

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION) FINAL DECISION AND ORDER
FOR A FINDING OF THE FAILURE TO)
INSURE WORKERS' COMPENSATION) AWCB Case No. 700004280
LIABILITY, AND ASSESSMENT)
OF A CIVIL PENALTY AGAINST,) AWCB Decision No. 14-0007
)
GARY NETH and) Filed with AWCB Anchorage, Alaska
ALASKAN VIEW MOTEL,) on January 17, 2014
)
Uninsured Employer,)
Respondents.)
)

The Division of Workers' Compensation, Special Investigations Unit's March 26, 2013 Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage, Alaska on November 26, 2013. Investigator David Plant appeared and represented and testified on behalf of the Special Investigations Unit (SIU or division). Gary Neth appeared and testified on behalf of Alaskan View Motel (Employer). Carrol Palmer appeared as a non-attorney representing Employer and also testified. The record remained open until December 17, 2013, to allow Employer to submit evidence concerning its workers' compensation policy coverage dates, and to allow Employer to respond to evidence which the division attempted to present for the first time at the November 26, 2013 hearing. The record closed on December 17, 2013.

ISSUES

The division at the November 26, 2013 hearing attempted to introduce evidence of Employer's assets and liabilities. The division had not previously filed the proffered evidence. Employer objected to the evidence and it was not accepted. An oral order issued inviting the parties to discuss limiting the scope of the proffered evidence after hearing, and re-submitting it in compliance with board regulations.

1) Was the oral order denying the Division's attempt to submit evidence of Employer's financial condition at the November 26, 2013 hearing correct?

The division contends Employer had lapses in workers' compensation insurance coverage between August 1, 2000 to August 28, 2001; between August 28, 2002 to February 6, 2004; and between October 1, 2004 to March 15, 2013. The division contends Employer has six aggravating factors: (1) Failure to maintain workers' compensation coverage after previous notification by the division of lack of coverage; (2) Violation of AS 23.30.075 that exceeds 180 calendar days; (3) Previous violations of AS 23.30.075; (4) Failure to provide compensation or benefits payable under the Act to an injured employee; (5) History of injury or deaths sustained by one or more employees while Employer was in violation of AS 23.30.075; and (6) Lapses in business practices that would be used by a reasonably diligent business person. The division contends Employer should be assessed a civil penalty in light of the facts. The division has not taken a position with respect to a payment plan, in the event a civil penalty is assessed.

Employer contends any civil penalty, if imposed, should be reduced, suspended, or otherwise deferred based on Employer's circumstances. Employer contends any lapses in its workers' compensation liability coverage were unintentional, inadvertent, or the result of miscommunication between it and its insurance broker. Employer contends it had significant financial hardship in the preceding several years due to a decline in business. Therefore, Employer requests leniency in the civil penalty assessment.

2) Should Employer be assessed a civil penalty for failure to insure?

FINDINGS OF FACT

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

- 1) On July 15, 2000, Gary Neth began operating Alaskan View Motel, a 24-room motel in Wasilla, Alaska, which is open year-round. (Neth).
- 2) Typical workplace injuries experienced by employees working at a motel, hotel, or inn include back injuries, wrist sprains and strains, repetitive motion disorders, ankle and knee injuries, minor lacerations, slips and falls on wet floors or outdoor ice and encounters with unruly or violent guests and the public. (Experience, judgment, observations).
- 3) The Department of Labor “responsible party detail” shows Neth as Employer’s sole proprietor as of August 1, 2000. (Department of Labor detail, March 14, 2013).
- 4) Neth currently operates Alaskan View Motel as a sole proprietor. (Hearing Brief, November 21, 2013; parties’ hearing stipulation).
- 5) The division’s November 21, 2013 hearing brief on its March 26, 2013 petition for failure to insure calculates Employer’s lapses in workers’ compensation coverage as follows: from August 1, 2000 to August 28, 2001; from August 28, 2002 to February 6, 2004; and from October 1, 2004 to March 15, 2013. (Hearing Brief, November 21, 2013).
- 6) One report of workplace injury was filed while Employer was not insured:
 - Date of injury August 25, 2001; reported injury: back. No time loss. (ICERS WC Database, Case Information Search -- Alaskan View Motel, January 13, 2014).
- 7) Employer has not taken financial responsibility for the uninsured injury. (*id.*; Neth).
- 8) On March 12, 2002, a prehearing conference was held for the above case, which was attended by the injured employee and Neth on Employer’s behalf. (Prehearing Conference Summary, March 12, 2002).
- 9) Neth believes the above claim was frivolous, filed in bad faith, and the claimed injury occurred the same day Employer terminated the employee for poor job performance. (Neth).
- 10) On June 29, 2002, Alaska National Insurance Company sent a cancellation notice to Employer regarding policy number 01HWW91351, advising the policy would expire on August 28, 2002. The letter was sent via United States Postal Service (USPS) Certified Mail and Neth signed for it on July 2, 2002. (Letter, June 29, 2002; USPS Certified Mail receipt, July 2, 2002).

11) On August 2, 2004, Liberty Northwest sent a cancellation notice to Employer regarding policy number WC43NC510814, advising the policy would expire on October 1, 2004. The letter was sent via USPS Certified Mail and Employer signed for it on August 7, 2004. (Letter, August 2, 2004; USPS Certified Mail receipt, August 7, 2004).

12) On October 4, 2004, Liberty Northwest sent another letter to Employer advising policy number WC43NC510814 expired on October 1, 2004. (Letter, October 4, 2004).

13) The National Council for Compensation Insurance (NCCI) database shows Employer's workers' compensation insurance policies in effect during the following dates:

- Policy number 01HWW91351 had an effective date of August 28, 2001, and an expiration date of August 28, 2002.
- Policy number WC43NC510814014 had an effective date of February 6, 2004, and an expiration date of October 1, 2004.
- Policy number WC43NC510814024 had an effective date of October 1, 2004, and an expiration date of October 1, 2005.
- Policy number 6JUB5B88280713 had an effective date of March 15, 2013, and an expiration date of March 15, 2014. (NCCI Proof of Coverage Inquiry, March 12, 2013).

14) Five employees worked a total of 10,089 hours for a total of 1,262 employee work days prior to February 28, 2010, the effective date of 8 AAC 45.176. (Division's Uninsured Employer Worksheet, Exhibit 18, September 23, 2013).

15) Twenty employees worked a total of 11,765 hours for a total of 1,471 employee work days after 8 AAC 45.176's effective date. (*id.*).

16) On March 26, 2013, the division filed a petition for a finding of failure to insure for workers' compensation liability. (Petition, March 26, 2013).

17) The division timely received discovery from Employer in response to its March 26, 2013 petition and discovery request. (Hearing Brief, November 21, 2013; Plant).

18) On September 10, 2013, Carrol Palmer of CP Accounting filed a non-attorney appearance on Employer's behalf. (Notice of Appearance, September 10, 2013).

19) Palmer agreed the Division's Uninsured Employer Worksheet employee workday calculation is correct. (Palmer).

- 20) Gary Neth and Alaskan View Motel are an “employer” employing “employees” during the uninsured periods in question. (Experience, judgment, observations, and inferences from all of the above).
- 21) Employer has had no previous failure to insure investigations with the division. (Record; Plant).
- 22) No stop work order was issued in this case. (Record).
- 23) Employer was “very helpful” and “very diligent” in its efforts to provide the division with timely information and cooperating in the discovery process. (Plant).
- 24) At the November 26, 2013 hearing, the division attempted to offer into evidence documents concerning Neth’s and Employer’s financial assets and liabilities. Employer objected and the evidence was not accepted or considered at hearing. (Record).
- 25) During a hearing break, Neth filed financial records, including his personal income tax return and accompanying schedules. Neth’s 2012 individual income tax return shows a net loss of \$134,446.00. (2012 U.S. Individual Income Tax Return).
- 26) Employer’s profit and loss statements reveal Employer had: a \$12,289.00 loss in 2007, a \$526.00 profit in 2008, a \$75,288.00 loss in 2009, a \$75,019.00 loss in 2010, a \$23,321.00 profit in 2011, and a \$11,412.00 loss in 2012. (Division’s Exhibit 19, September 23, 2013).
- 27) On November 27, 2013, the designated chair sent the parties a letter memorializing the oral order issued at the November 26, 2013 hearing. The letter stated, in relevant part:

Employer advised it may be able to obtain evidence of workers’ compensation insurance held during periods of uninsurance alleged by the division. Therefore, Employer has until December 17, 2013 to submit proof of workers’ compensation coverage in effect during the periods of uninsurance alleged by the division in its November 21, 2013 hearing brief.

The division attempted to offer additional evidence at the November 26, 2013 hearing and wishes it to be considered in assessing an appropriate civil penalty against Employer, if any. The board did not accept the additional evidence because under 8 AAC 45.120(i), evidence to be considered at hearing generally must be filed 20 days in advance. Both parties should have opportunity to present their respective arguments and defenses. Therefore, [the] record remains open in this case to give both parties an opportunity to file and respond to their respective evidence.

The division did not serve Mr. Neth or file with the board until hearing the additional evidence of Employer’s financial state – including income and assets of Gary Neth – it wishes to be considered. Therefore, Mr. Neth has not had an

opportunity to review the evidence. The division must first serve Mr. Neth with the proffered evidence. The parties are urged to meet and discuss limiting the scope of the division's proffered evidence. The division shall file the evidence by December 17, 2013 with a status report of the parties' discussions. Prior to that date, if the parties cannot come to agreement, they may file briefs in support of and in opposition to the division's evidence. The parties' briefs shall be limited to 15 pages and must be filed before December 31, 2013. If either party desires oral arguments on the additional evidence, a request for conference should be filed by December 17, 2013. (Letter, November 27, 2013).

28) On December 13, 2013, the division filed a document which discussed the parties' recent talks concerning the proffered evidence. (Post Hearing Brief of the Special Investigations Unit, December 13, 2013).

29) Attached to the post hearing brief was an email from Palmer. The email voices Employer's objections to the division's attempts to file evidence of Neth's assets and income. The email also states, in relevant part:

Gary has contacted the insurance companies to get coverage descriptions for his past policies. Richard Rentschler has evidently been employed by Alaska USA insurance and closed his own company. Gary has left two messages for him and he has not returned the calls. He contacted Biggs insurance and told him he needed a description of coverage because of his workers comp problem and they said, "Oh you signed a statement to waive workers comp coverage and stated that you did not have employees". He asked for a copy of that statement to be sent to him. He has made this request for documents three times and has not been responded to. (Palmer email, December 6, 2013).

30) Ultimately, the Division did not file the evidence proffered at November 26, 2013 hearing. (Record).

31) Employer did not file any additional evidence, including any evidence it had workers' compensation insurance during the periods of uninsurance alleged by the division. (Record).

32) Neth admitted at hearing Employer was uninsured for workers' compensation liability between the periods of October 1, 2004 to February 15, 2013. (Neth).

33) Neth testified Employer's lapses in workers' compensation liability coverage were due to a series of misunderstandings between Employer and his insurance brokers, and he was generally under the impression Employer was being sold "bundled" insurance policies, which Neth thought included workers' compensation liability insurance. (*id.*).

34) Neth's testimony he was under a mistaken assumption Employer was being sold "bundled" insurance policies is not credible, since repeated letters informing Employer of impending cancellations were sent to Employer by the various insurance carriers, and were even personally signed for by Neth upon receipt, as in findings of fact 10-12, above. (Experience, judgment, observations, and inferences from all of the above).

35) Employer is currently insured for workers' compensation liability through Travelers Property Casualty, policy number 6JUB5B882880713, which came into effect on March 15, 2013. (NCCI Proof of Coverage Inquiry, August 21, 2013).

36) The annual premium for the above policy is \$1,904.00. (Accord Letter , March 15, 2013).

37) The pro-rated premium for the above policy is \$5.22 per day ($\$1,904.00 \div 365 = \5.22), which equates to \$5,804.64 for the 1,112 combined post-regulation uninsured calendar days ($1,112 \times \$5.22 = \$5,804.64$). (Record).

38) Twice the pro-rated premium for the combined post-regulation uninsured calendar days is \$11,609.28 ($\$5,804.64 \times 2 = \$11,609.28$). (*Id.*).

39) Neth believed Employer received a fair chance to be heard at the November 26, 2013 hearing. (Neth).

PRINCIPLES OF LAW

AS 09.10.120. Actions in name of state, political subdivisions, or public corporations. (a) An action brought in the name of or for the benefit of the state, any political subdivision, or public corporation may be commenced only within six years of the date of the accrual of the cause of action. . .

The six-year statute of limitations established in AS 09.10.120 for "an action brought in the name of or for benefit of the state" applies in actions for penalties for a failure to insure under AS 20.30.080. *In re United Auto Sales, LLC*, AWCB Decision No. 11-0131 (August 24, 2011); *In re Soldotna Kiddie Kare*, AWCB Decision No. 13-0142 (November 1, 2013).

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. . . .

A decision may be based not only on direct testimony and other tangible evidence, but also on “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 23.30.060. 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 . . . 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. . . .
. . .

(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 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 7 days after the date of service of the order upon the employer, the director may declare the employer in default. . . .

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. Since the November 7, 2005 effective date of amendments to the Alaska Workers' Compensation Act (Act), 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 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); *In re Edwell John, Jr.*, AWCBC Decision No. 06-0059 (February 14, 2006). Alaska's 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. The primary goal of a penalty 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' employees in a safe work environment, and satisfy the community's interest in fairly penalizing an offender. *Alaska R&C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, AWCAC Decision No. 07-043 (September 16, 2008). A penalty is not intended to destroy a business or cause the loss of employment (*id.* at page 27). In assessing a civil penalty, consideration is given to the period the employer was uninsured, and any injury history. Injury history gives an indication as to whether the work is dangerous. Lastly, the employer's ability to pay the penalty must be assessed. (*Id.*).

Factors weighed in setting civil penalties have included: number of days of uninsured employee labor; business size; record of injuries; extent of the employer's compliance with the Act; diligence exercised in remedying the failure to insure; clarity of insurance cancellation notice; the employer's compliance with the investigation and remedial requirements; diligence in claiming certified mail; injury risk to employees; the penalty's impact on the employer's continued viability; the penalty's impact on the employees or the employer's community; the employer's regard for statutory requirements; violation of a stop work order; and credibility of the employer's promises to correct its behavior. Considering these factors, a wide range of penalties, from \$0 up to \$1,000 per uninsured employee work day has been 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).

However 8 AAC 45.176, effective February 28, 2010, set minimum and maximum penalty benchmarks, based primarily on aggravators, which were not present when much of the prior failure to insure decisional law was made. Ordinarily, provisions providing penalties against employers will be strictly construed. *Petty v. Mayor, et al., of College Park*, 11 S.E.2d 246 (1940).

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 his 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. . . .

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 of 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.

. . .

(i) If a hearing is scheduled on less than 20 days' notice or if a document is received by the board less than 20 days before hearing, the board will rely upon that document only if the parties expressly waive the right to cross-examination or

of the board determines the document is admissible under a hearsay exception to the Alaska Rules of Evidence.

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 not 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; . . .

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

. . .

(2) failure to maintain workers' compensation insurance after previous notification by the division; . . .

. . .

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

(4) previous 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;

(15) 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 familiarity with laws affecting the use of employee labor.

...

(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.

ANALYSIS

1) Was the oral order denying the division's attempt to submit evidence of Employer's financial condition at the November 26, 2013 hearing correct?

Employer had not previously been provided with a copy of the evidence the division proffered at the November 26, 2013 hearing. Employer objected to introduction of the evidence. In the absence of a finding of waiver by the parties of the right of cross-examination or a determination that the exhibit is admissible under a hearsay exception to the Alaska Rules of Evidence, any evidence tendered by any party less than 20 days prior to the hearing will not be considered. 8 AAC 45.120(i). Following the November 26, 2013 hearing, the designated chair sent the parties a letter memorializing the oral order, and inviting the parties to resubmit the evidence after attempting to limit the scope. In workers' compensation cases, both parties shall be afforded due process and an opportunity to be heard and for their respective arguments and evidence to be fairly considered, including the right to respond to evidence offered against a party. AS 23.30.001(3), (4). Leaving the record open provided the parties the requisite opportunity to be heard on these documents. Neither party filed any additional evidence. Therefore, the oral order denying the division's evidence proffered at the November 26, 2013 hearing was correct.

2) Should Employer be assessed a civil penalty for failure to insure?

While Employer's genuine, though mistaken, belief it was being sold "bundled" insurance policies may be considered as a mitigating factor, the strict liability nature of the Act does not excuse Employer from compliance with the requirement to carry workers' compensation liability insurance. Based on Employer's failure to provide evidence of compliance with insurance requirements under the Act, or evidence it ceased to be an "employer" from August 1, 2000 to August 28, 2001; from August 28, 2002 to February 6, 2004; and from October 1, 2004 to March 15, 2013, it is presumed, as a matter of law, Employer failed to insure or provide security as required by law for these periods. AS 23.30.080(f). Employer provided no evidence to rebut the presumption and is, therefore, subject to AS 23.30.075.

To ensure similar penalties are imposed on similarly culpable employers, 8 AAC 45.176 was enacted and became effective on February 28, 2010. Therefore, in determining the appropriate penalty to be imposed, separate analyses shall be applied to the period up to February 28, 2010 (pre-regulation) and after February 28, 2010 (post-regulation). The division provided evidence Employer's pre-regulation uninsured employee work days total 1,262 (March 26, 2007 to February 26, 2010). Employer's post-regulation uninsured workdays total 1,471 (February 27, 2010 to March 15, 2013). Employer and Neth provided no contrary evidence. Employer agreed at hearing the division's uninsured employer worksheet was correct.

Prior to enactment of 8 AAC 45.176, AS 23.30.080(f) provided only a maximum civil penalty in uninsured employer cases. For the pre-regulation period, Employer could be assessed a maximum penalty of \$1,262,000.00 (1,262 uninsured employee workdays x \$1,000.00). Decisions in prior cases have discussed a number of aggravating and mitigating factors to be considered in determining appropriate civil penalties under AS 23.30.080(f) prior to 8 AAC 45.176. Those factors include: number of days of uninsured employee labor, the business' size, the employer's record of injuries, both in general and during the uninsured period, extent of the employer's compliance with the Act, diligence exercised in remedying the failure to insure, clarity of notice of cancellation of insurance, the employer's compliance with the investigation and remedial requirements, risks in the employer's workplace, the penalty's impact on the employer's ability to continue to conduct business, the penalty's impact on employees and on the employer's

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community, whether the employer acted in blatant disregard for statutory requirements, whether the employer violated a stop order, whether the employer openly ignored its obligation to accept certified mail, and the credibility of the employer's promises to correct its behavior. Based on these factors, a wide range of penalties have been found reasonable, given the case specific circumstances. *See, e.g., 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], *In re Wrangell Seafoods, Inc.*, AWCB Decision No. 06-0055 (March 6, 2006) [\$500.00 per employee per day], *In re Patrick Burke, d/b/a Globe Link Telecom*, AWCB Decision No. 07-0235 (August 10, 2007) [\$200.00 per employee per day], *In re Rendezvous, Inc.*, AWCB Decision No. 07-0072 (April 4, 2007) [\$75.00 per employee per day], *In re Corporate Chiropractic, Inc.*, AWCB Decision No. 07-0098 (April 24, 2007) [\$35.00 per employee per day], *In re Debbie Bagdol, d/b/a Garden Montessori School*, AWCB Decision No. 08-0076 (April 25, 2008) [\$35.00 per employee per day], *In re Ivan Moore d/b/a Ivan Moore Research*, AWCB Decision No. 07-0307 (October 3, 2007) [\$35.00 per employee per day with part suspended], *In re St. Mary's Assisted Living Home*, AWCB Decision No. 07-0059 (March 21, 2007) [\$30.00 per employee per day], *In re White Spot Cafe, LLC*, AWCB No. 07-0174 (June 27, 2007) [\$30 per employee per day], *In Re Edwell John, Jr., d/b/a Admiralty Computers*, AWCB Decision No. 06-0059 (March 8, 2006) [\$25.00 per employee per day], *In re Absolute Fresh Seafoods, Inc.*, AWCB Decision No. 07-0014 (January 30, 2007) [\$20.00 per employee per day], *In re Joe L. Mead d/b/a Dynasty Interiors*, AWCB Decision No. 07-0177 (June 28, 2007) [\$20.00 per employee per day], *In re Captain Lou's Corp., Inc.*, AWCB No. 07-0171 (July 2, 2007) [\$20.00 per employee per day], *In re Alaska Native Brotherhood #2*, AWCB Decision No. 06-0113 (May 8, 2006) [\$15.00 per employee per day], *In re Hummingbird Services*, AWCB Decision No. 07-0013 (January 26, 2007) [\$15.00 per employee per day], *In re Alexandra Mayberry/Cooker, Inc.*, AWCB Decision No. 07-0032 (February 23, 2007) [\$11.00 per employee per day], *In re Shkequim (Ski) Dobrova d/b/a Ski & Benny Pizza*, AWCB Decision No. 07-0121 (May 9, 2007) [\$10.00 per employee per day], *In re Dufour*, AWCB Decision No. 06-0152 (June 9, 2006) [\$250.00 per employee per day, \$245.00 suspended, leaving a penalty of \$5.00 per employee per day], *In re Alaska Inter-Tribal Council*, AWCB Decision No. 07-0066 (March 29, 2007) [\$5.00 per employee per day], *In re Sunshine Custom Promotions, LLC*, AWCB Decision No. 07-0065 (March 29, 2007) [\$5.00 per employee per day], *In re Coalition Inc.*, AWCB Decision No. 07-0067 (March 29, 2007) [\$5.00 per employee per day], *In re Randy's Glass, Inc.*, AWCB Decision No. 07-0162 (June 15, 2007) [\$5.00 per employee per day], *In re Northern Cartage, Inc.*, AWCB Decision No. 07-0161 (June 15, 2007) [\$5.00 per employee per day], *In re Choice Mortgage, Inc.*, AWCB Decision No. 07-0175 (June 27, 2007) [\$5.00 per employee per day], *In re Ice Berry Inc.*, AWCB No. 07-0185 (July 2, 2007) [\$5.00 per employee per day], *In re The Coffee Can, LLC*, AWCB No. 07-0171 (July 2, 2007) [\$5.00 per employee per day], *In re William Bishop d/b/a*

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Mecca Jewelry Inc., AWCB No. 07-0056 (March 15, 2007) [\$3.00 per employee per day], *In re Coalition, Inc.*, AWCB No. 07-0067 (March 29, 2007) [\$3.00 per employee per day], *In re Ming Hua, Inc. and Ming Chao Fang d/b/a Hong Kong Wok Restaurant*, AWCB Decision No. 07-0282 (September 14, 2007) [\$3.00 per employee per day], *In re Doriolas, LLC*, AWCB No. 07-0152 (June 8, 2007) [\$2.00 per employee per day], *In re Linda O'Brien d/b/a Speedy Mail*, AWCB Decision No. 07-0279 (September 14, 2007) [\$1.00 per employee per day], *In re Good Karma*, AWCB Decision No. 07-0034 (February 27, 2007) [\$1.00 per employee per day], *In re Milano's, Inc.*, AWCB Decision No. 07-0353 (November 21, 2007) [no penalty], and *In re Homer Senior Citizens, Inc.*, AWCB Decision No. 07-0334 (November 6, 2007) [no penalty].

In *Casa Grande*, AWCB No. 07-0288 (September 21, 2007), the employer was found to have exhibited a total lack of regard for the Act and the maximum civil penalty was imposed. Applying the pre-regulation AS 23.30.080(f) analysis, aggravating factors including the employer's failure to cooperate in discovery, failure to appear at a prehearing conference and a hearing, failure to produce documentary evidence, repeated lapses in workers' compensation coverage, and "historical record of noncompliance" with the Act, justified the maximum \$1,000.00 per day penalty. Few of the foregoing elements discussed in *Casa Grande* are present in the instant case.

Patrick Burke, d/b/a Globe Link Telecom, AWCB Decision No. 07-0235 (August 10, 2007), where a \$200.00 per employee per day penalty was assessed, involved an employer similarly culpable to the one in the instant case. The findings in *Burke* included: the employer, a sole proprietor, had one uninsured workplace injury for which there was no time loss; employed ten employees while uninsured; was in a business which involved a medium amount of risk of workplace injury; had no previous failure to insure investigations; and testified that lapses in coverage were due to "underwriting reasons." *Burke* found the employer was cooperative in the discovery process. The employer was found to have a total of 447 calendar days without workers' compensation liability coverage. *Burke* made a \$200.00 per day penalty assessment based, in part, on a desire to avoid severe financial hardship on the employer if the maximum penalty was imposed. One half of the penalty amount in *Burke* was suspended and \$500.00 monthly installment payments were ordered.

In the present case, while Employer's employees are likely engaged in a medium- to lower-risk occupation, injuries are still common and may occasionally be expensive to treat. The public or an uninsured employee should not be expected to bear this cost. Employer was apparently cooperative with the division in the investigation process, a factor which weighs somewhat in Employer's favor. Neth and Palmer testified they were under the impression workers' compensation liability coverage was in place through a "bundled" insurance policy, even though this later turned out to be incorrect. However, Employer repeatedly signing for mail which notified of impending coverage lapses throws the credibility of this assertion into serious doubt. Neth also personally signed for some of this mail. Further, the enormous number of uninsured calendar days weighs strongly against Employer. An inadvertent, short lapse due to a missed payment or miscommunication with an insurance broker is one thing; going without insurance for a combined period of 2,181 days (or 5.97 years) quite another. This factor weighs very heavily against Employer. Employer was made aware during the prehearing conference on March 12, 2002 of its obligations under the Act and still failed to maintain workers' compensation liability coverage. Finally, Employer cannot be allowed to reap the benefits of the competitive advantage gained by not paying workers' compensation liability premiums for such a long period, while other similar businesses in the area did.

Given the totality of the circumstances, Employer shall be assessed a \$200.00 per day civil penalty for the pre-regulation lapse period. Therefore, the total per day civil penalty for the period Employer was uninsured between March 26, 2007 and February 26, 2010 is \$252,400.00 (1,262 pre-regulation work days x \$200.00 = \$252,400.00).

For uninsured periods after enactment of 8 AAC 45.176, a "range" analysis, based on consideration of listed aggravating factors, is used to assess civil penalties. In the present case, the division has alleged six "aggravating factors." For this post-regulation period, Employer could be assessed a minimum penalty of \$75,021.00 (1,471 uninsured employee workdays x \$51.00 = \$75,021.00). Employer could be assessed a maximum penalty of \$734,029.00 (1,471 uninsured employee workdays x \$499.00 = \$734,029.00). AS 23.30.080(f).

Employer has six aggravating factors: (1) Failure to maintain workers' compensation coverage after previous notification by the division of lack of coverage when Employer was provided with relevant portions of the Act at the March 12, 2002 injured worker prehearing conference; (2) Violation of AS 23.30.075 that exceeds 180 calendar days when Employer failed to carry workers' compensation liability coverage for 2,181 calendar days; (3) Previous violations of AS 23.30.075; (4) Failure to provide compensation or benefits payable under the Act to an injured employee; (5) History of injury or deaths sustained by one or more employees while Employer was in violation of AS 23.30.075; and (6) Lapses in business practices that would be used by a reasonably diligent business person, including failing to ensure adequate workers' compensation liability coverage was in place for a combined period of 2,181 calendar days.

Employer shall be assessed a \$200.00 per day civil penalty for the post-regulation lapse period. Therefore, the total civil penalty for the period Employer was uninsured between February 27, 2010 and March 15, 2013 is \$294,200.00 (1,471 post-regulation employee work days x \$200.00 = \$294,200.00).

Given the totality of circumstances, the total civil penalty assessed is not unreasonably punitive, is fair, is within the regulatory scheme, and is not likely to force Employer out of business, cause loss of employment, or harm the community. *Alaska R&C Communications*. The assessed penalties are not insignificant amounts even though they comport with pre- and post-regulation law. Employer has not convincingly shown why a minimal penalty should be assessed or why payment should be "deferred." Employer has a poor history of compliance with the Act. The law does not expressly provide for civil penalty deferments. AS 23.30.122; AS 23.30.080. Therefore, Employer will be assessed a \$546,600.00 total civil penalty. *Burke*.

To reduce Employer's financial burden and to avoid devastating Employer's business, a payment plan will be ordered. Employer will be ordered to make a \$5,466.00 civil penalty payment within seven (7) days of this order. Employer will be directed thereafter to make \$500.00 per month civil penalty payments until \$81,990.00 (15 percent) of the civil penalty is paid. The remainder of the civil penalty (\$464,610.00) shall be suspended for so long as Employer maintains workers' compensation coverage as required by AS 23.30.075, and timely makes its monthly civil penalty payments. If Employer maintains workers' compensation coverage as

required by AS 23.30.075 for ten years from the date of this order, the \$464,610.00 balance will be waived after the \$81,990.00 has been paid in full.

CONCLUSIONS OF LAW

- 1) The oral order denying the division's attempt to submit evidence of Employer's financial condition at the November 26, 2013 hearing was correct.
- 2) Employer will be assessed a civil penalty of \$546,600.00 for failure to insure for workplace injuries between March 26, 2007 and February 26, 2010, and February 27, 2010 and March 15, 2013.

ORDER

- 1) The division's March 26, 2013 petition is granted.
- 2) At any time Gary Neth and Alaskan View Motel has employees, it 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), Gary Neth and Alaskan View Motel 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 from August 1, 2000 to August 28, 2001; from August 28, 2002 to February 6, 2004; and from October 1, 2004 to March 15, 2013.
- 4) Pursuant to AS 23.30.080(f), Gary Neth and Alaskan View Motel are assessed a civil penalty of \$546,600.00 of which \$464,610.00 is suspended.
- 5) A payment plan is ordered.
- 6) **Gary Neth and Alaskan View Motel shall pay \$5,466.00 within seven (7) days of this decision in accord with AS 23.30.080(g). Thereafter, on the first day of each month Gary Neth and Alaskan View Motel shall make monthly payments in the sum of \$500.00 for one hundred sixty-four (164) months until the civil penalty of \$81,990.00 is paid in full.**
- 7) Gary Neth and Alaskan View Motel are ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **Gary Neth and Alaskan View Motel are ordered to make checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004280, and AWCB Decision Number 14-0007.** If Gary Neth and Alaskan View Motel fail to make timely civil penalty payments as ordered in this decision, the entire

\$546,600.00 shall immediately be due and owing and the director may declare the entire, assessed civil penalty in default and seek collection.

8) The SIU is directed to monitor Gary Neth and Alaskan View Motel for ten (10) years from this decision's date for continued compliance with the Act's insurance requirements.

9) The division's collection officer is ordered to prepare a proposed Liability Discharge Order within 30 days of Gary Neth and Alaskan View Motel'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 January 17, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Matthew Slodowy, Designated Chair

Ronald Nalikak, Member

Patricia Vollendorf, 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 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.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Gary Neth and Alaskan View Motel, Employer / respondents; Case No. 700004280; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on January 17, 2014

Pamela Murray, Office Assistant