

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. 700004829
OF A CIVIL PENALTY AGAINST,)
) AWCB Decision No. 16-0103
HOME OF LOVE ASSISTED LIVING)
HOME, LLC,) Filed with AWCB Anchorage, Alaska
) on November 3, 2016
Respondent.)
_____)

The Division of Workers' Compensation, (division) Special Investigations Unit's (SIU) unopposed January 23, 2015 Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage, Alaska on October 12, 2016, a date selected on September 8, 2016. The parties stipulated to all facts and there were no disputes. Investigator Christine Christensen appeared, testified and represented the SIU. Elena Canlas appeared, testified and represented Home of Love Assisted Living Home, LLC (Employer). The record closed at the hearing's conclusion on October 12, 2016.

ISSUES

The division contends Employer, uninsured for workplace injuries, should be assessed an appropriate civil penalty calculated under the law applicable to pre- and post-regulation lapses.

Employer concedes an appropriate penalty should be assessed. However, it contends its misplaced reliance on its insurance broker should mitigate the assessed civil penalty.

What is an appropriate civil penalty?

FINDINGS OF FACT

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

- 1) On October 5, 2016, the division filed a brief setting forth facts with which it anticipated Employer would agree. (Hearing Brief of the Special Investigations Unit, October 5, 2016).
- 2) At hearing on October 12, 2016, after the investigator clarified two alleged facts with supporting documentation, Employer stipulated orally to all facts set forth in the division’s brief, which are all incorporated herein by reference. (Canlas; *id.*).
- 3) Employer had the following uninsured calendar days and related uninsured employee workdays:

Table I

Lapse	Lapse Began	Lapse Ended	Uninsured Calendar Days	Uninsured Employee Workdays
(1)	September 24, 2009	February 27, 2010	157	
Regulation 8 AAC 45.176 is effective February 28, 2010				
(2)	February 28, 2010	July 16, 2011	503	688
(3)	February 21, 2012	September 11, 2012	203	194
(4)	September 11, 2013	October 18, 2013	37	30
(5)	April 1, 2014	May 29, 2014	58	40
(6)	August 25, 2014	December 9, 2014	106	114
(7)	December 9, 2015	December 23, 2015	14	
(8)	August 29, 2016	September 16, 2016	18	
Post-regulation Subtotal			939	
Totals			1,096	1,066

- 4) Employer’s pre-regulation lapse (1) was 157 calendar days; its post-regulation lapses (2) through (6) were 939 calendar days, totaling 1,096 uninsured calendar days. Five employees worked 8,528 hours during lapses (1) through (6), totaling 1,066 uninsured employee workdays. The division obtained no records for lapses (7) or (8), so these lapses are not included in the totals. (Christensen).
- 5) Employer’s current workers’ compensation insurance policy charges a \$1,269 annual premium, which prorates to a \$3.48 daily premium ($\$1,269 / 365 \text{ days} = \3.48). (*Id.*).

6) Employer's prorated premium for pre-regulation lapse (1) is \$546.36 (157 uninsured calendar days x \$3.48 = \$546.36). Twice the prorated premium for lapse (1) is \$1,092.72 (\$546.36 x 2 = \$1,092.72). (*Id.*).

7) The prorated premium for post-regulation lapses (2) through (6) is \$3,267.72 (939 uninsured calendar days x \$3.48 = \$3,267.72). Twice the prorated premium for lapses (2) through (6) is \$6,535.44 (\$3,267.72 x 2 = \$6,535.44). (*Id.*).

8) During the post-regulation lapses, Employer had five "aggravating factors" as follows: (1) Employer's failure to maintain workers' compensation insurance after previous notification by the division that Employer lacked coverage; (2) Employer's AS 23.30.075 violation exceeded 180 calendar days; (3) Employer's failure to comply with the division's initial discovery demand within 30 days; (4) a workers' compensation insurance policy cancellation due to Employer's failure to comply with the carrier's requests or procedures; and (5) Employer's lapses in business practices that would be used by a reasonably diligent business person. (Parties' hearing stipulation).

9) Employer is facing federal tax liens totaling at least \$42,584.02 and is working with the Internal Revenue Service (IRS) and a tax preparer to address this unrelated issue. (Canlas).

10) Employer mistakenly relied upon its insurance broker who got documents from the workers' compensation carrier but failed to pass those on to Canlas who manages the business. For several years, Canlas relied upon her broker to pass on information concerning her workers' compensation insurance coverage. However, the broker received audit and cancellation notices but failed to advise Canlas. Canlas did not know about any audits and was unaware she was uninsured until the division contacted her. Canlas is now her own "broker," does business directly with the insurer and keeps track of Employer's workers' compensation insurance coverage. Canlas has learned from her mistake, regrets her insurance lapses and understands why workers' compensation insurance coverage for her employees is important. (*Id.*).

11) Canlas owns her own home, has been in business providing assisted-living services since 2005 at the same location and is licensed for up to five clients. Her client load varies from three to five people, which at times makes finances difficult. Employer has two employees who make their living working for her and providing assisted living services to her clients. In addition to paying her two employees, Canlas gets paid \$3,500 per month and she pays her husband a co-owner \$2,500 per month. Canlas currently has less than \$500 in the bank, has a financed motorhome, which she uses

to take clients on road trips, owns no stocks and has no investments. She could afford to pay \$200 to \$300 per month on any assessed civil penalty. (*Id.*).

12) Employer's IRS lien will adversely affect its ability to make monthly payments on any assessed civil penalty in this case. Imposing too harsh a civil penalty may force Employer out of business causing reduced assisted-living services in the community and less employment for Employer's two workers. (Experience, judgment and inferences from the above).

13) Canlas' testimony was credible. (Experience, judgment and inferences from the above).

14) Employer provides a valuable benefit to clients in the community who need assisted-living services. Its employees are exposed to normal workplace injuries including sprains and strains from assisting clients as well as risks imposed through contracting infections from ill clients. (*Id.*).

PRINCIPLES OF LAW

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 23.30.080. 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 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.

(g) If an employer fails to pay a civil penalty order issued under (d), (e), or (f) of this section within seven days after the date of service of the order upon the employer, the director may declare the employer in default. The director shall file a certified copy of the penalty order and declaration of default with the clerk of the superior court. The court shall, upon the filing of the copy of the order and declaration, enter judgment for the amount declared in default if it is in accordance with law. Any time after a declaration of default, the attorney general shall, when requested to do so by the director, take appropriate action to ensure collection of the defaulted payment. Review of the judgment may be had as

provided under the Alaska Rules of Civil Procedure. Final proceedings to execute the judgment may be had by writ of execution.

Alaska's penalty provision in AS 23.30.080(f) is one of the highest in the nation. *In re Alaska Native Brotherhood #2*, AWCB Decision No. 06-0113 (May 8, 2006). Alaska's statute's severity is a policy statement: Failure to insure for workers' compensation liability will not be tolerated in Alaska. However, the board in its discretion may suspend part of an assessed civil penalty. *State of Alaska, Division of Workers' Compensation v. Lawn Ranger of Alaska, LLC*, AWCAC Decision No. 224 (March 7, 2016).

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 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 fairly penalizing an offender. *Alaska R&C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, AWCAC Appeal No. 07-043 (September 16, 2008). A penalty is not intended to destroy a business or cause employment loss. *Id.* at 27.

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 board's credibility findings are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

8 AAC 45.050. Pleadings. . . .

. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made . . . orally in the course of a hearing. . . .

(3) Stipulations of fact . . . are binding upon the parties to the stipulation. . . .

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. . . .

....

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

....

(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;

....

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

....

(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. . . .

ANALYSIS

What is an appropriate civil penalty?

a) Pre-regulation.

The parties stipulated to all facts and there are no disputes. 8 AAC 45.050(f)(2), (3). Employer's pre-regulation lapse totaled 157 calendar days. Canlas credibly testified she mistakenly relied on her insurance broker for information about her workers' compensation insurance. The information was not forthcoming. AS 23.30.122; *Smith*. Canlas had no idea her insurance had terminated and was unaware her carrier requested an audit because the broker failed to pass this information on to

Canlas. This credible testimony mitigates Employer's civil penalty for this lapse. *Alaska R&C Communications*. The prorated premium for Employer's current workers' compensation insurance is \$3.48 per day, which prorated over 157 days, totals \$546.36. Twice this amount is \$1,092.72. Canlas acknowledges and regrets her mistakes, now deals directly with the insurance carrier and understands how important workers' compensation insurance is to her employees. A civil penalty twice the premium Employer would have paid had it been insured during the pre-regulation lapse period is an appropriate penalty for this period. *Rogers & Babler*. Employer will be assessed a \$1,092.72 civil penalty for the pre-regulation lapse. AS 23.30.080(f).

b) Post-regulation lapse.

A different analysis applies to post-regulation lapses. Employer's five aggravating factors place its civil penalty calculation under 8 AAC 45.176(a)(4), because Employer has more than three but "no more than six aggravating factors." 8 AAC 45.176(d)(2), (3), (7), (13) and (14). Under 8 AAC 45.176(a)(4), Employer's assessed civil penalty for these lapses may be no less than \$51 and no more than \$499 per uninsured employee workday, notwithstanding mitigating factors. In no event may the assessed civil penalty for these post-regulation lapses be less than two times the premium Employer would have paid had it been properly insured. (*Id.*). Employer's post-regulation lapses totaled 939 calendar days. Employer's current, prorated workers' compensation insurance premium is \$3.48 per day, which prorated over 939 days, totals \$3,267.72. Twice this amount is \$6,535.44. However, under 8 AAC 45.176(a)(4), given Employer's five aggravating factors, it cannot be assessed a civil penalty less than \$51 per uninsured employee workday. Employer had 1,066 uninsured employee workdays in the post-regulation lapse periods. By law, Employer's assessed civil penalty cannot be less than \$54,366 (1,066 uninsured employee workdays x \$51 = \$54,366). Employer will be assessed a \$54,366 civil penalty for its post-regulation lapses.

c) Civil penalty suspension.

The total assessed civil penalty will be \$55,458.72 (\$1,092.72 pre-regulation civil penalty + \$54,366 post-regulation civil penalty = \$55,458.72 total assessed civil penalty). However, some of the assessed civil penalty may be suspended. *Lawn Ranger*. Employer is facing an IRS lien, which will affect its ability to pay a civil penalty. *Rogers & Babler*. The assessed civil penalty and the amount Employer is actually required to pay should not be punitive. *Alaska R&C Communications*.

Employer has little cash on hand and has varying income depending upon its client load. The goal is not to put Employer out of business, as it provides a valuable service to local citizens who need assisted living. The goal is to bring Employer into compliance, deter future lapses, ensure Employer's workers remain working in a safe environment, and satisfy the community's interest in fairly penalizing Employer as an offender. *Alaska R&C Communications*. Alaska will not tolerate employers not insured for workplace injuries. *In re Alaska Native Brotherhood #2*. Canlas' credible testimony demonstrates she has learned a valuable lesson through this experience and now maintains Employer's workers' compensation insurance by dealing directly with the carrier. AS 23.30.122; *Smith*. Given this case's particular facts and circumstances, the total civil penalty Employer must actually pay will be calculated as follows: \$55,458.72 total assessed civil penalty - \$47,830.56 suspended amount = \$7,628.16. *Rogers & Babler*. Employer will be ordered to pay \$7,628.16, which amount is double the total workers' compensation insurance premium Employer would have paid had it been insured for workplace injuries during both the pre- and post-regulation lapses. AS 23.30.080(f); *Alaska R&C Communications*.

A payment plan for the \$7,628.16 will be ordered. Employer is advised should it fail to make timely payments, the entire \$55,458.72 assessed civil penalty will be due and owing and the division director may declare this amount in default and seek collection. AS 23.30.080(g).

CONCLUSION OF LAW

\$55,458.72 is an appropriate civil penalty.

ORDER

- 1) The division's January 23, 2016 unopposed petition is granted.
- 2) At any time Home of Love Assisted Living Home, LLC has employees, it 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), Home of Love Assisted Living Home, LLC is directly liable for any and all benefits payable under the Act for compensable injuries to its employees during the uninsured periods.

In re HOME OF LOVE ASSISTED LIVING HOME, LLC

4) Pursuant to AS 23.30.080(f), Home of Love Assisted Living Home, LLC is assessed a civil penalty of \$55,458.72 of which \$47,830.56 is suspended. Home of Love Assisted Living Home, LLC must timely pay **\$7,628.16**.

5) A payment plan is ordered as follows:

6) **Home of Love Assisted Living Home, LLC shall pay \$1,628.16 as an initial payment within seven (7) days of this decision. Thereafter, on the first day of each month Home of Love Assisted Living Home, LLC shall make monthly payments in the sum of \$250 for twenty-four (24) months until the \$7,628.16 civil penalty is paid in full.**

7) **Home of Love Assisted Living Home, LLC is ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. Home of Love Assisted Living Home, LLC is ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700004829, and AWCB Decision Number 16-0103.** If Home of Love Assisted Living Home, LLC fails to make timely civil penalty payments as ordered in this decision, the entire **\$55,458.72 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 Home of Love Assisted Living Home, LLC for two 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 Home of Love Assisted Living Home, LLC's full, timely, civil penalty payment as set forth in this decision and order. The proposed order will be addressed in accord with 8 AAC 45.130.

Dated in Anchorage, Alaska on November 3, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Mark Talbert, 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.

