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 LIABILITY, AND ASSESSMENT OF A CIVIL PENALTY AGAINST,	)	FINAL DECISION AND ORDER
	)	AWCB Case No. 700004430
FREDDIE L. PATTERSON d/b/a F&M TRUCKING,	)	AWCB Decision No 14-0084
Respondents.	)	Filed with AWCB Anchorage, Alaska on June 18, 2014

The Division of Workers' Compensation, Special Investigations Unit's (the division) August 6, 2013 Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage, Alaska, on June 3, 2014, a date selected on March 12, 2014. Investigator Christine Christensen appeared, represented the SIU and testified. Attorney William Erwin appeared and represented Freddie L. Patterson d/b/a F&M Trucking (collectively, F&M) who also appeared and testified. Melissa Tuttle appeared and testified for F&M. The record closed at the hearing's conclusion on June 3, 2014.

ISSUES

The parties stipulated to most relevant facts. The only disputed facts are whether Patterson's fiancé Melissa Tuttle was his "employee" for purposes of assessing a civil penalty, and the amount.

The division contends Tuttle was and is F&M's "employee" and her uninsured employee workdays should be included in the penalty calculation. It contends with Tuttle's uninsured employee workdays included, F&M has 409 total uninsured employee workdays subject to penalty.

F&M contends Tuttle was not its employee. It contends Patterson and Tuttle were in a romantic, domestic relationship and had no contract of hire between them. Therefore, F&M contends Tuttle's alleged uninsured employee workdays are irrelevant and should not be included in the penalty calculation. It contends, absent Tuttle's "workdays," there are only 175 relevant uninsured employee workdays.

1) Was Tuttle F&M's "employee" for purposes of assessing a civil penalty?

The division contends F&M should be assessed an appropriate civil penalty given the facts. It did not oppose a payment plan.

F&M did not oppose a civil penalty, but contended this is not an "aggravated case" as all employees were covered by a "contractor-over." F&M requested a payment plan.

2) Should an appropriate penalty and payment plan be assessed against F&M?

FINDINGS OF FACT

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

1) At hearing, the parties stipulated to the following facts:

- F&M is a sole proprietorship.
- F&M was not insured for workplace injuries from June 16, 2011 through July 8, 2013.
- Patterson owns F&M.
- F&M had no prior failure to insure investigations.
- F&M had one workplace injury reported during the time it was not insured.
- F&M did not provide workers' compensation coverage for its employees.
- A different employer, a contractor-over, accepted responsibility to pay workers' compensation benefits to one driver who was injured while F&M was uninsured.
- On August 9, 2013, the division served a petition and a discovery demand on F&M.
- F&M's discovery was due on September 9, 2003.

- On September 9, 2003, F&M sent partial discovery to the division, sent additional discovery on November 7, 2013, and sent the remainder on March 12, 2014.
- On July 18, 2013, F&M obtained workers' compensation insurance through Alaska National Insurance Co. (Alaska National). The current annual premium charged for F&M's current workers' compensation policy is $322.
- F&M's pro-rated premium for its current policy is approximately 89¢ per day.
- Assuming 753 uninsured calendar days is correct, the current daily premium equates to $670.17 as a prorated premium for the uninsured period.
- Twice the prorated premium, assuming 753 uninsured calendar days is correct, is $1,340.34.
- F&M did not violate a stop order.
- F&M's lapse occurred after February 28, 2010, the effective date of 8 AAC 45.176.
- F&M's violation exceeded 180 calendar days.
- F&M did not fully comply with the division's initial discovery demand within 30 days, though its attorney took the blame for this oversight.
- F&M had an injury while in violation of AS 23.30.075.

2) The division initially determined a range between 175 to 496 possible uninsured employee workdays only because there was a legal dispute as to whether or not Melissa Davis, now known as Tuttle, and sometimes referred to as "Missy," was F&M's "employee" (Christensen).

3) F&M denies Tuttle was its employee at any time (F&M's hearing argument).

4) Tuttle has lived with Patterson since January 2012, and still lives with him. Her living arrangement with Patterson is as an "engaged couple" with no wedding date set. They are a "family unit" and Patterson is her "best friend." She has never completed an Internal Revenue Service W-2 form for F&M, never received any cash from F&M and never received a check from F&M. Tuttle lives on the premises for free at Patterson's home office, and Patterson pays her nothing. They are living together "with all that implies." She has never considered herself F&M's "employee." She never "listed" herself as its employee. If she fell down in the kitchen, in Tuttle's view, she could not file a workers' compensation claim as F&M's employee. She has never made a claim against F&M and has never been injured there. At no time did Patterson or she ever consider Tuttle was F&M's "employee." Duties she performs at home when she is

there alone and Patterson is "on the road," includes cleaning house, preparing meals, and doing limited duties within her physical limitations. She answers the phone if she is present and hears it, and when Patterson gets home, Tuttle gives him any messages. She does not operate a radio to contact Patterson while he is driving his truck. She has no decision-making authority whatsoever about accepting driving jobs for F&M. She called F&M's lawyer for assistance because she knows nothing about workers' compensation and Patterson needed help. Under no circumstances has she ever been considered F&M's "employee," and adamantly denies she is an employee (Tuttle).

5) On cross-examination, in reviewing F&M's recent workers' compensation application form, when asked why "Missy Davis" was listed as "contact information" for F&M, Tuttle explained Patterson does not read or write very well, so she helps him. Therefore, if the insurance company has any questions, they could call her and she would relay the message to Patterson who would answer any questions. When confronted with a contract in which she was listed as F&M's "Human Resources Manager," Tuttle explained Patterson needed a contract in one instance so she went online, found "Rocket Lawyer" and downloaded a form contract. There was a place on the form for a "human resource manager," and since Patterson reads poorly, and Tuttle filled out the form, she put her name in that section. She wanted to make sure people could get in contact with someone who could answer questions especially if something had to be read, since Patterson cannot read. This particular contract related to a driver who never cleaned his truck. As to a June 1, 2013 memo typed by her, and similar documents, Tuttle explained the hand-written phrase, "Freddie and I really like your work ethic you do a great job," was simply intended to give accolades to a driver. Tuttle thought she was "just helping." Lastly, in reference to a July 16, 2013 hand-written notation concerning injured driver Jeffery Sambo's need for a drug test, Tuttle explained she completed this note because she answered the phone on this occasion and completed a note for Patterson. Tuttle handled this because Patterson was driving the truck when the phone rang, while she was in the truck with him, and Patterson could not answer the phone. Tuttle answered the call from "Detective Rogers," who told her to call Sambo and tell him to do a drug test. As Patterson does not write well, she was helping him by taking notes and writing memos. On this occasion, while Patterson drove the vehicle, Tuttle called Sambo and spoke with him for two or three minutes. She did not understand what was going on with the drug test requirement, so Patterson pulled the vehicle over, Tuttle gave the

phone to Patterson, and Patterson completed the conversation with Sambo. Typed documents in the division's Exhibit 13 and 14 she found online. Tuttle occasionally obtains documents from the computer and assists Patterson in completing them. She also helps him use a calculator (*id*.).

6) F&M operates out of Patterson's apartment in Anchorage. Patterson's trucks are not kept at his residence but are stored at the loading dock at Spenard Builder's Supply's (Spenard) warehouse (Patterson).

7) At the time of Sambo's injury, Patterson had two trucks. Since Sambo totaled one of them, he now has only one truck (*id*.).

8) Patterson explained F&M's business as follows: If Spenard had a delivery to make but not enough vehicles or drivers, Spenard would call Patterson and ask him to deliver materials to Palmer, Homer, Soldotna, and occasionally Fairbanks. When this occurred, Spenard employees would load building supplies onto Patterson's truck at Spenard's loading dock, F&M's driver would tie them down and the driver would drive the truck. F&M's drivers would occasionally chain up vehicles in bad weather, and check the oil. If the F&M truck had a flat tire, Patterson would call the tire shop, which would send out a repair vehicle. Patterson does all maintenance on his vehicles or has it done elsewhere; the truck drivers do not have to perform maintenance. Drivers were expected to clean their own garbage out of the cab but did not wash the trucks; Patterson washed them. Upon arriving at the delivery sites, F&M's drivers would pull up to the dock, un-strap the load and "get out of the way" so non-F&M employees could unload the flatbed. Drivers also fueled vehicles when necessary (*id*.).

9) Patterson's home was and is the only place from which F&M's business is conducted. Patterson's home phone was and is F&M's number. F&M is Patterson's only job. Patterson drove one vehicle, so the only time he needed drivers occurred when he had two loads that needed to be delivered at the same time. Spenard is the only company with which F&M normally did business. If Spenard wanted him to deliver something, they would first call his home number, and if no one answered they would call Patterson's cell phone, which is not listed as a business number on F&M's business card. If Tuttle was present at home when the home phone rang, she would answer the phone, write a message down, and if it was F&M-related, relay it to Patterson later. The home-phone-land-line's answering machine does not work so if Tuttle was not home, and Patterson was on the road, the F&M phone would just ring (Patterson; Tuttle).

10) Tuttle worked as a cashier at Fred Meyer's until January 2013. She worked from 6:45 AM to 3:45 PM at Fred Meyer's. She was not in a relationship with Patterson or at his home from June 16, 2011 through December 2011. She moved in with Patterson in approximately January 2012, but still worked full-time at Fred Meyer's until around January 18, 2013. Thereafter, Tuttle spent most her time at home trying to heal from a back injury. She would occasionally go visit her grandchildren (Tuttle).

11) F&M's drivers over the period it was uninsured included Sambo, John Young, William Skinner, Jerry Bullington, Roland Hall, and Curtis Bain. Patterson contended one driver had his own rig and implied he was an "independent contractor" (Patterson).

12) Patterson does his own payroll and Tuttle will help him occasionally. Prior to when Tuttle moved in, Patterson's now deceased fiancée assisted him with this task (*id*.).

13) Tuttle considered herself a "volunteer" who tried to help Patterson. They always "help each other" (Tuttle; Patterson).

14) In respect to F&M's business, Tuttle was a "glorified phone answerer" who tried to help Patterson any way she could, including reading things to him and writing things down when necessary. She never cleaned or washed the trucks and had no commercial driver's license. Tuttle never hired a driver and if someone called for a job, she would tell them to call Patterson. If a potential driver had a resume or a driving record, she would read it to Patterson. On one occasion she called Sambo at Patterson's request and asked him to come in and speak to Patterson. She never told anyone Patterson had hired them; Patterson hired his drivers. Tuttle exercised no control over how the drivers exercised their duties. She never told drivers where to make deliveries (Tuttle).

15) Patterson's trucks were both flatbeds. Spenard would tell F&M drivers where to deliver materials on their "bill of lading." Before Tuttle moved in, no one took care of answering the phone and this had no effect on F&M's business. If Tuttle had not been there from January 2012 through July 2013, this would have had no effect on F&M's business. If Spenard would have called him during this period, it would have had to call his cell phone and leave a message, which he would have retrieved later. If, during the time in which F&M was not insured Tuttle had slipped and fallen down while trying to answer the phone, and injured herself, Patterson believed he would have been responsible for her medical bills because of their domestic relationship. They had no "business agreement" and were in a "couple relationship" (Patterson).

16) Patterson admitted he did not know truck drivers he employed needed to be covered by workers' compensation insurance, and until Sambo's injury had no idea how to even obtain workers' compensation insurance (*id*.).

17) F&M failed to gain familiarity with laws affecting use of employee labor (experience, judgment and inferences drawn from all the above).

18) F&M was an "employer," employing truck drivers as "employees" during the uninsured periods in question (experience, judgment, observations and inferences drawn from all the above).

19) The division's brief computes "uninsured employee workdays" based upon F&M's drivers as employees and includes Tuttle's uninsured employee hours based on her alleged "employee" status. If Tuttle is not F&M's employee, F&M had 175 uninsured employee workdays. If Tuttle is F&M's employee, the division contends F&M had 409 uninsured employee workdays, taking into account revised figures for Tuttle's absence from the home (Christensen).

20) F&M's current policy with Alaska National lists "drivers" and "clerical" employees, and states the estimated annual remuneration for these people is "if any." The division contends Tuttle enjoys food, housing and other benefits, which could be considered "compensation." The division contends if a family member is doing something to "benefit the business" and has an injury, they have a right to file a workers' compensation claim. If the injured family member chooses not to file a claim, there is nothing the division can do about it (*id*.).

21) The division contends Tuttle was and is F&M's employee. It contends there was an "express" employment contract between Patterson and Tuttle because this was a home-based business and Tuttle was essentially a "family member." The division contends there is no exclusion for "family businesses" and each family-member-employee must be covered (*id*.).

22) F&M contends Patterson and Tuttle cannot be forced into a contractual relationship they do not want and did not make, just so the Alaska Workers' Compensation Benefits Guaranty Fund can obtain revenue. It contends the division is on "thin ice," and is inappropriately expanding the "employee/employer" definition. If, hypothetically, Tuttle arose from her chair to answer the phone, tripped over the rug and fell breaking her leg, and it turned out Spenard was the party calling, and Patterson decided he did not want to pay for her broken leg and kicked her out of his home, F&M contends she could sue Patterson for negligence. Though she could arguably file a workers' compensation claim, in F&M's view this is a "domestic relationship"

not governed by workers' compensation law. The key to F&M's contention is whether there was an "employee/employer" contract, or simply a domestic relations contract. The only evidence presented demonstrated no employee/employer contract (F&M hearing arguments).

23) There is no evidence Tuttle and F&M intended to make Tuttle F&M's "employee" (*id*.).

24) There is no evidence Tuttle and F&M ever discussed compensation (*id*.).

25) There is no evidence Tuttle expected compensation from F&M (*id*.).

26) There is no evidence Tuttle was "trying out" for a position with F&M (*id*.).

27) There was no implied or express contract of hire between Tuttle and F&M (experience, judgment and inferences drawn from all the above).

28) Tuttle was and is not F&M's "employee" (*id*.).

29) Tuttle was and is a volunteer assisting her fiancé (*id*.).

30) If a penalty is assessed, F&M requested a payment plan and could pay about $200 per month given the fact Patterson has recently had health issues (Patterson).

31) Workers' compensation insurance premiums are based in large part on an employer's payroll (experience).

32) Workers' compensation disability benefits are calculated in large measure on an injured worker's earnings (*id*.).

PRINCIPLES OF LAW

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 23.30.020. Chapter part of the contract of hire.** This chapter constitutes part of every contract of hire, express or implied, and every contract of hire shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner provided in this chapter for all personal injuries sustained.

"The relationship of employer-employee can only be created by a contract, which may be express or implied." *Selid Construction Company v. Guarantee Insurance Co*., 355 P.2d 389 (Alaska 1960). In *City of Seward v. Wisdom*, 413 P.2d 931 (Alaska 1966), following the 1964

earthquake and tidal wave in Seward, Alaska, the local police chief asked men to aid in the city's rescue and security efforts. Wisdom approached the chief and asked if he "could be of assistance." The chief could not specifically recall his conversation with Wisdom, but ultimately Wisdom helped another resident and was drowned when a second tidal wave swept over Wisdom's pickup truck as he assisted a heavy equipment operator clear an escape route from downtown Seward. When Wisdom's widow filed a death benefits claim, the board found, under these facts, Wisdom was Seward's "employee" under the "emergency employment" doctrine (*id*. at 933). Seward appealed. On appeal, the Alaska Supreme Court said the emergency employee doctrine could make wisdom Seward's employee if there was an implied or express employment contract (*id*.).

"Despite the extremely compelling countervailing emotional considerations which this case presents," however, *Wisdom* concluded the board erred in finding an employment relationship between the city and Wisdom. *Wisdom* noted the purported employee had a different, full-time job, volunteered to assist the police chief, never requested pay from the city, and he and the chief never discussed compensation. *Wisdom* stated:

> It is significant that Alva Wisdom volunteered to help without any request for, or having received any assurance of, remuneration for his services. These factors strongly militate against finding an implied contract of employment under the circumstances of the record (*id*. at 938).

In *Searfus v. Northern Gas Co*., 472 P.2d 966 (Alaska 1982), the Alaska Supreme Court adopted the "relative nature of the work test." *Searfus* said:

> We believe that the 'nature of the work' test should be adopted in resolving future employee status issues under the Alaska Workmen's Compensation Act (footnote omitted; *id*. at 969).

In *Alaska Pulp v. United Paperworkers' International Union*, 791 P.2d 1008 (Alaska1990), the Alaska Supreme Court held:

> Finally, APC argues that the Board erred by not applying the 'relative nature of the work' test to determine Mr. Gernandt's employee status. We adopted this test to distinguish between employees and independent contractors for the purpose of determining whether an individual is an 'employee,' and thus eligible for

> workers' compensation benefits, under the Act (citation omitted). However, both relationships presuppose a contractual undertaking. Therefore, in the absence of a contract for hire, the Board was not required to make this distinction (*id*. at 1012).

Professor Larson's treatise explains the need for a "contract" for "hire" requirement in disputes over whether a person is an "employee" of an "employer":

> There is, however, one respect in which the compensation concept is narrower than that of the common laws; most acts (footnote omitted) insist upon the existence of a 'contract of hire, express or implied,' as an essential feature of the employment relation (footnote omitted). At common law, it is perfectly possible to strike up a master-servant relation without a contract, so far as vicarious liability is concerned. An infant, a prisoner, a slave, a helpful house guest -- all might impose vicarious liability on one who accepted their services performed subject to the master's control.
>
> The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual arrangement, but a unilateral liability of the master to a stranger. The sole concern of the vicarious liability rule, then, is with the master: Did he or she accept control the service that led to the stranger's injury? If so, it is of no particular importance between the master and the stranger whether the servant enjoyed any reciprocal or contractual rights vis-à-vis the master. . . .
>
> Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he or she has never consented would not ordinarily harm him or her in a vicarious liability suit by a stranger against his employer, but it might will deprive him or her of valuable rights under the compensation act, notably the right to sue his or her own employer for common-law damages. . . .
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> But in a compensation case, the entire philosophy of the legislation assumes that the worker is in a gainful occupation at the time of injury. The essence of compensation protection is the restoration of a part of the loss of wages which are assumed to have existed. Merely as a practical matter, it would be impossible to calculate compensation benefits for a purely gratuitous worker, since benefits are ordinarily calculated on the basis of earnings (3 Larson, *Larson's Workers 'Compensation Law* §64.01 at 64-2 through 64-4).

In *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1989), a pilot was injured in an automobile accident while allegedly employed by a hunting lodge. He filed a workers' compensation claim and the board denied coverage. On appeal, the Alaska Supreme Court reversed and set forth the appropriate test for a contract for hire, express or implied. *Childs* noted the board correctly recognized "that before an employee/employer relationship exists under the Act, an express or implied contract of employment must exist" (*id.* at 312). Furthermore, the board also correctly recognized "employment" generally begins after a "meeting of the minds" between the employee and the employer, at which point a "contract is formed." "Volunteer work, standing alone," does not necessarily establish an employee/employer relationship under the Act (*id.*).

Childs further held while a "formalization of a contract for hire is not the controlling factor" in determining whether an employment contract exists, a hiring contract is still necessary. An "express contract" requires an offer encompassing its essential terms, unequivocal acceptance by the offeree, consideration and an intent by the parties to be bound (*id*. at 313). An "implied employment contract" is formed by a "relation resulting from the manifestation of consent by one party to another that the other shall act on his behalf and subject to his control, and consent by the other to so act" (*id*. at 314). The parties' words and actions should be given such meaning "as reasonable persons would give them under all the facts and circumstances present at the time in question" (*id*.). Lastly, absent an implied or express contract of hire, a person may still be an employee under the "tryout exception" doctrine (*id*.).

In *Cluff v. NANA Marriott*, 892 P.2d 164 (Alaska 1995), the Alaska Supreme Court cited from Professor Larson's treatise and stated:

> In compensation law, the spotlight must now be turned upon the employee, for the first question of all is: Did he make a contract of hire with the special employer? If this question cannot be answered 'yes,' the investigation is closed, and there is no need to go on into tests of relative control and the like. . . .
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> This must necessarily be so, since the employee loses certain rights along with those he gains when he strikes up a new employment relation. Most important of all, he loses the right to sue the special employer at common law for negligence; and when the question has been presented in this form, the courts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit

> (*id*. at 172; quoting Larson, *Larson's Workers' Compensation Law*, 1B §§48.11 to 48.12, at 8-440).
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> **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. . . .
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> **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. . . .
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> **AS 23.30.080. Employer's failure to insure**. . . .
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> (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.

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, 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*, 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 (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 in assessing 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 aggravating factors, which were not present when much of the prior failure-to-insure decisions were made. Ordinarily, provisions providing penalties against employers will be strictly construed. *Petty v. Mayor 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. . . .
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> **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.

The board's credibility findings are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007);

> **AS 23.30.395. Definitions**. In this chapter,
> . . .
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> (19) 'employee' means an employee employed by an employer as defined in (20) of this section;
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> (20) 'employer' means . . . a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state. . . .

In *In re K6 Building Solutions*, AWCB Decision No. 13-0067 (June 19, 2013), the board determined a sole proprietor's wife was an "employee" because she held herself out as one on her Facebook page, performed clerical duties for the business and acted as an agent for the employer by signing binding legal documents. However, because the division failed to produce sufficient evidence documenting the spouse's uninsured employee workdays, her hours were not included in the civil penalty calculation (*id*. at 27).

> **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:
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> (d) For the purposes of this section, 'aggravating factors' include
> . . .

> (3) a violation of AS 23.30.075 that exceeds 180 days;
> . . .
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> (7) failure to comply with the division's initial discovery demand within 30 days after the demand;
> . . .
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> (10) a history of injuries or deaths sustained by one or more employees while employer was in violation of AS 23.30.075;
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> (14) lapse in business practice that would be used by a reasonably diligent business person, including
> . . .
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> > (C) failure to gain familiarity with laws affecting the use of employee labor. . . .

ANALYSIS

1) Was Tuttle F&M's "employee" for purposes of assessing a civil penalty?

F&M provides drivers and trucks to its client when the client cannot fulfill its own delivery requirements. Patterson, a sole proprietor, is "a person" who, while doing business in Alaska as F&M, employed one or more truck drivers in connection with his trucking business. Trucking businesses require truck drivers. Patterson did not seriously dispute the fact F&M's drivers were its employees. There is no question F&M was an "employer" as defined in the Act employing one or more truck drivers as "employees." AS 23.30.395(20).

As for Tuttle's disputed "employee" status, the first inquiry is whether or not there was a "contract for hire" between F&M and Tuttle, making her F&M's "employee" during the uninsured period in question. *Wisdom.* An employer-employee relationship can only be created by a contract, which may be express or implied. *Selid.* This preliminary finding is critical, because if Tuttle was F&M's "employee" during the relevant time, she was covered by the Act, and gave up her common law remedies against F&M for injuries. AS 23.30.020; *Larson's Workers 'Compensation Law* at §64.01. More importantly for this decision, if Tuttle was F&M's employee, her "uninsured employee workdays" must be included in any penalty calculation. AS 23.30.080(f). If, on the other hand, she was not F&M's employee, Tuttle retains her common law rights to sue F&M should she

be injured while on its premises, and her "uninsured employee workdays" must be excluded from the penalty equation. *Cluff*.

The facts do not disclose an express employment contract between Tuttle and F&M. There was no employment "offer" from F&M to Tuttle encompassing any essential terms, no Tuttle "acceptance" much less unequivocal acceptance, no "consideration" or any intent to be bound by any employment agreement and clearly no "meeting of the minds" concerning employment. Both Patterson and Tuttle adamantly and credibly testified Tuttle was not F&M's employee. AS 23.30.122; *Smith.* There is clearly also no express, written employment contract between F&M and Tuttle. Given the testimony, there is no evidence of an express, oral contract between them either. Thus, there is no express "contract of hire" between Tuttle and F&M. AS 23.30.020.

As for an "implied" employment contract, the result is the same. Patterson and Tuttle were and are in a romantic, domestic relationship. Patterson allows Tuttle to live in his apartment, which also happens to be his home office. She normally works full-time as a cashier at Fred Meyer's when she is not out with an injury. There is no evidence performing any services for F&M is a requirement of Tuttle's living arrangement with Patterson. There is no requirement Tuttle answer the F&M phone when she is home. There is no requirement she even remain at home, and she visits her grandchildren occasionally. If she is home and hears the phone ring, she answers it. It may or may not be Spenard calling. If it is, she takes a message, like any resident would probably do, and passes it on to Patterson. There is no evidence Patterson and Tuttle ever discussed compensation for Tuttle providing any services for F&M. There is no evidence Patterson ever paid Tuttle anything for performing any services for F&M. There is no evidence Tuttle expected any compensation from F&M. There is no evidence Patterson exerted any control over Tuttle. All the evidence is precisely the opposite. In a workers' compensation case, the legislative philosophy assumes the worker is in a "gainful occupation" when employed and when injured. Disability benefits are intended to replace a "part of the loss of wages" which is assumed to have existed. As a practical matter, it is impossible to calculate compensation benefits for a gratuitous worker, since benefits are calculated on the basis of "earnings." *Larson's Workers' Compensation Law* at §64.01.

By contrast, the uncontradicted facts show Tuttle volunteered to assist her fiancé Patterson who has limited reading and writing skills, by answering the phone on occasion and sometimes obtaining and completing forms from the Internet. *Wisdom.* There is no evidence Tuttle was "trying out" for a position with F&M. *Childs.* F&M operated successfully without Tuttle's help before she moved in. The fact her assistance made F&M's business a little easier from time to time does not mean Tuttle became F&M's "employee." "Volunteer work, standing alone," does not establish an employee/employer relationship. An employment contract is still necessary. *Childs.* An employment contract is necessary so a broker can calculate premiums based upon payroll. An employment contract sets forth essential terms, such as wages, so if a person is injured, an adjuster can calculate a disability rate. All these important functions are abrogated where, as here, there is no contract, express or implied. *Larson's Workers' Compensation Law* at §64.01.

The fact a contract vis-à-vis F&M and a truck driver listed Tuttle as "Human Resources Manager," is not dispositive. It was not a contract between F&M and Tuttle. Tuttle credibly explained she obtained this contract from "Rocket Lawyer" online and put herself in this position because there was a spot to list someone and she recorded herself so if people had questions they could direct those to her since Patterson does not read or write well. AS 23.30.122. Furthermore, as already mentioned, there is no evidence Tuttle received any compensation for any services rendered, including those as a human resource manager. A person can volunteer to fill any title or position, including assisting to create an escape route after a natural disaster, and still not be an "employee." *Wisdom.* Similarly, Tuttle's contact information on a workers' compensation insurance application simply demonstrates Tuttle's efforts to direct questions to her, as Patterson's friend, who is better equipped to read documents when necessary so Patterson could answer questions. AS 23.30.122.

By contrast, the law is clear that an employment status cannot and should not be "thrust upon" a person who does not want it. *Wisdom.* Clearly, neither Patterson nor Tuttle thinks Tuttle was F&M's employee and neither wants her to be. If, in the hypothetical scenarios offered at hearing, Tuttle were to walk across the living room floor in Patterson's apartment to answer the phone, and if she tripped, fell and broke her leg, and it turned out Spenard was calling, Tuttle might have a civil negligence action against Patterson for her injuries, but not a workers' compensation claim. *Cluff.*

The division's general premise stating an employer must insure employees in "family businesses" and all family-member-employees for work injuries is accurate. However, such family members must first be "employees" under an express or implied "contract of hire" before the Act applies to them. AS 23.30.020; *Childs*. Therefore, this case is distinguishable from *K-6 Building Solutions*, which determined a sole proprietor's wife was an "employee." Though Tuttle could conceivably file a workers' compensation claim, under these hypothetical facts, she would not be successful because there is no evidence of any "contract of hire" between Tuttle and F&M. The inquiry therefore ends here. *Childs*. Because there is no hiring contract, this decision need not explore the "relative nature of the work test." *Alaska Pulp*; *Searfus*. Tuttle is not F&M's "employee." Tuttle was and is a "volunteer" in a romantic, domestic relationship, which is not covered by the Alaska Workers' Compensation Act. AS 23.30.020; *Wisdom*.

2) Should an appropriate penalty and payment plan be assessed against F&M?

In this case, the entire uninsured period occurred after 8 AAC 45.176's effective date. Therefore, its mandatory civil penalty requirements apply. F&M has four "aggravating factors": A violation of AS 23.30.075 exceeding 180 days; failure to comply with the division's initial discovery demand within 30 days; an injury sustained by an employee while F&M was uninsured; and a lapse in business practices, including failure to gain familiarity with laws regarding employee labor use. 8 AAC 45.176(d)(3, 7, 10, 14(C)). As F&M has more than three but not more than six aggravating factors, the appropriate civil penalty range may be no less than $51 and no more than $499 per uninsured employee workday. The civil penalty may also not be less than two times the premium F&M would have paid had it been insured. 8 AAC 45.176(a)(2-4).

F&M's current workers' compensation insurance premium is $322 per year. It is reasonable for this decision to use this premium because F&M currently only has one truck, the other truck having been demolished, and Patterson is likely to be the only driver. As this decision determined Tuttle is not F&M's employee, the current annual premium, which contemplates payroll to be "if any," seems reasonable for this decision's purposes. F&M was uninsured for 753 calendar days. The pro-rated premium for F&M's current policy is 89¢ per day, which equates to $670.17. Twice this amount is $1,340.34. Therefore, a civil penalty assessed in this case may not be less than $1,340.34. 8 AAC 45.176(a)(2-4).

F&M stipulated to the first three aggravating factors. Its attorney took blame for failing to provide discovery to the division in a timely manner. However, F&M failed to provide legal authority stating its attorney's failure excuses F&M from responsibility to provide timely discovery. As to the fourth aggravating factor, F&M argued at hearing there was no evidence showing a lapse in business practice that would be used by a reasonably diligent business person and objected to that aggravating factor being included in the civil penalty calculation. F&M's argument is not well taken because Patterson admitted he had no idea he needed workers' compensation insurance on his truck drivers and had no idea how to even obtain workers' compensation insurance until Sambo's injury. Patterson should have familiarized himself with insurance requirements before beginning his trucking business. Therefore, this fourth aggravating factor is properly applied in this case. 8 AAC 45.176(d)(14)(C).

Fortunately, in Sambo's case, and presumably in other injury cases which could arise against F&M during the uninsured period, a "contractor-over" covered Sambo's losses. Nevertheless, truck driving can be hazardous. Drivers are exposed to nature, the elements and to hazardous driving conditions. F&M's drivers had limited duties but would occasionally have to apply chains to truck tires in icy conditions. Truck chains are heavy and relatively difficult to install. Strapping down loads on flatbed trailers can also require considerable physical exertion. F&M's drivers were therefore exposed to typical road-driving hazards as well as slips, falls and sprain and strain type injuries. Given F&M's limited business operations, a penalty within the lower, acceptable, mandatory range is appropriate in this case to insure compliance and protect future employees. Therefore, F&M's penalty will be based on $51 per uninsured employee workday. 8 AAC 45.176(a)(4).

This decision determined Tuttle was not F&M's employee for assessing civil penalty purposes. Therefore, the uninsured employee workdays the division attributed to Tuttle will not be included in this calculation. Without including Tuttle's "uninsured employee workdays," the division identified 175 uninsured employee workdays for F&M's truck drivers. Though Patterson argued one driver had "his own truck," F&M did not provide adequate evidence on this issue to justify further reducing the division's uninsured employee workday calculations. Therefore, F&M's civil penalty will be $8,925 ($51 per day times 175 days = $8,925).

F&M requested a payment plan and Patterson said he could probably afford around $200 per month. The division did not object to a payment plan. Therefore, F&M will be ordered to pay its $8,925 civil penalty in monthly installments of $200 per month, beginning July 1, 2014, and continuing until the entire $8,925 civil penalty is paid in full. AS 23.30.080(f).

CONCLUSIONS OF LAW

1) Tuttle was not F&M's "employee" for purposes of assessing a civil penalty.
2) An appropriate penalty and payment plan will be assessed against F&M.

ORDER

1) The division's August 6, 2013 petition is granted in accordance with this decision.
2) At any time Freddie L. Patterson d/b/a F&M Trucking has employees, he is ordered to maintain workers' compensation insurance coverage in accordance with AS 23.30.075, and file evidence of compliance in accordance with AS 23.30.085.
3) Pursuant to AS 23.30.060(a), Freddie L. Patterson d/b/a F&M Trucking is personally and directly liable for any and all benefits payable under the Act for compensable injuries to employees who may have been injured during the uninsured period.
4) Pursuant to AS 23.30.080(f), Freddie L. Patterson d/b/a F&M Trucking is assessed a civil penalty of $8,925. Freddie L. Patterson d/b/a F&M Trucking must timely pay $8,925. A payment plan is ordered as follows:
5) **Freddie L. Patterson d/b/a F&M Trucking shall pay $200 on or before July 1, 2014, and thereafter on the first day of each month Freddie L. Patterson and F&M Trucking shall make monthly payments in the sum of $200 for 44.625 months until the total civil penalty of $8,925 is paid in full.**
6) Freddie L. Patterson d/b/a F&M Trucking is ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **Freddie L. Patterson d/b/a F&M Trucking is ordered to make checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004430, and AWCB Decision Number 14-0084.** If Freddie L. Patterson and F&M Trucking fail to make timely civil penalty payments as ordered in this decision, the entire $8,925 civil penalty 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 accordance with this Decision and Order, jurisdiction is maintained.

7) The SIU is directed to monitor Freddie L. Patterson d/b/a F&M Trucking for two (2) years from this decision's date for continued compliance with the Act's insurance requirements.

8) The division's Collection Officer is ordered to prepare a proposed Liability Discharge Order within 30 days of Freddie L. Patterson's d/b/a F&M Trucking's full, timely, civil penalty payment as set forth in this decision and order. The proposed order will be addressed in accordance with 8 AAC 45.130.

Dated in Anchorage, Alaska, on June 18, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

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Dave Kester, 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 Freddie L. Patterson d/b/a F&M Trucking; Employer / respondents; Case No. 700004430; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on June 18, 2014.

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Anna Subeldia, Office Assistant