

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION)
FOR A FINDING OF THE FAILURE TO)
INSURE WORKERS' COMPENSATION) FINAL DECISION AND ORDER
LIABILITY, AND ASSESSMENT)
OF A CIVIL PENALTY AGAINST,) AWCB Case No. 700004040
))
ANITA FINCH d/b/a) AWCB Decision No. 13-0142
SOLDOTNA KIDDIE KARE)
) Filed with AWCB Anchorage, Alaska
Defendants.) on November 01, 2013
))

The April 11, 2012 petition for finding of failure to insure for workers' compensation liability, and assessment of civil penalty was heard on October 24, 2013, a date set on August 28, 2013. Investigator Christine Christensen of the Alaska Division of Workers' Compensation (division) Special Investigations Unit (SIU) appeared, testified and represented the division. Anita Finch, d/b/a Soldotna Kiddie Kare (collectively Employer), appeared telephonically, testified and represented herself. There were no witnesses. The record closed at the hearing's conclusion on October 24, 2013.

ISSUES

The division contends Employer operated a business using employee labor without maintaining workers' compensation insurance, and a civil penalty should be assessed. The division requests a lenient penalty due to Employer's limited financial resources and the negative impact on the community if the business were forced to close. The division does not object to a payment plan.

Employer does not dispute it operated a business using employee labor while uninsured. It contends mitigating factors should be considered in assessing a penalty.

1) Should Ms. Finch, d/b/a Soldotna Kiddie Kare, be assessed a civil penalty for failure to insure for purposes of workers' compensation insurance, and if so, in what amount?

FINDINGS OF FACT

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

- 1) Employer is a sole proprietorship, owned by Anita Finch (Soldotna Kiddie Kare business license, Alaska Department of Commerce, Division of Corporations, Business and Professional Licensing).
- 2) Employer failed to insure employees for workers' compensation liability from October 24, 2003 through April 20, 2012, and July 8, 2012 through September 16, 2012. From April 10, 2006 through February 27, 2010, Employer was uninsured for 1,419 calendar days. Employer was also uninsured from February 28, 2010 through April 20, 2012, and July 8, 2012 through September 16, 2012, resulting in another 852 uninsured calendar days (National Council on Compensation Insurance, Inc. (NCCI) online database, proof of coverage screens; SIU Soldotna Kiddie Kare uninsured employer worksheet).
- 3) Employer reported one injury, occurring January 3, 2003, at which time Employer was insured (division database legacy record, injury screen).
- 4) On April 11, 2012, the SIU petitioned for a finding of failure to insure under AS 23.30.075, and assessment of civil penalty under AS 23.30.080(f). The SIU also served a discovery demand for business documents from April 10, 2006 forward, to be returned within 30 calendar days of receipt (petition and discovery demand, April 11, 2012).
- 5) On April 14, 2012, Employer received the petition and discovery demand (United States Postal Service certified mail receipt, April 14, 2012).
- 6) On April 20, 2012, Employer purchased workers' compensation insurance for the period April 21, 2012 to April 21, 2013 (Soldotna Kiddie Kare / Anita Finch check #4513, April 20, 2012; Liberty Mutual Insurance Group policy information page, May 10, 2012).
- 7) Employer's discovery was due on May 14, 2012 (inference drawn from unique facts of the case).

- 8) On July 8, 2012, Employer's policy was cancelled for non-payment of premium (NCCI online database, proof of coverage screen).
- 9) On July 30, 2012, the SIU received the discovery due May 14, 2012 (record).
- 10) On or about September 17, 2012, Employer purchased workers' compensation insurance with an \$1,806.00 annual premium for the period September 17, 2012 to September 17, 2013 (American Interstate Insurance Co. policy information page, October 23, 2012).
- 11) On January 22, 2013, Employer's annual premium increased to \$2,358.00, or \$6.46 per calendar day. At this rate, Employer would have paid \$5,504.15 in premiums for the 852 uninsured calendar days beginning February 28, 2010. Twice that amount is \$11,008.31 (American Interstate Insurance Co. updated policy information page, January 22, 2013; SIU Soldotna Kiddie Kare uninsured employer worksheet).
- 12) Based on payroll records, the SIU calculated an average of 2.24 employees worked each calendar day between April 10, 2006 through February 27, 2010, resulting in 3,179 uninsured employee workdays. For the 782 calendar days from February 28, 2010 through April 20, 2012, an average of 2.24 employees worked, resulting in 1,752 uninsured employee workdays. For the 70 calendar days from July 8, 2012 through September 16, 2012, an average of 3.36 employees worked, resulting in 235 uninsured employee workdays. Adding the latter two lapsed periods yields 1,987 uninsured employee workdays since February 28, 2010 (SIU Soldotna Kiddie Kare uninsured employer worksheet).
- 13) Employer reported a business loss of \$4,983.00 in 2009, \$7,053.00 in 2010, and \$10,431.00 in 2011. In 2011 Employer and her husband reported \$35,278.00 in social security benefits and \$10,592.00 in rental real estate income (Finch 1040 income tax returns, 2009-2011).
- 14) Ms. Christensen and Employer testified credibly at hearing (observations, judgment).
- 15) Citing *In re Lighthouse Therapeutic Massage, LLC*, AWCB Decision No. 07-0076 (April 4, 2007), Ms. Christensen testified the SIU considered \$15.00 per uninsured employee workday a reasonable penalty in the instant case (Christensen).
- 16) Employer testified she did not dispute any evidence presented by the SIU, though she did not recall all the facts (Finch).
- 17) Employer testified she operated the only childcare center in the Soldotna/Kenai area offering night-time care; her business is open 24 hours a day, seven days a week (*id.*).

- 18) Employer testified she is 63 years old and has significant health problems, but plans to keep the business open as long as possible (*id.*).
- 19) Employer testified she hopes to make a profit this year, but business is not stable because the area's parents get laid off a lot.
- 20) Employer testified a \$100,000.00 civil penalty will bankrupt her.
- 21) Employer testified if assessed a civil penalty, she will try to make \$500.00 monthly payments, but is unsure she will be able to do so (*id.*).
- 22) At the hearing's conclusion, Employer testified she believed it was fair (*id.*).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . Employers. . . .

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. . . .

AS 23.30.080. Employer's failure to insure. . . .

(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. . . .

Since November 7, 2005, when an employer subject to AS 23.30.075 fails to insure, the law grants 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 in AS 23.30.080(f) is one of the highest in the nation. See, e.g., *In re Alaska Native Brotherhood #2*, AWCBC Decision No. 06-0113 (May 8, 2006); *In re Wrangell Seafoods, Inc.*, AWCBC Decision No. 06-0055 (March 6, 2006); and *In re Edwell John, Jr.*, AWCBC Decision No. 06-0059 (February 14, 2006). The statute's severity is a policy statement: failure to insure for workers' compensation liability will not be tolerated in Alaska.

A penalty is assessed based on the unique circumstances arising in each case. Consideration is given to a numerous factors to determine whether an uninsured employer's conduct, or the conduct's impact, aggravates or mitigates its offense.

A penalty's primary goal under AS 23.30.080(f) is not to be unreasonably punitive, but rather to bring an Employer into compliance, deter future lapses, ensure the continued employment of the business's employees in a safe work environment, and satisfy the community's interest in penalizing an offender without vengeance. *Ivan Moore d/b/a Ivan Moore Research v. State of Alaska, Division of Workers' Compensation*, AWCAC Appeal No. 07-044 (November 17, 2008); referencing *Alaska R&C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, AWCAC Appeal No. 07-043 (September 16, 2008). A penalty is not intended to destroy a business or reduce employment (*Alaska R&C* at 12). In assessing a civil penalty, consideration is given to the duration, scope and severity of the risk associated with the offending employer's conduct; the culpability of the employer's conduct; the impact on the community and employees; and the employer's ability to pay (*id.* at 22-27).

Decisions such as *In re Edwell John, Jr.* AWCBC Decision No. 06-0059 (March 8, 2006), *In re Hummingbird Services*, AWCBC Decision No. 07-0013 (January 26, 2007), *In re Wrangell Seafoods, Inc.*, AWCBC 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); *In re Corporate Chiropractic, Inc.*, AWCB Decision No. 07-0098 (April 24, 2007) evaluated a penalty's appropriateness in light of the employer's business' viability, the violation's gravity, and any extent to which the employer complied with provisions requiring acquisition of worker's compensation insurance, or otherwise attempted to remedy consequences of its violation. Factors weighed in setting civil penalties included the number of days of uninsured employee labor; business size; injury risk to employees and injuries reported; extent of the employer's compliance with the Alaska Workers' Compensation Act (Act), the investigation and remedial requirements; diligence exercised in in claiming certified mail and remedying the failure to insure; clarity of the insurance cancellation notice; the penalty's impact on the employer's continued viability; the penalty's impact on the employees and the community; the employer's regard for statutory requirements; violation of a stop-work order; and the credibility of the employer's promises to correct its behavior. Considering these factors, a wide range of penalties, from \$0.00 to \$1,000.00 per uninsured employee work day was assessed based on the specific circumstances. *See, e.g., In re Homer Senior Citizens, Inc.*, AWCB Decision No. 07-0334 (November 6, 2007) (no penalty); *In re Casa Grande, Inc. and Francisco Barajas*, AWCB Decision No. 07-0288 (September 21, 2007) (\$1,000 per employee per day with part suspended). For non-egregious violations, *In re Lighthouse Therapeutic Massage, LLC*, AWCB Decision No. 07-0076 (April 4, 2007), found \$15.00 per uninsured employee workday a reasonable penalty.

Minimum and maximum penalty benchmarks, based primarily on specific aggravating factors, were established by 8 AAC 45.176, effective February 28, 2010. Ordinarily, provisions establishing penalties against employers will be strictly construed. *Petty v. Mayor, et al., of College Park*, 11 S.E.2d 246 (1940).

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 23.30.122. 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.

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:

...

(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;

...

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

(e) In this section,

...

(2) 'uninsured employee workday' means the total hours of employee labor utilized by the Employer while in violation of AS 23.30.075 divided by eight.

AS 23.30.239. Sole proprietors and partners as employees (a) A person who is a sole proprietor, or a member of a partnership, may elect coverage as an employee under this chapter by making written application to an insurer.

Sole proprietors and their partners are exempt from the Act and need not file an executive officer waiver.

ANALYSIS

2) Should Ms. Finch, d/b/a Soldotna Kiddie Kare, be assessed a civil penalty for failure to insure for purposes of workers' compensation insurance, and if so, in what amount?

Employer operated a business using uninsured employee labor during two periods, October 24, 2003 through April 20, 2012, and July 8, 2012 through September 16, 2012. The division filed its petition for failure to insure on April 11, 2012. Applying the six-year statute of limitations for actions brought in the name of or for the benefit of the state, only insurance lapses since April 10, 2006 will be considered here. AS 09.10.120.

Employer was uninsured for workers' compensation liability for 3,179 uninsured employee workdays prior to enactment of 8 AAC 45.176 on February 28, 2010, and 1,987 uninsured employee workdays after. Pre-regulation penalties ranged from \$0.00 to \$1,000.00 per uninsured employee work day, based on each case's specific circumstances. *Homer Senior Citizens; Casa Grande*. Here, although Employer was uninsured for a long period of time, the pre-regulation violation was otherwise not egregious, and the SIU's recommended \$15.00 penalty per uninsured employee work day will be ordered. *Lighthouse Therapeutic Massage*. Under AS 23.30.080(f), the appropriate penalty for April 10, 2006 through February 27, 2010 is therefore \$47,685.00 (\$15.00 multiplied by 3,179 days).

In determining the appropriate post-regulation penalty, aggravating factors were considered. Here Employer's conduct involved four: (1) Failure to maintain workers' compensation insurance after previous notification by the division of a lack of coverage; (2) A violation of AS 23.30.075 exceeding 180 calendar days; (3) Failure to comply with the division's initial discovery demand within 30 days after the demand; and (4) A history of injuries or deaths while Employer was insured under AS 23.30.075.

Under 8 AAC 45.176(a)(4), an employer with between four and 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. Given Employer's meager financial resources, the minimum

penalty will be assessed. At \$51.00 per uninsured employee work day for 1,987 days, the appropriate post-regulation penalty is \$101,337.00. This amount is greater than twice the premium amount Employer would have paid ($\$5,504.15 \times 2 = \$11,008.30$) had it been in compliance during the 852 uninsured calendar days between February 28, 2010 and September 16, 2012. Adding the \$47,685.00 pre-regulation and the \$101,337.00 post-regulation penalties yields a total civil penalty of \$149,022.00.

However, tax returns and credible testimony indicate a \$149,022.00 penalty would destroy the business, force its employees into unemployment, and have significant detrimental effects on the community by depriving working parents of reliable, 24-hour childcare. Moreover, Employer's offense is mitigated by the lack of reported injuries in nearly 11 years. Assessing the full penalty would be inconsistent with the legislative intent of AS 23.30.080(f), as applied in *Moore* and *Alaska R&C*. Therefore, 75 percent, or \$111,766.50, will be suspended, leaving an unsuspended \$37,255.50 civil penalty, and a payment plan will be permitted.

Employer credibly testified she would attempt to pay \$500 per month, but was unsure she would be able to do so. In accord with AS 23.30.080(g), Employer will be ordered to pay \$455.50 within seven days of this decision, and 92 monthly payments of \$400.00 thereafter until the total civil penalty of \$37,255.50 is paid in full.

CONCLUSIONS OF LAW

1) Ms. Finch, d/b/a Soldotna Kiddie Kare, will be assessed a civil penalty of \$149,022.00, of which \$111,766.50 will be suspended, for failure to insure for purposes of workers' compensation insurance.

ORDER

- 1) The division's April 11, 2012 petition is granted.
- 2) At any time Anita Finch and Soldotna Kiddie Kare have employees, they shall maintain workers' compensation insurance coverage in accord with AS 23.30.075, and shall file evidence of compliance in accord with AS 23.30.085.

3) Pursuant to AS 23.30.060(a), Anita Finch and Soldotna Kiddie Kare are personally, jointly, severally and directly liable for any and all benefits payable under the Act for compensable injuries to employees during the uninsured periods.

4) Pursuant to AS 23.30.080(f), Anita Finch and Soldotna Kiddie Kare are personally, jointly and severally assessed a civil penalty of \$149,022.00, of which \$111,766.50 is suspended. Anita Finch and Soldotna Kiddie Kare must timely pay \$37,255.50.

5) A payment plan is ordered.

6) Anita Finch and Soldotna Kiddie Kare shall pay \$455.50 within seven (7) days of this decision in accord with AS 23.30.080(g). Thereafter, on the first day of each month Anita Finch and Soldotna Kiddie Kare shall make monthly payments in the sum of \$400.00 for 92 months until the total civil penalty of \$37,255.50 is paid in full.

7) Anita Finch and Soldotna Kiddie Kare are ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **Anita Finch and Soldotna Kiddie Kare are ordered to make their checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004040, and AWCB Decision Number 13-0142.** If Anita Finch and Soldotna Kiddie Kare fail to make timely civil penalty payments as ordered in this decision, the entire \$37,255.50 shall immediately be due and owing and the director may declare the entire, assessed civil penalty in default and seek collection. Pending full, civil penalty payment under AS 23.30.080(f) in accord with this Decision and Order, jurisdiction is maintained.

8) The SIU is directed to monitor Anita Finch and Soldotna Kiddie Kare for eight (8) years from this decision's date for continued compliance with the Act's insurance requirements.

9) The division's Collections Officer is ordered to prepare a proposed Liability Discharge Order within 30 days of Anita Finch and Soldotna Kiddie Kare's full, timely, civil penalty payment as set forth in this decision and order. The proposed order will be addressed in accord with 8 AAC 45.130.

Dated in Anchorage, Alaska on November 01, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Ron Nalikak, Member

Ron 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, whoever 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 accord 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 accord with 8 AAC 45.150 and 8 AAC 45.050.

In re ANITA FINCH d/b/a SOLDOTNA KIDDIE KARE

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Anita Finch and Soldotna Kiddie Kare, Employer / defendants; Case No. 700004040; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on November 01, 2013.

Pamela Murray, Office Assistant