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. 700004615
MICHAEL J. HELMBRECHT, DDS, P.C.,	)	AWCB Decision No. 14-0159
Respondent.	)	Filed with AWCB Fairbanks, Alaska on December 8, 2014.

The Division of Workers' Compensation, Special Investigations Unit's July 31, 2014 petition seeking a finding of failure to insure and imposition of a civil was heard in Fairbanks, Alaska on November 6, 2014, a date selected on September 24, 2014. Investigator Wayne Harger represented the Special Investigations Unit ("SIU" or "division") and testified. Michael J. Helmbrecht, DDS, appeared on behalf of Michael J. Helmbrecht, DDS, P.C. (Employer), and testified. Esther Hayes, Dr. Helmbrecht's office manager, and Mike Mongold, Dr. Helmbrecht's business agent, appeared and testified on Employer's behalf. The record closed at the hearing's conclusion on November 6, 2014.

ISSUE

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

Employer contends its insurance company never notified it of non-renewal of its policy; consequently, under AS 21.36.240, it continued to be insured. Specifically, Employer contends AS 21.36.260 requires a certificate of mailing and, the one SIU presents in this case as evidence of non-renewal, is a "forged U.S. government document" produced to commit "insurance fraud." It contends the forgery occurred after an employee of the insurance carrier tasked with sending the notice of non-renewal failed to do so. Employer contends, when the employee's supervisor inquired about Employer's certificate of mailing, the employee who had "dropped the ball" retrieved a certificate of mailing addressed to someone else, with the same date on which Employer's notice should have been sent, and "doctored it up" to "save his butt."

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

FINDINGS OF FACT

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

1) On May 13, 2002, Michael J. Helmbrecht incorporated and registered Michael J. Helmbrecht, DDS, P.C., as a professional corporation with the State of Alaska. (Articles of Incorporation, Ex. 1 to SIU's Notice of Evidence, October 29, 2014).

2) On May 13, 2002, the Alaska Department of Community and Economic Development Division of Banking, Securities, and Corporations issued Michael J. Helmbrecht, DDS, P.C., a certificate of incorporation to operate as a professional corporation in the State of Alaska. (Certificate of Incorporation, Ex. 2 to SIU's Notice of Evidence, October 29, 2014).

3) Michael J. Helmbrecht, DDS, P.C., operates a year-round dental office at 421 Third Street, Fairbanks, AK 99701. Dr. Helmbrecht is actively in charge of the business and utilizes between 6 and 11 employees to conduct the functions of his dental office. (SIU Hearing Brief, October 28, 2014; Helmbrecht).

4) SIU contends, on August 20, 2012, 76 days prior to the effective anniversary renewal date, Commerce and Industry Insurance Company issued a notice of nonrenewal of insurance and mailed it to Michael J. Helmbrecht, DDS, P.C., at 421 Third Street, Fairbanks, AK 99701, Commerce and Industry Insurance Company obtained a certificate of mailing (PS FM 3877) from the U.S. Postal Service. The notice of nonrenewal of insurance informed Michael J. Helmbrecht, DDS, P.C. that Commerce and Industry Insurance Company was not renewing policy number WC009936523

effective November 4, 2012, because the policy did not meet their underwriting requirements, specifically: Account premium is below premium guidelines. (SIU Hearing Brief, October 28, 2014).

5) During the time periods relevant to the underlying petition for failure to insure and through the present, Michael J. Helmbrecht, DDS, P.C. conducted business as a professional corporation in Fairbanks, Alaska. Michael J. Helmbrecht was the only executive officer and was actively in charge of the corporation during the lapse in coverage between November 4, 2012, and July 24, 2014. (Corporate Entity documents, Ex. 3 to SIU's Notice of Evidence, October 19, 2014)

6) On March 26, 2004, the Alaska Workers' Compensation Division approved an executive officer waiver for Michael J. Helmbrecht, DDS, P.C. (Executive Office Waiver, Ex. 18 to SIU's Notice of Evidence, October 29, 2014).

7) There is no record of any previous AWCB cases against Michael J. Helmbrecht, DDS, P.C., for failure to insure under AS 23.30.075. (Failure to Insure and Injury Case History, Ex. 19 to SIU's Notice of Evidence, October 29, 2014).

8) Division records show Michael J. Helmbrecht, DDS, P.C., has not filed any reports of injury in the last six years. (*Id.*).

9) A Stop Order was not issued in this case. (Record; observations).

10) Pursuant to service of the discovery demand, discovery was due on September 4, 2014. On August 5, 2014, Michael J. Helmbrecht, DDS, PC provided a QuickBooks report documenting all employees and their hours they worked between November 4, 2012 and July 24, 2014. (Petition, discovery demand, certificate of mailing, QuickBooks reports, Ex. 21, 22, 23, and 24 to SIU's Notice of Evidence, October 29, 2014).

11) On July 24, 2014, American Interstate Insurance Company issued policy number RAWCAK2325432014 (effective July 24, 2014 – July 24, 2015). Michael J. Helmbrecht, DDS, P.C., obtained coverage prior to service of the petition. The estimated annual premium charged for this policy is $5,598.00. (Policy documents and Employee Workday Calculation Sheet, Ex. 17 and 27 to SIU's Notice of Evidence, October 29, 2014).

12) SIU contends it calculated the pro-rated premium in accordance with 8 AAC 45.176(e)(1). Based on the annual premium of $5,598.00 it would have cost Michael J. Helmbrecht, DDS, P.C., $15.34 per day to maintain workers' compensation insurance coverage. SIU contends Michael J. Helmbrecht, DDS, P.C., was uninsured between November 4, 2012 and July 24, 2014, for 627

calendar days. The pro-rated premium for the alleged lapse in coverage from November 4, 2012 to July 24, 2014, totals $9,618.18. (Employee Workday Calculation Sheet, Ex. 17 to SIU's Notice of Evidence, October 29, 2014).

13) Based on the pro-rated premium of $9,618.18, twice the pro-rated premium totals $19,236.36. (*Id.*).

14) SIU calculated employee workdays in accordance with 8 AAC 45.176(e)(2). During the alleged lapse in coverage between November 4, 2012 and July 24, 2014, Michael J. Helmbrecht, DDS, P.C. utilized 21 employees, who worked a total of 19,889 hours, which calculates to 2486 employee workdays. (Quick Books reports and Employee Workday Calculation Sheet, Ex. 24 and 27 to SIU's Notice of Evidence, October 29, 2014).

15) SIU contends, pursuant to 8 AAC 45.176(d), one aggravating factor applies in this case: a violation of AS 23.30.075 that exceeds 180 calendar days. (SIU Hearing Brief, October 28, 2014).

16) SIU obtained the following information from the Employment Security Division's database: Michael J. Helmbrecht, DDS, P.C.'s. reported annual payroll was: 2013: $379,947.36; 2012: $378,964.40; 2011: $397,160.75; 2010: $371,469.18; 2009: $376,662.54. (ESD Employee Count and Payroll Report, Ex. 26 to SIU's Hearing Brief, October 28, 2014).

17) SIU calculated the penalty range under 8 AAC 45.176(a)(3). Based on one aggravating factor the penalty range per employee work day is between $10.00 and $50.00. Based on 2486 employee work days the range for a civil penalty is between $24,860.00 and $124,300.00. (Employee Workday Calculation Worksheet, Ex. 27 to SIU's Hearing Brief, October 28, 2014).

18) At hearing, Wayne Harger testified regarding the results of his investigation. His testimony was consistent with the contentions set forth in SIU's hearing brief. Mr. Harger also testified, the certificate of mailing was provided to him by Commerce and Industry Insurance Company, and the portions of the form that are blacked-out on SUI's exhibit, were blacked-out upon his receipt of the form. He stated no position on Employer's defense theory alleging the certificate of mailing was a "forgery." Dr. Helbrecht had had no lapse in coverage during his 30 years in business, and he had a workers' compensation policy in effect within 24 hours of notification of the lapse. Employer fully cooperated with SIU's investigation and responded to all requests within 24 hours. (Harger; SIU Hearing Brief, October 28, 2014; observations).

19) At hearing, Mr. Harger contended the certificate of mailing contained Employer's correct address and bore an official U.S. Postal Service stamp for August 20, 2012. (Record).

20) At hearing, Employer argued as follows: It contends a questioned document expert is required in this case to evaluate the certificate of mailing. Employer cites four reasons why it believes the certificate of mailing is a "forgery." First, Employer contends the numbers entered into the "Total Number of Pieces Listed by Sender," and "Total Number of Pieces Received at the Post Office," appear to have been altered from "ones" to "twos" by the addition of "swirls" to the bottom of the "ones." Second, it contends its name and address were "cut and paste" into the form because this information is not centered within the form's box, unlike the numerical values for the mailing fees, which are centered in other boxes. Also, Employer contends its name and address are not parallel to, and perpendicular with, the lines around the form's box. Third, it contends its purported notice of non-renewal cost $0.87 to mail and the total metered postage for the two items on the form was $1.20. Therefore, the first item on the form, which has been blacked out, would only have cost $0.33 to mail. Employer contends this amount is suspicious, and further contends it believes the blacked out amount on the first item was actually the entire $1.20 metered. Fourth, it contends someone used a straightedge to re-establish the top line of the box for its name and address information after its name and address were cut and pasted into the box. (Record).

21) In addition to presenting Employer's arguments at hearing, Dr. Helmbrecht testified as follows: Dr. Helmbrecht's office manager opens the daily mail and puts it on his desk for his attention. In 28 ½ years, the business has only missed one bill - a phone bill, because he threw it away thinking it was a solicitation. Referring to the alleged lapse in workers' compensation insurance, Dr. Helbrecht stated, "We don't make this kind of mistake." The certificate of mailing is a forgery, and he thinks this matter ought to be investigated. Dr. Helmbrecht's original position on SIU's complaint was: he would write a check for $10,000 in exchange for a letter "clearing his name." Now, he is willing to pay $20,000, but only if he is "culpable." Dr. Helmbrecht confirmed he does not dispute the amount of premium he would have paid and the number of employee workdays. He also confirmed Employer's address is correct on the certificate of mailing. Dr. Helmbrecht only reviewed the documents in this case the day before the hearing. He confirmed he received notice of the hearing at least 30 days prior to the hearing's commencement. Dr. Helmbrecht is "real busy doing things," such as "serving on boards and advisory panels, and raising three kids." (Helmbrecht).

22) At hearing, Dave Mongold testified as follows: Employer's notice of non-renewal would have come from Employer's insurance carrier. Sometimes the carriers notify him of non-renewal,

sometimes the brokerage will. No one notified him in Employer's case. He thinks Employer's carrier should have notified him. Even if it did not, he thinks the brokerage should have notified him. If he does recieve a notice of non-renewal, he notifies his client because he is paid by selling insurance. Regarding the insurance entities in the documentation, he testified AIG Insurance Company became Chartis Insurance Company, and Commerce and Industry Insurance Company became part of Chartis Insurance Company. He had never heard of Granite State Insurance Company. Mr. Mongold also described how he sells workers' compensation policies: He either places a client's workers' compensation insurance in the standard market or through "the pool." In Employer's case, he had to take Employer's policy outside the pool because of the premium amount. Mr. Mongold then writes the insurance application and sends it to Northeastern Agency, and Northeastern Agency places the policy with whoever will accept it. (Mongold).

23) At hearing, Ester Hayes testified as follows: She takes great pride in paying the office bills and has never made a late payment. In response to a question from a panel member, Ms. Hayes denied noticing not paying $5,600.00 per year in workers' compensation premiums over the course of two years. (Hayes).

24) At the conclusion of hearing, in response to a request by the hearing chair for a copy of Employer's balance sheets and profit and loss statements during the period of lapse, Employer contended it did not wish for the panel to consider its ability to pay a civil penalty. The hearing chair explained the range of penalties in this case ranged between $24,000 and $124,000. Dr. Helmbrecht contended he had "done very well in the stock market," and was "doing okay." (Record).

25) At the conclusion of the hearing, the hearing chair inquired whether Employer wished to keep the hearing record open to obtain and submit evidence from a questioned document expert concerning the allegedly forged certificate of mailing for the panel's consideration. Employer requested two months to investigate the alleged forgery and the hearing chair decided to deliberate Employer's request with the other panel member following the hearing. The hearing chair instructed the parties he would inform them by telephone of the panel's decision on Employer's request to extend the closing date of the record following the hearing. (Record).

26) At a November 6, 2014 prehearing conference, the hearing chair informed the parties by telephone the panel had denied Employer's request to extend the record to receive additional evidence. (Prehearing Conference Summary, November 6, 2014).

27) The August 20, 2012 certificate of mailing at issue, PS Form 3877, bears the name and addresses for two addressees. Information for the first addressee on the form appears to have been crossed-out with an ink pen, and also redacted with a black marker, which obscures the first addressee's name and address, as well as the postage and fee amounts for the particular item mailed to that addressee. Employer's name and address appear as the second addressee on the form. The form provides lines for up to eight addressees, but only two are listed. In addition to the eight lines provided for addressees' name and address information, the form also contains columns for "Postage" and "Fee" amounts for each addressee. Below the line for the first addressee, the amounts of $0.45 and $0.42 are entered on each line on the form under the columns for "Postage" and "Fee," respectively, including on Employer's line and on the six remaining lines that do not contain addressees. The form bears a postal meter stamp in the upper right corner in the amount of $1.20, and a U.S. Postal Service stamp, dated August 20, 2012. (Certificate of Mailing, Ex. 11 to SIU's Notice of Evidence, October 29, 2014; observations).

28) In the lower left corner of the certificate of mailing, spaces are provided for "Total Number of Pieces Listed by Sender," and "Total Number of Pieces Received at the Post Office." The space for "Total Number of Pieces Listed by Sender" contains a handwritten number that appears to be a stylized one, with an exaggerated "hat" and an exaggerated "base." The space for "Total Number of Pieces Received at the Post Office" contains a handwritten number, written in the same style as the first number, which could appear to be either a one, or a two, due to a loop at the base of the handwritten number. (*Id.*; judgment; unique or peculiar facts of the case, and inferences drawn therefrom).

29) The first class rate for a one ounce domestic letter on August 20, 2012 was $0.45. (Historian, U.S. Postal Service, *Rates for Domestic Letters Since 1863*, February 2014).

PRINCIPLES OF LAW

> **AS 21.36.240. Failure to renew.** An insurer may only fail to renew a personal insurance policy on the policy's annual anniversary. An insurer may not fail to renew a policy unless a written notice of nonrenewal is mailed to the named insured as required by AS 21.36.260 at least 20 days for a personal insurance policy, and at least 45 days for a business or commercial insurance policy, before the expiration date of the policy or of the anniversary date of a policy written for a term longer than one year or with no fixed expiration date. If notice of nonrenewal is not given as required by this section, the existing policy shall

continue until the insurer provides notice for the time period required by this section for that policy. This section does not apply

(1) if the insurer has in good faith manifested its willingness to renew;

(2) in case of nonpayment of premium for the expiring policy;

(3) if the insured fails to pay the premium as required by the insurer for renewal; or

(4) to business or commercial policies placed under AS 21.34.

AS 21.36.260. Proof and method of mailing notice. If a notice is required from an insurer under this chapter, the insurer shall

(1) mail the notice by first class mail to the last known address of the insured and obtain a certificate of mailing from the United States Postal Service; or

(2) transmit the notice by electronic means, to the last known electronic address of the intended recipient, if the insurer can obtain an electronic confirmation of receipt by the intended recipient.

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

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

AS 23.30.075. Employer's liability to pay. (a) An Employer under this chapter, unless exempted, shall either insure and keep insured for the Employer's liability under this chapter in an insurance company or association ... or shall furnish the board satisfactory proof of the Employer's financial ability to pay directly the compensation provided for....

(b) If an employer 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.

When an employer is subject to the requirement of AS 23.30.075 and fails to comply, the board may assess a civil penalty. Since the November 7, 2005 effective date of the 2005 amendments to the Alaska Workers' Compensation Act (Act), when an employer subject to the requirements of AS 23.30.075 fails to insure, the law grants the board 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 at AS 23.30.080(f) is one of the highest in the nation. *See e.g., In re: Alaska Native Brotherhood* #2, AWCB Decision No. 06-0113 (May 8, 2006). The statute's severity is a statement of policy that failure to insure for worker's compensation liability will not be tolerated in Alaska. The legislature has made its intentions clear: uninsured employers are subject to a severe penalty when employees are permitted to work without coverage for workers' compensation liability in place. *See* Committee Minutes from March 10, 2005, SB 130, before the Senate Labor and Commerce Committee, testimony of Director of Workers' Compensation Paul Lisanke, beginning at 1:47:55 PM.

> **AS 23.30.080 Employer's failure to insure**.
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> (f) If an employer fails to insure or provide security as required by AS 23.30.075, the division may petition the board to assess a civil penalty of up to $1,000.00 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.

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 that 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 the business' 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 Decision No. 88 (September 16, 2008). A penalty is not intended to destroy a business or cause the loss of employment. *Alaska R&C Communications*, at 27. The statute permits assessment of "a civil penalty of up to $1,000 per day of employment per uninsured employee when an employer is uninsured." Based upon this specific statutory language and AS 23.30.135(a), discretion is granted to assess an appropriate civil penalty considering the specific facts of each case, and the assessment may be between zero and $1,000.00 per day per uninsured employee. Former decisions discuss a number of aggravating and mitigating factors considered in determining appropriate civil penalties under AS 23.30.080(f). Those factors include: number of days of uninsured employee labor, the size of the business, the record of injuries of the employer, both in general and during the uninsured period, the extent of employer's compliance with the Act, the diligence exercised in remedying the failure to insure, the clarity of notice of insurance cancellation, employer's compliance with the investigation and remedial requirements, the risk of employer's workplace, the impact of the penalty on employer's ability to continue to conduct business, the impact of the penalty on the employees, the impact of the penalty on employer's community, whether employer acted in blatant disregard for the statutory requirements, whether employer properly accepted service of the SIU's petition, whether employer violated a stop order, and credibility of employer's promises to correct its behavior. Based on these factors, a wide range of penalties have been found reasonable based on the specific circumstances of the violation. *See, e.g., In re: St. Lawrence Assisted Living Home, Inc.*, AWCB Decision No. 10-170 (October 12, 2010). In many cases, the penalty was twice the estimated premium the employer would have paid if insured. *See, e.g. In re: Swayback, Inc.* AWCB Decision No. 12-0050 (March 9, 2012). These factors are now set forth in regulation at 8 AAC 45.176, effective February 28, 2010.

> **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....

The law requires employers to file evidence of compliance with the workers' compensation insurance requirements.

> **AS 23.30.240. Officers of corporations, municipal corporations, and nonprofit corporations and members of limited liability companies as employees**.
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> (b) Except as provided in this subsection, a member of a limited liability company organized under AS 10.50 is not an employee of the company under this chapter. Notwithstanding any other provision of this chapter, a limited liability company may bring a member of the company within the coverage of the company's insurance contract by specifically including the member in the contract of insurance. The election to bring the member within the company's coverage continues in force for the period the contract of insurance is in effect. During that period, a member brought within the coverage of the insurance contract is an employee of the company under this chapter.
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> **AS 23.30.255. Penalty for failure to pay compensation**. (a) An employer required to secure the payment of compensation under this chapter who fails to do so is guilty of a class B felony if the amount involved exceeds $25,000 or a class C felony if the amount involved is $25,000 or less. If the employer is a corporation, its president, secretary, and treasurer are also severally liable to the fine or imprisonment imposed for the failure of the corporation to secure the payment of compensation. The president, secretary, and treasurer are severally personally liable, jointly with the corporation, for the compensation or other benefit which accrues under this chapter in respect to an injury which happens to an employee of the corporation while it has failed to secure the payment of compensation as required by AS 23.30.075.
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> **AS 23.30.395. Definitions**. In this chapter,
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> (20) "employer" means the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state;
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> **AS 44.62.570. Scope of Review**.
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> (b) .... Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
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> (c) .... If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by
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> (1) the weight of the evidence; or
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> (2) substantial evidence in the light of the whole record.
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Workers' compensation decisions must be based on substantial evidence. "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

On appeals to the Alaska Worker's Compensation Appeals Commission (Commission) or the courts, board determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570, incorporating the "substantial evidence test." *Miller* at 1049. When applying a substantial evidence standard, the "[reviewer] may not re weigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order ... must be upheld." *Id.*

> **8 AAC 45.060. Service.** (a) The board will serve a copy of the claim by certified mail, return receipt requested, upon each party or the party's representative of record.
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> (b) A party shall file a document with the board … either personally or by mail; the board will not accept any other form of filing. Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed

> with sufficient postage and properly addressed to the party at the party's last known address.…
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> **8 AAC 45.120. Evidence**.
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> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. ...

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

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

Alaska R&C Communications, LLC v. State, Division of Workers' Compensation, Decision No. 088 (September 16, 2008).

The law requires civil penalties for uninsured employers be calculated based upon the number of uninsured employee workdays, defined in 8 AAC 45.176(e)(2) as the total hours of employee labor utilized by the Employer while in violation of AS 23.30.075 divided by eight. When the calculation of uninsured employee workdays is based on SIU estimates, rather than established facts, penalty requests have been denied for lack of adequate evidence. *See, e.g., In re Rhonda Smith & Victor Smith d/b/a R&V Enterprises, ABC Plumbing, and All Alaska Construction & Maintenance, LLC,* AWCB Decision No. 12-0137 (August 8, 2012) (penalty against one business entity denied); *In re Stanley L. Barney d/b/a The Wreckerman Towing*, AWCB Decision

No. 10-0073 (April 23, 2010) (only accurate, not estimated, uninsured employee work days considered in penalty determination).

> **8 AAC 45.176. Failure to provide security: assessment of civil penalties**. (a) If the board finds an employer to have failed to provide security as required by AS 23.30.075, the employer is subject to a civil penalty under AS 23.30.080(f), determined as follows:
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> (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;
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> (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 AS23.30.075 ...
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> ....
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> (d) For the purposes of this section, "aggravating factors" include
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> (1) failure to obtain workers' compensation insurance within 10 days after the division's notification of a lack of workers' compensation insurance;
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> (2) failure to maintain workers' compensation insurance after previous notification by the division of a lack of coverage;
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> (3) a violation of AS 23.30.075 that exceeds 180 calendar days;
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> (4) previous violations of AS 23.30.075;
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> (5) issuance of a stop order by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);
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> (6) violation of a stop order issued by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);

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

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

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

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

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

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

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

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

(A) ignoring certified mail;

(B) failure to properly supervise employees; and

(C) failure to gain a familiarity with laws affecting the use of employee labor;

(15) receipt of government funding of any form to obtain workers' compensation coverage under AS 23.30.075, and failure to provide that coverage.

(e) In this section,

(1) "premium" means the current amount charged to the employer by a carrier for coverage under AS 23.30.075;

(2) "uninsured employee workday" means the total hours of employee labor utilized by the employer while in violation of AS 23.30.076 divided by eight.

However, the burden of proving the factors that the board must consider in assessing a penalty continue to rest on the SIU, because there is no presumption that a particular penalty within the

range established by § .080(f) is appropriate. The SIU has the burden of production and persuasion on the facts and circumstances to support imposition of a particular penalty, including factors supporting an enhanced penalty; the employer has the burden of establishing the facts and circumstances that may be considered in excuse or mitigation of a penalty established by § .080(f). *Alaska R & C Communications*, at 22-23.

ANALYSIS

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

SIU contends Employer's workers' compensation policy was not renewed on November 4, 2012; and from November 4, 2012, until July 24, 2013, Employer was without insurance in violation of AS 23.30.080(f). During this period, SIU contends Employer utilized employee labor amounting to 2,486 employee workdays. It contends, under 8 AAC 45.176, Employer had one aggravating factor of a lapse exceeding 180 days, and should be assessed a civil penalty between $24,860.00 and $124,300.00. Employer does not object to the timeframe SIU alleges, or to the number of employee workdays. Instead, it contends its insurance company never notified it of non-renewal of its policy; consequently, under AS 21.36.240, it continued to be insured during the period alleged by SIU.

If an employer fails to insure under the Act, AS 23.30.080(f) provides for the imposition of a civil penalty of up to $1,000 for each employee workday during the period an employer was uninsured. The statute establishes a rebuttable presumption of failure to insure. The Division has the burden of establishing the absence of proof of insurance; having done so, the burden of proof shifts to the employer to establish coverage. *Alaska R&C Communications*.

Here, SIU contends Employer's policy was non-renewed on November 4, 2012. It uses the insurance carrier's August 20, 2012 notice of non-renewal, which was purportedly mailed to Employer, as evidenced by the August 20, 2012 certificate of mailing, to establish the lapse alleged in its petition. Even though Employer presents an extremely imaginative defense theory, the certificate of mailing is a curious document meritting close examination.

Although no particular significance is afforded Employer's contentions regarding the appearance of the line above its name and address, or the relative position of its name and address within the box on the form, it is not clear what is indicated by the handwritten numbers in the spaces provided for "Total Number of Pieces Listed by Sender," and "Total Number of Pieces Received at the Post Office." The space for "Total Number of Pieces Listed by Sender" contains a handwritten number that appears to be a stylized one with an exaggerated "hat" and an exaggerated "base." The space for "Total Number of Pieces Received at the Post Office" contains a handwritten number, written in the same style as the first number, which could appear to be either a one, or a two, due to the presence of a "loop" at the base of the handwritten number. These handwritten numbers do raise questions: If both numbers are ones, why are two items listed on the form? If the first number is a one, and the second is a two, why are they inconsistent? It is unlikely both numbers are twos, because the first number appears to be a one.

In addition to the questions raised by the handwritten numbers on the certificate of mailing, there are irregularities in the amounts of postage and fees shown on the form. The postage on Employer's parcel was $0.45, and the fee was $0.42, totaling $0.87. Meanwhile, total postage metered for both parcels on the form was $1.20. Therefore, the postage and fee for the first parcel on the form would have been $0.33. However, first class postage alone for a one ounce, domestic letter on August 20, 2012 was $0.45, not including any applicable fee. Yet the parcel for the first addressee on the form apparently incurred both postage and a fee, since both these spaces have been blacked-out on the certificate of mailing.

Furthermore, because the amounts of $0.45 and $0.42 are entered on the each line on the form under "Postage" and "Fee," respectively, including lines without any addressees, it would appear the certificate of mailing form may have been pre-filled with these amounts, as might be done if the form was prepared for a dedicated purpose, such as mailing notices of cancellation and non-renewal, where each item mailed would incur the same postage and fee. These observations make it even more unlikely the postage and fees for the first addressee were a mere $0.33.

There is insufficient evidence to fully explain these irregularities. Perhaps, only one of the two items listed was mailed. Perhaps one or both items on the certificate of mailing were mailed

with insufficient postage. *See* 8 AAC 45.060(b) (requiring sufficient postage for service by mail). Perhaps an unsuccessful attempt was made to mail one item on the form with no postage at all. Although this decision cannot conclude the certificate of mailing was "forged," as Employer contends, the irregularities on the form do cast considerable doubt on whether Employer's insurance carrier effectively non-renewed Employer's policy under the statutes required for that process, in which case, Employer's policy would have continued past November 4, 2012. AS 21.36.240; AS 21.36.260.

Decisions in workers' compensation cases must be based on substantial evidence. *Miller*; AS 44.62.570(c)(2). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller*. Given the unexplained irregularities in the certificate of mailing, that document cannot serve as substantial evidence upon which to base a finding Employer failed to insure. Here, SIU has not induced a belief in the fact finders' minds that Employer failed to insure past November 4, 2012. *Saxton*. Since SIU has not met its burden of establishing the absence of insurance, its petition will be denied. *Alaska R&C Communications*.

As a concluding note, the holding in this decision is limited to the facts of this case, and further limited to the issue of whether there is substantial evidence on which to conclude Employer failed to insure under the Act. This decision only concludes the evidence presented in this case was insufficient to raise the presumption Employer had failed to insure such that civil penalties could be imposed. *Id.*; AS 23.30.108(f); *see also* AS 23.30075(b); AS 23.30.085(b) (providing for penalties "[i]f an employer fails to insure."). It does not purport to decide the ultimate legal issue of whether Employer's insurance carrier effectively non-renewed Employer's policy under AS 21.36.240, or whether Employer's insurance policy continued beyond the purported non-renewal date of November 4, 2012.

CONCLUSION OF LAW

Employer will not be assessed a civil penalty for failure to insure for purposes of workers' compensation liability.

ORDER

SIU's July 31, 2014 petition seeking a finding of failure to insure and for imposition of a civil penalty is denied.

Dated in Fairbanks, Alaska on December 8, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Lake Williams, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MICHAEL J. HELMBRECHT, DDS, P.C.; Employer / respondent; Case No.

700004615; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served upon the parties on December 8, 2014.

/s/_____
Darren R. Lawson, Office Assistant II