

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION OF)	STOP WORK ORDER FINAL
THE EMPLOYER'S FAILURE TO)	DECISION AND ORDER
INSURE WORKERS' COMPENSATION)	
LIABILITY,)	AWCB Case Nos. 700004253
)	
STATE OF ALASKA, DIVISION OF)	AWCB Decision No. 13-0140
WORKERS' COMPENSATION,)	
)	Filed with AWCB Anchorage, Alaska
)	on October 25, 2013
Petitioner,)	
)	
v.)	
)	
CATFISH HAVEN, INC.,)	
)	
Employer,)	
)	

On October 23, 2013, in Anchorage, Alaska, the Alaska Workers' Compensation Board (board) heard the accusation against employer, Patrick McGowan, d/b/a Catfish Haven, Inc. (Employer) that it failed to carry workers' compensation insurance. Investigator Christine Christensen appeared and testified on behalf of the Workers' Compensation Division's Special Investigations Unit (SIU). Rosemary McGowan appeared telephonically representing Employer and testified. There were no other witnesses. At the hearing's conclusion, the record closed. After deliberations, the record was reopened and the hearing was reconvened on October 24, 2013. On October 24, 2103, Christine Christensen again appeared and testified on behalf of the SIU. Patrick McGowan, owner of Catfish Haven, Inc., appeared telephonically representing Employer and testified. There were no other witnesses. After taking testimony from the parties and a review of the administrative record, including Patrick McGowan's testimony, an oral stop order was issued, effective immediately. The October 24, 2013 oral order is hereby memorialized. The record closed at the hearing's conclusion. A decision and order on the

division's petition for finding of failure to insure and assessment of civil penalties will be issued within 30 days of record closure.

ISSUES

The SIU contends Employer has failed to file proof of workers' compensation liability insurance, pursuant to AS 23.30.085(a). The SIU contends Employer was uninsured as of August 21, 2013, and continuing through the date of the October 24, 2013 hearing. The SIU contends Employer operated as Catfish Haven, Inc. utilizing employee labor while not insured for workers' compensation liability, and requested a stop work order be issued to Employer effective immediately.

Patrick McGowan contended he spoke with insurance agents and brokers regarding obtaining workers' compensation liability coverage for Employer. McGowan contended he was not certain whether Employer was currently insured. Employer presumably opposes the issuance of a stop work order.

- 1) Has Employer failed to file proof of workers' compensation liability insurance?**
- 2) Did Employer violate the requirement to provide workers' compensation liability insurance?**
- 3) Was the board's October 24, 2013 stop work order prohibiting the use of employee labor correct?**

FINDINGS OF FACT

The following recitation of facts is limited to those necessary to address the issues presented. A preponderance of evidence establishes the following relevant findings of fact and factual conclusions:

1. On February 13, 2013, the Division filed a Petition for Finding of Failure to Insure and Assessment of Civil Penalty against Employer. (Petition, February 13, 2013).
2. On October 23, 2013, a hearing was held on the SIU's accusation of Employer's failure to insure workers' compensation liability for the period of June 15, 2012 to April 12, 2013. (Record; Special Investigations Hearing Brief, October 2, 2013).
3. At the October 23, 2013 hearing, Rosemary McGowan, Employer's bookkeeper, appeared on behalf of Employer. Although she had not yet filed an entry of appearance, she orally entered her appearance. She stated she would file an entry of appearance later that day. She was permitted to represent the Employer. (Record; McGowan, October 23, 2013).
4. Patrick McGowan, Employer's owner, attended telephonically. Mr. McGowan announced he would not be testifying. When called upon to testify, Mr. McGowan did not stay on the line, but was either disconnected or hung up. (McGowan, October 23, 2013; Record, observations).
5. During the October 23, 2013 hearing, Investigator Christensen stated the SIU recently received evidence Employer incurred a second lapse in workers' compensation coverage, allegedly since August 21, 2013 to the present, and was currently uninsured. (Christensen, October 23, 2013).
6. If taken as true, the uninsured employee days Employer has had between August 21, 2013, and the October 24, 2013 hearing is 64. (Observations).
7. Employer and the SIU were notified the hearing would be reconvened the following day to address if Employer is insured. The parties were notified a determination would be made regarding whether Employer is currently insured and Employer would be permitted to present evidence. Employer was given notice that failure to present proof of insurance may result in issuance of a stop order, which prohibits use of employee labor by Employer. (Letter, October 23, 2013).

McGowan, Rosemary, Uninsured Employer

8. On October 23, 2013, the SIU filed an Additional Notice of Evidence to be Introduced at Hearing, which was also emailed and sent via facsimile to Employer. (Notice, October 23, 2013; Letter, July 29, 2013).

9. On October 23, 2013, the board's designated chair received the following email from Investigator Christensen, copying Employer as a recipient:

Please see the attached Additional Notice of Evidence To Be Introduced At Hearing, which includes the cancellation notice from Alaska National Insurance Company showing policy 13DWW71936 effective 4/12/13 was cancelled on 8/21/2013 for nonpayment of premium. Also attached is the NCCI Proof of Coverage Inquiry showing the policy was cancelled. This information will be discussed on the record on October 24, 2013 at 9:30 am when the parties reconvene.

The original and two copies will be filed with the AWCB today and a copy will be faxed to Ms. McGowan as well. Due to the timeframe, the Division felt it important the Board and Ms. McGowan get this information as soon as possible. (Email, October 23, 2013).

10. Alaska National Insurance Company (ANIC) notified Employer its workers' compensation policy number 13D WW 71936 was cancelled as of 12:01 A.M. on August 21, 2013. (Letter from ANIC to Catfish Haven, Inc., July 29, 2013).

11. The National Council for Compensation Insurance (NCCI)'s database shows Employer's policy number 13D WW 71936 was cancelled as of August 21, 2013 for nonpayment of premium. (Proof of Coverage Inquiry, October 4, 2013).

12. At the October 24, 2013 hearing, Mr. McGowan could not state whether he could produce a certificate or other proof of workers' compensation coverage currently in effect. McGowan stated he had been in contact with agents and brokers at Allstate Insurance, Alaska National, and Alaska Pacific to resolve the issue, but did not have any evidence showing Employer is insured. When queried whether Employer was insured as of October 24, 2013, McGowan responded, "I'm not absolutely sure how it really works, but if I had to answer, I would say no..." (McGowan, October 24, 2013).

13. Employer employed approximately thirteen employees during the period which the Division alleged it was uninsured. (Christensen, October 23, 2013; Hearing Brief of Division, October 2, 2013, Ex. 14).

14. After review of the administrative record, including Patrick McGowan's testimony, an oral stop order was issued by the board. The order was effective immediately and remains in effect until Employer files evidence of compliance as required by AS 23.30.085. (Record).

PRINCIPLES OF LAW

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 . . . employers. . . .

AS 23.30.005. Alaska Workers' Compensation Board. . . .

. . .

(h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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, 533-34 (Alaska 1987).

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 the employer may not escape liability for personal injury or

death sustained by an employee when the injury sustained arises out of and in the usual course of the employment. . . .

(d) If an employer fails to insure or provide security as required by AS 23.30.075, the board may issue a stop order at the request of the division prohibiting the use of employee labor by the employer until the employer insures or provides 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....** (emphasis added).

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 proscribed 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.

...

AS 23.30.395. Definitions.

...

(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 45.120. Evidence.

...

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing documents.

ANALYSIS

Based on the testimony and the administrative record, Catfish Haven, Inc., is an employer as defined at AS 23.30.395(20). Investigator Christensen testified and provided evidence at the October 23, 2014 hearing that Employer employed approximately thirteen employees during the period which the Division alleged it was uninsured. Employer has a duty to provide workers' compensation insurance for its employees. Employer is required by AS 23.30.075 to insure for liability and to insure its employees for workers' compensation benefits under the Act.

Employer had notice its workers' compensation insurance would be cancelled. ANIC provided notice to Employer its workers' compensation policy was cancelled as of 12:01 A.M. on August 21, 2013. NCCI records show Employer's workers' compensation insurance policy number was cancelled as of August 21, 2013 because Employer had not paid its premium. Based upon ANIC's notice and NCCI's records, the SIU requested issuance of a stop order.

The number of uninsured days Employer has had between August 21, 2013 and the October 24, 2013 hearing is 64.

Patrick McGowan recently had contact with agents and representatives at Allstate Insurance, Alaska National, and Alaska Pacific in effort to obtain insurance. However, he stated he did not currently have nor could he provide evidence Employer is insured. The administrative record, including Mr. McGowan and Ms. Christensen's testimony, support the SIU's request for issuance of a stop order. Employer has failed to insure for workers' compensation liability since August 21, 2013, and continues to be uninsured. Employer failed to file evidence of compliance as required by AS 23.30.085, creating a rebuttable presumption Employer has failed to insure for workers' compensation liability. Employer is unable to rebut the presumption. AS 23.30.080. Employer's workers' compensation insurance was cancelled on August 21, 2013, for failure to pay the insurance premium, and Employer has been without workers' compensation insurance coverage since August 21, 2013.

The board's oral issuance of a stop work order was proper and shall remain in effect until Employer files evidence of compliance as required by AS 23.30.085.

Finally, Employer's attention is directed to AS 23.30.080(d), which states, "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...**" (emphasis added). If Employer continues to conduct business using employee labor, assessment of a \$1,000.00 per day civil penalty is mandatory and must be assessed each day until Employer ceases conducting business using Employee labor, insures, or provides security as required under AS 23.30.075.

CONCLUSIONS OF LAW

- 1) Employer failed to file proof of workers' compensation liability insurance, pursuant to AS 23.30.085(a).
- 2) Employer violated the requirement to provide workers' compensation liability insurance.
- 3) The October 24, 2013 oral stop work order prohibiting use of employee labor was correct and shall remain in effect until Employer files evidence of compliance as required by AS 23.30.085.

ORDER

- 1) The board's oral stop work order issued at the October 24, 2013 hearing was correct.
- 2) The stop work order shall remain in effect until Employer files evidence of compliance as required by AS 23.30.085 with the Workers' Compensation Division it is insured for workers' compensation liability.
- 3) The Special Investigations Unit is directed to personally serve a copy of this Decision and Order on Employer Catfish Haven, Inc. and its registered agent Rosemary McGowan on October 25, 2013, or as soon as possible thereafter.

Dated in Anchorage, Alaska on October 25, 2013

ALASKA WORKERS' COMPENSATION BOARD

Matthew Slodowy, Designated Chair

Ronald Nalikak, Member

Rick Traini, 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 that 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 ordered 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 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 the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of CATFISH HAVEN, INC., uninsured employer / defendant; Case Nos. 700004253; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on October 25, 2013

Pam Murray, Office Assistant