

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)	FINAL DECISION AND ORDER
INSURE WORKERS' COMPENSATION)	
LIABILITY, AND ASSESSMENT)	AWCB Case No. 700004561
OF A CIVIL PENALTY AGAINST,)	
)	AWCB Decision No. 15-0078
MICHAEL MOUTOUX d/b/a STAR)	
AUTOMOTIVE,)	Filed with AWCB Fairbanks, Alaska
)	on July 6, 2015
Respondents.)	

The Division of Workers' Compensation (Division) Special Investigations Unit's (SIU) July 2, 2014 petition for failure to insure for workers' compensation liability, and assessment of a civil penalty, was heard on June 25, 2015, in Fairbanks, Alaska, a date selected on April 24, 2015. Investigator Wayne A. Harger appeared, represented the division, and testified. Michael Moutoux d/b/a Star Automotive (Employer) appeared telephonically, represented himself, and testified. There were no witnesses. The record closed at the hearing's conclusion on June 25, 2015.

ISSUE

The division contends Employer operated a business using employee labor without maintaining workers' compensation insurance, and requests a civil penalty of two times the prorated premium for the lapse after the enactment of 8 AAC 45.176. The division does not object to a payment plan.

Employer does not dispute he operated a business using employee labor while uninsured. He contends mitigating factors should be considered in assessing a penalty, and requests a payment plan due to financial hardship.

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

FINDINGS OF FACT

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

- 1) At hearing Employer stipulated to the following facts in the SIU's brief:
 - a) Employer is a sole proprietorship.
 - b) Employer did not carry workers' compensation insurance from July 8, 2008 to June 28, 2014.
 - c) Employer was the only owner associated with the business during the lapsed period.
 - d) Employer is not considered an employee for the purpose of workers' compensation insurance coverage.
 - e) Employer was not previously investigated for failure to insure.
 - f) No reports of injury have been filed by or against Employer.
 - g) On June 28, 2014, Employer obtained workers' compensation insurance from Alaska National Insurance Company. The policy was effective June 28, 2014 to June 28, 2015, with an estimated \$809.00 annual premium, which equates to \$2.22 per day.
 - h) Employer was uninsured for 599 calendar days prior to the February 28, 2010 enactment of 8 AAC 45.176.
 - i) Employer was uninsured for 1581 calendar days on and after February 28, 2010, equating to a \$3,509.82 pro-rated premium ($1581 \times \$2.22 = \$3,509.82$.) Twice the pro-rated premium for the post-regulation lapse is \$7,019.64 ($\$3,509.82 \times 2 = \$7,019.64$).
 - j) On July 2, 2014, the Division petitioned for a finding of failure to insure under AS 23.30.075, and assessment of a civil penalty under AS 23.30.080(f). On July 7, 2014, the petition and a discovery demand were served on Employer via certified return receipt mail.

- k) Employer admits to using employee labor, but did not respond to the discovery demand because he did not maintain employee records.
- l) Two aggravating factors apply here:
 - i. 8 AAC 45.176(d)(3): A violation of AS 23.30.075 that exceeds 180 calendar days;
 - ii. 8 AAC 45.176(d)(7): Failure to comply with the division's initial discovery demand within 30 days after that demand.
- 2) Employer was cooperative with the SIU investigation. However, in the absence of records indicating the total hours of employee labor used by Employer while in violation of AS 23.30.075, uninsured employee workdays cannot be accurately calculated. (Prehearing Conference Summary, January 26, 2015; Observation.)
- 3) At hearing Employer testified his business consists of washing and vacuuming vehicles, mostly for a used car lot. Initially the work was done only by family members, but beginning in 2009 Employer employed transient people, many from the Fairbanks Rescue Mission, who worked for money or food. Most worked only three or four hours, and many were reluctant to give him personal information. Employer testified he employs people only when he needs them, and they are paid by the vehicle, not by the hour. He has no business from January through March, or when it is raining. (Record.)
- 4) Employer testified his insurance lapse was the result of his failure to research the legal requirements for operating a small business. Employer apologized for his noncompliance and emphasized it would not happen again because he has been "schooled." He testified he is now insured and keeping employee records, and was in the process of "catching up" with his financial records and tax obligations. He testified he had renewed his City of Fairbanks business license and believed his Alaska business license was current, but could not verify this because the website was down. He further testified he was working on his Employment Security Division (ESD) application and expected to have an account established within two weeks. (*Id.*)
- 5) Employer testified he was behind in filing income tax returns, but he estimated the business's 2014 gross annual income was \$25,000 - \$27,000, with a net income of \$21,500. He does not take a salary and had \$1,025 in the bank at the time of hearing. He pays \$400 a month rent to live on the work premises. Beginning next year he plans to retire and draw a pension from the Painter's Union, out of which he worked until 2007, but he did not know the amount he will be receiving. Employer further testified the only way he would be able to pay a civil penalty would be via a payment plan,

and the maximum the business could afford to pay would be \$100 per month for the nine months of the year he does business, from April through December. (*Id.*)

6) Employer's testimony was credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above.)

7) At the hearing's conclusion, both parties testified they believed it had been fair. (Record.)

PRINCIPLES OF LAW

AS 23.05.080. Employer's records.

An employer shall keep an accurate record of the name, address, and occupation of each person employed, of the daily and weekly hours worked by each person, and of the wages paid each pay period to each person. The record shall be kept on file for at least three years.

AS 23.05.090. Employer shall furnish information.

An employer shall furnish to the department the information it is authorized to require, and shall make true and specific answers to all questions, whether submitted orally or in writing, authorized to be asked of the employer.

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

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

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.075. Employer's liability to pay.

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

AS 23.30.080. Employer's failure to insure.

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

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

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

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

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 to be considered in assessing a penalty continues to rest on the Division, because there is no presumption that a particular penalty within the established range 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 to mitigate a penalty. *Alaska R&C* at 22-23.

The law requires civil penalties for uninsured periods 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. Penalty requests have been denied when there is inadequate evidence to determine the number of uninsured employee workdays. *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); *In re Ruth Page d/b/a Fishhook Bar & Liquor*, AWCB Decision No. 14-0099 (July 16, 2014) (“egregious offender” employer assessed penalty based on twice the prorated premium, due to insufficient evidence supporting a higher penalty); *In re Delta Sanitation, Inc.*, AWCB Decision No. 14-0150 (November 18, 2014) and *In re Lawn Ranger of Alaska, LLC*, AWCB Decision No. 15-0059 (June 11, 2015) (penalties of twice the prorated premium assessed but suspended in full due to lack of reliable evidence, so long as the businesses remain in compliance with the Alaska Workers’ Compensation Act.)

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

AS 23.30.122. Credibility of witnesses.

The board has the sole power to determine the credibility of a witness. . . .

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:

...

(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; ...

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

...

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

...

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

...

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

...

(e) In this section, ...

(2) 'uninsured employee workday' means the total hours of employee labor utilized by the Employer while in violation of AS 23.30.075 divided by eight.

ANALYSIS

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

Employer concededly operated a business using uninsured employee labor from July 8, 2008 to June 28, 2014, including 599 calendar days prior to the February 28, 2010 enactment of 8 AAC 45.176, and 1581 calendar days after. Due to the lack of employee records, neither the pre- nor the post-regulation maximum penalties can be definitively calculated, as both require a determination of uninsured employee workdays. AS 23.30.080(f); 8 AAC 45.176(a)(3). However, the minimum penalty for the post-regulation lapse can be established, because it is based on undisputed evidence of two aggravating factors and the premium Employer would have paid if insured.

The aggravating factors here are:

- 1) a violation of AS 23.30.075 that exceeded 180 calendar days; and
- 2) failure to comply with the division's initial discovery demand within 30 days after the demand. 8 AAC 45.176(d)(3), (7).

With two applicable aggravating factors, 8 AAC 45.176(a)(3) establishes a penalty of no less than \$10.00 and no more than \$50.00 per uninsured employee work day, but in no event less than two times the premium the employer would have paid had it complied with AS 23.30.075. Had Employer complied with AS 23.30.075, its premium for the 1581 uninsured calendar days from February 28, 2010 to June 28, 2014, at \$2.22 per day, would have been \$3,509.82. Twice the prorated premium is \$7,019.64, and Employer will be assessed that amount as a civil penalty for failure to insure employees for workers' compensation liability.

Employer testified his noncompliance stemmed from ignorance of the legal requirements for operating a small business. However employers are not absolved from compliance with the Alaska Workers' Compensation Act because they do not understand their obligations or the actions necessary to maintain insurance coverage. It is not the state's responsibility to educate business owners; rather, knowledge of all relevant statutes and regulations is imputed to them. Employers cannot be relieved of responsibility or liability because they are unaware of or misunderstand the published laws governing their enterprises. Not purchasing insurance allows employers to cut costs and offer lower prices to consumers, thereby unfairly undercutting the ability of compliant businesses to successfully compete in the marketplace.

The primary goal of a penalty under AS 23.30.080(f) is not to be unreasonably punitive, but rather to bring an Employer into compliance, deter future lapses, ensure the continued employment of the business' employees in a safe work environment, and satisfy the community's interest in penalizing an offender without vengeance. *Ivan Moore; Alaska R&C Communications*. Further, a penalty is not intended to destroy a business or reduce employment. *Alaska R&C*.

Here the challenges of starting and maintain a small business, Employer's cooperative, apologetic attitude and willingness to take responsibility for his errors, his limited financial

resources, and the valuable service he provides to the community by employing and feeding the homeless were all mitigating factors taken into consideration in determining an appropriate civil penalty. Therefore, though the minimum \$7,019.64 penalty under 8 AAC 45.176(a)(3) will be ordered, 50 percent of that penalty, or \$3,509.82, will be suspended. Employer will be ordered to make an initial payment of \$109.82 within 14 days of this Decision and Order, then pay the remaining \$3,400.00 in monthly payments of \$100.00 from April through December of each year, until the entire \$3,509.82 has been paid in full. Employer will remain personally responsible for this debt even if he retires or closes the business. In the meantime, Employer is urged to continue his efforts to bring all aspects of his business into full compliance with local, state and federal laws as soon as possible.

CONCLUSIONS OF LAW

1) Employer will be assessed a civil penalty of \$7,019.64, of which \$3,509.82 will be suspended, for failure to insure for purposes of workers' compensation liability and a payment plan will be allowed.

ORDER

- 1) The division's July 2, 2014 petition is granted.
- 2) At any time MICHAEL MOUTOUX and STAR AUTOMOTIVE 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), MICHAEL MOUTOUX and STAR AUTOMOTIVE 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), MICHAEL MOUTOUX and STAR AUTOMOTIVE are assessed a civil penalty of \$7,019.64, of which \$3,509.82 is suspended. MICHAEL MOUTOUX and STAR AUTOMOTIVE must timely pay \$3,509.82.
- 5) A payment plan is ordered.
- 6) **MICHAEL MOUTOUX and STAR AUTOMOTIVE shall pay \$109.82 within 14 days of this decision, in accord with AS 23.30.080(g). Thereafter, on the fifteenth day of each month MICHAEL MOUTOUX and STAR AUTOMOTIVE shall make 34 monthly**

payments in the sum of \$100.00 every month from April through December, until the total civil penalty of \$3,509.82 is paid in full.

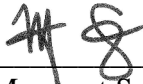
7) MICHAEL MOUTOUX and STAR AUTOMOTIVE are ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **MICHAEL MOUTOUX and STAR AUTOMOTIVE are ordered to make checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004561, and AWCB Decision Number 15-0078.** If MICHAEL MOUTOUX and STAR AUTOMOTIVE fail to make timely civil penalty payments as ordered in this decision, the entire \$7,019.64 shall immediately be due and owing and the director may declare the entire, assessed civil penalty in default and seek collection. Pending full, civil penalty payment under AS 23.30.080(f) in accord with this Decision and Order, jurisdiction is maintained.

8) The SIU is directed to monitor MICHAEL MOUTOUX and STAR AUTOMOTIVE for five (5) years from this Decision's date for continued compliance with the Act's insurance requirements.

9) The division's Collection Officer is ordered to prepare a proposed Liability Discharge Order within 30 days of MICHAEL MOUTOUX and STAR AUTOMOTIVE'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 July 6, 2015.

ALASKA WORKERS' COMPENSATION BOARD



Margaret Scott, Designated Chair

Sarah Lefebvre, Member

Jacob Howdeshell, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

In re MICHAEL MOUTOUX D/B/A STAR AUTOMOTIVE

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 MOUTOUX d/b/a STAR AUTOMOTIVE; Employer / respondent; Case No. 700004561; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on July 6, 2015.

Elizabeth Pleitez, Office Assistant