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. 700002789
TITAN ENTERPRISES LLC, TITAN TOPSOIL, INC., CCO ENTERPRISES, LLC, TODD CHRISTIANSON	)	AWCB Decision No. 14-0131
	)	Filed with AWCB Anchorage, Alaska on October 1, 2014
Respondents.	)	

The Division of Workers' Compensation, Special Investigations Unit's June 10, 2008 Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard on the written record on remand from the Alaska Workers' Compensation Appeals Commission (the Commission). The hearing was originally scheduled to be heard on July 1, 2014, in Anchorage, Alaska. At Employer's request, the hearing was continued to August 5, 2014. The panel members were unable to deliberate on that date, and on September 11, 2014, September 15, 2014 was selected as the hearing date. Investigator Christine Christensen represented the Special Investigations Unit ("SIU" or "division"). Attorney David A. Nesbett represented Titan Enterprises, LLC (TE), Titan Topsoil, Inc. (TT), CCO Enterprises, LLC (CCO LLC), and Todd Christianson. The record closed at the hearing's conclusion on September 15, 2014.

ISSUES

On January 8, 2013, the Commission issued *Titan Enterprises, et al.*, Decision No. 175 (the Commission decision), reversing and vacating *Titan Enterprises, et al.*, AWCB Decision No. 11-0095 (June 30, 2011) (*Titan II)*, and remanding the matter to the board. On remand, the Commission directed the board to determine whether TE, TT, and CCO LLC merit treatment as separate entities. If so, the aggravating factors applicable to each must be identified, and a separate penalty calculated for each. If not, the aggravating factors applicable to the combination of entities must be identified and the penalty calculated for the combined entities.

1. Should TE, TT, and CCO LLC be treated as separate entities, and if so, what aggravating factors apply to each, and what penalty should be assessed against each?

2. If TE, TT, and CCO LLC are not treated as separate entities, which of them should be combined, what aggravating factors apply to the combination, and what penalty should be assessed against the combined entities?

FINDINGS OF FACT

All findings of fact in *Titan Enterprises, LLC*, AWCB Decision No. 09-0114 (June 16, 2009) (*Titan I)* and *Titan II* are incorporated herein. The following facts and factual conclusions are reiterated from *Titan I, Titan II,* or are established by a preponderance of the evidence:

1. TT was formed as a corporation on April 21, 1995 by Todd Christianson as the sole shareholder. (Alaska Corporations, Business and Professional Licensing entity history).
2. Mr. Christianson was before the Board as an uninsured employer on September 11, 2002, at which time he was found uninsured while doing business as Great Alaska Lawn and Landscaping. Mr. Christianson testified that he was having problems securing a workers' compensation policy due to past premium disputes. (*In re Todd Christianson d/b/a Great Alaska Lawn & Landscaping*, AWCB No. 02-0207 (October 8, 2002)).
3. TE was formed as an LLC on January 13, 2003, in Anchorage, Alaska, with Todd Christianson listed as the only member. (Alaska Corporations, Business and Professional Licensing entity history).
4. Great Alaska Lawn and Landscaping "ended" in 2002, and its equipment was transferred to TE. At the time of the April 1, 2009 hearing, Mr. Christianson was still in the process of winding down Great Alaska Lawn and Land. (Christianson).

5. On May 22, 2005, Commerce and Industry Insurance Company issued policy WC1513758 to TE. TT, Great Alaska Lawn and Landscaping, Inc., and Gage Development, Inc. were also listed as insured. The policy was for the period from May 22, 2005 to May 22, 2006, and had an estimated annual premium of $74,959.00. (NCCI Policy Search and Policy and Carrier printouts). Gage Development, Inc. and Great Alaska Lawn and Landscaping are corporations affiliated with Mr. Christianson, but are not a party to this proceeding. (Christianson; Observation). An annual premium of $74,959.00 equates to a daily cost to insure of $205.37. (Observation).
6. On March 5, 2006, the Commerce and Industry policy WC1513758 was cancelled for nonpayment of the premium. (NCCI, Cancellations/Reinstatements/Non-Renewals print out, Policy WC1513758).
7. TE and TT became uninsured on March 5, 2006. (Observation).
8. On April 26, 2006, the National Council on Compensation Insurance (NCCI) responded to TE's insurance agent's application for insurance. NCCI advised the agent that TE had an outstanding premium of $52,641 with Alaska National Insurance Company (ANIC) on policy number 02FWW92876, and coverage would not be available until the matter was resolved. (Letter Ryan McKee to Tate Insurance Services, April 27, 2006).
9. In the dispute with ANIC, Mr. Christianson insisted ANIC provide a breakdown of the premium for each insured entity, argued there were some minor classification errors, and appears to argue that TT was not included in the policy, but he noted TT would have been uninsured if not included. (Letter Todd Christianson to Kevin Fitzgerald, July 17, 2006). He maintained ANIC was holding TE hostage for Great Alaska Lawn and Landscaping's obligation.
10. There is no evidence TE, TT, Great Alaska Lawn and Landscaping, Inc., or Gage Development paid, or offered to pay, the undisputed portion of the premium to ANIC. Rather, they refused to pay anything until the premium audit and billing met Mr. Christianson's approval. (Record; Observation).
11. On June 8, 2006, a TE employee reported an injury. On October 3, 2006, he filed a workers compensation claim for medical and time loss benefits. The employee retained an attorney, and on January 12, 2007 sent medical bills to TE. The next working day, January 17, 2007, TE accepted the claim and on January 30, 2007 the parties filed a stipulation in which TE

agreed to pay benefits to the employee. The stipulation was approved by the board (*Aubert v. Titan Enterprises, LLC*, AWCB Decision No. 07-0015 (January 31, 2007)).

12. TE did not pay benefits as agreed in the stipulation, and on May 4, 2007, the employee filed a petition for order of default. On May 24, 2007 he filed a claim of lien against much of TE's equipment. TE did not pay the benefits until October 2, 2007. (Notice of Withdrawal of Petition for Order of Default, Case No. 200610069, October 4, 2007; Certificate of Satisfaction of Lien, October 8, 2007).
13. On July 31, 2006, TE and TT entered an employee leasing agreement with NMS Employee Leasing (NMS). (Letter of Agreement, July 28, 2006). Mr. Christianson explained that this was done because TE and TT were unable to obtain workers' compensation insurance because of the dispute with ANIC. (Christianson).
14. NMS was insured for workers' compensation liability by ACE American Insurance Company under policy number C43964549, effective from April 1, 2006 to April 1, 2007. (Certificate of Liability Insurance).
15. Because it was using NMS employees rather than its own, TE and TT's need for insurance ended on July 31, 2006, for a lapse of 148 calendar days. Between March 5, 2006 and July 31, 2006, TE accumulated 1,899 uninsured employee workdays, and TT accumulated 324 uninsured employee workdays. (Observation; TE and TT timesheets).
16. Mr. Christianson told Chad Oyster employee leasing "was a heck of an opportunity" and he "should see the money these guys (NMS) are making." He convinced Mr. Oyster to start an employee leasing business. (Christianson). On August 30, 2006, a business license was issued to Chad C. Oyster as CCO Enterprises, a sole proprietorship (Oyster/CCO). (Alaska Corporations, Business, and Professional Licensing, Expired License, 737629).
17. SIU asserts the agreement between NMS, TE, and TT ended on September 10, 2006. (Investigation Summary/Brief, March 2, 2010) Mr. Christianson testified he terminated the agreement with NMS because they were charging him too much to use his own employees. (Christianson). NMS stated the contract was terminated in September 2006 because Mr. Christianson did not follow NMS's hiring practices and for nonpayment. (Email, Angela Moody to Christine Christensen, July 1, 2008). At the time of the March 23, 2010 board hearing, Mr. Christianson was in litigation over his unpaid balance to NMS. (Christianson).

18. Policy RAWCAK1543982006, issued to Oyster/CCO on September 25, 2006, was issued based on estimated annual wages of $10,000.00 and had an estimated annual premium of $1,649.00. The policy was issued for the period from September 25, 2006 to September 25, 2007. Under the section titled "Who is Insured" the policy states, "You are insured if you are an employer named in Item 1 of the Information Page." The section titled "Transfer of Your Rights and Duties" states, "Your rights or duties under this policy may not be transferred without our written consent." Item 1 of the information page identifies the named insured as "Chad Curtis Oster (sic Oyster) dba C.C.O. Enterprises." (NCCI Proof of Coverage Inquiry, Policy RAWCAK1543982006). An annual premium of $1,649.00 equates to a daily cost to insure of $4.52. (Observation).
19. TE and TT began leasing employees from CCO Enterprises, LLC (CCO LLC) on September 25, 2006 (Christianson, Letter, Todd Christianson to Christine Christensen, December 14, 2009).
20. It is unclear exactly what date the agreement between NMS, TE and TT actually ended, but SIU does not assert TE or TT had any uninsured employee workdays between September 10, and September 25, 2006. (Uninsured Employee Workday calculations, April 24, 2014).
21. On September 29, 2006, the state issued a certificate of organization for CCO LLC. (Certificate of Organization, September 29, 2006). Mr. Christianson testified Mr. Oyster formed CCO LLC at his direction specifically to accommodate TE's workers' compensation needs. (Christianson). CCO LLC's only clients were TT and TE. (Christianson).
22. At the April 1, 2009 hearing when explaining TT and TE's coverage though NMS and CCO, Mr. Christianson stated, "basically, we ended up getting insurance from NMS to CCO, *which was Chad Oyster*, to my business." (emphasis added.). At the April 27, 2010 hearing Mr. Christianson testified "CCO is strictly Chad Oyster as far as this thing is concerned." (Christianson).
23. Also on September 29, 2006, CCO LLC opened an unemployment insurance account with the Alaska Department of Labor. Mr. Oyster was the only listed member of the LLC. (Smith; Letter, Stan Smith to Christine Christensen, June 26, 2008).
24. On November 29, 2006, the Division filed two petitions against TE and Todd Christianson/TT for failure to insure in relation to an uninsured injury referenced below.

These petitions were never brought before the Board, but have not been withdrawn. (See AWCB files 700001786 and 700001785).

25. On March 30, 2007, Mr. Oyster and Mr. Christianson entered a Sale/Purchase Agreement for CCO LLC. The agreement states Mr. Christianson and Mr. Oyster each owned 50 percent of CCO LLC, and Mr. Oyster was transferring his remaining interest to Mr. Christianson. The agreement states it "was made this 30 day of December 2005," with the number 30 being handwritten. The agreement was not signed and dated until March 30, 2007. (CCO Enterprises LLC Interest Sale/Purchase Agreement, March 30, 2007). Minutes of a special meeting of CCO LLC, stating the meeting was held on December 30, 2005, approved the Sale/Purchase agreement signed by Mr. Oyster and Mr. Christianson on March 30, 2007. The minutes refer to "both members" being present. (Minutes, March 30, 2007).
26. Mr. Christianson testified the date of December 30, 2005 was a typographical error, and the agreement also errs in stating he was a fifty percent owner; he contends he had no interest in the LLC prior to the March 30, 2007 agreement. (Christianson).
27. On April 24, 2007, the court granted summary judgment to ANIC in the dispute over policy number 02FWW92876. TT was given credit for three payments of $2,500.00 and ordered to pay an additional $39,853.00, for a total of $47,353.00. (Order Granting and Approving Plaintiff's Motion for Summary Judgment, Case No. 3AN-04-10868CI, April 24, 2007). The summary judgment order was vacated after stipulations, and on July 24, 2007, TT was ordered to pay $15,000. On August 1, 2007, Great Alaska Lawn and Landscaping, Inc. was ordered to pay $35,509.00 in addition to the three $2,500.00 payments. (Court View Docket Search, Case No. 3AN-04-10868CI).
28. The last day employees worked for CCO LLC was September 22, 2007. (Letter, Todd Christianson to Christine Christensen, December 14, 2009). Between September 25, 2006 and September 22, 2007, CCO LLC incurred 3,854 employee workdays. (CCO Payroll Information).
29. Oyster/CCO did not comply with the year-end policy audit for policy RAWCAK1543982006. (Letter, Glenda Averitt to Oyster/CCO, October 18, 2007; Email, Virginia Decker to Christine Christensen, January 14, 2013). Because Oyster/CCO did not comply with the audit, the premium was not adjusted to account for any payroll in excess of $10,000.00. The final audit billing was sent to Oyster/CCO at the TE and TT's mailing

address. (Workers' Compensation Final Audit Billing, Policy No. RAWCAK1543982006; Observation).

30. TE and TT obtained workers' compensation on October 18, 2007 from Alaska National Insurance Company, policy number 07JWW96259. The estimated premium for coverage from October 18, 2007 to October 18, 2008 was $69,985.00 based on an estimated payroll of $480,900.00. (Policy Information Page, Policy 07JWW96259). An annual premium of $69,985.00 equates to a daily cost of $191.22 per day. (Observation).
31. TE was uninsured from September 26, 2007, through October 17, 2007, a period of 22 calendar days. (Observation). During that time, it accrued 157 uninsured employee workdays. TT had no employees during that time, and, consequently had no uninsured employee workdays. (Uninsured Employee Workday calculations, April 24, 2014).
32. The Alaska National Policy, 07JWW96259, was cancelled on January 3, 2008 for nonpayment of the premium. (NCCI Cancellation/Reinstatement/Non-Renewal print out, Policy Number 07JWW06259).
33. TE and TT became uninsured again on January 3, 2008. (Observation).
34. On January 16, 2008, Umialik Insurance Company issued policy number AR20000022552008A covering TE and TT. (NCCI Proof of Coverage Inquiry, Policy Number AR20000022552008A). The adjusted annual premium was $50,927.00. (Christensen). That equates to a daily cost to insure of $139.53. (Observation).
35. TT and TE were uninsured from January 3, 2008 to January 16, 2008, 13 calendar days. (Observation). During that period TE accrued 164 uninsured employee workdays. TT had no employees during that time, and, consequently, had no uninsured employee workdays. (Uninsured Employee Workday calculations, April 24, 2014).
36. SIU does not allege TE, TT, CCO LLC or Mr. Christianson were uninsured at any time they had employees after January 15, 2008. (Uninsured Employee Workday calculations, April 24, 2014).
37. TE and TT have a significant history of workers' compensation injuries. There are ten reported injuries for TE (198509016, 198511752, 200308893, 200408935, 200417935, 200523887, 200524432, 200610069 (uninsured), 200617644, and 200814092). Six of those injuries resulted in time-loss. (AWCB ICERS database). Mr. Christianson testified TE had only three time-loss injuries. (Christianson). TT has six reported injuries (199423772

(uninsured), 199409582, 199815869, 199816889, 199823377, and 200122600). Four of those injuries resulted in lost time. (AWCB ICERS database). The injuries include a leg amputation, upper and lower extremity and back injuries. (*Titan II*).

38. Mr. Christianson testified the only "serious" injury was the leg amputation, and believed the entities "had an exemplary record with the exception of one accident". (*Titan II;* Christianson).
39. TE employees operate equipment, use saws, and drive vehicles. (Christianson).
40. Employment Security Division (ESD) records show TE had between 10 and 47 employees in 2006 and 2007. (*Titan II*).
41. Todd Christianson was the person actively in charge of TE, TT, and CCO during the periods they were uninsured. (*Titan II*).
42. TT is a seasonal business that exists solely to provide topsoil to TE. (Christianson).
43. TE, TT and other entities owned and controlled by Mr. Christianson were frequently covered by a single workers' compensation insurance policy. (*Titan II*).
44. When ANIC filed its lawsuit against TE, TT, Gage Development, Inc. and Great Alaska Lawn and Landscaping, Inc. for the unpaid premium, Mr. Christianson hired one attorney to represent the interests of all the entities. (*Titan II*).
45. A bill of sale dated June 15, 2005, between TE and TT, along with a list of equipment transferred, was attached to a transmittal letter from Mr. Christianson's attorney, John Tindall, and addressed to Dave Stringer, First National Bank Alaska. The bill of sale conveyed TE's equipment to TT to serve as collateral for a loan to TT. Mr. Tindall further noted the equipment was being transferred so TE's assets were free and clear when it attempted to obtain additional funds for working capital. The January 28, 2005 equipment list is titled "2005 Titan Enterprises, LLC & Titan Topsoil, Inc. Equipment List," printed on TE's letterhead, and signed twice by Todd Christianson. The second equipment list titled "Titan Topsoil, Inc. Equipment List (as of June 15, 2005)," noted as Attachment A, and lists the same equipment as the "2005 Titan Enterprises, LLC & Titan Topsoil, Inc. Equipment List" and gives the equipment a total value of $706,000. The bill of sale transfers equipment valued at $135,000 from TE to TT for "ten dollars and other valuable consideration," and is signed twice by Mr. Christianson. The Bill of Sale also has attached a certification that the equipment list contained in Attachment A (titled "Titan Topsoil, Inc. Equipment List (as of

June 15, 2005)") is a true and correct list of TT's equipment and TT has the right to pledge the items on the list as collateral for a consolidation loan from First National Bank Alaska. (*Titan II*).

46. Mr. Christianson did not report any income or loss from Oyster/CCO or CCO, LLC on his 2006 income tax return. In his 2007 tax return, he reported a loss of just under $152,000 from CCO, LLC; the return shows a deduction of $60,000 for insurance. Mr. Christianson indicated on the form that he had started or acquired the business in 2007. (2006 and 2007 Forms 1040, with schedules and attachments).
47. Mr. Christianson commingled the assets and interests of his different business entities. (Experience, Observation, and Judgment).
48. Mr. Christianson used TE, TT, and CCO as "alter egos," and therefore, the corporate veil was pierced so Mr. Christianson, TE, TT, and CCO LLC can be penalized for violations of AS 23.30.075.[1] (*Titan II*).
49. TE, TT, CCO LLC, and Mr. Christianson (collectively Employer) had previous violations of AS 23.30.075, from November 6, 1992 to February 6, 1993, January 10, 1994 to April 11, 1995, April 1, 2000 to May 4, 2000, October 2, 2000 to June 19, 2001, September 18, 2002 to May 22, 2003. These violations occurred prior to November 7, 2005, the effective date of AS 23.30.080(f), but are considered an aggravating factor. (*Titan II*).
50. Employer's business is landscaping, which carries a moderate risk of sprains, strains and lacerations, but has produced serious injuries to Employer's employees in the past. (Christianson, Experience, observations, and conclusions). (*Titan II*).
51. Employer has appeared before the board previously for being uninsured and for an uninsured injury. (*Titan II*).
52. *Titan II* issued on June 30, 2011 and made the following determinations:
    a. It held TE, TT, and CCO were alter egos of Mr. Christianson, and did not warrant treatment as separate entities. Based in part on an email from the underwriter, stating the insurer had not been notified of the transfer, and if "Mr. Oster" sold the business, the new owner would have to file an application for a new policy, it held that CCO's policy was

[1] We note that the Superior Court found TE, TT, and other entities to be Mr. Christianson's alter egos in *Christianson et al. v. First National Bank Alaska*, 3AN-06-13690CI (April 9, 2010), but we do not rely on that decision in finding Mr. Christianson to be the alter egos of TT, TE, and CCO LLC in this case.

"voided" on the March 30, 2007 transfer to a new owner, and Employer was consequently uninsured from then until to September 25, 2007, resulting in a total of 6,399 uninsured employee workdays. (*Titan II*).

b. The total of 6,399 uninsured workdays in Titan II is incorrect. The evidence showed TE incurred 2,220 uninsured employee workdays during the lapses from March 5, 2006 to July 31, 2006, September 26, 2007 to October 17, 2007, and January 3, 2008 to January 16, 2008. TT incurred 324 uninsured employee workdays during the lapse from March 5, 2006 to July 31, 2006. And CCO had incurred 3,854 uninsured employee workdays from March 30, 2007 to September 25, 2007. The total of 2,220, 324, and 3,854 is 6,398, not 6,399. (Observation).

c. Titan II observed Employer may have engaged in "deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums" under AS 23.30.250, and referred the matter for criminal prosecution pursuant to AS 23.30.075(b) and AS 23.30.250.

d. Titan II noted that if 8 AAC 45.176, which became effective on February 28, 2010, was applied to the case, Employer would have nine aggravating factors: 1) failure to obtain workers' compensation insurance within 10 days of notification by the Division, 2) failure to comply with a discovery demand within 30 days, 3) failure to maintain coverage after previous notification by the Division, 4) a lapse in insurance greater than 180 days, 5) previous violations of AS 23.30.075, 6) a history of injuries while insured, 7) a history of injuries while uninsured, 8) cancellation of a policy for failure to comply with the carrier's requests and procedures, and 9) lapses in business practices used by reasonably diligent business persons. (Titan II).

e. Titan II noted that with nine aggravating factors 8 AAC 45.176 would result in penalty range of $500.00 to $999.00 per uninsured employee workday. A penalty of $999.00 per uninsured workday was assessed. Using 6,399 uninsured employee workdays, that resulted in a total penalty of $6,392,601.00. (Titan II).

53. Employer appealed to the Commission, and on January 8, 2013, the Commission issued its decision (Decision No. 175) and made the following determinations:

    a. The Commission held that the board's finding that TE, TT, and CCO were "mere instrumentalities" of Christianson was supported by substantial evidence and the decision to pierce the corporate veil was warranted.

    b. The Commission held that the email regarding the cancellation of the Oyster/CCO policy was hearsay and inadmissible under ER 801(c) and ER 802,2 and, as the email was the only evidence supporting the finding the policy was voided, there was no substantial evidence to support the board's finding the policy was voided. As a result, the Commission ruled the days the policy was in effect should not have been included in calculating TE, TT, and CCO LLC's uninsured days. Rather than remanding, the Commission determined that under AS 21.36.220, the insurer could not unilaterally cancel the policy without first notifying the insured. Because the insurer had not sent notice, the board could not consider the policy void as a matter of law.

    c. The Commission held that 8 AAC 45.176 could not be applied in this case, because the times Employer was uninsured were prior to the effective date of the regulation. However, the Commission held it was appropriate to consider the regulation's aggravating factors in determining the penalty. Because it appeared to the Commission that the board might have applied the doctrine of brother-sister corporate liability, it remanded for findings as to which of the aggravating factors in the regulation applied to each entity.

    d. The Commission noted the board had only cited one case in which a $1,000.00 per uninsured employee workday had been assessed, and questioned whether the violation in Titan II was equally egregious. The Commission stated the $6,392,601.00 penalty was "a shocking amount" and appeared to be purely punitive.

[2] The email appears to supplement or explain the transfer of rights provision in the Oyster/CCO policy. If, on appeal, the Commission should elaborate on its holding regarding the inadmissibility of hearsay evidence in light of 8 AAC 45.120(e) and AS 44.62.460(d), the board would welcome such guidance for future hearings.

54. On appeal, the division conceded that two of the aggravating factors found in *Titan II* did not apply: The failure to obtain workers' compensation insurance within 10 days of notification by the division, and the failure to comply with a discovery demand within 30 days. (Decision No. 175).
55. The parties agree that TE had a total of 2,220 uninsured employee workdays and TT had a total of 324. (SIU Hearing Brief at 5; Employer Hearing Brief at 14).
56. CCO LLC and TT have ceased doing business. (Employer Hearing Brief at 2). All TE assets have been sold. (*Id.* at 16).
57. Mr. Christianson asserts he is unable to pay a significant penalty because he has judgments against him in excess of $1.4 million, including a debt to the IRS of over $400,000.00 and a judgment to a bank of almost $800,000.00. (Employer's Hearing Brief, at 1, 17).
58. Mr. Christianson reported earnings from TE of $161,149.00 in 2012 and a loss of $49,569.00 in 2013. TE had no employees in 2012. (2012 Form 1040, Schedule C; 2013 Form 1040, Schedule C).
59. Mr. Christianson is not credible. (Experience, Observation, Judgment).
60. Of the seven remaining 8 AAC 45.176 aggravating factors identified in *Titan II*, six apply to TE standing alone: 1) a lapse in insurance of more than 180 days, 2) failure to maintain insurance after notification by the division, 3) previous violations of AS 23.30.075, 4) a history of injuries while insured, 5) a history of injuries while uninsured, and 6) cancellation of a policy for failure to comply with the carrier's requests or procedures. (Record; Observation).
61. In addition to the aggravating factors identified in *Titan II*, the evidence in the record at the time *Titan II* was decided supports an additional aggravating factor against TE – failure to provide compensation or benefits to an employee injured while the employer was uninsured. TE did not voluntarily pay benefits to the employee injured on June 8, 2006. It did not pay in accordance with the parties January 30, 2007 stipulation. It did not pay until October 2, 2007, almost 16 months after the injury, and only after the employee had filed a lien against much of TE's equipment. (Observation; Judgment).
62. Of the seven remaining 8 AAC 45.176 aggravating factors identified in *Titan II*, five apply to TT standing alone: 1) failure to maintain insurance after notification by the Division, 2) previous violations of AS 23.30.075, 3) a history of injuries while insured, 4) a history of

injuries while uninsured, and 5) cancellation of a policy for failure to comply with the carrier's requests or procedures. (Record; Observation).

63. Because the Commission found CCO LLC was insured between March 30, 2007 and September 25, 2007, it had no lapse in insurance. Consequently none of the aggravating factors in 8 AAC 45.176 apply to CCO LLC standing alone. (Record).
64. From the enactment of AS 23.30.075(f) to the September 15, 2014 written record hearing in this case, the board has assessed penalties against 316 uninsured employers. (Record; Observation).
65. Severe, life-altering injuries can occur to employees working in even low-risk occupations. A slip and fall in an icy parking lot, or a motor vehicle accident can result in extended, and even permanent, disability and result in hundreds of thousands of dollars in medical costs. (Experience, Observation).
66. Despite the fact an employee injured while his or her employer is uninsured may eventually recover benefits from the Workers' Compensation Benefits Guaranty Fund or in civil court, the process is almost always slower and more complicated than that of an insured employee, and may well involve the bankruptcy of the employer. (Experience, Observation).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> (3) this chapter may not be construed by the courts in favor of a party;
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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, 533-534 (Alaska 1987).

> **AS 23.30.060. Election of direct payment presumed.**
> (a) An employer is conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employment according to the provisions of this chapter, until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, is given to the employee.
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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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> (b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the board, upon conviction the court shall impose a fine of $10,000 and may impose a sentence of imprisonment for not more than one year. . . . If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits in which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.
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> **AS 23.30.080. Employer's failure to insure.**
> (a) If an employer fails to comply with AS 23.30.075. . . .
> . . .
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> (d) If an employer fails to insure or provide security as required by AS 23.30.075, the board may issue a stop order prohibiting the use of employee labor by the employer until the employer insures or provides the security as required by AS 23.30.075. The failure of an employer to file evidence of compliance as required by AS 23.30.085 creates a rebuttable presumption that the employer has failed to insure or provide security as required by AS 23.30.075. If an employer fails to comply with a stop order issued under this section, the board shall assess a civil penalty of $1,000 a day. The employer may not obtain a public contract with

> the state or a political subdivision of the state for three years following the violation of the stop order.
> . . . .
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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 $1,000.00 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.
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> (g) If an employer fails to pay a civil penalty order issued under (d), (e), or (f) of this section within seven days after the date of service of the order upon the employer, the director may declare the employer in default. The director shall file a certified copy of the penalty order and declaration of default with the clerk of the superior court. The court shall, upon the filing of the copy of the order and declaration, enter judgment for the amount declared in default if it is in accordance with law. Anytime after a declaration of default, the attorney general shall, when requested to do so by the director, take appropriate action to ensure collection of the defaulted payment. Review of the judgment may be had as provided under the Alaska Rules of Civil Procedure. Final proceedings to execute the judgment may be had by writ of execution.

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. When an employer is subject to the requirements of AS 23.30.075 and fails to comply, a civil penalty may be assessed. Since November 7, 2005, the effective date of the 2005 amendments to the Alaska Workers' Compensation Act, when an employer subject to the provisions of AS 23.30.075 fails to insure, the law grants discretion to assess a civil penalty of up to $1,000.00 for each employee, for each day an employee is employed while the employer fails to insure.

Alaska's penalty provision 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 (March 8, 2006). Alaska's statute's severity is a policy statement -- *i.e*., failure to insure for workers' compensation liability will not be tolerated in Alaska.

In assessing an appropriate civil penalty, consideration is given to a number of factors to determine whether an uninsured employer's conduct, or the impact of such conduct, aggravates or mitigates its offense. A penalty is assessed based on the unique circumstances arising in each case. The primary goal of a penalty under AS 23.30.080(f) is not to be unreasonably punitive, but rather to bring the employer into compliance, deter future lapses, ensure the continued employment of employees in a safe work environment, and to satisfy the community's interest in fairly penalizing the offender. *Alaska R & C Communications, LLC v. State of Alaska, Division of Workers' Compensation,* Alaska Workers' Compensation Appeals Commission, AWCAC Appeal No. 07-043 (September 16, 2008). A penalty is not intended to destroy a business or cause the loss of employment. *Id.* at 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. The employer's ability to pay the penalty must also be assessed. *Id.*

Based on *In re Edwell John, Jr.* AWCB Decision No. 06-0059 (March 8, 2006), *In re Hummingbird Services,* AWCB Decision No. 07-0013 (January 26, 2007), *In re Wrangell Seafoods, Inc.,* AWCB Decision No. 06-0055 (March 6, 2006), *In re Absolute Fresh Seafoods, Inc.,* AWCB Decision No. 07-0014 (January 30, 2007), *In re Alaska Native Brotherhood #2,* AWCB Decision No. 06-0113 (May 8, 2006), *In re Alaska Sportsfishing Adventures,* AWCB Decision No. 07-0040 (March 1, 2007), *In re Rendezvous, Inc.,* AWCB Decision No. 07-0072 (April 4, 2007) and *In re Corporate Chiropractic, Inc.,* AWCB Decision No. 07-0098 (April 24, 2007) consideration is given to the penalty's appropriateness in light of the employer's business' viability, the violation's gravity, any extent to which the employer has complied with provisions requiring acquisition of worker's compensation insurance or has otherwise attempted to remedy consequences of its violation. Factors weighed in setting civil penalties have included the number of days of uninsured employee labor, business size, record of injuries with the employer, both in general and during the uninsured period, extent of the employer's compliance with the Act, diligence exercised in remedying the failure to insure, clarity of notice of cancellation of insurance, the employer's compliance with the investigation and remedial requirements, including diligence in claiming certified mail, risk to employees at the employer's workplace, the penalty's impact on the employer's ability to continue to conduct business, the penalty's impact on the employees or the employer's community, whether the employer acted in blatant disregard

for statutory requirements, whether the employer violated a stop work order, and the credibility of the employer's promises to correct its behavior. Considering these factors, a wide range of penalties, from $0 up to $1,000.00 per uninsured employee work day, has been assessed based on the violation's specific circumstances. *See, e.g., In Re Wrangell Seafoods, Inc.*, AWCB Decision No. 06-0055 (March 6, 2006) ($500.00 per employee per day), *In Re Wrangell Seafoods, Inc.*, AWCB Decision No. 07- 0093 (April 20, 2007) ($1,000.00 per employee per day); *In Re Edwell John, Jr., d/b/a Admiralty Computers*, AWCB Decision No. 06-0059 (March 8, 2006) ($25.00 per employee per day), *In re Absolute Fresh Seafoods, Inc.*, AWCB Decision No. 07-0014 (January 30, 2007) ($20.00 per employee per day), *In re Alaska Native Brotherhood #2*, AWCB Decision No. 06-0113 (May 8, 2006) ($15.00 per employee per day); *In re Rendezvous, Inc.*, AWCB Decision No. 07-0072 (April 4, 2007) ($75.00 per employee per day); *In re Corporate Chiropractic Inc.*, AWCB Decision No. 07-0098 (April 24, 2007) ($35.00 per employee per day), *In re Alaska Sportfishing Adventures, LLC,* AWCB Decision No. 07-0040 (March 1, 2007) ($20.00 per employee per day), *In re St. Mary's Assisted Living Home,* AWCB Decision No. 07-0059 (March 21, 2007) ($30.00 per employee per day), *In re EM Enterprises, Inc.*, AWCB Decision No. 07-0104 (April 25, 2007) ($35.00 per employee per day), *In re Thompson Log & Gift,* AWCB Decision No. 07-0062 (March 23, 2007) ($5.00 per employee per day), *In re Hummingbird Services*, AWCB Decision No. 07-0013 (January 26, 2007) ($15.00 per employee per day), *In re Academy of Hair Design*, AWCB Decision No. 07-0122 (May 10, 2007) ($70.00 per employee per day); *In re Halo Salon,* AWCB Decision No. 07-0142 (May 30, 2007) ($30.00 per employee per day); *In re Pizza Express*, AWCB Decision No. 07-0144 (May 30, 2007) ($30.00 per employee per day); *In re White Spot Café,* AWCB Decision No. 07-0174 (June 27, 2007) ($30.00 per employee per day); *In re Outboard Shop,* AWCB Decision No. 07-0197 (July 12, 2007) ($30.00 per employee per day). These factors have been codified into regulation 8 AAC 45.176 effective February 28, 2010.

> **8 AAC 45.176. Failure to provide security: assessment of civil penalties.**
> (a) If the board finds an employer to have failed to provide security as required by AS 23.30.075, the employer is subject to a civil penalty under AS 23.30.080(f), determined as follows:
>
> > (1) if an employer has an inadvertent lapse in coverage, the civil penalty assessed under AS 23.30.080(f) for the employer's violation of AS 23.30.075

may be no more than the prorated premium the employer would have paid had the employer been in compliance with AS 23.30.075; the division shall consider a lapse in coverage of not more than 30 days to be inadvertent if the employer has changed carriers, ownership of the employer has changed, the form of the business entity of the employer has changed, the individual responsible for obtaining workers' compensation coverage for the employer has changed, or the board determines an unusual extenuating circumstance to qualify as an inadvertent lapse;

(2) if an employer has not previously violated AS 23.30.075, and is found to have no aggravating factors, and agrees to a stipulation of facts and executes a confession of judgment without action, without a board hearing, the employer will be assessed a civil penalty of two times the premium the employer would have paid had the employer complied with AS 23.30.075;

(3) if an employer has not previously violated AS 23.30.075, and is found to have no more than three aggravating factors, the employer will be assessed a civil penalty of no less than $10 and no more than $50 per uninsured employee workday; however, the civil penalty may not be less than two times the premium the employer would have paid had the employer complied with AS 23.30.075; without a board hearing, if an employer agrees to a stipulation of facts and executes a confession of judgment without action, the employer will be given a 25 percent discount of the assessed civil penalty; however, the discounted amount may not be less than any civil penalty that would be assessed under (2) of this subsection;

(4) if an employer is found to have no more than six aggravating factors, the employer will be assessed a civil penalty of no less than $51 and no more than $499 per uninsured employee workday; however, the civil penalty may not be less than two times the premium the employer would have paid had the employer complied with AS 23.30.075; without a board hearing, if an employer agrees to a stipulation of facts and executes a confession of judgment without action, the employer will be given a 25 percent discount of the assessed civil penalty; however, the discounted amount may not be less than any civil penalty that would be assessed under (3) of this subsection;

(5) if an employer is found to have no fewer than seven and no more than 10 aggravating factors, the employer will be assessed a civil penalty of no less than $500 and no more than $999 per uninsured employee workday; however, the civil penalty may not be less than four times the premium the employer would have paid had the employer complied with AS 23.30.075; without a board hearing, if an employer agrees to a stipulation of facts and executes a confession of judgment without action, the employer will be given a 25 percent discount of the assessed civil penalty; however, the discounted amount may not be less than any civil penalty that would be assessed under (4) of this subsection;

(6) if an employer is found to have more than 10 aggravating factors, the employer will be assessed a civil penalty of $1,000 per uninsured employee workday.

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

(c) An employer receiving government funding of any form to obtain workers' compensation coverage under AS 23.30.075 that fails to provide that coverage may be assessed the maximum civil penalty under AS 23.30.080(f).

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

(l) 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;
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> (13) cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures;
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> (14) lapses in business practice that would be used by a reasonably diligent business person, including
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> (A) ignoring certified mail;
>
> (B) failure to properly supervise employees; and
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> (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.

8 AAC 45.176 has been held not to apply retrospectively to cases in which the insurance lapse occurred prior to the regulation's effective date, as the regulation in some cases may result in an increase in penalties. *In re Midnight Sun Montessori School, Inc.*, AWCB Decision No. 10-0080 at 10, n. 27 (May 3, 2010); *see also*, *In re RMR Parts*, AWCB Decision No. 10-0152 at 10, n. 33 (September 7, 2010); *In re Keiki Home, LLC*, AWCB Decision No. 10-0171 at 13 (October 14, 2010). Notwithstanding the regulation's inapplicability, the regulation's factors are useful guides in determining the severity of the penalty. *In re Alaska Packaging*, AWCB Decision No. 11-0001 (January 4, 2011).

Of the 316 decisions imposing a penalty since the enactment of AS 23.30.080(f), the board has assessed the maximum or near maximum penalty on only eight occasions. In *In re Wrangell Seafoods, Inc.*, AWCB Decision No. 07-0093 (April 20, 2007), the employer had previously been before the board for a failure to insure for 203 uninsured employee workdays. Although the employer had violated a stop order, the board reduced the penalty to $500.00 per uninsured employee workday because the employer was the largest employer in the City of Wrangell, and a higher penalty would jeopardize the employer's existence placing the city's workforce at risk. Subsequently, employer allowed its coverage to lapse for two days, during which it accrued 15 uninsured employee workdays. Upon learning it was uninsured, the employer closed down and sent

its employee's home. The board assessed a penalty of $1,000.00 per uninsured employee workday, or $15,000.00 based on the 15 uninsured employee workdays.

In *In re Casa Grande, Inc.*, AWCB Decision No. 07-0288 (September 21, 2007), the employer failed to respond to the division's discovery demand. In response to a subpoena, the employer filed only eight time cards for the period from December 2005 to February 2007; some of which did not identify the dates worked. The employer was found to be uninsured for 1,887 calendar days, most of which predated the penalty provision of AS 23.30.080(f). However, the employer used 3,917 uninsured employee workdays after November 7, 2005. There was one reported injury while the employer was uninsured. The employer did not obtain insurance until 104 days after notification by the division, and had disregarded certified mail. The employer was a corporation that had been dissolved, and the board found a sizable penalty would not significantly impact the community or cause a loss of jobs. A penalty of $1,000.00 per uninsured employee workday was imposed resulting in a penalty of $3,917.000.00.

In *In re We Bake, Inc.*, AWCB Decision No. 09-0031 (February 11, 2009), after a lapse of about six weeks, the employer obtained coverage prior to notice from the division, but later allowed the policy to lapse. A stop work order was issued. Based on a daily cost to insure of $33.39 the employees faced only moderate risk of injury. One injury was reported while the employer was uninsured. The employer was uninsured for 308 calendar days, and incurred at least 3,696 uninsured employee workdays. The employer was found to have shown a blatant disregard for its obligation to insure for workers' compensation liability. At hearing the employer agreed to provide additional documentation, but did not do so. The board found the inability to continue in business would not adversely affect the community or the employees. A penalty of $1,000.00 per uninsured employee workday was imposed for a total penalty of $3,696,000.00

In *In re Mark Reed*, AWCB Decision No. 09-0073 (April 14, 2009), the employer was a sole proprietor with one to three employees. The employer had allowed its insurance to lapse twice after notification by the division, and was uncooperative with discovery. Three injuries were reported, one while the employer was uninsured. The daily cost to insure of $6.81 reflects low risk. The employer had previously been before the board, and the board had entered a stop work order. The

employer was found to have been uninsured for 253 calendar days but only accrued 55 uninsured employee workdays. The board found employer had demonstrated a blatant disregard for its obligation to insure, found that its inability to continue in business would not adversely affect the community, and alternative employment was available to the employees. A penalty of $1,000.00 per uninsured employee workday was imposed for a total penalty of $55,000.00. A portion of the penalty was subsequently suspended by a stipulation of the parties.

In *In re Patricia and Mark Lawson*, AWCB Decision No. 09-0015 (January 22, 2009), the employer had been before the board three times previously, all of which occurred prior to the enactment of AS 23.30.080(f). No stop orders had been entered. The employer did not insure within 10 days of notice from the division, and accrued 91 uninsured employee workdays. The risk to the employees was moderate. The board found the employer had shown a blatant disregard for its obligation to insure, had repeated violations, and had a willful lapse. The board determined the inability of the employer to continue in business would not adversely affect the community or employees. The board imposed a penalty of $1,000.00 per uninsured employee workday for a total penalty of $91,000.00.

In re Godwin Glacier Tours, LLC, AWCB Decision No. 11-0108 (July 22, 2011) dealt with two LLCs with common owners, but did not involve piercing the LLCs' veil. The lapse occurred prior to the effective date of 8 AAC 45.176. A stop work order was issued against one LLC, so the owners formed the second LLC, but again operated without insurance. A stop work order was issued against the second entity. The employer had four to seven employees seasonally, and argued they were independent contractors. Five injuries were reported, one while uninsured. The employers were found to have a total of 1,215 uninsured employee workdays. The board imposed a penalty of $1,000.00 per uninsured employee workday against both LLCs, for a total penalty of $1,205,000.00.

In *In re Mary S. Percak Dennett*, AWCB Decision No. 11-0078 (May 27, 2011), the lapse occurred prior to the effective date of 8 AAC 45.176. The employer operated a hot tub/spa supply business as a sole proprietor. The employer had violated a stop order included in an earlier decision, and had failed to pay the penalty in accordance with the payment plan. The employer had between 18 and

24 employees, and accrued 2,705 uninsured employee workdays. The employer's daily cost to insure was $5.41. There was one unreported injury, but the employer had paid benefits to the injured employee. The employer's annual profits were between $14,000.00 and $18.000.00. The board found ten aggravating factors in 8 AAC 45.176 were present, and imposed a penalty of $1,000.00 per uninsured employee workday for a total penalty of $2,705,000.00.

A portion of the lapse in *In re N.P.W., Inc.*, AWCB Decision No. 13-0150 (November 15, 2013) occurred before the effective date of 8 AAC 45.176, and a portion after. There was a previous violation and a penalty had been imposed, but the employer failed to pay the penalty. Employer's president was found to be an experienced businessman. During the entire lapse, the employer had 12 employees and incurred 1,364 uninsured employee workdays. At the time of the hearing, the employer was no longer in business; consequently, a high penalty did not adversely affect the community or risk a loss of jobs. A penalty of $900.00 per uninsured employee workday was imposed for the pre-regulation lapse, and based on seven of 8 AAC 45.176's aggravating factors, a penalty of $899.00 was imposed for the post-regulation lapse.

AS 23.30.082. Workers' compensation benefits guaranty fund.

(a) The workers' compensation benefits guaranty fund is established in the general fund to carry out the purposes of this section. The fund is composed of civil penalty payments made by employers under AS 23.30.080, income earned on investment of the money in the fund, money deposited in the fund by the department, and appropriations to the fund, if any. However, money appropriated to the fund does not lapse. Amounts in the fund may be appropriated for claims against the fund, for expenses directly related to fund operations and claims, and for legal expenses.

AS 23.30.085. Duty of employer to file evidence of compliance.

(a) An employer subject to this chapter, unless exempted, shall initially file evidence of compliance with the insurance provisions of this chapter with the division, in the form 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. These requirements do not apply to an employer who has certification from the board of the employer's financial ability to pay compensation directly without insurance.

(b) If an employer fails, refuses, or neglects to comply with the provision of this section, the employer shall be subject to the penalties provided in

AS 23.30.070 for failure to report accidents; but nothing in this section may be construed to affect the rights conferred upon an injured employee or the employee's beneficiaries under this chapter.

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.

23.30.165. Lien.
(a) Each employee and beneficiary entitled to compensation under the provisions of this chapter has a lien for the full amount of the compensation the person is entitled to, including costs and disbursements of suit and attorney fees allowed, upon all of the property in connection with the construction, preservation, maintenance, or operation of which the work of the employee was being performed at the time of the injury or death. For example: in the case of an employee injured or killed while engaged in mining or in work connected with mining, the lien extends to the entire mine and all property used in connection with it; and in the case of an employee injured or killed while engaged in fishing or in the packing, canning, or salting of fish, or other branch of the fish industry, the lien extends to the entire packing, fishing, salting, or canning plant or establishment and all property used in connection with it; and this is the case with other businesses, industries, works, occupations, and employments.

(b) The lien is prior and paramount to any other lien on the property, except a lien for wages or materials as provided by law, and is of equal rank with a lien for wages or materials.

(c) The lien extends to all right, title, interest, and claim of the employer in the property affected by the lien.

(d) A person claiming a lien under this chapter shall, within one year after the date of the injury from which the claim of compensation arises, record in the office of the recorder of the recording district in which the property affected by the lien is located a notice of lien signed and verified by the claimant or someone on behalf of the claimant, and stating, in substance, the name of the person injured or killed out of which injury or death the claim of compensation arises, the name of the employer of the injured or deceased person at the time of the injury or death, a description of the property affected or covered by the lien, and the name of the owner or reputed owner of the property.

(e) The lien for compensation provided for in this section may be enforced by equitable proceedings as in the enforcement of other liens upon real or personal

> property, within 10 months after the cause of action arises. Nothing in this section prevents an attachment of property as security for the payment of compensation
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> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.**
> (a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120-11.46.150.
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> (b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter. If a person fails to comply with an order of the board requiring reimbursement of compensation and payment of costs and attorney fees, the employer may declare the person in default and proceed to collect any sum due as provided under AS 23.30.170(b) and (c).
>
> (c) To the extent allowed by law, in a civil action under (a) of this section, an award of damages by a court or jury may include compensatory damages and an award of three times the amount of damages sustained by the person, subject to AS 09.17. Attorney fees may be awarded to a prevailing party as allowed by law.

The doctrine of "piercing the corporate veil" occasionally arises in failure to insure cases. As a general matter, a sole proprietorship is not an entity separate or apart from the individual. *See, e.g., State v. ABC Towing*, 954 P.2d 575, 578 (Alaska Ct. App. 1998). On the other hand, corporations are legal entities separate from the shareholders, and the shareholders' liability for corporate debts is limited. *Brown v. Knowles*, 307 P.3d 915, 929 (Alaska 2013), *reh'g denied*

(Sept. 13, 2013) (Citations omitted.) Similarly, LLCs are legal entities separate from the members. AS 10.50.265.

The Alaska Supreme Court first addressed the issue of piercing the corporate veil in *Jackson v. General Electric Co.*, 514 P.2d 1170 (Alaska 1973), a parent-subsidiary case, by adopting eleven factors to determine if a subsidiary is the mere instrumentality of the parent corporation. The Court expressly found that all eleven factors need not be present to pierce the veil. (*Id.).* The Court also held a parent corporation may be held liable for its subsidiary's conduct when the parent uses a separate corporate form to defeat public convenience, justify wrong, commit fraud, or defend crime. Further the Court found "a parent corporation which does not permit its subsidiary to exercise an individual status may not expect that the subsidiary's independence will be recognized elsewhere." (*Id* at 1173).

Uchitel Co. v. Telephone Co., 646 P.2d 229 (Alaska 1982) involved a corporation and its sole shareholder rather than parent and subsidiary corporations. The court held the analysis was similar, but narrowed the factors to be considered to six in the shareholder/corporation context. The six factors considered by the Court in *Uchitel* are:

1. Whether the shareholder sought to be charged owns all or most of the stock of the corporation;
2. Whether the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation;
3. Whether the corporation has grossly inadequate capital;
4. Whether the shareholder uses the property of the corporation as his own;
5. Whether the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest;
6. Whether the formal legal requirements of the corporation are observed. (*Id* at 235).

The *Uchitel* court explained the rationale and consequence of piercing the corporate veil.

> (W)hen ... the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person, it being immaterial whether the sole or dominant shareholder, is an individual or another corporation.

Uchitel quoting *Henderson v. Security Mortgage & Fin. Co.*, 273 N.C. 253, 160 S.E.2d 39, 44 (1968).

The Court expanded the piercing doctrine to brother-sister corporations in *Husky Oil NPR Operations v. Sea Airmotive, Inc*, 724 P.2d 531 (Alaska 1986). In "brother/sister" cases, when two or more corporations share a common nucleus of shareholders, and are so closely intertwined that they are alter egos of each other, the distinction between the brother and sister corporations may be disregarded. A finding that brother-sister corporations should be treated as a single entity, does not, without more, pierce through the corporations and disregard them as to a parent corporation or dominant shareholder. In other words, the veil is pierced only between the brother-sister corporations, but the parent corporation or dominate shareholder remain protected.

Although "piercing" arose in the context of corporations, the same factors listed in *Uchitel* apply to piercing an LLC. *See, Christianson et al. v. First National Bank Alaska*, Memorandum Opinion and Judgment No. 1445, (Alaska, December 5, 2012) (affirming a superior court decision piercing both corporate and LLC entities).

> **AS 21.42.110. Representations in applications.**
> All statements and descriptions in an application for an insurance policy or annuity contract, or in negotiations for the policy or contract, by or in behalf of the insured or annuitant, shall be considered to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements may not prevent a recovery under the policy or contract unless either
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> (1) fraudulent;
>
> (2) material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
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> (3) the insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount, or at the same premium or rate, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

> **AS 21.42.150. Policy must contain entire contract.**
> The policy, when issued, shall contain the entire contract between the parties, and neither the insurer nor its agent or representative, nor a person insured by the policy, may make an agreement as to the insurance that is not expressed in the policy. This section does not prohibit the modification of a policy, after issuance, by written rider or endorsement issued by the insurer.

AS 21.42.160. Contents of policies in general.
(a) Each policy must specify
(1) the names of the parties of the contract;

AS 21.42.270. Assignment of policies.
A policy may be assignable or nonassignable, depending upon its terms. Subject to its terms relating to its assignability, a life, group life, or health insurance policy, whether issued before or after July 1, 1966, under the terms of which the beneficiary may be changed upon the sole request of the insured, may be assigned either by pledge or transfer of title by an assignment executed by the insured alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. The assignment entitles the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment until the insurer has received at its home office written notice of termination of the assignment or pledge, or written notice by or on behalf of some other person claiming an interest in the policy that is in conflict with the assignment.

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. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

AS 23.30.128. Commission proceedings.
. . . .

(b) The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

> **44.62.460. Evidence rules.**
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> (d) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Relevant evidence shall be admitted 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 a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action. Hearsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action. The rules of privilege are effective to the same extent that they are recognized in a civil action. Irrelevant and unduly repetitious evidence shall be excluded.

ANALYSIS

1. Should TE, TT, and CCO LLC be treated as separate entities, and if so, what aggravating factors apply to each, and what penalty should be assessed against each?

Titan II found that TE, TT, and CCO LLC were alter egos of Mr. Christianson and should be disregarded as separate entities. The Commission determined there was substantial evidence to support the board's finding, and piercing the veils was warranted. For the reasons set out in *Titan II*, and for the reasons set out above, TE, TT, and CCO LLC will again be disregarded as separate entities. For purposes of imposing a penalty, there is no distinction between Mr. Christianson, TE, TT, and CCO LLC. There are no separate entities to which aggravating factors can be applied or against which a penalty can be assessed.

2. If TE, TT, and CCO LLC are not treated as separate entities, which of them should be combined, what aggravating factors apply to the combination, and what penalty should be assessed against the combined entities?

While entities might be combined if pierced as brother-sister entities, because TE, TT, and CCO LLC have been disregarded as entities separate from Mr. Christianson, there are no entities to which brother-sister piercing may be applied. TE, TT, and CCO LLC are not treated as separate entities. There is only Mr. Christianson operating the three businesses as a sole proprietor; all three entities and Mr. Christianson have been "combined" into one Employer.

As *Titan II* noted, and the Commission affirmed, 8 AAC 45.176 does not apply in this case because all of the lapses occurred before its effective date, February 28, 2010. The penalty will be determined based on those factors used for lapses prior to February 28, 2010. The board has imposed the maximum penalty of $1,000.00 per uninsured employee workday in only seven of the 316, or about 2.2 percent, of the penalty cases since AS 23. 30.080(f) was enacted. Clearly, the maximum penalty is reserved for the most egregious offenders.

Mr. Christianson is an experienced businessman, and his knowledge and understanding of workers' compensation insurance is well above average. He understood the necessity of workers' compensation coverage. On more than one occasion, he had disputes with the insurer about the premium. In the dispute with ANIC, he argued over the classification of various employee and the entities covered by the policy. Mr. Chrisianson engaged in employee leasing to obtain workers' compensation coverage when he was unable to do so, an unusual and relatively sophisticated technique.

Despite his experience and sophistication, Mr. Christianson may be one of the least credible employers to appear before the board. He placed the blame for the TE and TT's inability to obtain insurance on ANIC, and argued that he had to sue ANIC because it refused to correct its mistakes or provide him the information he demanded. The court, however, granted summary judgment in favor of ANIC. That means that when required to do so, Mr. Christianson could not point to evidence that, even when viewed in a light most favorable to him, demonstrated a genuine issue of material fact. The dispute was not ANIC's fault. He then argues he went to great effort to ensure his employees had workers compensation coverage by entering the employee leasing agreement with NMS, but NMS terminated the agreement after little more than a month because it had not been paid. Mr. Christianson then convinced Mr. Oyster that leasing employees to TE and TT would be "a heck of an opportunity" to make money. He maintains the fact he "directed" Mr. Oyster to form CCO LLC further demonstrates his efforts to ensure his employees were covered. However, he either deliberately misled, woefully misinformed, or purposely directed Mr. Oyster to obtain workers' compensation insurance for a tiny fraction of the anticipated payroll and, consequently, at a tiny fraction of the true premium. Rather than going to great efforts to ensure the employees were covered, Mr. Christianson went to great efforts to avoid paying the cost of the insurance.

His explanations that misdating of the LLC purchase agreement is a "typo," and his 50 percent interest in the LLC is a mistake are not credible. Both the agreement and the LLC minutes are short documents. It is just not believable that both Mr. Christianson and Mr. Oyster would have overlooked two errors of such magnitude in such simple documents. It is far more likely that Mr. Christianson was attempting to "back-date" his interest in the LLC to show the LLC was in existence on September 25, 2006, when it began leasing employees to TE and TT and to further demonstrate his efforts to ensure his employees were covered. In explaining the creation of CCO LLC, he was only too eager to explain that Mr. Oyster created CCO LLC "at his direction" for the purpose of providing workers' compensation coverage to TE and TT. His testimony regarding coverage under the policy was direct and certain. However, when questioned about the terms of the policy or the unrealistically low premium, suddenly it became "strictly Chad Oyster."

Employer has had eight lapses in insurance; five occurred prior to the effective date of AS 23.30.080(f), and three occurred after. During the three lapses for which a penalty may be imposed, Employer was uninsured for a total of 183 calendar days (148 days from March 6, 2006 to July 31, 2006; 22 days from September 26, 2007 to October 17, 2007; and 13 days from January 3, 2008 to January 16, 2008). Mr. Christianson contends the 22 and 13 day lapses were inadvertent and occurred when he was attempting to obtain coverage. In both cases, however, the reason he needed to obtain coverage was his own failures. The lapse from September 26, 2007 to October 17, 2007 occurred because he failed to renew the Oyster/CCO policy. The lapse from January 3, 2008 to January 16, 2008 occurred because he failed to pay the premium for the Alaska National policy. No one is to blame for those lapses other than Mr. Christianson himself.

Employer agreed that during the three lapses, it accumulated 2,544 uninsured employee workdays (2,220 for TE and 324 for TT). That is an extremely high number of uninsured workdays. This is higher than the uninsured workdays in *Wrangell Seafoods*, *Reed*, *Lawson,* and *Godwin Glacier Tours*, although it is lower than the uninsured workdays in *Casa Grande*, *We Bake*, and *Dennett*.

Employer has 16 reported injuries, a significant number, and has been before the board before for failure to insure. While Mr. Christianson testified TE had only three time-loss injuries, in fact it

had six. Although TT had only six injuries, four of them resulted in lost time, including the leg amputation. While the overall risk to the employees is not extraordinarily high, the potential for a very serious accident clearly exists.

Two of the reported injuries occurred while Employer was uninsured. In one of those cases, *Aubert*, Employer stipulated it would pay benefits. Despite agreeing to do so, it did not pay for over nine months. It did not pay voluntarily, but delayed until the employee had pursued an order of default and filed a lien on much of Employer's equipment. Employer can hardly claim credit for paying benefits to the employee when it did so only to secure the release of the lien. Employer failed to pay benefits to an employee injured while uninsured.

From March 6, 2006, when Commerce and Industry cancelled Employer's policy for nonpayment, until July 31, 2006, when Employer began leasing employees from NMS, it knowingly and deliberately continued to operate without insurance. During those 148 days, it incurred 2,223 uninsured employee workdays (1,899 for TE and 324 for TT). It inexcusably placed its employees at risk. Similarly Employer knowingly and deliberately kept operating from September 26, 2007, when Oyster/CCO's policy expired, to October 17, 2007, when it obtained insurance through Alaska National, and incurred an additional 157 uninsured employee workdays. Only 77 days later, the Alaska National policy was cancelled for nonpayment, and Employer knowingly and deliberately operated 13 more days without insurance, incurring 164 uninsured employee workdays.

Most concerning in this case is Employer's scheme to obtain insurance under the Oyster/CCO policy. Mr. Christianson testified Mr. Oyster started CCO LLC at Mr. Christianson's direction, and the only purpose of the business was to provide worker's compensation insurance to TE and TT. Employer's last workers' compensation policy before leasing employees from NMS and CCO LLC was with Commerce and Industry for the year from May 22, 2005 to May 22, 2006. It had an estimated annual premium for of $74, 959.00, or $205.37 per calendar day. The policy Employer obtained after leasing employees from CCO LLC was with Alaska National for the period from October 18, 2007 to October 18, 2008. The annual premium was $69,985.00 or $191.22 per day, based on an expected payroll of $480,900.00. In contrast, the estimated annual premium for the Oyster/CCO policy was a mere $1,649.00 based on an estimated payroll of $10,000.00. Clearly, if

the purpose of CCO was to provide workers' compensation insurance for TE and TE employees, the estimated annual premium is low – so low as to suggest it was done deliberately to achieve a minimal premium. Mr. Christianson's disavowal of knowledge of the policy or the premium is not credible. Further, while a low estimated premium might be remedied through a premium audit, Employer failed to respond to the audit request and the premium was never increased. As a result, Employer obtained a year's insurance coverage, during which it incurred 3,854 employee workdays at 2.2 percent of the cost of the preceding policy. Employer misrepresented, or deceived Mr. Oyster into misrepresenting, facts material to the premium and engaged in deceptive leasing practices, and Employer failed to comply with the insurers audit procedures.

As the Commission noted, no stop work order has ever been entered against Employer. Stop work orders have been entered in most of the maximum penalty cases, but that is not necessarily the most significant factor in determining the penalty because under AS 23.30.080(d) there is a separate $1,000.00 per day penalty for violating a stop work order. However, of the 316 penalty cases, this is the first case in which an employer engaged in a scheme to fraudulently obtain insurance coverage, a factor every bit as egregious, if not worse than, violating a stop work order. Had there been a claim, it is doubtful the policy would have withstood a challenge by the insurer. Because Employer radically understated its payroll to obtain a low premium, the risk imposed on the insurer was far, far in excess of what it bargained for. If allowed, the practice jeopardizes insurers' ability to stay in business or to offer workers' compensation insurance in Alaska. It would result in higher workers' compensation premiums for honest employers, and would ultimately threaten the entire workers' compensation system in Alaska.

In imposing a penalty, the board also considers mitigating factors. Generally those factors relate to whether the penalty would jeopardize the employer's ability to remain in business, cause a loss of employee jobs, or adversely affect the community. *Wrangell Seafoods* addressed all of those factors. It involved the largest employer in the City of Wrangell. A higher penalty was considered to jeopardize the employer's existence, thus endangering the City's workforce. In both *Casa Grande, Inc.* and *N.P.W., Inc.* the employers were no longer in business, there was no risk a higher penalty would jeopardize the employers' existence or cause a loss of jobs. In *We Bake, Inc.*, *Reed,* and *Lawson*, the inability of the employer to continue in business was found to not adversely affect

the community or the employees. Here, TT and CCO LLC are no longer in business, and TE sold all its assets and has no employees. A sizeable penalty will not jeopardize their existence, place employee jobs at risk, or adversely affect the community.

Also considered as mitigating factors are the employer's efforts to secure insurance or reduce the risk to its employees. Employer contends its efforts to provide coverage by leasing employees should be a mitigating factor. Mr. Christianson's testimony is self-serving and not credible. That position was rejected above; the focus of Employer's efforts was not to protect its employees, but to minimize its costs. In *Wrangell Seafoods*¸ the employer immediately closed down and sent its employees home on learning it was uninsured. Here, Employer knowingly and deliberately used its employees without insurance on three occasions incurring 2,544 uninsured employee workdays. Employer's conduct does not warrant a mitigation of the penalty.

Employer argues it is unable to pay a sizable penalty, and the ability of an employer to pay the penalty must be considered. The ability to pay is considered in determining whether a penalty would jeopardize the employer's existence, cause a loss of jobs, or adversely affect the community, and was considered above. Apart from those factors, the ability to pay has no relationship to an employer's culpability; there is no reason it should be a mitigating factor. The fact Employer is unable to pay because of an IRS lien and the bank's judgment lien is unfortunate timing, but it is not a mitigating factor. Under AS 23.30.082, penalties assessed under AS 23.30.080(f) are paid to the Workers' Compensation Guaranty Fund, which provides benefits to employees injured while their employer was uninsured. Nothing in AS 23.30.080 or .082 suggests the legislature intended the benefits available to those employees should be reduced merely because other creditors obtained liens more quickly.

The penalty in this case will not bring Employer back into compliance, because it no longer has employees. It will, however, serve as a disincentive to other employers that might consider engaging in deceptive employee leasing practices to avoid full payment of their workers' compensation insurance premium or to misrepresent facts material to the insurer's risk when applying for a policy.

After the hearing on remand, and upon reflection, Employers' conduct still compels a penalty at or near the maximum. A penalty of $999.00 per uninsured employee workday will again be imposed. With 2,544 uninsured employee workdays, that will result in a penalty of $2,541,456.00. Given the size of the penalty and Employer's obligations under the IRS lien and bank judgment, a payment plan, including the deferral of the initial payment, will be allowed.

The Commission found the penalty in *Titan II* to be "a shocking amount" that appeared to be purely punitive. By its very nature, a civil penalty is punitive, and, by adopting the highest penalty in the nation for failure to insure, the legislature clearly anticipated sizable penalties would be imposed against the most egregious offenders. While the amount of the penalty may be shocking, it is appropriate given Employer's shocking behavior.

The Commission affirmed the use of the 8 AAC 45.176 aggravating factors in determining whether a penalty is appropriate, even though the lapse in insurance occurred before the effective date of the regulation. Consequently, even though the regulation is not being applied in this case, a review of how those factors would be applied shows a similar penalty would result.

Here, eight of those factors are present. 1) Employer failed multiple times to maintain workers' compensation insurance coverage after notification by the division, 8 AAC 45.176(d)(2). 2) Employer's violation of AS 23.30.075 exceeded 180 days, 8 AAC 45.176(d)(3). Employer contends this factor does not apply because none of the individual lapses exceeds 180 days, an interpretation adopted in some board opinions. That interpretation is rejected. The purpose of the factor is to address the length of time employees were exposed to risk. That risk is the same whether the employees were exposed to a single lapse of 183 days, or three lapses of 148, 22, and 13 days. 3) Employer previously violated AS 23.30.075, 8 AAC 45.176(d)(4). 4) Employer failed to pay compensation to an employee injured while Employer was uninsured, 8 AAC 45.176(d)(9). 5) Employer has a history of injuries while uninsured, 8 AAC 45.176(d)(10). 6) Employer has a history of injuries while insured, 8 AAC 45.176(d)(11). 7) Employer's workers' compensation policies have been cancelled because Employer failed to comply with the carriers' requests or

procedures, 8 AAC 45.176(d)(12). And 8) Employer demonstrated lapses in business practices used by reasonably diligent business persons, 8 AAC 45.176(d)(12).

Even if Employer's failure to pay benefits to an employee injured while it was uninsured is disregarded because it was not identified as an aggravating factor in *Titan II*, Employer still has seven aggravating factors. Under 8 AAC 45.176(5) the penalty for an employer with seven aggravating factors is $500 to $999. Because Employer engaged in deceptive leasing practices to avoid full payment of its workers' compensation insurance premium or misrepresented facts material the risk assumed by the insured in the Oyster/CCO policy, a penalty at the high end of the range is appropriate. Had 8 AAC 45.176 been applied, the penalty would have been $999.00 per uninsured employee workday.

CONCLUSIONS OF LAW

1. TE, TT, and CCO LLC should not be treated as separate entities; consequently the aggravating factors do not apply to them separately, and separate penalties will not be assessed.

2. TE, TT, and CCO LLC have been disregarded as separate entities; aggravating factors were applied to Mr. Christianson and the entities, and a penalty of $999.00 per uninsured employee workday will be assessed for 2,544 uninsured employee workdays.

ORDER

1) The division's June 10, 2008 petition is granted.

2) At any time TODD CHRISTIANSON, TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., or CCO ENTERPRISES, LLC have employees, they shall maintain workers' compensation insurance coverage in accord with AS 23.30.075, and shall file evidence of compliance in accord with AS 23.30.085.

3) Pursuant to AS 23.30.060(a) and AS 23.30.075(b), because TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC have been disregarded as separate entities, TODD CHRISTIANSON, TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC are personally, jointly, severally and directly liable for any and all benefits payable under the Act for compensable injuries to employees during the uninsured periods.

4) Pursuant to AS 23.30.080(f), because TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC have been disregarded as separate entities, TODD CHRISTIANSON, TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC are assessed a civil penalty of $2,541,456.00.

5) Should Employer desire a payment plan, Mr. Christianson shall contact the Division's Special Investigation Unit within 14 days of the date of this decision to arrange a payment plan which shall be submitted to the board for approval. If a payment plan is not requested within 14 days of the date of this decision, TODD CHRISTIANSON, TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC shall pay the entire $2,541,456.00 civil penalty within 21 days of the date of this decision.

6) TODD CHRISTIANSON, TITAN ENTERPRISES, LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC are ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. TODD CHRISTIANSON, TITAN ENTERPRISES LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC **are ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700002789, and AWCB Decision Number 14-0131.** If TODD CHRISTIANSON, TITAN ENTERPRISES LLC, TITAN TOPSOIL, INC., or CCO ENTERPRISES, LLC fails to make timely civil penalty payments as ordered in this decision, the entire unpaid balance of the $2,541,456.00 shall immediately be due and owing and the director may declare the unpaid balance of the assessed civil penalty in default and seek collection. Pending full, civil penalty payment under AS 23.30.080(f) in accord with this Decision and Order, jurisdiction is maintained.

7) The SIU is directed to monitor TODD CHRISTIANSON, TITAN ENTERPRISES LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC 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 TODD CHRISTIANSON, TITAN ENTERPRISES LLC, TITAN TOPSOIL, INC., and CCO ENTERPRISES, LLC's full, timely, civil penalty payment as set forth in this decision and order. The proposed order will be addressed in accord with 8 AAC 45.130.

Dated in Anchorage, Alaska on September 30, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Patricia Vollendorf, Member

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Amy Steele, Member

CONCURRENCE & DISSENT

I concur with the majority's reasoning and result. I would go further, however, and find CCO LLC was uninsured from September 25, 2006 to September 25, 2007. The Commission held the CCO policy was not voided because the insurer never sent notice of cancellation in accordance with AS 21.36.220. There was, however, other evidence in the record at the time of the *Titan II* hearing that supports a finding that CCO, LLC was uninsured during that time. I do not believe the Commission intended to preclude further fact finding on the issue; or to preclude the board from finding CCO LLC was uninsured on other grounds, because to do so would usurp the board's authority as the primary fact-finder. AS 23.30.122; AS 23.30.128.

In hindsight, the use of "voided" in *Titan II* in reference to the Oyster/CCO insurance policy was ambiguous. The Commission held the policy was not "void" because the insurer had not "cancelled" it in accordance with the insurance code. The question of whether the policy was cancelled is, however, separate from the question of whether CCO LLC was ever covered by the policy to begin with. There is evidence the policy did not cover CCO LLC or its employees, and thus the policy was "void" as to CCO LLC.

Mr. Oyster obtained a business license as CCO Enterprises (Oyster/CCO), a sole proprietorship, on August 30, 2006. On September 25 2006, the policy was issued to him in his capacity as an individual. The named insured is "Chad Curtis Oster (sic Oyster) dba CCO Enterprises," i.e., the sole proprietorship, and the policy lists the "Entity of Insured" as "Individual." CCO Enterprises, LLC (CCO LLC) was not created until September 29, 2006, four days later. The LLC is a legal entity separate and apart from Mr. Oyster, and could not have been a "named insured" under the Oyster/CCO policy because it did not exist at the time the policy was issued.

CCO LLC was not a party to the insurance contract under AS 21.42.160. Regardless of whether such an assignment would have been valid without the insurer's consent, there is no evidence whatsoever that Mr. Oyster assigned his interest in the policy to CCO LLC. Mr. Oyster may well have remained insured because the insurer never sent him a notice of cancellation. There is no evidence, however, that CCO LLC was ever insured.

Because I would find CCO LLC uninsured from September 25, 2006 to September 25, 2007, I would find Employer uninsured for the additional 3,854 employee workdays during that time. As a result, I would find Employer uninsured for 6,398 employee workdays and assess a penalty of $999.00 per uninsured employee workday for a total penalty of $6,391,602.00.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Chair

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 TITAN ENTERPRISES LLC *et al.*, Employer / respondent; Case No. 700002789; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on October 1, 2014.

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Sertram Harris, Office Assistant II