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. 700004739
WALTER WARNER AND CHRISTINA WARNER, D/B/A WARNER'S CARE,	)	AWCB Decision No. 16-0040
Respondents.	)	Filed with AWCB Fairbanks, Alaska on May 27, 2016

The Division of Workers' Compensation, Special Investigations Unit's March 4, 2015 petition seeking a finding of failure to insure and imposition of civil penalty was heard in Fairbanks, Alaska on November 19, 2015, a date selected on September 14, 2015. Investigator Christine Christensen appeared, represented the Special Investigations Unit (Division), and testified on its behalf. Walter Warner appeared, represented Warner's Care (Employer) and testified on its behalf. The record was held open following the November 19, 2015 hearing to elicit additional testimony to determine employer/employee status. The hearing recommenced March 29, 2016, a date selected on January 5, 2016. Investigator Christine Christensen appeared telephonically and represented the Division. Walter Warner and Christina Warner appeared telephonically, represented Employer and testified on its behalf. The record closed at the hearing's conclusion on March 29, 2016.

ISSUES

Liability under AS 23.30.075 necessarily depends on a person being an "employer" under the Workers' Compensation Act. Mr. Warner's November 19, 2015 testimony, which seemed to indicate the Warner's clients, rather than the Warners themselves, set employee work hours and directed employee work activity, initially created some doubt in this regard, so it was decided additional testimony was necessary to determine employer/employee status as a threshold issue in this case.

1. Are the Warners an "employer" under the Workers' Compensation Act such that they are subject to the liability set forth at AS 23.30.075?

The division contends Employer operated its business utilizing employee labor without maintaining workers' compensation insurance and a civil penalty should be assessed. Specifically, it contends Employer utilized employee labor between June 1, 2013 and February 7, 2015 without workers' compensation insurance coverage. The division contends the applicable regulation provides for a civil penalty between $92,922 and $909,178; however, in this case, the board should determine the appropriate amount of the civil penalty.

Employer does not dispute the Division's contentions, but it contends it was unaware of the requirement to maintain workers' compensation insurance coverage. Employer also contends, when it became aware of the legal requirement to maintain insurance, it attempted to secure coverage, but was unable to afford the premiums. Employer contends it cannot afford to pay the maximum penalty sought by the Division, but contends the minimum penalty "shouldn't be a problem" if business picks up. Employer contends it could not pay the minimum penalty amount in a lump sum, but rather would require payments to be made over time.

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

The Division contends Employer continues to utilize employee labor in violation of the Act and requests a stop work order until such time as the Employer insures for workers' compensation liability.

Employer did not respond to the Division's request for a stop work order. It is assumed Employer oppose the Division's request.

3. Should a stop work order be issued?

FINDINGS OF FACT

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

1) Employer provides home healthcare services for the elderly and disabled, including meal preparation, personal care, housekeeping, transportation to medical appointments and monitoring prescription and physical therapy guidelines for its clients. (Division's Hearing Brief, November 6, 2015; Christensen; Walter Warner; Christina Warner).

2) Employer is a partnership licensed by the State of Alaska since January 28, 2003. (Business license no. 293586, October 2, 2015).

3) The partners in Employer's business are Walter Warner and Christina Warner. (*Id.*).

4) Walter and Christina Warner previously operated Warner's Group Home as a partnership from July 10, 1997 until December 31, 2002, and Warner Board and Care from December 6, 1993 until December 31, 1995. (Business license nos. 224965 and 164434, October 2, 2015).

5) Employer has not been subject to prior failure to insure investigations and no reports of injury have been filed since Employer began business operations. (Division's Hearing Brief, November 6, 2015; Christensen).

6) On November 12, 2014, the Division was contacted by a third party with an inquiry concerning Employer's current status of workers' compensation insurance coverage. Investigator Wayne Harger conducted a preliminary records check that revealed Employer may have been uninsured. (*Id.*; Division's Petition, March 4, 2015).

7) On December 9, 2014, Investigator Wayne Harger contacted Employer by telephone and informed it of workers' compensation insurance requirements. (Division's Hearing Brief, November 6, 2015; Christensen; Walter Warner).

8) On March 4, 2015 the Division filed its instant petition. (Division's Petition, March 4, 2015).

9) On March 6, 2015, Employer was served with the Division's petition and discovery request. (USPS return receipt card, March 6, 2015).

10) On April 15, 2015, the Division received partial discovery from Employer consisting of Employer's tax returns for the years 2012 and 2013, and a calculation worksheet for one employee, which did not include the hours or days worked. (Division's Hearing Brief, November 6, 2015; Christensen; Employer letter, April 15, 2015; Employer's calculation worksheet, undated).

11) On May 17, 2015, the Division received additional, partial discovery from Employer consisting of calculation worksheets for an additional three employees, which did not include the hours or days worked. (Fax cover letter, May 17, 2015; Employer's calculation worksheets, April 15, 2015).

12) On May 21, 2015, the Division received Employer's calculation worksheets, with hours and days worked, for five employees. (Fax cover letter, May 21, 2015; Employer's calculation worksheets, May 21, 2015).

13) On February 7, 2015, Employer obtained workers' compensation insurance through Riverport Insurance Company. Employer has no prior history of maintaining workers' compensation insurance prior to date. (State of Alaska proof of coverage inquiry, undated; NCCI proof of coverage inquiry, October 2, 2015; Walter Warner; Policy Declarations Sheet #AKARP300125, February 7, 2015).

14) On May 18, 2015, Employer's workers' compensation policy was cancelled for nonpayment of premium. (*Id.*).

15) On May 20, 2015, Employer again obtained workers' compensation insurance through Riverport Insurance Company. The annual premium charged for Employer's policy was $11,433, which equates to a pro-rated premium of $31.31 per day. (Policy Declarations Sheet #AKARP300973, May 20, 2015; Uninsured Employer Worksheet, undated; observations).

16) The Division contends Employer was uninsured for a period prior to the effective date of the penalty assessment regulation at 8 AAC 45.176, but the commencement of this period is statutorily limited by AS 09.10.120 to six years before the filing of its petition. Therefore, the Division contends Employer's pre-regulation uninsured period ran from March 5, 2009 through February 27, 2010, a period of 359 calendar days. (Division's Hearing Brief, November 6, 2015; Christensen).

17) Employer denies it utilized employee labor during the alleged pre-regulation uninsured period, and the Division admits it does not have evidence to the contrary. (*Id.*).

18) The Division does not seek imposition of a penalty on Employer for the period of time it is alleged to have been uninsured prior to the effective date of the regulation. (*Id.*).

19) The Division contends Employer continued to be uninsured after February 28, 2010, the effective date of 8 AAC 45.176, until February 7, 2015, a period of 1,805 calendar days. (*Id.*).

20) Employer contends it did not utilize Employee labor until 2012, and the Division admits it does not have evidence to the contrary. (*Id.*).

21) Documentation provided by Employer shows employee wages being paid starting in June of 2013. (*Id.*; Employer's calculation worksheet for Amy Ernst, May 21, 2015).

22) On March 19, 2015, Employer opened an account with the Division of Employment and Training Services and began filing quarterly payroll reports for the purpose of paying required Unemployment Insurance contributions. Prior to March 19, 2015, Employer did not report payroll. (Division's Hearing Brief, November 6, 2015; Christensen).

23) Employer provided documentation showing five employees worked 14,576 hours from June 2013 until February 7, 2015, which equates to 1,822 employee workdays. (Employer's Calculation worksheets, May 21, 2015; Invoices, undated; Uninsured Employer Worksheet, undated).

24) The Division contends four aggravating factors apply under the regulation: 1) Failure to obtain workers' compensation insurance within 10 days after the division's notification of a lack of workers' compensation insurance; 2) A violation that exceeds 180 calendar days; 3) Failure to comply with the Divisions initial discovery demand within 30 days; and 4) Lapses in business practice that would be used by a reasonable diligent business person, including failure to gain a familiarity with laws affecting the use of employee labor. (*Id.*).

25) The Division contends, with four aggravating factors, the appropriate penalty range under the regulation is $51 to $499 per employee workday. (*Id.*).

26) Mr. and Mrs. Warners' 2012 U.S. Individual Income Tax Return shows an adjusted gross income of $224,843, which includes $143,222 net profit reported on their Schedule C. The Warners did not list wages, employee benefit programs or insurance expenses as business deductions on their Schedule C. (Employer's 2012 U.S. Individual Income Tax Return, including Schedule C, undated).

27) Mr. and Mrs. Warners' 2013 U.S. Individual Income Tax Return shows an adjusted gross income of $154,216, which includes $53,805 net profit reported on their Schedule C. The Warners did not list wages, employee benefit programs or insurance expenses as deductions on their

Schedule C. (Employer's 2013 U.S. Individual Income Tax Return, including Schedule C, undated).

28) On November 19, 2015, Christine Christensen testified to facts consistent with those alleged in the Division's brief. (Christensen).

29) Ms. Christensen is credible. (Experience, judgment, observations, and inferences drawn therefrom).

30) On November 19, 2015, Walter Warner testified as follows: He does not dispute the underlying facts alleged by the Division. Employer pays it employees by the hour, but did not use utilize time sheets, so when it was contacted by the Division, the only payroll information it had was cancelled checks. The lack of time sheets, and being "overwhelmed" and "overworked," is what caused Employer's untimely response to the Division's discovery request. Employees are paid by the hour, and Employer's clients set and keep the hours worked by its employees. Employer ultimately provided the number of hours worked by its employees to the Division based on receipts it issues to its clients. The only qualification to work for Employer is "a kind heart." Employer's clients tell it what they expect an employee to do, and it, in turn, notifies its employees of the clients' expectations. If a client is unhappy with an employee's performance, either the client or the client's family inform Mr. Warner the client's dissatisfaction. Employer used to have as many as 15 clients but, more recently, four clients passed away, and one moved out-of-state. Now Employer has four clients. Mr. Warner "had no idea" he was required to maintain workers' compensation insurance. He learned about the workers' compensation insurance requirement when Investigator Wayne Harger telephoned him. Employer was initially unable to obtain insurance because insurers it contacted did not carry its type of insurance. With regards to paying its employees, Employer originally did not withhold payroll taxes, but then it hired a "tax agency" to help out with the business. Employer cannot pay a $900,000 penalty. When asked if Employer could pay a $93,000 penalty, Mr. Warner testified if business picks up, "that shouldn't be a problem." He further stated, "That's a lot, but what else can I do?" Employer is not insured now because it cannot afford the insurance. Its premium was originally $1,700 per month. Employer initially tries to set a rate of $25 per hour with a new client for its services, but charges its clients "mostly what they can afford." Employer continues to use employees to "help" its clients. Mr. Warner "expects to be doing business for a long time," and plans to continue using employees. When Employer attempted to secure workers' compensation insurance, it completed an audit packet. Then, in October 2015, the

broker sent Employer a bill for $5,000, and $800 per month thereafter. Employer was unable make these payments. Mr. Warner is "hoping business picks up" so it can pay any civil penalty that may be ordered. Employer is also getting a website. Mrs. Warner also has an appointment today with a prospective client, and Mr. Warner is hoping they will pick up an additional client later today. It is difficult for the Mr. and Mrs. Warner to keep up with vehicle and house payments, and they have already obtained a loan extension on one vehicle. (Walter Warner).

31) Mr. Warner's November 19, 2015 testimony is generally credible, but his testimony regarding not being able to afford workers' compensation insurance premiums, and there "shouldn't be a problem" paying $93,000 penalty, is not credible. (Experience, judgment, observations, and inferences drawn therefrom).

32) Ms. Christensen did not know Employer's insurance had lapsed since writing her hearing brief. (Christensen).

33) At the conclusion of the hearing, the Division requested a stop work order. (Record).

34) On March 29, 2016, Christina Warner testified as follows: Employer obtains clients when either the hospital or a family member calls and asks them to check on disabled adults. Employer provides the following services for its clients: it cooks meals, gives baths, transports clients to doctors' appointments, does laundry, performs housework, changes diapers, goes shopping and sometimes, "just take[s] them for a ride." Employer's business is "up and down" all the time. At one point, seven clients passed away at the same time. Its youngest client now is 82 years old. Employer started out as a family business with Mr. and Mrs. Warner using their adult children to help out with clients. Then, after one child went on a mission, and another went to college, they started using "people that [the Warners] knew" to help them out with their clients - "That's what we call it, helping us out." Employer does not advertise to hire its employees. Mrs. Warner thinks she has to "know" her employees; therefore, she hires family members or friends. Typically, the Mr. and Mrs. Warner know their friends from church. The Warner's friends will typically approach them seeking employment. Employer performs a "background check" on any "outsiders" who seek employment. Qualifications to work for Employer include: a Christian attitude, CPR and first aid, and a driver's license if the employee transports a client to doctors' appointments. All client transport is done using Mr. and Mrs. Warner's vehicles; Employee's do not use their own vehicles. Employer has clients "with nothing," so it has provided them with such things as clothes and food in the past. In determining how much to charge a client, Employer will ask its' clients, how much can

they pay. Most clients have long term care insurance and Employer will bill according to what the insurance will pay. Employer does "a lot of charity stuff, too." The clients pay what they can afford to pay. If a client cannot afford to pay, Employer "does it anyways." The hiring process consists of Mr. and Mrs. Warner deciding with which client to place an employee. Mr. and Mrs. Warner will next discuss the placement with the client, and then decide to try the employee out for a couple of days to see if the client likes the employee. Employer had a "couple of guys" working for it "a while back," and Mrs. Warner liked them "because they were guys," but they did not wash their hands enough, so when the client passed away, she did not "hire" them anymore. Training consists of Mrs. Warner taking the employee out to lunch, where she informs the employee about the client's likes, dislikes and life experiences. Next, Mr. and Mrs. Warner will take an employee into the client's home and show the employee where things are located in the home. Sometimes they will take an employee into the client's home for a day, sometimes for a week, before the employee begins to care for the client alone. After employees begin to work in a client's home, they "keep in contact" with Mrs. Warner – they call her, text her and let her know how things are going. If Mrs. Warner has not heard from an employee in a while, she will call the employee. Mrs. Warner has only had one occasion to fire an employee who was "coming in late and lying." Mrs. Warner fired the employee, not the client. Employees were paid once per week by check, "but now we have decided all our employees are going to be self-employed." Employees are paid by the hour for hours they work. Since employees are all family and friends, they are expected to carry their own health insurance in the event of a workplace injury. Mrs. Warner asks her employees if they have health insurance. She also does not believe Employer has "contracts" with its employees, rather she believes the relationship is based on a "right to hire, a right to fire." Employer does not have "contracts" with its clients, either. Employer pays its employees by the hour, once per week, and retains a portion of what the client pays for itself. When a client cannot pay, Employer and the employees "back them up," which means they continue to provide services without pay. Employer's clients tell Mrs. Warner what their needs are, and Mrs. Warner, not the clients, communicates work instructions to the employees. Mrs. Warner emphasized, "it was always me [communicating work instructions]." Mrs. Warner taught Mr. Warner how to care for clients. When Employer started its company, it did not know anything about the business end of it. All it knew was there were elderly people out there that needed help. Mrs. Warner explained, "Walter and I don't ever want to break a law – that we know about." Employer is prepared to make

premium payments for workers' compensations insurance - "What we are doing is right, so we want everything to be right." "We'll have to make it work." Mr. Warner primarily handles Employer's financial business. Mrs. Warner understands family and friends working for them are employees for workers' compensation purposes. Employer has three employees working for it right now, and two of these employees have worked since the last hearing. (Christina Warner).

35) Mrs. Warner is generally credible, but she is not credible in regards to asking employees if they carry their own health insurance, and performing "background checks" on prospective employees, at least in any formal sense. (Experience, judgment, observations, and inferences drawn therefrom).

36) On March 29, 2016, Mr. Warner testified Employer started using a payroll company "a couple of years ago." He estimates approximately 50 percent of Employer's business is pro bono work. Mr. Warner thinks 2015 was the business's best year yet. When clients have long term care insurance, the insurance will pay the clients' families a flat rate per month, and the clients' families will then pay Employer. When Employer originally obtained workers' compensation insurance, it cost $1,700 per month. But, that was at a time when Employer had "a lot of clients" and seven or eight employees. Later, Employer's "payroll" dropped substantially. Employer "didn't have a clue" about workers' compensation insurance requirements. When asked about Employer's ability to pay a $93,000 penalty, Mr. Warner stated, "We'd have to make it work," but added Employer could not pay it all at once. A $500 monthly payment "might be feasible." Mr. Warner thought a $50,000 penalty would be "manageable." When asked about Employer's intention with respect to obtaining workers' compensation insurance, Mr. Warner answered, "We'll have to try to get it immediately." (Walter Warner).

37) Mr. Warner's March 29, 2016 testimony is credible. (Experience, judgment, observations, and inferences drawn therefrom).

38) On March 29, 2015, Ms. Christensen contended Employer is not currently insured as a result of a cancelation audit on the previous policy, and Employer cannot get insurance until it pays balance from previous policy. She contends Employer continues to utilize employee labor and renewed the Division's request for a stop work order. (Christensen).

39) Employer did not dispute Ms. Christensen's contentions. (Record).

40) The State of Alaska, Department of Health and Social Services, Senior and Disability Services, provides for a Personal Care Assistance (PCA) certification. 7 AAC 43.793.

PRINCIPLES OF LAW

> **AS 09.10.120. Actions in name of state, political subdivisions, or public corporations.** (a) An action brought in the name of or for the benefit of the state, any political subdivision, or public corporation may be commenced only within six years of the date of accrual of the cause of action. . . .
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> **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 . . . to ensure the 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, medical findings, 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. . . .
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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.

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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> (d) If an employer fails to insure or provide security as required by AS 23.30.075, the board may issue a stop order at the request of the division prohibiting the use of employee labor by the employer until the employer insures or provides 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.

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. The board also has 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) (penalty suspension was not an abuse of discretion when it stemmed from reluctance to jeopardize the continued viability of the employer's business). However, suspending an entire penalty amount is incompatible with the deterrent and punitive purposes of AS 23.30.080(f), and absent a finding that such a suspension is necessary in order to provide for continued, safe employment, a minimum civil penalty should be imposed. *State of Alaska v. Lawn Ranger of Alaska, LLC,* AWCAC Decision No. 224 (March 7, 2016).

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. *Id.* at 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.,* AWCB Decision No. 07- 0334 (November 6, 2007) (no penalty); *In re Casa Grande, Inc. and Francisco Barajas,* AWCB Decision No. 07-0288 (September 21, 2007) ($1,000 per employee per day with part suspended). These decisions discuss a number of aggravating and mitigating factors considered in determining appropriate civil penalties under AS 23.30.080(f), including: the 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 division's petition, whether employer violated a stop order, and credibility of employer's promises to correct its behavior. These factors are now set forth in regulation at 8 AAC 45.176, effective February 28, 2010, which establishes minimum and maximum penalty benchmarks, based on specific aggravating factors.

> **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.
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> (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 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board's credibility determinations. *Id.*

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **AS 23.30.240. Officers of corporations, municipal corporations, and nonprofit corporations and members of limited liability companies as employees**. (a) An executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation . . . is an employee of the corporation under this chapter. However, an executive officer of a corporation may waive coverage under this chapter, subject to the approval of the director . . . .
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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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> (19) "employee" means an employee employed by an employer as defined in (20) of this section;
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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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> **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 division'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 division's estimates, rather than established facts, penalty requests have been denied for lack of adequate evidence. *E.g., In re Lawn Ranger of Alaska*, AWCB Decision No. 15-0059 (June 11, 2015) (alternative penalty accessed due to insufficient evidence of uninsured employee workdays); *In re Fishhook Bar and Liquor*, (AWCB Decision No. 14-0099 (July 16, 2014) (alternative penalty accessed and suspended due to insufficient evidence of uninsured employee workdays); *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 45.174. Uninsured employers.**
> . . . .
>
> (b) At the request of the division and after a hearing, if the board finds an employer is in violation of AS 23.30.075, the board may issue a stop order prohibiting the use of employee labor by the employer. The order will be personally served upon the employer or his agent. A person authorized or

designated by the commissioner to serve process in department proceedings may serve an order issued by the board under this section.

. . . .

(d) A stop order issued in accordance with this section will be withdrawn, in accordance with AS_23.30.080(e), when the employer complies with AS 23.30.075.

(e) A hearing to determine if an employer failed to comply with a stop order issued under this section and should be assessed a civil penalty is a continuation of the administrative proceeding that began with the issuance of the stop order.

(f) The conducting of proceedings under this section does not affect the right of the department to seek criminal penalties against the employer under AS 23.30.075(b).

(g) Proceedings conducted under this section are subject to AS 44.62.330 - 44.62.630 (Administrative Procedure Act).

8 AAC 45.176. Failure to provide security: assessment of civil penalties. (a) If the board finds an employer to have failed to provide security as required by AS 23.30.075, the employer is subject to a civil penalty under AS 23.30.080(f), determined as follows:

. . . .

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

(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;

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

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

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

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

(4) previous violations of AS 23.30.075;

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

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

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

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

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

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

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

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

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

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

(A) ignoring certified mail;

(B) failure to properly supervise employees; and

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

(15) receipt of government funding of any form to obtain workers'

> compensation coverage under AS 23.30.075, and failure to provide that coverage.
>
> (e) In this section,
>
> (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.

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 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.

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

Aggravating factor (d)(12) is "failure to appear at a hearing before the board after receiving proper notice under AS 23.30.110." Prehearings and hearings are distinctly different events. Prehearings are informal proceedings in which parties meet with a board designee to "examine the Alaska Workers' Compensation Board's records, identify issues, memorialize any agreements, and provide parties the opportunity to resolve disputed issues." Division Prehearing Notice; 8 AAC 45.065(a). A hearing is a formal procedure before an administrative body performing a quasi-judicial function. The two are not equal in form or substance, and extending

8 AAC 45.176(d)(12) to include failure to attend prehearings as an aggravating factor is beyond the regulation's scope. *In re Amber Brophy-Mock d/b/a C.O.R. Cosmetics and C.O.R. Wax Lash & Cosmetics*, AWCB Decision No. 14-0036 (March 20, 2014).

> **8 AAC 45.890. Determining employee status.** For purposes of AS 23.30.395 (19) and this chapter, the board will determine whether a person is an "employee" based on the relative-nature-of-the-work test. The test will include a determination under (1) - (6) of this section. Paragraphs (1) and (2) of this section are the most important factors, and at least one of these two factors must be resolved in favor of an "employee" status for the board to find that a person is an employee. The board will consider whether the work
>
> (1) is a separate calling or business; if the person performing the services has the right to hire or terminate others to assist in the performance of the service for which the person was hired, there is an inference that the person is not an employee; if the employer
>
> (A) has the right to exercise control of the manner and means to accomplish the desired results, there is a strong inference of employee status;
>
> (B) and the person performing the services have the right to terminate the relationship at will, without cause, there is a strong inference of employee status;
>
> (C) has the right to extensive supervision of the work then there is a strong inference of employee status;
>
> (D) provides the tools, instruments, and facilities to accomplish the work and they are of substantial value, there is an inference of employee status; if the tools, instruments, and facilities to accomplish the work are not significant, no inference is created regarding the employment status;
>
> (E) pays for the work on an hourly or piece rate wage rather than by the job, there is an inference of employee status; and
>
> (F) and person performing the services entered into either a written or oral contract, the employment status the parties believed they were creating in the contract will be given deference; however, the contract will be construed in view of the circumstances under which it was made and the conduct of the parties while the job is being performed;
>
> (2) is a regular part of the employer's business or service; if it is a regular part of the employer's business, there is an inference of employee status;

> (3) can be expected to carry its own accident burden; this element is more important than (4) - (6) of this section; if the person performing the services is unlikely to be able to meet the costs of industrial accidents out of the payment for the services, there is a strong inference of employee status;
>
> (4) involves little or no skill or experience; if so, there is an inference of employee status;
>
> (5) is sufficient to amount to the hiring of continuous services, as distinguished from contracting for the completion of a particular job; if the work amounts to hiring of continuous services, there is an inference of employee status;
>
> (6) is intermittent, as opposed to continuous; if the work is intermittent, there is a weak inference of no employee status.

In *Searfus v. Northern Gas Co.*, 472 P.2d 966 (Alaska 1970), the Alaska Supreme Court first adopted Professor Larson's "relative nature of the work test" as the standard for determining employee status under the Alaska Workers' Compensation Act. *Accord Ostrem v. Alaska Workmen's Compensation Bd.*, 511 P.2d 1061 (Alaska 1973) (affirming and elaborating on the relative nature of the work test).

> Professor Larson states that the theory of compensation legislation is that the costs of all industrial accidents should be borne by the consumer as a part of the cost of the product. From this principle, Professor Larson infers that 'the nature of the claimant's work in relation to the regular business of the employer' should be the test for applicability of workmen's compensation, rather than the masterservant test of control which has been developed to delimit the scope of a master's vicarious liability to third persons for torts committed by his servants.
>
> It follows that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channelled, is within the presumptive area of intended protection.
>
> Terming this approach the 'relative nature of the work' test, Larson would have the trier of fact determine 'employee' status through consideration of the character of the claimant's work or business, and the relationship of the claimant's work or business to the purported employer's business.
>
> The 'relative nature of the work' test has two parts: first, the character of the claimant's work or business; and second, the relationship of the claimant's work or business to the purported employer's business. Larson urges consideration of three factors as to each of these two parts. With reference to the character of

> claimant's work or business the factors are: (a) the degree of skill involved; (b) the degree to which it is a separate calling or business; and (c) the extent to which it can be expected to carry its own accident burden. The relationship of the claimant's work or business to the purported employer's business requires consideration of: (a) the extent to which claimant's work is a regular part of the employer's regular work; (b) whether claimant's work is continuous or intermittent; and (c) whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of the particular job.

Olstrem at 1063 (quoting *Searfus*). Professor Larson's relative nature of the work test is now set forth in regulation at 8 AAC 45.890. In determining whether a particular individual is an employee, the board must assess the totality of all the relevant circumstances surrounding the parties' relationship. *Kroll v. Reeser,* 655 P.2d 753 (Alaska 1982).

The determination of whether a claimant is an "employee" under the relative nature of the work test requires a threshold determination of whether the other party is an "employer" within the ambit of the Workers' Compensation Act. The issue of whether the other party is an employer is critical both as a precondition to the application of the Act and as an element of the relative nature of the work test. *Kroll* at 756-57. Whether a person engages in a "business" within the meaning of AS 23.30.395(20) is relevant for the purposes of determining the "extent to which the claimant's work is a regular part of the employer's regular work." *Kroll* at 757 n.4 (citing *Olstrem*). Therefore, the Board's first obligation is to ascertain the nature of the particular business enterprise in which the injury allegedly occurred, and then to determine whether the work being done by the claimant is a regular part of that business. *Id*. However, the Board does not error by not applying the relative nature of the work test in the absence of a contract for hire. *Alaska Pulp* at 1012.

Larson's Workers' Compensation Law states in relevant part:

> **§ 61.03 Extent of Control of Details.** The rule here is best put negatively: An owner, who wants to get work done without becoming an employer, is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, as distinguished from control of the person doing it, without going beyond the independent contractor relation.

§ 61.04 Weight of Individual Factors Evidencing Right of Control. The four factors treated in this subsection – direct evidence of right of exercise of control, method of payment, furnishing of equipment and right to fire – are well-established tests resorted to in almost every case.

§ 61.05 Direct Evidence of Control. Although . . . the "right of control" is more often a conclusion that a provable fact, it is occasionally possible to resort to the best possible evidence, the employment contract itself. When the degree of control is spelled out in the agreement, there are usually only two remaining questions: first, whether the extent of control so created indicates employment . . . ; and second, whether the agreement is bona fide and can be taken at its face value. . . .

§ 61.06 Method of Payment. Payment on a time basis is a strong indication of the status of employment. Payment on a completed project basis is indicative of independent contractor status. . . .

§ 61.07 Who Furnishes Equipment. When the employer furnishes valuable equipment, the relationship is almost invariably that of employment. . . . . In applying the test of who furnishes equipment, it is essential to bear in mind the rationale underlying the test. When it is the employer who furnishes the equipment, the inference of right of control is a matter of common sense and business. The owner of a $10,000 truck who entrusts it to a driver is naturally going to dictate details such as speed, maintenance, and the like, in order to protect his or her investment. Moreover, since there is capital tied up in this piece of equipment, the owner will also want to ensure that it is kept as productive and busy as possible. For these reasons, it is not surprising that there seems to be no case on record in which the employer owned the truck but the driver was held to be an independent contractor. . . .

§ 61.08 Right to Fire. The power to fire, it is often said, is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contract, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract. . . .

§ 62.02 Whether Work is Integral Part of Employer's Business. . . . .
. . . .

(3) Transportation

Transportation, depending on the main business of the employer, may be ancillary or central to his operation. . . . [W]hen the employer's main business is transportation, farming out a portion of that business will often lead to a finding of employment. . . .

§ 63.03 Effect of Name Chosen by Parties. It is a truism that the name chosen by

> the parties to describe their relationship is ordinarily of very little importance as against the factual rights and duties they assume. A plain statement that the parties intend the relationship of independent contractor and not employee is not entirely to be disregarded, however. In a close case, it may swing the balance by aiding in establishing the true intent of the parties, and after all that intent is entitled to considerable respect if it can be accurately ascertained. . . . [I]t is quite possible that the worker honestly does not want to be an employee; and paternalism should not be carried so far that the state says to him, "We do not care what you want; we think employee status with compensation protection is better for you."

3 A. Larson, *Larson's Workers' Compensation Law* § 61-63 (2008).

ANALYSIS

1) Are the Warners an "employer" under the Workers' Compensation Act such that they are subject to the liability set forth at AS 23.30.075?

Liability under AS 23.30.075 necessarily depends on a person being an "employer" under the Workers' Compensation Act (Act). In most failure to insure cases, the issue of employer/employee status is seldom an issue. However, Mr. Warner's November 19, 2015 testimony, where he seemed to indicate the Warners' clients, rather than the Warners themselves, set employee work hours and directed employee work activity, created some doubt in this regard, so it was decided additional testimony would be taken to determine employer status as a threshold issue. *Kroll*

The law requires employers to insure for workers' compensation liability. AS 23.30.075(a). "Employer" is defined as a person employing one or more persons in connection with a business coming within the scope of the Act and carried on within the State. 23.30.395(20). Under the relative nature of the work test, whether or not a person engages in a "business" within the meaning of the Act is relevant for purposes of determining the extent to which a potential claimant's work is a part of employer's regular work. *Kroll.* Therefore, the first obligation is to ascertain the nature of the particular business enterprise in which an injury may occur, and then to determine whether work being done by a potential claimant is a regular part of that business. *Id.*

It is undisputed Employer provides home healthcare services for the elderly and disabled, including meal preparation, personal care, housekeeping, transportation to medical appointments and monitoring prescription and physical therapy guidelines for its clients. For its services, Employer

initially tries to set a rate of 25 dollars per hour, but will actually charge what a client can afford, or bill at a flat rate according to what a long term care insurance policy will pay. In turn, the Warners pay individuals providing services to their clients by the hour, once per week, and retain a portion of what their clients pay for themselves. Both, Mr. Warner's November 19, 2015 testimony, as well as Mrs. Warner's March 29, 2016 testimony, make clear individuals working for them deliver the very services their business enterprise provides for its clients. In other words, the services provided by individuals working for the Warners, and the services the Warners provide their clients, are one and the same. In no way can the services of the Warner's workers be distinguished as a "separate calling or business," 8 AAC 45.890(1), and neither can they be distinguished as anything other than a regular part of the Warner's own business, 8 AAC 45.890(2). Thus, the Warners are both operating a "business," and an "employer," under the Act. *Kroll*.

Conversely, 8 AAC 45.890 expressly applies to determining employee status. Of the many factors set forth, the first two, including six subparts, are most important. Since it was just decided the Warners' workers provide a service that is a regular part of the Warners' business, there already is an inference of employee status. 8 AAC 45.890(2). Additionally, Mrs. Warner testified it was she, and not her clients, who transmitted work instructions to her workers, and even emphasized, "It was always me." She expected her workers to keep in contact with her, either by phone or text messages, and if a worker did not, she would call an uncommunicative worker. Mrs. Warner also provided an example of not providing continuing work to "a couple of guys" because they did not wash their hands often enough; and she even instructed her own husband on how to care for clients. There can be no doubt, Mrs. Warner retained the right to exercise control over the manner and means to accomplish the desired result; as well as a right to extensive supervision, and thus, there are two additional, strong inferences of employee status. 8 AAC 45.890(1)(A), (C).

If the person performing the services has a right to terminate the relationship, at will and without cause, there is a strong inference of employee status. 8 AAC 45.890(1)(B). Here, Mrs. Warner denied she has "contracts" with either her workers or her clients, and no testimony was offered or elicited regarding the ability of an *individual* working for the Warners to terminate the relationship at will. However, Mrs. Warner's testified her relationships with workers are based "a right to hire, a right to fire," which provides strong indicia of at-will employment. Additionally, though they were

family members, two of the Warners' children left their employ, one to go to college and another to go on a mission. This also suggests individuals performing work for the Warners were free to leave their employ without contractual consequences. These examples provide a strong inference of employee status. *Id.*

Although the Warners have clients "with nothing," and have provided charitable clothing and food for its clients in the past, they mostly deliver services to their clients, in the clients' own homes, using client provided food, medications, household goods, etc. However, there is one notable exception – transporting clients to their doctors' appointments, which as always done using the Warners' vehicle. Since transporting clients to doctors' appointments is a primary, versus ancillary, part of the Warners' business, *Larson* at 61.07; and since furnishing valuable equipment such as a motor vehicle "almost invariably" indicates employee status, *Larson* at § 62.02(3); there is an additional inference of employee status. 8 AAC 45.890(1)(D).

Mr. Warner testified the only qualification to work for them was a "kind heart." Mrs. Warner testified the qualifications to work for them included a "Christian attitude," CPR (cardiopulmonary resuscitation), first aid, and a drivers' license, if the worker is to transport clients to doctors' appointments. Even under Mrs. Warner's more stringent criteria, it is not thought knowledge of CPR and first aid are representative of particular specialized skill or knowledge, considering the availability of other credentials, such as certification as a Personal Care Attendant (PCA) from the Department of Health and Social Services. Therefore, since working for the Warners requires little skill or experience, there is another inference of employee status.

Similarly, the fact that individuals who work for the Warners are paid on an hourly basis creates yet another inference of employee status, 8 AAC 45.890(1)(E), as does the Warners' testimony, which indicates they typically provide continuous services to their clients until death, 8 AAC 45.890(5). Finally, although Mrs. Warner testified she asks prospective workers about health insurance coverage, she was not credible on this point. Moreover, she also testified workers are expected to carry their own health insurance. However, even given an ideal scenario, were the Warners are billing the client 25 dollars per hour, and retaining a portion of that fee for themselves; given the extraordinary cost of health care, if an expectation for a worker to carry their own accident burden

existed at all, it was wholly an unreasonable one. Again, there is another strong inference of employee status. 8 AAC 45.890(3). In this case, the results under the relative nature of the work test are self-evident: the Warners are an "employer" operating a "business" with "employees" under the Act and are subject to the liability set forth at 23.30.075.

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

Employer does not dispute it operated a business using uninsured employee labor during a portion of at least one period alleged by the Division, totaling 1,822 employee workdays. Neither does it dispute the four alleged aggravating factors. With four aggravating factors, the applicable regulation provides for a civil penalty range of $51 to $499 per uninsured employee workday. 8 AAC 45.176(a)(4). Substantial evidence in the record supports both the 1,822 uninsured employee workdays, as well as the four aggravating factors alleged by the Division. 8 AAC 45.120. Given Employer's 1,822 uninsured employee workdays, the potential penalty could be between $92,922 and $909,178.

The Warners are, undoubtedly, a charitable, mission-driven couple providing a valuable service to an underserved segment of the community. With that said, however, they have operated their business, in one form or another, for nearly twenty years; and after that time period, their present lack of business acumen is striking. The Warners admit to utilizing employee labor as early as 2013, yet did not begin paying required unemployment insurance premiums until 2015. Mr. Warner also acknowledged their failure to withhold other payroll taxes as well. Additionally, even though they hired a payroll company "a couple years ago," the Warners could not readily provide the number of hours their employees worked, and had to calculate this number based on receipts they had provided their clients. It took the Warners two months to obtain workers' compensation insurance after Mr. Harger notified them of the requirement for them to do so; and then twice let their policies lapse. Neither did the Warners obtain workers' compensation insurance following the November 19, 2015 hearing, even as they continued to utilize at least three employees.

Additionally, Mr. Warner's explanation for not maintaining workers' compensation coverage after he became aware of the requirement for him to do so is at odds with other facts in the record. The

Warners' federal income tax returns show an adjusted gross income of $224,843, with a $143,222 net profit from their business in 2012, and a $53,805 net profit in 2013, and Mr. Warner thought 2015 had been the best year yet for their business. Although the Warners' business ebbs and flows, and although workers' compensation insurance is not inexpensive, the record demonstrates the Warner's can afford an $800, or even a $1,700, per month premium payment. Their ability to afford a premium is not an issue, but there choice not to pay one is.

Mr. Warner's testimony regarding their ability to pay a civil penalty is also quite revealing. When asked about their ability to pay a $93,000 penalty, Mr. Warner casually testified, if business picks up, "that shouldn't be a problem." In addition to "hoping business picks up," Mr. Warner added they are getting a website, and he was also hoping Mrs. Warner was going to pick up an additional client later in the day. Such testimony shows remarkable naiveté. Simply hoping business pick up, or getting a website, or gaining one additional client, is not going to dramatically transform the Warners' business as Mr. Warner apparently believes.

These facts demonstrate a significant penalty will be required to impress upon the Warners the importance of obtaining, and maintaining, workers' compensation insurance for the protection of workers in their employ. *Alaska R & C Communications*. Based on their tax returns, the minimum penalty of $92,922 would reflect such an amount, and will be assessed. However, the Warners' ability to pay a penalty must also be considered alongside of their ability to pay ongoing workers' compensation insurance premiums. *Id.* Mr. Warner testified a $500 per month penalty payment "might be feasible." Such a payment, extended over five years, would total $30,000, and will be ordered. The balance of $62,922 will be suspended for so long as Employer maintains workers' compensation insurance as required by AS 23.30.075, or executive office waivers pursuant to AS 23.30.240, according to its circumstances, and timely pays the unsuspended portion of its civil penalty. If Employer timely pays the unsuspended portion of its civil penalty, and maintains workers' compensation insurance as required by AS 23.30.075, or executive office waivers pursuant to AS 23.30.240, according to its circumstances, for five years from the date of this decision and order, the remaining balance will be waived.

3) Should a stop work order be issued?

The Division has requested a stop work order pursuant to AS 23.30.080(d), which provides the failure of an employer to file evidence of compliance creates a rebuttable presumption the employer failed to insure. Here, not only did the Warners fail to file evidence of compliance with the Division, but they readily acknowledge they repeatedly failed to maintain the required insurance. The presumption the Warners failed to insure has not been rebutted, and a stop work order will issue. Additionally, Mr. Warner's candid testimony, where he explained he "expects to be doing business for a long time" and plans to continue using employee labor, only reinforces the need for a stop work order in this case. **The Warners are cautioned: violating the stop work order "shall" result in a $1,000 per day civil penalty assessment.** AS 23.30.080(d).

CONCLUSIONS OF LAW

1) The Warners are an "employer" subject to liability at 23.30.075.

2) The Warners will be assessed a civil penalty in the amount of $92,922 for failure to insure against workplace injuries between 2012 and February 7, 2015, of which $62,922 is suspended on the conditions set forth above.

3) A stop work order will issue.

ORDER

1) **WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE are prohibited from utilizing employee labor until it insures as required by AS 23.30.075.**

2) The division's March 4, 2015 petition is granted.

3) At any time WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE have employees, or lacks an executive waiver for an employee, 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.

4) Pursuant to AS 23.30.060(a) and AS 23.30.075(b), WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE 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 from 2012 to February 7, 2015.

5) Pursuant to AS 23.30.080(f), WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE are assessed a civil penalty of $92,922, of which $62,922 is suspended on the conditions set forth above.

6) A payment plan is ordered.

7) WALTER AND CHRISTINA WARNER d/b/a WARNER CARE shall pay $500 within seven (7) days of service of this decision in accord with AS 23.30.080(g). Thereafter, on the 1st day of each month WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE shall make monthly payments in the sum of $500 for 60 months until the total civil penalty of $30,000 is paid in full.

8) WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE are ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **WALTER AND CHRISTINA WARNER D/B/A WARNER CARE NATIVE is ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004739, and AWCB Decision Number 16-0040.** If WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE fail to make timely civil penalty payments as ordered in this decision, the entire $92,922 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.

9) The Division is directed to monitor WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE for five (5) years from this decision's date for continued compliance with the Act's insurance requirements.

10) The Division's Collection Officer is ordered to prepare a proposed Liability Discharge Order within 30 days of WALTER AND CHRISTINA WARNER'S d/b/a WARNER'S CARE 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 Fairbanks, Alaska on May 27, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Julie Duquette, Member

/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 WALTER AND CHRISTINA WARNER d/b/a WARNER'S CARE; Employer / respondent; Case No. 700004739; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served upon the parties by First-Class U.S. Mail, postage prepaid, on May 27, 2016.

/s/_____
Jennifer Desrosiers, Office Assistant II