Mr. Lind's Muldoon Road address which bears a 99504 zip code, and was delivered to the addressee on January 21, 2012. (USPS Track &

Confirm Certified Mail No. 9171082133393755823448; Exhibit 4, at 13-14; Judgment, observation, experience, facts of the case and inferences therefrom).

8. When SIU received no response to the petition and discovery demand, on February 29, 2012, it again sent the petition and discovery demand to Respondent, this time by regular mail to both the Chignik Lake and Anchorage addresses. Neither mailing was returned. The discovery demand sought a complete list of the names, addresses, occupations and telephone numbers of all persons performing work on behalf of Respondent, and all timesheets, timecards, payroll summaries, work schedule calendars and the like, dating from November 7, 2005 to the present. (Christensen; Exhibit 4 at 15; Petition, Discovery Demand).
9. Also on February 29, 2012, Mr. Lind appeared for a prehearing conference in the Ragan injury case. He advised the board designee and those present “he has a different address during the winter and mail would get to him faster if it is sent there until April.” (Prehearing conference summary, AWCB Case No. 201118525, February 29, 2012). The winter address for faster delivery is the same Muldoon Road address on Respondent’s registered guide/outfitter license, and to which SIU’s initial petition was forwarded from Chignik Lake and received on January 21, 2012. (Observation).
10. On April 5, 2012, SIU sent Respondent a demand letter, again to both addresses. It allowed Respondent until April 20, 2012 within which to provide the requested discovery, including copies of all related contracts and agreements, 1099 forms and independent workers’ compensation policies, if Respondent was claiming individuals performing work related to Respondent’s business held independent or private contractor status. (Letter, April 5, 2012).
11. Accompanying an April 23, 2012 letter to SIU, Respondent provided IRS Forms 1099-Misc., for 2011 only, for five individuals, Mr. Ragan among them. No contracts, agreements, independent workers’ compensation policies, nor 1099 forms from any other years, were provided, (Prehearing conference summary, March 27, 2013). In the letter, Mr. Lind contended all of the five identified individuals were performing as Assistant Guide under his Registered Guide-Outfitter license, and all were independent contractors, not “employees” under the Act. According to Mr. Lind, all persons he utilizes as guides perform the same assistant guide duties, carry the same assistant guide responsibilities and have the same working relationship as assistant guides for him, the licensed registered outfitter-guide. Mr. Lind stated he did the cooking for Respondent’s clients, assisted on occasion by his sister, who volunteered

her time and worked solely for a gratuity from him. (Letter from Lind to Christensen, April 23, 2012, Exhibit 5 at 20). No employment information with respect to services performed for Respondent by Mr. Lind's sister was provided. (Record).

12. Respondent's letter provided SIU with a telephone number at which he could be reached until April 29, 2012, noting that after April 29, 2012 he would be in Chignik Lake "preparing for the spring hunt season" and could be reached by mail at the Chignik Lake address. (Christensen; Observation).
13. Respondent's reply to SIU's initial discovery request was received 95 days after it was delivered to Respondent in Anchorage on January 21, 2012. (*Id.*).
14. The Alaska Big Game Commercial Services Board (Game Board), a state regulatory body, was created in 2005 for the purpose of licensing and regulating the activities of providers of commercial services to big game hunters, including registered guide-outfitters, master guide-outfitters, class-A assistant guides, assistant guides, and transporters. (AS 08.54.591).
15. An "assistant guide" may not contract to guide or outfit a big game hunt, and must "*be employed by a registered guide-outfitter . . .*" (italics added)(AS 08.54.630(b)(1) and (2)).
16. A "class A assistant guide" may not contract to guide or outfit a big game hunt, and must "*be employed by and under the supervision of a registered guide-outfitter . . .*" (italics added)(AS 08.54.620(b)(1) and (2)).
17. A "registered guide-outfitter may *be employed* by another registered guide-outfitter to perform the functions of . . .an assistant guide in any game management unit." (italics added)(AS 08.54.610).
18. Respondent utilized the services of twelve individuals during the hunting seasons from 2007 through 2012. Six of the named individuals were licensed "Assistant Guides." Two of the individuals were Class A Assistant Guides. Four of the men were "Registered Guides." (Email from Lee Strout, Investigator, Big Game Commercial Services Board, to C. Christensen, Investigator, SIU, April 20, 2012, with enclosures; Exhibit 12 at 67-79).
19. On April 26, 2012, SIU amended its petition for failure to insure, requesting the board to determine Respondent's employer status. (Amended Petition). The amended petition was mailed to Respondent at both its Chignik Lake post office box, and Chignik Lake residential address. Neither was returned. (Amended Petition; Record).

20. On May 10, 2012, Workers' Compensation Division Director Michael Monagle issued a Stop Work Order requiring Respondent "to immediately cease and desist and stop using all employee labor," and notifying Respondent that "Violation of a stop order is a \$1,000.00 per day civil penalty." (Stop Work Order, May 10, 2012).
21. Between May 10, 2012 and May 29, 2012, Respondent was operating a hunt or hunts, utilizing the services of four assistant guides. (Big Game Commercial Services Board listing "2012 Guides Working for Ronald Lind, Registered Guide R-1011"; Exhibit 16; Judgment, observation, facts of the case and inferences therefrom.).
22. The Stop Work Order was personally served on Mr. Lind on May 20, 2012, "at his residence of . . . Chignik Lake, Alaska 99548." Successful service in Chignik Lake was obtained following unsuccessful service at Respondent's Muldoon Road address. The returned unserved writ states "Per the management @ [Mr. Lind's] trailer park. As of 5/2/12 Mr. Lind notified them he will be @ Chignik Lake May-Sep and possibly October." (Peace Officer's Return of Writ Unserved, May 16, 2012).
23. On May 23, 2012, Respondent obtained workers' compensation insurance through Travelers Property Casualty Company of America. (Christensen; Travellers Workers Compensation and Employer Liability Policy, #6JUB-5B41831-6-12; Exhibit 10).
24. For three days after service of the Stop Work Order, May 20-22, but before obtaining workers' compensation insurance on May 23, 2012, Respondent continued operating its eight and 10-day hunts which began, respectively, on May 17 and May 19, 2012. (*Compare* Game Board records, *supra*, with Travellers policy, effective date May 23, 2012 at 12:01 a.m.; Return of Writ for Stop Work Order; Judgment, experience, observation, facts of the case and inferences therefrom).
25. Respondent obtained workers' compensation insurance coverage 122 days after having been served with the original petition for failure to insure, and three days after having been served with the Stop Work Order. (Observation; *Compare* Finding of Fact 7 with Findings of Fact 21-23).
26. On September 20, 2012, Respondent's workers' compensation policy was cancelled for non-payment of premium. (NCCI Proof of Coverage Search, Bearskin Creek Guiding Service; Exhibit 9). Mr. Lind informed SIU that Respondent was done operating for the year by the time the policy was cancelled. This is corroborated in the Game Board records, which show May 29,

2012 as the last day assistant guide services were utilized during 2012. (*Id.*; Christensen; Game Board records).

27. In part because Respondent maintains two addresses: late April through September or October at the Chignik Lake address, and fall through late April at the Muldoon Road address, obtaining Respondent's receipt for service of notices of prehearing conferences and hearings has been problematic. This case was previously scheduled for hearing on October 17, 2012, but was continued when Mr. Lind failed to appear and it was determined he had not received notice of the hearing. (*See In re Ronald Lind, dba Bearskin Creek Guiding Service*, AWCB Decision No. 12-0185 (October 23, 2012)(*Bearskin I*).
28. *Bearskin I* ordered the parties to schedule a prehearing conference to set a new hearing date for the failure to insure case. (*Bearskin I* at 7).
29. *Bearskin I* ordered SIU to serve Respondent at both the Anchorage and Chignik Lake addresses unless and until Respondent provided a single service address. (*Id.*).
30. *Bearskin I* ordered Respondent to provide a correct mailing address, and two if necessary to account for seasonal locations, and a valid phone number. (*Id.*).
31. Respondent never provided the board a single service address, nor changed his addresses or telephone number from those previously of record. (Record).
32. The copy of *Bearskin I* sent certified mail to the Chignik Lake address on October 23, 2012, was returned "Not Deliverable as Addressed, Unable to Forward." A copy of *Bearskin I* sent certified mail to the Muldoon Road address was returned "Unclaimed." (Stamped, returned envelopes).
33. On February 6, 2013, Mr. Lind was interviewed by SIU investigator Mark Lutz. Mr. Lind provided both the Muldoon Road, Anchorage address, which he stated was effective until April each year, followed by the Chignik Lake address, until "right around October." Mr. Lind admitted he has been operating his business since 1999, and has never carried workers' compensation insurance coverage. (Transcript, Ronald Lind recorded statement February 6, 2013; Exhibit 17).
34. On February 15, 2013, Mr. Lind attended the deposition of Gregory Ragan, conducted in Mr. Ragan's case for benefits for injury sustained while performing guide services for Respondent. (Deposition Transcript, Gregory Ragan, at 2). Investigator Christensen hand-delivered a copy of *Bearskin I* to Respondent at the deposition. (Christensen).

35. On February 21, 2013, notice of a March 27, 2013 prehearing conference in the failure to insure case was sent to Respondent at both of his addresses. Only the notice sent to the Chignik Lake address was returned. (Notices of prehearing conference; return envelope from Chignik Lake address). This is consistent with Respondent's acknowledged seasonal locations, with spending the winter months at his Muldoon Road address in Anchorage. (Observation).
36. Respondent received notice of the March 27, 2013 prehearing conference in this case. (Judgment, observation, facts of the case and inferences therefrom).
37. On March 5, 2013, Respondent attended a prehearing conference in the Ragan injury case. The board designee reminded Respondent and Investigator Christensen of the March 27, 2013 prehearing conference scheduled in the failure to insure case. (Prehearing conference summary, AWCB Case No. 700003881, March 27, 2013).
38. On March 13, 2013, Mr. Ragan's injury claim was heard in Anchorage. Respondent appeared, represented himself and testified. Four guides working under the auspices of Bearskin Creek Guiding Service, including Ragan, testified, as did two Bearskin clients Mr. Ragan guided on successful brown bear hunts during the 2011 season. (*Ragan v. Ronald Lind, dba Bearskin Creek Guides*, AWCB Decision No. 13-0041 (April 23, 2013) at 1)(*Ragan*).
39. Guides Ragan, Gilbert Huntington, Larry Rogers and Craig Hill testified they performed as "assistant guides" for Bearskin Creek Guiding Services during the October 2011 hunting season. (*Ragan* at Findings of Fact 20, 43, 65, 67). Their testimony was consistent with Mr. Lind's April 23, 2012 admission all of the men Respondent utilizes perform "assistant guide" services. (Letter from Lind to Christensen, April 23, 2012).
40. Despite having both actual and constructive notice of the March 27, 2013 prehearing conference in this case, Respondent did not attend, and the board designee was unsuccessful in her efforts to reach him by telephone during the conference. (Prehearing conference summary, March 27, 2013; Judgment, experience, observation, facts of the case and inferences therefrom).
41. After establishing Respondent had notice of the prehearing conference, the board designee set a May 21, 2013 hearing date for SIU's amended petition, and established filing dates for witness lists, legal memoranda and evidence filing. The prehearing conference summary informed Respondent that if the scheduled hearing date interfered with his summer guiding season, he could contact the board prior to May 1, 2013 to request new prehearing conference and hearing dates. The prehearing conference summary also contained the text of the statutes and

regulations pertinent to the allegations contained in the petition for failure to insure, assessment of civil penalties, and determination of employee and employer status. (Prehearing conference summary, March 27, 2013).

42. On April 10, 2013, the prehearing conference summary containing notice of the May 21, 2013 hearing date was mailed to Respondent at both the Chignik Lake and Anchorage addresses by regular U. S. Mail. Neither was returned as undelivered or undeliverable. (*Id.*; Prehearing conference summary service attestation; record; observation, facts of the case, inferences therefrom).
43. Respondent received actual notice of the May 21, 2013 hearing date. (Judgment, observation, experience, facts of the case and inferences therefrom).
44. Respondent did not contact the board to request a new hearing date. (Record).
45. On April 23, 2013, the board panel hearing the Ragan injury case issued its final decision and order in *Ragan v. Ronald Lind, dba Bearskin Creek Guides*, AWCB Decision No. 13-0041 (*Ragan*). Based on the evidence and testimony, including the testimony of Mr. Lind, and applying the “relative nature of the work” test established at 8 AAC 45.890, the board found Gregory Ragan was an employee, and Ronald Lind dba Bearskin Creek Guiding Services was an employer under the Act. The board held Mr. Ragan’s employment for Respondent was the substantial cause of his disability and need for medical care, and ordered Respondent to pay Mr. Ragan’s medical expenses incurred from October 4, 2011 through January 4, 2012, attorney fees and costs. (*Ragan* at 32-37, 38-41, 43-44).
46. On April 23, 2013, the final decision and order in *Ragan* was mailed to Respondent by certified mail to the Chignik Lake post office box address, and by regular mail to the Muldoon Road address. Neither was returned. (Record).
47. Allowing three days for mailing, Respondent received notice of his “employer” status with respect to his assistant guides by April 26, 2013. (Judgment, observation, experience, facts of the case and inferences therefrom).
48. Respondent did not appeal *Ragan*. By operation of law it became a final order on May 24, 2013. (Record; AS 23.30.125(a)).
49. No evidence was introduced to determine whether or not Respondent has paid the benefits awarded in *Ragan*. (Observation).

50. The Game Board records reflect Respondent employed three guides in 2007 over 32 calendar days, five guides in 2008 over 11 calendar days, three guides in 2009 over 21 calendar days, four guides in 2010 over 23 calendar days, six guides, not five as Respondent reported, in 2011 over 37 calendar days, and four guides in 2012 over 13 calendar days. (Email from Lee Strout, Investigator, to C. Christensen, April 20, 2012, with enclosed Game Board Records; Exhibits 12, 16).
51. Respondent utilized employee labor between 2007 and 2012 for a total of 137 calendar days. (*Id.*). During this six year period, Respondent was uninsured for 130 of these 137 calendar days, having purchased insurance effective May 23, 2012 through May 29, 2012, the last day Respondent operated with employee labor. Thus, between 2007 and 2012 Respondent utilized employee labor while uninsured for workers' compensation liability for a total of 130 calendar days. (*Id.*; NCCI Proof of Coverage Search, Bearskin Creek Guiding Services, Exhibit 9; Travellers policy).
52. In 2007 Respondent operated using uninsured employee labor between September 14, 2007 and October 21, 2007, for a combined total of 76 uninsured employee workdays (three guides working 32, 32 and 12 days, respectively). (Game Board records, Exhibit 12, pp. 66-67).
53. In 2008, Respondent operated using uninsured employee labor between May 10, 2008 and May 20, 2008, for a combined total of 55 uninsured employee workdays (five guides each working 11 days). (Game Board records, Exhibit 12, pp. 66, 68).
54. In 2009, Respondent operated using uninsured employee labor between October 1, 2009 and October 21, 2009, for a combined total of 63 uninsured employee workdays (three guides each working 21 days). (*Id.* at pp. 66, 70).
55. For the period 2007 through 2009, prior to the effective date of 8 AAC 45.176, Respondent operated using uninsured employee labor for a total of 194 uninsured employee workdays. (*Id.*; Findings of Fact 53-55; Judgment, observation, experience, facts of the case and inferences therefrom).
56. In 2010, Respondent operated using uninsured employee labor between May 10, 2010 and September 16, 2010, for a combined total of 71 uninsured employee workdays (four guides working 23, 16, 16 and 16 calendar days, respectively). (Game Board records, Exhibit 12, pp. 66, 71).

57. In 2011, Respondent operated using uninsured employee labor between September 10, 2011 and October 21, 2011, for a combined total of 135 uninsured employee workdays (six guides working 37, 27, 21, 21, 21, and 8 days, respectively). (*Id.* at pp. 66, 72-73).
58. In 2012, Respondent operated using uninsured employee labor from May 10, 2012 through May 22, 2012, having obtained insurance effective May 23, 2012, for a combined total of 52 uninsured employee workdays (four guides each working 13 days, respectively). (Game Board Records, Exhibit 16, pp. 91-92).
59. For the period May 10, 2010 through May 22, 2012, after the effective date of 8 AAC 45.176, Respondent operated using uninsured employee labor for a total of 258 uninsured employee workdays. (*Id.*; Findings of Fact 57-59; Judgment, observation, experience, facts of the case and inferences therefrom).
60. According to Respondent's workers' compensation policy in effect between May 23, 2012 and September 20, 2012, the classification code 9094, for "outdoor guide services including drivers," carries a rate of \$13.47 per \$100.00 in remuneration. (Travellers Insurance Policy, Exhibit 10.).
61. For the 2011 season, the only year for which Mr. Lind provided information, Respondent paid \$20,596.00 for the services provided by his six assistant guides. (Letter from Lind to Christensen, April 23, 2012, including attached 1099-Misc. forms, Exhibit 5).
62. At a rate of \$13.47 per \$100.00 earned, the workers' compensation premium payment Respondent would have paid for hired guides for the 2011 hunting season would have been \$2,774.28. ($\$20,596 / \$100 = 206 \times \$13.47 = \$2,774.82$). (Judgment, experience, observation, facts of the case, and inferences therefrom).
63. Prorating the \$2,774.26 premium for the 37 calendar days in which Respondent employed assistant guides in 2011, equates to a per diem cost of \$74.98 for Respondent to insure its assistant guides ($\$2,477.28 / 37 = \74.98). (Game Board records, Exhibit 12, pages 72-73; Judgment, observation, facts of the case and inferences therefrom).
64. Based on the number of calendar days Respondent employed hunting guides from 2007 – 2012, and utilizing the \$74.98 per diem premium rate to insure explained in Findings of Fact 61-64, Respondent would have paid the following insurance premiums in each of the identified years:

Employment Year	Uninsured Calendar Days using Employee Labor	x the Daily Cost to Insure	= Projected Premium in each year
2007	32	x \$74.98	= \$2,399.36
2008	11	x \$74.98	= \$ 824.78
2009	21	x \$74.98	= \$1,574.58
2010	23	x \$74.98	= \$1,724.51
2011	37	x \$74.98	= \$2,774.26
2012	13	x \$74.98	= \$ 974.74
Date Range 2007 - 2012	Total Calendar Days 137	x daily cost to insure x \$74.98	Total Premiums = \$10,272.26

65. Between 2007 and 2012, Respondent would have paid a total of \$10,272.26 in insurance premiums for the 137 calendar days it operated with uninsured employee labor. Twice that premium cost would be \$20,544.52. (Findings of Fact 61-65; Judgment, observation, facts of the case and inferences therefrom).
66. Ronald Lind dba Bearskin Creek Guiding Services earns approximately \$25,000.00 annually from its guiding and outfitting services. Whether Respondent earns income, or whether he has employees during the remainder of the year, is unknown. (Lind recorded statement, February 6, 2013, Exhibit 17; record).
67. Ronald Lind dba Bearskin Creek Guiding Services has not previously been the subject of a failure to insure investigation. (Christensen).
68. Although mistaken, Mr. Lind sincerely believed he was not an “employer” under the Act, and did not purposely violate the Act when he failed to procure workers’ compensation insurance. (Christensen).
69. Requiring payment of any assessed penalty in a lump would devastate Respondent’s business. A payment plan for any assessed penalty is justified and supported by SIU. (Christensen).
70. Six aggravating factors exist in this case: (1) Failure to obtain workers’ compensation insurance within 10 days after SIU’s notification of a lack of insurance (*Compare* Finding of Fact 7 *with* Findings of Fact 23, 25); (2) Issuance of a Stop Work Order (Finding of Fact 20); (3) Violation of a Stop Work Order (Findings of Fact 21-22); (4) Failure to comply with SIU’s

initial discovery demand within 30 days after the demand was received (Finding of Fact 13); (5) A history of injuries sustained by one or more employees while Respondent was in violation of the requirement he insure for workers' compensation liability (Findings of Fact 38, 45; *Ragan v. Ronald Lind, dba Bearskin Creek Guides*, AWCB Decision No. 13-0041 (April 23, 2013)); and (6) Lapses in business practice that would be used by a reasonably diligent business person, including: (a) ignoring certified mail, and (b) failure to gain familiarity with laws affecting the use of employee labor. (Findings of Fact 7, 8, 13, 24, 25, 27, 31, 32, 40; 8 AAC 45.176(d)).

PRINCIPLES OF LAW

Employers have a duty to insure their employees against work-related injury.

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

- (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
- (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
- (3) this chapter may not be construed by the courts in favor of a party;
- (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

AS 23.30.060. Election of direct payment presumed. (a) An employer is conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employment according to the provisions of this chapter, until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, is given to the employee.

AS 23.30.075. Employer's liability to pay. (a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer's liability under this chapter in an insurance company or association . . . or shall furnish the board satisfactory proof of the employer's financial ability to pay directly the compensation provided for. . . .

(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the board, upon conviction the court shall impose a fine of \$10,000 and may impose a sentence of imprisonment for not more than one year. . . . If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits in which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

AS 23.30.080. Employer's failure to insure. (a) If an employer fails to comply with AS 23.30.075. . . .

. . .

(d) If an employer fails to insure or provide security as required by AS 23.30.075, the board may issue a stop order prohibiting the use of employee labor by the employer until the employer insures or provides the security as required by AS 23.30.075. The failure of an employer to file evidence of compliance as required by AS 23.30.085 creates a rebuttable presumption that the employer has failed to insure or provide security as required by AS 23.30.075. If an employer fails to comply with a stop order issued under this section, the board shall assess a civil penalty of \$1,000 a day. The employer may not obtain a public contract with the state or a political subdivision of the state for three years following the violation of the stop order.

(f) If an employer fails to insure or provide security as required by AS 23.30.075, the division may petition the board to assess a civil penalty of up to \$1,000.00 for each employee for each day an employee is employed while the employer failed to insure or provide the security required by AS 23.30.075. The failure of an employer to file evidence of compliance as required by AS 23.30.085 creates a rebuttable presumption that the employer failed to insure or provide security as required by AS 23.30.075.

(g) If an employer fails to pay a civil penalty order issued under (d), (e), or (f) of this section within seven days after the date of service of the order upon the

employer, the director may declare the employer in default. The director shall file a certified copy of the penalty order and declaration of default with the clerk of the superior court. The court shall, upon the filing of the copy of the order and declaration, enter judgment for the amount declared in default if it is in accordance with law. Any time after a declaration of default, the attorney general shall, when requested to do so by the director, take appropriate action to ensure collection of the defaulted payment. Review of the judgment may be had as provided under the Alaska Rules of Civil Procedure. Final proceedings to execute the judgment may be had by writ of execution.

Workers' compensation acts nationwide frequently provide for penalties against employers that fail to obtain workers' compensation insurance. *See* 101 C.J.S. Workers' Compensation §1577. When an employer is subject to the requirements of AS 23.30.075 and fails to comply, a civil penalty may be assessed. Since November 7, 2005, the effective date of the 2005 amendments to the Alaska Workers' Compensation Act, when an employer subject to the provisions of AS 23.30.075 fails to insure, the law grants the Board discretion to assess a civil penalty of up to \$1,000.00 for each employee, for each day an employee is employed while the employer fails to insure.

Alaska's penalty provision is one of the highest in the nation. *See e.g., In re Alaska Native Brotherhood #2*, AWCB Decision No. 06-0113 (May 8, 2006); *In re Wrangell Seafoods, Inc.*, AWCB Decision No. 06-0055 (March 6, 2006); *In re Edwell John, Jr.*, AWCB Decision No. 06-0059 (March 8, 2006). Alaska's statute's severity is a policy statement -- *i.e.*, failure to insure for workers' compensation liability will not be tolerated in Alaska.

In assessing an appropriate civil penalty, consideration is given to a number of factors to determine whether an uninsured employer's conduct, or the impact of that conduct, aggravates or mitigates its offense. A penalty is assessed based on the unique circumstances arising in each case. The primary goal of a penalty under AS 23.30.080(f) is not to be unreasonably punitive, but rather to bring the employer into compliance, deter future lapses, ensure the continued employment of employees in a safe work environment, and to satisfy the community's interest in fairly penalizing the offender. *Alaska R & C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Compensation Appeals Commission, AWCAC Appeal No. 07-043 (September 16, 2008). A penalty is not intended to destroy a business or cause the loss of employment. *Id.* at 27. The employer's ability to pay the penalty must also be assessed. *Id.* For

lapses which occurred after November 7, 2005, and prior to February 28, 2010, a line of cases were developed and referred to in board decisions in which penalties were assessed against uninsured employers.¹ Effective February 28, 2010, regulations were implemented codifying those factors previously considered in setting penalty amounts, and establishing a range of penalties to ensure similarly culpable uninsured employers were similarly penalized. 8 AAC 45.176.

The six-year statute of limitations established in AS 09.10.120, for “an action brought in the name of or for the benefit of the state,” applies in actions for penalties for a failure to insure under as 23.30.080. *In re United Auto Sales, LLC*, AWCB Decision No. 11-0131 (August 24, 2011).

AS 23.30.085. Duty of employer to file evidence of compliance. (a) An employer subject to this chapter, unless exempted, shall initially file evidence of compliance with the insurance provisions of this chapter with the division, in the form prescribed by the director. The employer shall also give evidence of compliance within 10 days after the termination of the employer's insurance by expiration or cancellation. These requirements do not apply to an employer who has certification from the board of the employer's financial ability to pay compensation directly without insurance.

(b) If an employer fails, refuses, or neglects to comply with the provision of this section, the employer shall be subject to the penalties provided in

¹ See *In re Edwell John, Jr.* AWCB Decision No. 06-0059 (March 8, 2006), *In re Hummingbird Services*, AWCB Decision No. 07-0013 (January 26, 2007), *In re Wrangell Seafoods, Inc.*, AWCB Decision No. 06-0055 (March 6, 2006), *In re Absolute Fresh Seafoods, Inc.*, AWCB Decision No. 07-0014 (January 30, 2007), *In re Alaska Native Brotherhood #2*, AWCB Decision No. 06-0113 (May 8, 2006), *In re Alaska Sportsfishing Adventures*, AWCB Decision No. 07-0040 (March 1, 2007), *In re Rendezvous, Inc.*, AWCB Decision No. 07-0072 (April 4, 2007) and *In re Corporate Chiropractic, Inc.*, AWCB Decision No. 07-0098 (April 24, 2007). *In Re Wrangell Seafoods, Inc.*, AWCB Decision No. 06-0055 (March 6, 2006), *In Re Wrangell Seafoods, Inc.*, AWCB Decision No. 07- 0093 (April 20, 2007); *In re St. Mary's Assisted Living Home*, AWCB Decision No. 07-0059 (March 21, 2007) ; *In re EM Enterprises, Inc.*, AWCB Decision No. 07-0104 (April 25, 2007) (\$35.00 per employee per day), *In re Thompson Log & Gift*, AWCB Decision No. 07-0062 (March 23, 2007); *In re Hummingbird Services*, AWCB Decision No. 07-0013 (January 26, 2007); *In re Academy of Hair Design*, AWCB Decision No. 07-0122 (May 10, 2007); *In re Halo Salon*, AWCB Decision No. 07-0142 (May 30, 2007); *In re Pizza Express*, AWCB Decision No. 07-0144 (May 30, 2007); *In re White Spot Café*, AWCB Decision No. 07-0174 (June 27, 2007); *In re Outboard Shop*, AWCB Decision No. 07-0197 (July 12, 2007), among others.

AS 23.30.070 for failure to report accidents; but nothing in this section may be construed to affect the rights conferred upon an injured employee or the employee's beneficiaries under this chapter.

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

AS 23.30.395. Definitions. In this chapter,

...

(19) 'employee' means an employee employed by an employer as defined in (20) of this section;

(20) 'employer' means the state or its political subdivision or 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;

...

8 AAC 45.060. Service. . . .

...

(b) . . . Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address.

...

(e) . . . the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing . . .

(f) Immediately upon a change of address for service, a party or party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served on the party at the party's last known address.

While service is complete upon mailing with sufficient postage to the parties' last known address, the board has repeatedly found parties have received actual notice of hearings when, "although the return receipt from the notice sent via certified mail had not been received [by the board], neither had the notice sent via first class mail been returned as undeliverable." *See, e.g., Mendez v. Sundance Raceways*, AWCB 93-0173 at 4 (July 7, 1993); *Woodwards v. Four-Star Terminals, Inc.*, AWCB 95-0167 at 3 (June 23, 1995); and *McCarroll v. Catholic Comm. Svcs.*,

AWCB 97-0001 at 5 (January 6, 1997), citing *Mendez*. Under such circumstances, the board found it proper to proceed with a hearing under 8 AAC 45.070(f)(1) in a party's absence. *Id.*

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

...

(f) If the board finds that a party was served with the notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;
- (2) dismiss the case without prejudice; or
- (3) adjourn, postpone, or continue the hearing.

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance for good cause as set out in (1)(A) - (I) of this subsection.

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

- (1) The affidavit of readiness is inoperative for purposes of scheduling another hearing;
- (2) The board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and
- (3) A party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

8 AAC 45.176. Failure to provide security: assessment of civil penalties. (a) If the board finds an employer to have failed to provide security as required by AS 23.30.075, the employer is subject to a civil penalty under AS 23.30.080(f), determined as follows:

(1) if an employer has an inadvertent lapse in coverage, the civil penalty assessed under AS 23.30.080(f) for the employer's violation of AS 23.30.075 may be no more than the prorated premium the employer would have paid had the employer been in compliance with AS 23.30.075; the division shall consider a lapse in coverage of not more than 30 days to be inadvertent if the employer has changed carriers, ownership of the employer has changed, the form of the business entity of the employer has changed, the individual responsible for obtaining workers' compensation coverage for the employer has changed, or the board determines an unusual extenuating circumstance to qualify as an inadvertent lapse;

(2) if an employer has not previously violated AS 23.30.075, and is found to have no aggravating factors, and agrees to a stipulation of facts and executes a confession of judgment without action, without a board hearing, the employer will be assessed a civil penalty of two times the premium the employer would have paid had the employer complied with AS 23.30.075;

(3) if an employer has not previously violated AS 23.30.075, and is found to have no more than three aggravating factors, the employer will be assessed a civil penalty of no less than \$10 and no more than \$50 per uninsured employee workday; however, the civil penalty may not be less than two times the premium the employer would have paid had the employer complied with AS 23.30.075; without a board hearing, if an employer agrees to a stipulation of facts and executes a confession of judgment without action, the employer will be given a 25 percent discount of the assessed civil penalty; however, the

discounted amount may not be less than any civil penalty that would be assessed under (2) of this subsection;

(4) if an employer is found to have no more than six aggravating factors, the employer will be assessed a civil penalty of no less than \$51 and no more than \$499 per uninsured employee workday; however, the civil penalty may not be less than two times the premium the employer would have paid had the employer complied with AS 23.30.075; without a board hearing, if an employer agrees to a stipulation of facts and executes a confession of judgment without action, the employer will be given a 25 percent discount of the assessed civil penalty; however, the discounted amount may not be less than any civil penalty that would be assessed under (3) of this subsection;

(5) if an employer is found to have no fewer than seven and no more than 10 aggravating factors, the employer will be assessed a civil penalty of no less than \$500 and no more than \$999 per uninsured employee workday; however, the civil penalty may not be less than four times the premium the employer would have paid had the employer complied with AS 23.30.075; without a board hearing, if an employer agrees to a stipulation of facts and executes a confession of judgment without action, the employer will be given a 25 percent discount of the assessed civil penalty; however, the discounted amount may not be less than any civil penalty that would be assessed under (4) of this subsection;

(6) if an employer is found to have more than 10 aggravating factors, the employer will be assessed a civil penalty of \$1,000 per uninsured employee workday.

(b) A civil penalty assessed under (a) of this section may not exceed the maximum civil penalty allowed under AS 23.30.080(f).

(c) An employer receiving government funding of any form to obtain workers' compensation coverage under AS 23.30.075 that fails to provide that coverage may be assessed the maximum civil penalty under AS 23.30.080(f).

(d) For the purposes of this section, "aggravating factors" include

(1) failure to obtain workers' compensation insurance within 10 days after the division's notification of a lack of workers' compensation insurance;

(2) failure to maintain workers' compensation insurance after previous notification by the division of a lack of coverage;

(3) a violation of AS 23.30.075 that exceeds 180 calendar days;

- (4) previous violations of AS 23.30.075;
- (5) issuance of a stop order by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);
- (6) violation of a stop order issued by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);
- (7) failure to comply with the division's initial discovery demand within 30 days after the demand;
- (8) failure to pay a penalty previously assessed by the board for violations of AS 23.30.075;
- (9) failure to provide compensation or benefits payable under the Act to an uninsured injured employee;
- (10) a history of injuries or deaths sustained by one or more employees while employer was in violation of AS 23.30.075;
- (11) a history of injuries or deaths while the employer was insured under AS 23.30.075;
- (12) failure to appear at a hearing before the board after receiving proper notice under AS 23.30.110;
- (13) cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures;
- (14) lapses in business practice that would be used by a reasonably diligent business person, including
 - (A) ignoring certified mail;
 - (B) failure to properly supervise employees; and
 - (C) failure to gain a familiarity with laws affecting the use of employee labor;
- (15) receipt of government funding of any form to obtain workers' compensation coverage under AS 23.30.075, and failure to provide that coverage.

8 AAC 45.890. Determining employee status. For purposes of AS 23.30.395 (19) and this chapter, the board will determine whether a person is an 'employee' based on the relative-nature-of-the-work test. The test will include a determination under (1) - (6) of this section. Paragraphs (1) and (2) of this section are the most important factors, and at least one of these two factors must be

resolved in favor of an 'employee' status for the board to find that a person is an employee. The board will consider whether the work

(1) is a separate calling or business; if the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee; if the employer

(A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;

(B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;

(C) has the right to extensive supervision of the work then there is a strong inference of employee status;

(D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;

(E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and

(F) and person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;

(2) is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;

(3) can be expected to carry its own accident burden; this element is more important than (4) - (6) of this section; if the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;

(4) involves little or no skill or experience; if so, there is an inference of employee status;

(5) is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;

(6) is intermittent, as opposed to continuous; if the work is intermittent, there is a weak inference of no employee status.

Before an employer-employee relationship exists under the Act, an express or implied contract of employment must exist. *Alaska Pulp Co. v. United Paperworkers Intern. Union*, 791 P.2d 1008, 1010 (Alaska 1990). Formation of such a contract generally requires mutual assent and consideration. *Id.* An important purpose underlying the contract of employment requirement is to avoid “thrust[ing] upon a worker an employee status to which he has never consented . . . [since doing so] might well deprive him of valuable rights. . . .” *Id.* at 1011.

“The law of the case doctrine” ‘maintains that issues previously adjudicated can only be reconsidered where there exist ‘exceptional circumstances’ presenting a ‘clear error constituting a manifest injustice’” (footnote omitted). *Groom v. State*, 169 P.3d 626 (Alaska 2007) at 635-636.

AS 08.54.630. Assistant guide license. . . .

. . .

(b) An assistant guide

(1) may not contract to guide or outfit a big game hunt’

(2) shall be employed by a registered guide-outfitter and under the supervision of a registered guide-outfitter or class-A assistant guide while the assistant guide is in the field on guided hunts; and

(3) may not take charge of a camp or provide guide services unless the contracting registered guide-outfitter is in the field and participating in the contracted hunt or a registered guide-outfitter or class-A assistant guide employed by the contracting guide is physically present and supervising the hunt.

ANALYSIS

1. Was it proper to proceed with the hearing in Respondent’s absence?

Hearings must be held at the time and place fixed by notice served by the Board. 8 AAC 45.070. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party’s last known address. 8 AAC 45.060(b). Parties are deemed to have received actual notice of hearings when, although the return receipt from the notice sent by certified mail has not been returned to the board, neither has the notice sent by first class mail been returned. *Mendez, Woodward, McCarroll*.

The May 21, 2013 hearing was scheduled at a March 27, 2013 prehearing conference. Respondent was properly served at his addresses of record, and received notices of both the prehearing conference at which the hearing date was established, and of the hearing date itself. When Respondent failed to appear on both occasions, efforts were made to contact him at his telephone number of record. The telephone calls were unanswered and messages left were unreturned. When selecting the May 21, 2013 hearing date, the board designee considered Respondent's seasonal business and offered him an opportunity to change the hearing date if the scheduled date proved inconvenient. Respondent took no action to change the hearing date. The hearing on SIU's petition was continued once before, from October 17, 2012, when it was found Respondent's failure to appear resulted from his not receiving notice of the hearing. That is not the case here. Respondent was properly served and received notice of the May 21, 2013 hearing, failed to appear and defend, and SIU opposed a further continuance.

Where, as here, the board finds a party was served with notice of hearing and is not present when the hearing convenes, it may, in the following order of priority (1) proceed with the hearing and decide the matter, (2) dismiss the case without prejudice, or (3) continue the hearing. Respondent's failure to appear was in no way SIU's fault, and no basis exists to dismiss SIU's petition. Continuances are not favored, and may be granted only for good cause defined at 8 AAC 45.074. Under the facts here, there is no basis to justify continuing this properly scheduled and noticed hearing. The decision to proceed with the hearing in Respondent's absence was proper under 8 AAC 45.070(f)(1).

2. *Is Respondent, Ronald Lind d/b/a Bearskin Creek Guiding Services, an Employer subject to the Act?*

SIU contends Ronald Lind d/b/a Bearskin Creek Guiding Services is an employer who was operating a business using employee labor. Respondent contends the individuals performing hunting and guiding services under the auspices of Bearskin Creek Guiding Services are independent contractors, not employees, and Respondent is not an employer subject to the Act.

The law defines an "employer" under the Act as a person who employs one or more persons in connection with a business conducted in this state. AS 23.30.395(20). An "employee" is defined as one "employed by an employer." *Id.* at (19). Employee status is determined in

disputed cases by applying statutory factors to the unique facts in a case. Application of these factors is known as the “relative nature of the work test.” 8 AAC 45.890. The board applied the “relative nature of the work test” to the Respondent’s business in *Ragan v. Ronald Lind dba Bearskin Creek Guiding Services*, AWCB Decision No. 13-0041 (April 23, 2013)(*Ragan*), finding Respondent was an employer, and assistant guide Mr. Ragan an employee under the Act. Respondent did not appeal *Ragan*, and it became a final, non-appealable order on May 23, 2013. The Board’s finding Respondent is an employer, and assistant guide Mr. Ragan an employee, represents “the law of the case.”

In both his April 23, 2012 letter to SIU, and in his February 6, 2013 interview with SIU, Mr. Lind admitted that all twelve of the people Respondent uses as hunting guides for his clients perform the same assistant guide duties Mr. Ragan performed, carry the same assistant guide responsibilities as did Mr. Ragan, and all have the same working relationship with Respondent as Mr. Ragan had, even those with licenses above “assistant guide.” Just as *Ragan* held Respondent was an employer and Mr. Ragan an employee under the Act, Respondent was similarly an employer in relation to all twelve of his assistant guides. Indeed, the law prohibits licensed assistant guides from independently contracting to provide guide services, and permits them to practice their profession only when “employed by a registered guide-outfitter.” AS 08.54.630(b). Accordingly, Respondent was an “employer,” and all twelve of his guides were “employees” under the Act.

3. Is Respondent subject to and in violation of the requirement to file evidence of compliance with the Act, and if so, for what dates?

The law requires employers subject to the Act to file evidence of compliance with the Act’s insurance provisions with the Division of Workers’ Compensation. AS 23.30.085(a). Because Respondent is an “employer” under the Act, and utilized employee labor, it was required to file proof of compliance with the workers’ compensation insurance requirements. Between September 10, 2007 and May 23, 2012, it failed to do so.

Although SIU contends Respondent failed to file proof of compliance for the entirety of the six years in question, and alleges a period of non-compliance totaling 1712 calendar days, dating back to 1999, the evidence demonstrates that between 2007 and 2012, Respondent operated a business using employee labor without filing proof of insurance for 137 calendar days. No definitive

evidence was introduced to support a finding Respondent was in violation before 2007 or, if so, calculate to what extent. Respondent's outfitter-guiding business is seasonal. Between 2007 and 2011 it operated with employees for only 32, 11, 21, 23, and 37 calendar days, respectively. In 2012, it operated for 19 calendar days, 13 without insurance. Specifically, Respondent failed to file proof of insurance for the following periods:

*In 2007, 32 calendar days, from September 10 through 20, and October 1 through 21, 2007.

*In 2008, 11 calendar days, from May 10 through May 20, 2008.

*In 2009, 21 calendar days, from October 1 through October 21, 2009.

*In 2010, 23 calendar days, from May 10 through May 25, and September 10 through September 16, 2010.

*In 2011, 37 calendar days, from September 10 through September 25, and October 1 through October 21, 2011.

*In 2012, 13 calendar days, from May 10 through May 22, 2012.

Because Employer failed to file proof of compliance as required by AS 23.30.085, any employee who files a claim for an injury arising during these periods is entitled to an additional award under AS 23.30.070(f).

4. Was Respondent subject to and in violation of the requirement to insure against workplace injuries, and if so, for what dates?

Under AS 23.30.080(d), an employer who fails to provide proof of compliance as required by AS 23.30.085, is presumed to have failed to insure or provide security as required by AS 23.30.075. Here, not only did Respondent not provide proof of compliance, it failed to provide workers' compensation insurance coverage during the periods it utilized employee labor, specifically: September 10 through 20, 2007 and October 1 through 21, 2007; May 10 through May 20, 2008; October 1 through October 21, 2009; May 10 through May 25 and September 10 through September 16, 2010; September 10 through September 25 and October 1 through October 21, 2011; and May 10 through May 22, 2012.

Respondent had a duty to provide workers' compensation insurance during periods it operated using employee labor. Because it did not do so during its seasonal operations from 2007 through 2012, it is liable for benefits under the Act for any compensable claims arising during the periods it was in violation of AS 23.20.075. Based upon Respondent's lack of coverage,

under AS 23.30.060 it has elected to directly pay compensation or benefits for any compensable claims should any employee make a claim for an injury occurring during these periods.

5. *Should Respondent be assessed a civil penalty for failure to insure, and if so, in what amount?*

Under the Act, when an employer subject to AS 23.30.075's requirements fails to insure, AS 23.30.080(f) grants the board discretion to assess a civil penalty of up to \$1,000.00 per employee for each day employed while the employer was uninsured. Except in the most egregious cases, the maximum penalty is not appropriate.

To ensure similar penalties are imposed on similarly culpable employers, 8 AAC 45.176 was enacted and became effective on February 28, 2010. Prior to the regulation's adoption, consideration was given to a number of factors to determine whether an uninsured employer's conduct, or the impact of that conduct, aggravated or mitigated its offense. A penalty was assessed based on the unique circumstances arising in each case. The factors considered included the number of days of uninsured employee labor, the size of the business, the employer's record of injuries, both in general and during the uninsured period, the extent of employer's compliance with the Act, the diligence exercised in remedying the failure to insure, the clarity of notice of insurance cancellation, employer's compliance with the investigation and remedial requirements, the risk of employer's workplace, the impact of the penalty on employer's ability to continue to conduct business, the impact of the penalty on the employees, the impact of the penalty on employer's community, whether employer acted in blatant disregard for the statutory requirements, whether employer properly accepted service of the Division's petition, whether employer violated a stop order, and credibility of employer's promises to correct its behavior. Based on these factors, a wide range of penalties have been found reasonable based on the specific circumstance of a case. *See, e.g., In Re St. Lawrence Assisted Living Home, Inc.*, AWCB Decision No. 10-170 (October 12, 2010).

The considerations previously examined when assessing an appropriate penalty were codified at 8 AAC 45.176, which standardized penalties based on the number of aggravating factors, if any, in a particular case. The primary goal of the civil penalty is not to be unreasonably punitive, but rather to bring the employer into compliance, deter future lapses, ensure the continued

employment of the business' employees in a safe work environment, and to satisfy the community's interest in fairly penalizing the offender. *Alaska R & C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, AWCAC Decision No. 088 (September 16, 2008).

Here, because Respondent did not provide more detailed information, its employment information must be gleaned from the Game Board records. Those reflect 64 calendar days prior to the regulation's effective date during which Respondent used uninsured employee labor, and 73 calendar days after. They demonstrate Respondent operated using uninsured employee labor during 194 uninsured employee work days prior to enactment of 8 AAC 45.176, and during 258 uninsured employee work days after its effective date.

Respondent's conduct was found to have involved six aggravating factors: (1) Failure to obtain workers' compensation insurance within 10 days after SIU's notification of a lack of insurance; (2) Issuance of a Stop Work Order; (3) Violation of a Stop Work Order; (4) Failure to comply with SIU's initial discovery demand within 30 days after the demand was received; (5) A history of injuries sustained by one or more employees while Respondent was in violation of the requirement he insure for workers' compensation liability; and (6) Lapses in business practice that would be used by a reasonably diligent business person, including: (a) ignoring certified mail, and (b) failure to gain familiarity with laws affecting the use of employee labor. SIU's contention there exist two additional aggravating factors, for a total of eight, is unpersuasive. Given the seasonal nature of Respondent's business, its failure to insure employee labor was for a period of 137 calendar days, not in excess of 180 calendar days. In addition, SIU offered no evidence for its contention Respondent has failed to pay the benefits awarded in *Ragan*.

Under 8 AAC 45.176(a)(4), an employer with no more than six aggravating factors will be assessed a civil penalty of no less than \$51 and no more than \$499 per uninsured employee work day, but in no event less than two times the premium the employer would have paid had it complied with AS 23.30.075. This penalty range is consistent with penalties assessed prior to the regulation's enactment in cases with this number of aggravating factors. Given the unintentional nature of Respondent's violation, the brief seasonal nature of its business, the relatively small remuneration it generates, the small number of employees, and the fact Respondent's behavior with respect to his business and his employees was the same both before and after the regulation's enactment, a penalty

at the lowest end of the penalty range for the entire uninsured period is appropriate. During the six years examined, Respondent operated a business using uninsured employee labor for a total of 452 uninsured employee work days. At \$51 per uninsured employee work day for 452 days, the appropriate penalty is \$23,052.00. This amount is greater than twice the premium amount Respondent would have paid ($\$10,272.26 \times 2 = \$20,544.52$) had he been in compliance during the six seasons he operated between 2007 and 2012. In addition, Respondent operated for three days after having been served a stop work order. At \$1,000 per day for violating a stop work, an additional \$3,000 must be added to the penalty, bringing the penalty of \$26,052.00. At SIU's request, and based on the evidence, a payment plan will be permitted.

CONCLUSIONS OF LAW

1. It was proper for the hearing to proceed in Respondent's absence.
2. Ronald Lind d/b/a Bearskin Creek Guiding Services is an employer subject to the Act.
3. Ronald Lind d/b/a Bearskin Creek Guiding Services was subject to and in violation of the requirement to file evidence of compliance with workers' compensation insurance laws.
4. Ronald Lind d/b/a Bearskin Creek Guiding Services was subject to and in violation of the requirement to insure against workplace injuries.
5. Ronald Lind d/b/a Bearskin Creek Guiding Services will be assessed a civil penalty for failure to insure of \$26,052.00.

ORDER

1. Employer shall maintain workers' compensation insurance coverage of any current and future employees in compliance with AS 23.30.075, and shall file evidence of compliance in accordance with AS 23.30.085.
2. Pursuant to AS 23.30.060, Ronald Lind d/b/a Bearskin Creek Guiding Services is directly liable for all compensable claims arising during the periods Respondent was in violation of AS 23.30.075, namely, September 10 through 20, and October 1 through 21, 2007; May 10 through May 20, 2008; October 1 through October 21, 2009; May 10 through May 25, and September 10 through September 16, 2010; September 10 through September 25, and October 1 through October 21, 2011; and May 10 through May 22, 2012.

3. Ronald Lind d/b/a Bearskin Creek Guiding Services are subject to the penalties provided in AS 23.30.080 for any compensable claims arising during the above listed periods in which Respondent was in violation of AS 23.30.075.
4. Pursuant to AS 23.30.080, Ronald Lind d/b/a Bearskin Creek Guiding Services is assessed and ordered to pay a civil penalty of \$26,052.00 for the 452 uninsured employee workdays during which Employer failed to insure as required by AS 23.30.075, and the three days it operated in violation of a stop work order. Respondent shall pay \$1,052.00 no later than December 1, 2013. Thereafter, beginning January 1, 2014, and for 100 consecutive months thereafter, Respondent will make monthly payments of \$250.00. Payments will be due on the first of the month and continue until April 1, 2022, when the final payment of \$250.00 will be due.
5. Employer shall make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund established under AS 23.30.082. Checks must include AWCB Case Number 700003881, in addition to the AWCB Decision Number 13-0116. Pending payment of civil penalties assessed under AS 23.30.080(f) in accord with this Decision and Order, jurisdiction over this matter is maintained.
6. Employer shall mail its payments to the Alaska Department of Labor, Division of Workers' Compensation, Juneau Office, P.O. Box 25512, Juneau, Alaska 99802-5512.
7. If Employer fails to make the initial payment by its due date, or any of the remaining payments within seven days of the monthly due date, the balance of the civil penalty shall immediately become due and payable. Under AS 23.30.080(g), the Director of the Division of Workers' Compensation may declare Employer in default.
8. The Special Investigations Unit of the Workers' Compensation Division shall monitor Employer for compliance with AS 23.30.075 and AS 23.30.085 on a quarterly basis until the penalty is paid in full. Upon full, timely compliance by Employer as set forth herein, the Special Investigation Unit shall, within 30 days, prepare a proposed Order of Discharge of Liability for Penalty for approval and issuance.

IN re RONALD LIND d/b/a BEARSKIN CREEK GUIDING SERVICES

Dated at Anchorage, Alaska on September 20th, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Linda M. Cerro
Designated Chairman

Mark Talbert, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the Board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of the Petition for Failure to Insure Workers' Compensation Liability and for Civil Penalty, State of Alaska, Division of Workers' Compensation v. RONALD LIND d/b/a BEARSKIN CREEK GUIDING SERVICES, respondent; Case No. 700003881; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties this this 20th day of September, 2013.

Pamela Murray, Clerk