

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION )  
FOR A FINDING OF FAILURE TO )  
INSURE WORKERS' COMPENSATION ) FINAL DECISION AND ORDER  
LIABILITY, AND ASSESSMENT )  
OF A CIVIL PENALTY AGAINST, ) AWCB Case No. 700004171  
)  
RUTH PAGE d/b/a FISHHOOK BAR & ) AWCB Decision No. 14-0099  
LIQUOR, )  
) Filed with AWCB Anchorage, Alaska  
Respondent. ) on July 16, 2014  
)

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The Division of Workers' Compensation, Special Investigations Unit's (SIU) Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage, Alaska on June 25, 2014, a date selected on July 12, 2014. Investigator Douglas Love represented the SIU and testified. Ruth Page d/b/a Fishhook Bar & Liquor (Employer) did not appear. The record was held open for the submission of evidence of Employer's liquor licenses. The record closed on June 27, 2014.

As a preliminary matter, the board considered whether Employer received sufficient notice of the June 25, 2014 hearing. Having found she did receive adequate notice, the panel issued an oral order to proceed in Employer's absence. This decision examines the oral order to proceed in Employer's absence and decides the SIU's petition on its merits.

ISSUES

The SIU contended Employer was given adequate notice of the hearing. It contended the hearing should go forward.

Employer did not appear at hearing. Her position is therefore not known.

***1) Was it proper to conduct the hearing in Employee's absence?***

The SIU contends Employer operated a business using employee labor without maintaining workers' compensation insurance, and a civil penalty should be assessed.

Employer's position is unknown, but it is assumed she opposes a civil penalty.

***2) Should Employer be assessed a civil penalty for failure to insure for purposes of workers' compensation liability, and if so, in what amount?***

FINDINGS OF FACT

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

1) Employer is a sole proprietorship owned by Ruth Page. (Fishhook Bar & Liquor business license, Alaska Department of Commerce, Division of Corporations, Business and Professional Licensing).

2) Employer's business license was issued November 20, 2000 and expired December 31, 2002. The license was issued again on February 7, 2003 and expired December 31, 2012. (*Id.*)

3) On July 21, 2003, employee Jason Bay reportedly injured his right hand while working for Employer. (Alaska Workers' Compensation Board Case No. 200312099.)

4) Employer operated a business using uninsured employee labor for 854 calendar days in five periods: September 10, 2008 to January 24, 2009 (136 days); January 24, 2010 to January 26, 2010 (2 days); April 24, 2010 to April 5, 2011 (346 days); November 5, 2011 to July 7, 2012 (245 days); and July 7, 2013 to November 9, 2013 (125 days). The first two lapses, totaling 138 uninsured calendar days, occurred prior to February 28, 2010, the effective date of 8 AAC 45.176. The three

post-regulation lapses totaled 716 uninsured calendar days. (National Council on Compensation Insurance, Inc. (NCCI) online database, proof of coverage screens; Alaska Workers' Compensation Division Proof of Coverage Database screens; SIU Ruth Page d/b/a Fishhook Bar & Liquor uninsured employer worksheet.)

5) On August 22, 2013, the SIU petitioned for a finding of failure to insure under AS 23.30.075, and assessment of civil penalty under AS 23.30.080(f). The SIU also served on Employer, via certified mail to the business address, a discovery demand for business documents, to be returned within 30 calendar days of receipt. (Petition and discovery demand, August 22, 2013; USPS certified mail 91 7108 2133 3937 5582 8405).

6) On September 26, 2013, the SIU served a photocopy of the August 22, 2013 petition and discovery demand via regular mail to both Employer's address of record and the business address. (Love affidavit, September 26, 2013.)

7) On October 31, 2013, the certified mail petition and discovery order was returned to the SIU marked "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD." (USPS Track & Confirm for certified mail no. 91 7108 2133 3937 5582 8405; returned envelope.)

8) On November 9, 2013, Employer obtained workers' compensation insurance with an estimated annual premium of \$1,631.00, which equates to \$4.47 per day, or \$3,200.52 for the 716 post-regulation uninsured calendar days. Twice the pro-rated premium ( $\$3,200.52 \times 2$ ) is \$6,401.04. (Alaska National Insurance Company policy for Ruth Page d/b/a Fishhook Bar & Liquor; SIU Ruth Page d/b/a Fishhook Bar & Liquor uninsured employer worksheet.)

9) Employer did not attend a January 16, 2014 prehearing conference, but was reached by phone. The board designee "advised Employer that failure to insure for workers' compensation can affect her liquor license so it was in her best interest to get this case resolved or to hearing as soon as possible." The designee ordered Employer to provide the documentation sought by the SIU within 30 days. (Prehearing conference summary, January 16, 2014, served January 31, 2014.)

10) Employer did not attend an August 10, 2014 prehearing conference, and could not be reached by phone. The designee noted:

Employer did not produce the discovery she was ordered to produce at the 1/16/14 prehearing. Ms. Page is ordered to produce evidence regarding her employees and the hours and days they worked during the periods the division has alleged Employer was uninsured. **Ms. Page is ORDERED to produce this evidence to Mr. Love immediately.**

A hearing on the SIU's August 22, 2013 petition was set for June 12, 2014. (Prehearing conference summary, April 10, 2014, served April 17, 2014; emphasis original.)

11) The notice for the June 12, 2014 hearing was sent to both Employer's address of record and the business address by certified mail. Both certified mail notices were returned unclaimed, marked, respectively, "FORWARD TIME EXP . . . RETURN TO SENDER" and "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD." (Returned envelopes for USPS certified mail 7012 0470 0002 2898 5980 and 7012 0470 0002 2898 6017.)

12) The June 12, 2014 hearing was continued under 8 AAC 45.074(b)(1)(A) because Mr. Love was unexpectedly unavailable. It was rescheduled for June 25, 2014. (Record.)

13) The notice for the June 25, 2014 hearing was sent to both Employer's address of record and the business address by certified mail. The certified mail notice sent to the address of record was returned marked "FORWARD TIME EXP . . . RETURN TO SENDER." (Returned envelope for USPS certified mail 7012 0470 0002 2898 5041.)

14) The address of record is Employer's last known address. (Record.)

15) Employer did not appear at hearing, and could not be reached at either her phone number of record, or the business phone. (Record.)

16) The SIU produced evidence of the quarterly wages Employer reported it paid to each employee from January 2007 through September 2013, and the total reported quarterly wages to all employees from January 2009 through March 2014. (Alaska Employment Security Division Reported Wage screens.)

17) Mr. Love credibly testified Employer failed to provide any discovery. (Love.)

18) The record contains no evidence of employee pay rates; without this, it is impossible to establish the number of hours each employee worked. (Experience, observation.)

#### PRINCIPLES OF LAW

##### **AS 04.21.030. Responsibility of licensees, agents, and employees.**

The licensee has a duty to exercise that degree of care that a reasonable person would observe to ensure that a business under the person's control is lawfully conducted. . . .

The state laws regarding alcoholic beverage sales are contained in Alaska Statutes Title Four. A liquor licensee's responsibilities include exercising a reasonable degree of care to ensure the business is lawfully conducted.

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

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

(1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . Employers. . . .

The Alaska Workers' Compensation Board (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). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

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

. . .

(h) . . . The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. The superior court, on application of the department, the board or any members of it, shall enforce the attendance and testimony of witnesses and the production and examination of books, papers, and records.

**AS 23.30.075. Employer's liability to pay.**

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

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

. . .

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

to file evidence of compliance as required by AS 23.30.085 creates a rebuttable presumption that the Employer failed to insure or provide security as required by AS 23.30.075.

The severity of AS 23.30.080(f) is a policy statement: failure to insure for workers' compensation liability will not be tolerated in Alaska. A penalty's primary goal 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 penalizing an offender without vengeance. *Ivan Moore d/b/a Ivan Moore Research v. State of Alaska, Division of Workers' Compensation*, AWCAC Decision No. 092 (November 17, 2008); referencing *Alaska R&C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, AWCAC Decision No. 088 (September 16, 2008). A penalty is not intended to destroy a business or reduce employment (*Alaska R&C* at 12). In assessing a civil penalty, consideration is given to the duration, scope and severity of the risk associated with the offending employer's conduct; the culpability of the employer's conduct; the impact on the community and employees; and the employer's ability to pay (*id.* at 22-27).

For lapses prior to February 28, 2010, the effective date of 8 AAC 45.176, a wide range of penalties, from \$0 to \$1,000 per uninsured employee work day, have been assessed based on specific circumstances. *See, e.g., In re Homer Senior Citizens, Inc.*, AWCAC Decision No. 07-0334 (November 6, 2007) (no penalty); *In re Casa Grande, Inc. and Francisco Barajas*, AWCAC Decision No. 07-0288 (September 21, 2007) (\$1,000 per employee per day with part suspended). For lapses on or after February 28, 2010, 8 AAC 45.176 established minimum and maximum penalty benchmarks, based primarily on specific aggravating factors.

Ordinarily, provisions providing penalties against employers will be strictly construed. *Petty v. Mayor, et al., of College Park*, 11 S.E.2d 246 (Georgia 1940). However the board does have the authority to suspend part of a penalty in light of mitigating circumstances. *Miller's Market v. State of Alaska*, AWCAC Decision No. 161 (May 14, 2012) found penalty suspension was not an abuse of discretion when it stemmed from reluctance to jeopardize the continued viability of the employer's business.

**AS 43.70.020. License required; application.**

(a) For the privilege of engaging in a business in the state, a person shall first apply, upon forms prescribed by the commissioner, and obtain a license, and pay the license fee provided for in AS 43.70.030. . . .

(e) If a person knowingly engages in a business in the state without having a current license issued under (a) of this section, the department may impose a civil fine of up to \$300. . . .

**AS 44.62.570. Scope of Review. . . .**

. . .

(b) . . . Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by

- (1) the weight of the evidence; or
- (2) substantial evidence in the light of the whole record.

. . .

On appeals to the Alaska Worker’s Compensation Appeals Commission (Commission) or the courts, board determinations are subject to reversal under the “abuse of discretion” standard in AS 44.62.570, incorporating the “substantial evidence test.” *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1049 (Alaska 1978). When applying a substantial evidence standard, the “[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld.” *Id.*

**AS 44.62.590. Contempt.**

(a) In a proceeding before an agency, the agency shall certify the facts to the superior court in the judicial district where the proceeding is held if a person in the proceeding

. . .

- (2) Refuses to respond to a subpoena;

. . .

(b) Upon certification under (a) of this section, the court shall issue an order directing the person to appear before the court and show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person.

(c) After service under (b) of this section, the court has jurisdiction of the matter.

. . .

Under the doctrine of separation of powers, administrative agencies may not adjudicate and punish disobedience of their orders. *ICC v. Brimson*, 154 U.S. 447 (1894); *Wright v. Plaza Ford*, 164 N.J. Super. 202, 395 A.2d. 1259 (1978). AS 44.62.590 provides a means by which administrative agencies may seek enforcement of their orders through the courts. After the agency certifies the facts demonstrating misconduct, the superior court issues an order directing the noncompliant person to appear before it, and explain to the judge why he should not be punished for contempt. *Harp v. ARCO*, AWCB Decision No. 95-0174 (June 30, 1995).

The Court of Appeals of Alaska discussed punishment for civil contempt in *Carter v. Broderick*, 750 P.2d 843, 844 (Alaska 1988):

Civil contempt proceedings are by nature remedial and have the goal of coercing litigants to comply with lawful orders of court in order to remedy harm occasioned to other litigants by noncompliance. Persons incarcerated for civil contempt are not sentenced to definite terms of imprisonment. Rather, they “carry the keys of their prison in their own pockets.” *In re Nevitt*, 117 F. 448, 461 (8th Cir.1902). By agreeing to comply with the court's order, they may purge themselves of contempt and be released. *Johansen v. State*, 491 P.2d 759, 766 (Alaska 1971).

The State of Alaska Department of Law’s *Hearing Officer's Manual*, Fifth Edition (August 2002), at Chapter 8, pp. 43-45, is instructive on the issuance and enforcement of administrative subpoenas:

2. Compelling Testimony/ Subpoenas.

...

b. *When Appropriate.* A subpoena may only be used to compel testimony, or the production of documents, at the hearing or at a scheduled deposition. A party may not use a subpoena to directly obtain documents without notice to the other parties and scheduling a records deposition. . . .

...

e. *Enforcing a Subpoena.* In proceedings covered by the APA, AS 44.62.590 allows the superior court in the judicial district where the hearing is being held to use the court's contempt powers to enforce a hearing officer's subpoena or other lawful order. The agency prepares a written certification setting out the details of the alleged subpoena violation. The person seeking to compel the subpoena initiates the enforcement proceeding by filing a petition requesting enforcement of the subpoena and including the written certification. The court will then issue an order to show cause why the person failing to honor the subpoena should not be held in contempt.



**3 AAC 304.180. Denial, suspension, revocation, or refusal to renew or transfer, in the public interest.**

(a) The factors the [Alcoholic Beverage Control] board will, in its discretion, consider in determining whether it is in the public interest to deny, revoke, suspend, or refuse to renew or transfer a license include

(1) the applicant's, the applicant's affiliates', the transferee's, or the transferee's affiliates' histories of commission of

...

(B) a violation of AS 04 or regulations adopted by the board;

...

(2) whether the applicant, the applicant's affiliates, the transferee, or the transferee's affiliates are untrustworthy, unfit to conduct a licensed business, or a potential source of harm to the public;

...

**8 AAC 45.054. Discovery.**

...

(c) The board or division will issue subpoenas and subpoenas duces tecum in accordance with the Act. . . .

...

**8 AAC 45.060. Service. . . .**

(b) . . . Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .

...

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

**8 AAC 45.070. Hearings.**

...

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

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing.

**8 AAC 45.120. Evidence.**

. . . .  
(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. . . .

The Commission delineated the SIU's and the uninsured employer's respective evidentiary burdens:

AS 23.30.080(f) establishes a rebuttable presumption of failure to insure established by failure to provide proof of insurance. The Division has the burden of establishing the absence of proof of insurance; having done so, the burden of proof shifts to the employer to establish coverage. However, the burden of proving the factors that the board must consider in assessing a penalty continue to rest on the Division, because there is no presumption that a particular penalty within the range established by § .080(f) is appropriate. The Division has the burden of production and persuasion of the facts and circumstances to support imposition of a particular penalty, including factors supporting an enhanced penalty; the employer has the burden of establishing the facts and circumstances that may be considered in excuse or mitigation of a penalty. *Alaska R&C* at 10.

The law requires civil penalties for uninsured employers be calculated based upon the number of uninsured employee workdays, defined in 8 AAC 45.176(e)(2) as the total hours of employee labor utilized by the Employer while in violation of AS 23.30.075 divided by eight. When the calculation of uninsured employee workdays is based on SIU estimates, rather than established facts, penalty requests have been denied for lack of adequate evidence. *See, e.g., In re Rhonda Smith & Victor Smith d/b/a R&V Enterprises, ABC Plumbing, and All Alaska Construction & Maintenance, LLC*, AWCB Decision No. 12-0137 (August 8, 2012) (penalty against one business entity denied); *In re Stanley L. Barney d/b/a The Wreckerman Towing*, AWCB Decision No. 10-0073 (April 23, 2010) (only accurate, not estimated, uninsured employee work days considered in penalty determination).

**8 AAC 45.175. Failure to insure: issuance of subpoena.**

Upon request by the division, the board or its designee will issue subpoenas, including subpoenas duces tecum, if an employer is under investigation for failure to insure for workers' compensation liability, and the employer fails to comply with

discovery demands within 30 days after the demands. Failure to comply with a subpoena issued by the board or its designee will result in certification of the facts to the superior court to enforce the subpoena.

**8 AAC 45.176. Failure to provide security: assessment of civil penalties.**

(a) If the board finds an Employer to have failed to provide security as required by AS 23.30.075, the Employer is subject to a civil penalty under AS 23.30.080(f), determined as follows:

...

(4) if an employer is found to have no more than six aggravating factors, the employer will be assessed a civil penalty of no less than \$51 and no more than \$499 per uninsured employee workday; however, the civil penalty may not be less than two times the premium the employer would have paid had the employer complied with AS 23.30.075; . . .

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

...

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

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

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

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

(4) previous violations of AS 23.30.075;

(5) issuance of a stop order by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);

(6) violation of a stop order issued by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);

(7) failure to comply with the division’s initial discovery demand within 30 days after the demand;

(8) failure to pay a penalty previously assessed by the board for violations of AS 23.30.075;

(9) failure to provide compensation or benefits payable under the Act to an uninsured injured employee;

(10) a history of injuries or deaths sustained by one or more employees while Employer was in violation of AS 23.30.075;

(11) a history of injuries or deaths while the Employer was insured under AS 23.30.075;

(12) failure to appear at a hearing before the board after receiving proper notice under AS 23.30.110;

(13) cancellation of a workers’ compensation insurance policy due to the Employer’s failure to comply with the carrier’s requests or procedures;

(14) lapses in business practice that would be used by a reasonably diligent business person, including

(A) ignoring certified mail;

(B) failure to properly supervise employees; and

- (C) failure to gain a familiarity with laws affecting the use of employee labor;
- (15) receipt of government funding of any form to obtain workers' compensation coverage under AS 23.30.075, and failure to provide that coverage.
- (e) In this section, . . .
  - (2) 'uninsured employee workday' means the total hours of employee labor utilized by the Employer while in violation of AS 23.30.075 divided by eight.

Aggravating factor (d)(3) is "a violation of AS 23.30.075 that exceeds 180 calendar days." The Alaska Supreme Court held "statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty." *Anchorage Midtown Motel, Inc., v. State of Alaska, Division of Workers' Compensation*, AWCAC Decision No. 11-0021 (February 14, 2012), citing *Alaska Public Offices Comm'n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009). Following this guidance, the article "a" in AS 23.30.075(d)(3) is construed to refer to a single, continuous violation, not the total of two or more separate violations.

Aggravating factor (d)(12) is "failure to appear at a hearing before the board after receiving proper notice under AS 23.30.110." Prehearings and hearings are distinctly different events. Prehearings are informal proceedings in which parties meet with a board designee to "examine the Alaska Workers' Compensation Board's records, identify issues, memorialize any agreements, and provide parties the opportunity to resolve disputed issues." Division Prehearing Notice; 8 AAC 45.065(a). A hearing is a formal procedure before an administrative body performing a quasi-judicial function. The two are not equal in form or substance, and extending 8 AAC 45.176(d)(12) to include failure to attend prehearings as an aggravating factor is beyond the regulation's scope. *In re Amber Brophy-Mock d/b/a C.O.R. Cosmetics and C.O.R. Wax Lash & Cosmetics*, AWCAC Decision No. 14-0036 (March 20, 2014).

## ANALYSIS

### ***1. Was it proper to conduct the hearing in Employee's absence?***

Employer was served notices of the June 25, 2014 hearing by certified mail to both her last known address and the business address. Employer is found to have been properly served under 8 AAC 45.060(f).

At hearing the designated chair attempted to contact Employer at her phone number of record, and also at the business number. The calls were unanswered and did not go to voicemail. The decision to proceed with the hearing in Employee's absence was proper under 8 AAC 45.070(f)(1).

***2. Should Employer be assessed a civil penalty for failure to insure for purposes of workers' compensation liability, and if so, in what amount?***

Employer is an egregious offender of the Act. Employer operated a business using uninsured employee labor during five periods: two lapses, totaling 138 uninsured calendar days, prior to the effective date of 8 AAC 45.176, and three post-regulation lapses totaling 716 uninsured calendar days. All told, Employer was uninsured for 854 of the 1886 calendar days from September 10, 2008 to November 9, 2013, or more than 45 percent of the time. The severity of this infraction, and the significant impact Employer's failure to insure could have had on others, is enhanced by the nature of the business. The possibility of alcohol impairment in the workplace increases the risk of employee injuries; Employer is fortunate it has encountered only one workers' compensation claim.

Additionally, Employer's conduct involved six aggravating factors considered under 8 AAC 45.176(d) in determining an appropriate civil penalty:

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

The SIU served its initial petition and discovery demand on August 22, 2013. Employer did not obtain coverage until 79 days later, on November 9, 2013. 8 AAC 45.176(d)(1).

- 2) a violation of AS 23.30.075 that exceeded 180 calendar days;

Employer was insured 854 calendar days. However, under *Anchorage Midtown Motel*, only the individual lapsed periods, not the total of the five lapses, are applicable here. Thus the uninsured periods from April 24, 2010 to April 5, 2011, and November 5, 2011 to July 7, 2012 are considered to be two violations, each exceeding 180 calendar days. 8 AAC 45.176(d)(3).

- 3) failure to comply with the division's initial discovery demand within 30 days after the demand;

Employer did not respond to the SIU's initial discovery demand, and subsequently defied two board designee orders to provide evidence. 8 AAC 45.176(d)(7).

- 4) a history of injuries or deaths sustained by one or more employees while Employer was insured under AS 23.30.075;

In 2003, during a period Employer was insured, an employee reported a work-related injury. 8 AAC 45.176(d)(11).

- 5) failure to appear at a hearing before the board after receiving proper notice under AS 23.30.110;

Employer's nonparticipation in the April 4, 2014 prehearing, while notable as an example of Employer's noncompliance with these proceedings, does not rise to the level of an aggravating factor. *Amber Brophy-Mock*. However, Employer's failure to appear at the properly noticed June 25, 2014 hearing is found to be an aggravating factor under 8 AAC 45.176(d)(12).

- 6) lapses in business practice that would be used by a reasonably diligent business person, including

- (A) ignoring certified mail;

...

Four pieces of certified mail to Employer were unclaimed and returned to the division: the SIU's August 22, 2013 petition and discovery demand, sent to the business address; the notice for the June 12, 2014 hearing, sent to both the address of record and the business address; and the notice for the June 25, 2014 hearing, sent to the address of record. Employer is found to have repeatedly ignored certified mail, lapses in business practice that constitute an aggravating factor under 8 AAC 45.176(d)(14)(A).

With six applicable aggravating factors, 8 AAC 45.176(a)(4) establishes a penalty of no less than \$51.00 and no more than \$499.00 per uninsured employee work day, but in no event less than two times the premium the employer would have paid had it complied with AS 23.30.075. However

here each employee's hourly pay rate is unknown, and therefore it is impossible to accurately determine the total hours of employee labor; without that figure, no finding can be made regarding the number of uninsured employee workdays. 8 AAC 45.176(e)(2); AS 44.62.570(b),(c). The SIU made logical, educated guesses at the job titles and wages of Employer's employees, but unsupported assumptions and speculation are not sufficient to support assessment of a civil penalty. *Alaska R&C; Smith; Barney*. Due to insufficient evidence, neither the pre-regulation nor the post-regulation penalties can be definitively calculated, as both require a determination of uninsured employee workdays. 8 AAC 45.176(a)(4). However, the minimum penalty for the post-regulation lapse is not dependent on the number of uninsured employee workdays, but is based on the premium an employer would have paid if insured. Had Employer complied with AS 23.30.075, its premium for 716 post-regulation uninsured calendar days, at \$4.47 per day, would have been \$3,200.52. Twice the prorated premium is \$6,401.04, and Employer will be assessed this amount. Employer will be required to pay the full penalty within ten days of this Decision and Order.

It must be emphasized the leniency of Employer's civil penalty is not attributable to any mitigating factors on its part, but rather to the SIU's failure to meet its burden of production of the facts necessary to support imposition of a higher penalty. *Alaska R&C; Smith; Barney*. The challenges of maintaining a small business are acknowledged, as is the fact Employer was insured on the hearing date, but these do not excuse Employer's conduct. Employer's five lapses in workers' compensation insurance, its defiance of two board designee orders to produce discovery, and its lack of participation in properly noticed administrative proceedings are nothing less than reprehensible. Its failure to insure placed its employees at risk, and resulted in an unfair competitive advantage over law-abiding competitors.

Employer's professional irresponsibility and flagrant disregard for the law extends beyond its actions before the board. The SIU therefore will be ordered to serve a copy of this Decision and Order on:

- The State of Alaska Division of Corporations, Business and Professional Licensing, for determination of whether a civil fine for operating a business without a current license is appropriate under AS 43.70.020; and

- The State of Alaska Alcoholic Beverage Control Board, for determination of whether it is in the public interest to deny, revoke, suspend, or refuse to renew or transfer Employer's two liquor licenses under AS 04.21.030 and 3 AAC 304.180.

If Employer intends to continue to operate a business using employee labor, Ms. Page is urged to attend one of the division's Employer Education Workshops to enhance her understanding of her rights and obligations under the Act, as well as the protections it provides her. The 2014 Employer Education Workshop Schedule is available by calling (907) 269-4002 or at [http://labor.state.ak.us/wc/notices/SI\\_Training\\_Sessions\\_2014.pdf](http://labor.state.ak.us/wc/notices/SI_Training_Sessions_2014.pdf).

In the future, the SIU is advised to follow statutory and regulatory procedures drafted to enable them to obtain evidence from employers who refuse to cooperate with discovery. First, upon request by the SIU, the board or its designee "will" issue subpoenas and subpoenas duces tecum if a recalcitrant employer fails to comply with discovery demands within 30 days after they are made. 8 AAC 45.175. Failure to comply with a subpoena issued by the board or its designee "will" result in certification of the facts to the superior court, which "shall" enforce the subpoena. AS 23.30.005(h); 8 AAC 45.175. Upon certification, the superior court "shall" issue an order directing the uncooperative person to appear before the court and show cause why that person should not be punished for contempt. AS 44.62.590(b); *Harp*. (The use of "will" and "shall," rather than, for example, "may" or "reserves the right to," indicates the obligatory intent of this legislative language.) Failure to show cause for noncompliance with a subpoena or subpoena duces tecum can result in imprisonment until compliance is achieved. *Carter v. Broderick*. Further instruction on the issuance and enforcement of administrative subpoenas is found in the State of Alaska Department of Law's *Public Hearing Officer's Manual*, Fifth Edition (August 2002), available at [http://www.law.alaska.gov/pdf/manuals/hearing\\_officer.pdf](http://www.law.alaska.gov/pdf/manuals/hearing_officer.pdf).

#### CONCLUSIONS OF LAW

- 1) It was proper to conduct the hearing in Employee's absence.
- 2) Employer will be assessed a \$6,401.04 civil penalty for failure to insure for purposes of workers' compensation liability.



ORDER

- 1) The division's August 22, 2013 petition is granted.
- 2) At any time Ruth Page d/b/a Fishhook Bar & Liquor has employees, it is ordered to maintain workers' compensation insurance coverage in accordance with AS 23.30.075, and shall file evidence of compliance in accordance with AS 23.30.085.
- 3) Pursuant to AS 23.30.060(a), Ruth Page d/b/a Fishhook Bar & Liquor is personally and directly liable for any and all benefits payable under the Act for compensable injuries that may have occurred to employees during the uninsured periods.
- 4) Pursuant to AS 23.30.080(f), Ruth Page d/b/a Fishhook Bar & Liquor is assessed a civil penalty of \$6,401.04.
- 5) **Ruth Page d/b/a Fishhook Bar & Liquor shall pay \$6,401.04 within ten (10) days of this decision and order.**
- 6) Ruth Page d/b/a Fishhook Bar & Liquor is ordered to make its payment to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **Ruth Page d/b/a Fishhook Bar & Liquor is ordered to make its check payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004171, and AWCB Decision Number 14-0099.** If Ruth Page d/b/a Fishhook Bar & Liquor fails to timely make the \$6,401.04 civil penalty payment as ordered in this decision, the director may declare the 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 Ruth Page d/b/a Fishhook Bar & Liquor for five (5) 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 Ruth Page d/b/a Fishhook Bar & Liquor's full, timely, civil penalty payment as set forth in this Decision and Order. The proposed Discharge Order will be addressed in accordance with 8 AAC 45.130.
- 9) The SIU is directed to serve a copy of this Decision and Order on the State of Alaska Division of Corporations, Business and Professional Licensing.
- 10) The SIU is directed to serve a copy of this Decision and Order on the State of Alaska Alcoholic Beverage Control Board.

*In re* Ruth Page d/b/a Fishhook Bar & Liquor

Dated in Anchorage, Alaska on July 16, 2014.

ALASKA WORKERS' COMPENSATION BOARD



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Margaret Scott, Designated Chair

/s/ Ronald Nalikak

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Ronald Nalikak, Member

/s/ Stacy Allen

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Stacy Allen, 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

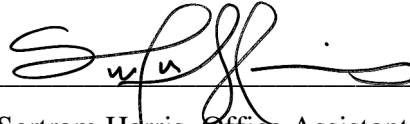
Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to

*In re* Ruth Page d/b/a Fishhook Bar & Liquor

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 Ruth Page d/b/a Fishhook Bar & Liquor Employer / respondent; Case No. 700004171; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on July 16, 2014.

A handwritten signature in black ink, appearing to read 'Sertram Harris', is written over a horizontal line. The signature is stylized and cursive.

Sertram Harris, Office Assistant II