

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. 700007067
OF A CIVIL PENALTY AGAINST,)
) AWCB Decision No. 21-0052
NORTHERN CONTRACTING, LLC,)
) Filed with AWCB Anchorage, Alaska
Respondent.) on June 17, 2021
)

The Division of Workers' Compensation, Special Investigations Unit's (SIU) June 17, 2020 petition and February 24, 2021 amended petition for failure to insure workers' compensation liability and assessment of a civil penalty, were heard in Anchorage, Alaska on May 25, 2021, a date selected on April 1, 2021. The SIU's March 22, 2021 hearing request gave rise to this hearing. Investigator Christine Christensen represented the SIU and testified. Dolton Grey, Megan Grey and Douglas Grey appeared on behalf of Northern Contracting, LLC (Employer) and testified. The record was left open until June 14, 2021, to permit Employer to file evidence of wages paid to employees, profit and loss statements, and its last two years of income tax returns. No additional evidence was filed and the record closed on June 15, 2021.

ISSUE

The SIU contends Employer was uninsured for workplace injuries while operating a business with employees in Alaska. It contends, taking all evidence and legal factors into account, Employer should pay a civil penalty consistent with the Alaska Workers' Compensation Act's (Act) applicable statutes and regulations.

Employer does not dispute the SIU's evidence or arguments. However, it contends its financial difficulties weigh against a large penalty that could create an unrecoverable financial hardship.

Shall Employer be assessed a civil penalty?

FINDINGS OF FACT

The following facts and factual conclusions are undisputed based upon Employer's representatives' testimony, or are established by a preponderance of the evidence:

- 1) Employer, a limited liability company (LLC) formed on September 12, 2016, is in the construction and snow removal business. Employer does "dirt work" described as moving rocks and dirt for foundations, septic systems and water lines and "trucking" work which involves driving dump trucks and semi-trucks and hauling loads of dirt, snow and other things. Employer is also a framing contractor. It utilizes heavy equipment operators, laborers and truck drivers to perform work. Employer has four members, Dalton Grey, the managing member, and Douglas Grey, II, Douglas Grey, III, and William Grey. Dalton Grey own 92 percent of the LLC and the other three members each own two percent. (Northern Contractors, LLC - License Details, License No. 10426882; Entity Details, Entity No. 10040009, License Details, License No. 114941, Division of Corporations, Business & Professional Licensing; Douglas Grey.)
- 2) On September 12, 2018, the SIU received information Employer was operating in Fairbanks and using employee labor. The investigation found Employer incurred a lapse in coverage from August 24, 2017 to September 5, 2018. Employer reported having no employees during this time of lapse, and the Division was unable to find evidence to refute this report. The SIU informed Employer of its obligation to maintain coverage and closed the case without filing a petition for failure to insure. Employer's failure to maintain workers' compensation insurance coverage after receiving this notice is an aggravating factor. (SIU Hearing Brief, May 17, 2021; experience, observation, judgment.)
- 3) On June 17, 2020, SIU filed a petition for a finding Employer failed to insure workers' compensation liability and assessment of a civil penalty and on February 24, 2021, SIU filed an amended petition. (Petition, June 17, 2020; Petition, February 24, 2021.)

- 4) When the June 17, 2020 petition was provided to Employer via email, it received notice of its obligation to maintain workers' compensation insurance coverage. Thereafter, an amended petition was filed because Employer's coverage was cancelled for premium non-payment. Employer's failure to maintain workers' compensation insurance coverage after receiving this notice is an aggravating factor. (SIU Hearing Brief, May 17, 2021; experience, observation, judgment.)
- 5) The SIU's undisputed evidence shows Employer was uninsured for workplace injuries while using employee labor from December 18, 2018 to March 25, 2020, August 5, 2020 to August 8, 2020, and again from December 3, 2020 to February 19, 2021, for a total of 544 calendar days and 2,265 uninsured employee workdays. (SIU Hearing Brief with exhibits, May 17, 2021.)
- 6) Employer's workers' compensation policy through Alaska National Insurance Co. had been cancelled as of December 18, 2018 for failure to comply with the audit. Coverage was reinstated on March 25, 2020 following completion of the previous audit and payment to Alaska National Insurance Co., leaving a 463 day lapse in coverage from December 18, 2018 to March 25, 2020. Employer incurred two additional lapses in coverage from August 5, 2020 to August 8, 2020 and again from December 3, 2020 to February 19, 2021. Failure to insure for more than 180 calendar days is an aggravating factor. Cancellation of Employer's workers' compensation insurance policy due to its failure to comply with the carrier's requests and procedures during the audit is an aggravating factor. (SIU Hearing Brief with exhibits, May 17, 2021; experience, observation, judgment.)
- 7) On June 17, 2020, SIU's petition for a finding of Employer's failure to insure and assessment of a civil penalty and SIU's discovery demand were mailed to Employer via certified mail and was returned unclaimed. Failing to sign for certified mail is a lapse in business practice used by a reasonably and diligent business person and is an aggravating factor. (*Id.*)
- 8) On December 3, 2020, SIU's November 5, 2020 petition to compel Employer to provide discovery was granted. Employer was ordered to provide the requested discovery with 10 days of service of the prehearing conference summary. (Prehearing Conference Summary, December 3, 2020.)
- 9) On February 24, 2021, an amended petition and discovery demand were mailed to Employer via certified mail and was returned unclaimed. The discovery demand was also electronically served on February 24, 2021 and discovery was due 30 days thereafter. Employer did not respond

to the discovery demand within 30 days, which is an aggravating factor. (SIU Hearing Brief with exhibits, May 17, 2021; experience, observation, judgment.)

10) On March 19, 2021, the SIU emailed Employer, reminded it to provide discovery and attached a copy of the petition and an April 1, 2021 prehearing conference summary notice. (SIU Hearing Brief with exhibits, May 17, 2021.)

11) On April 1, 2021, Employer failed to attend the prehearing conference and SIU's November 5, 2020 petition to compel discovery was granted. (Prehearing Conference Summary, April 1, 2021.)

12) Employer is currently insured and its estimated annual premium is \$11,195.00; this equals \$30.67 per day to insure against workplace injuries ($\$11,195 / 365 = \30.67). (Northern Contracting, LLC, WCIP Information Page, Policy Number WCAK0000022300, Policy Period: 2/19/2021 to 2/19/2022; Experience, observation, judgment.)

13) Based on its current insurance costs, the estimated premium Employer would have paid had it been insured for the 544 calendar days is \$16,684.48 ($544 \times \$30.67 = \$16,684.48$). (Experience, judgment, observations.)

14) Twice the estimated premium Employer would have paid had it been insured for the 544 calendar days is \$33,368.96 ($\$16,684.48 \times 2 = \$33,368.96$). (Experience, judgment, observations.)

15) Employer agrees it had lapses in workers' compensation insurance coverage and it was not compliant with its carriers audit requests and procedures. When the audit was conducted, Employer had a payment due from the previous year's overtime hours on Employer's work on Costco in Fairbanks. Employer could not afford the payment and its insurance was cancelled. (Douglas Grey.)

16) Employer hired Alberto Perez to get its financial records in order. (Douglas Grey.)

17) Megan Grey and Douglas Grey both testified they thought Employer's accountant provided the information SIU requested in the discovery demand, which was employee records, tax returns and profit and loss statements. Neither contacted the accountant until the day of hearing to seek confirmation the information had been sent. (Megan Grey, Douglas Grey.)

18) Employer spends \$600 every two days on fuel and for the last three years has paid \$220,000 to \$300,000 per year in payroll. It has equipment payments, a debt to Spenard Builders Supply and is making payments to its former workers' compensation insurance carrier for the audit correction. In 2020, Employer's gross income was between \$800,000 and \$1,000,000 and net

income was between \$80,000 and \$100,000. Its estimated gross income for 2021 is \$500,000. (Douglas Grey, Dalton Grey.)

19) Employer provided no discovery or evidence to support its testimony regarding the company's financials. (Observation.)

20) Employer cannot afford to pay any civil penalty assessed in a lump sum. In the summer, it can afford to pay \$2,000 per month; however, in the winter, it can only pay \$1,000 per month. Its estimated net annual income in 2020 was between \$80,000 and \$100,000. (Douglas Grey, Dalton Grey.)

21) Employer has five aggravating factors: (1) It failed to maintain workers' compensation after a previous notification it lacked coverage; (2) An uninsured lapse exceeding 180 consecutive calendar days; (3) It failed to comply with SIU's initial discovery demand within 30 days after the demand and failed to comply with discovery orders; (4) Employer's workers' compensation insurance policy was cancelled because it failed to comply with its carrier's audit requests and procedures; and (5) Employer ignored certified mail, did not attend prehearing conferences, and did not confirm its accountant had provided discovery resulting in several lapses in business practice that would be used by a reasonably diligent business person. (Experience, observation, judgment.)

22) The SIU seeks an order setting an appropriate civil penalty pursuant to the Act and applicable regulations; it contends the penalty could be as high as \$1,130,235 under this case's facts. It does not object to a penalty assessed on the applicable range's lower end, nor does it object to a monthly payment plan. (SIU Hearing Brief, May 17, 2021; Record.)

23) There were no workplace injuries reported during Employer's coverage lapse periods. (SIU Hearing Brief, May 17, 2021.)

24) Employer engages in work that exposes workers' to injury that can lead to injured workers' entitlement to costly medical and indemnity benefits. (Experience, observation.)

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 23.30.060. Election of direct payment presumed. (a) An employer is conclusively presumed to have elected to pay compensation directly to employees for injuries sustained arising out of and in the course of the employment according to the provisions of this chapter, until notice in writing of insurance, stating the name and address of the insurance company and the period of insurance, is given to the employee. . . .

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 duly authorized to transact the business of workers' compensation insurance in this state, or shall furnish the division satisfactory proof of the employer's financial ability to pay directly the compensation provided for. . . .

(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the division, upon conviction, the court shall impose a fine of \$10,000 and may impose a sentence of imprisonment for not more than one year. . . .

AS 23.30.080. Employer's failure to insure.

. . . .

(f) If an employer fails to insure . . . 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. . . .

(g) If an employer fails to pay a civil penalty order issued under . . . 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. . . .

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. . . .

Since November 7, 2005, the effective date of the 2005 amendments to the Alaska Workers' Compensation Act (Act), when an employer required to insure fails to insure, the law grants the board discretion to assess a civil penalty of up to \$1,000 for each employee, for each day an employee is employed while the employer fails to insure. Alaska's penalty provision is one of the highest in the nation. *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. *State of Alaska, Division of Workers' Compensation 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 such conduct, aggravates or mitigates its offense. A penalty is assessed based on the unique circumstances arising in each case. The primary goal of a penalty under AS 23.30.080(f) is not to be unreasonably punitive, but rather to bring the employer into compliance, deter future lapses, ensure the continued employment of employees in a safe work environment, and to satisfy the community's interest in fairly penalizing the offender. *Alaska R&C Communications, LLC v. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Compensation Appeals Commission, AWCAC Appeal No. 07-0043 (September 16, 2008). A penalty is not intended to destroy a business or cause employment loss. *Id.* at 27. In assessing a civil penalty, consideration is given to the period the employer was uninsured and any injury history. Injury history helps determine if the work is dangerous. The employer's ability to pay the penalty must also be assessed. *Id.*

8 AAC 45.054. Discovery.

....

(e) If an employer petitioned for failure to insure for workers' compensation liability fails to comply with the division's discovery demand not later than 30 days after service, the division may petition the board for an order compelling the employer to provide the discovery. If the employer fails to comply with an order by the board or the board's designee concerning discovery matters, the board may impose appropriate sanctions, including dismissing the employer's defenses and accepting the division's proffered evidence regarding estimated uninsured employee workdays and workers' compensation insurance premiums the employer would have paid had it been insured.

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 . . . 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 persons, including

(A) ignoring certified mail;

(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 23.30.075 divided by eight.

ANALYSIS

Shall Employer be assessed a civil penalty?

In re NORTHERN CONTRACTING, LLC

The relevant facts in this case are not disputed. Employer acknowledges it was uninsured and at least one policy was cancelled because it failed to comply with its carrier's audit requests and procedures. A second policy was cancelled because Employer failed to pay its premium.

Employer had 544 uninsured calendar days and 2,265 uninsured employee workdays. It has five aggravating factors. 8 AAC 45.176(d). It failed to maintain workers' compensation insurance after having been previously notified by SIU it lacked coverage. 8 AAC 45.176(d)(2). Employer had four violations of AS 23.30.075 and the 463 day lapse in coverage from December 18, 2018 to March 25, 2020 exceeded 180 calendar days. 8 AAC 45.176(d)(3). It failed to comply with the division's initial discovery demand within 30 days after the demand, failed to comply with discovery orders and when SIU stipulated to hold the record open to give Employer an opportunity to provide evidence after the hearing, in the two weeks allowed at Employer's request, it filed nothing. 8 AAC 45.176(d)(7). Employer's workers' compensation insurance policy was cancelled because it failed to comply with the carrier's audit. 8 AAC 45.176(d)(13). Employer did not accept certified mail that contained SIU's petitions and discovery requests; this is a lapse in business practices that a reasonably diligent business persons would use. 8 AAC 45.176(d)(14); *Rogers & Babler*.

The SIU has requested the statutes and regulations be followed when assessing Employer's civil penalty. The penalty is not intended to cause Employer to fail or employees to lose their jobs. Either of those consequences would not serve the Act's purpose to restore Employer to compliance and provide security to its workers if they are injured while working. *In re Alaska R&C*. Employer was not forthcoming with records to support the Greys' testimony even when given an opportunity to do so after hearing. The applicable statute and regulations' clear language and intent, uninsured employers are not tolerated in Alaska, cannot be ignored. *Lawn Ranger; In re Alaska Native Brotherhood*.

Employer's workers are heavy equipment operators, laborers and truck drivers and the nature of their work exposes them to injury risk. *Rogers & Babler*. Given five aggravating factors and with 2,265 uninsured employee workdays, Employer can be assessed a civil penalty from \$115,515 (2,265 x \$51 per uninsured employee work day = \$115,515) to \$1,130,235 (2,265 x \$499 per

uninsured employee work day = \$1,130,235). 8 AAC 45.176(a)(4). The estimated premium for the 544 calendar days Employer was uninsured is \$16,684.48, and twice this amount is \$33,368.96. Employer's repeated lapses in coverage are concerning as is its lack of attention to basic business practices especially in an industry that places employees at high risk of injury. Because twice the estimated premium amount is lower than the minimum penalty required under 8 AAC 45.176(a)(4), Employer will be assessed a penalty at the lowest end of the range, \$115,515. There is evidence Employer cannot pay the \$115,515 civil penalty in a lump sum. To minimize the impact the assessed civil penalty will have on Employer's operations, a payment plan will be ordered. Employer will be directed to pay \$2,515 within seven (7) days of this decision's date; thereafter 100 monthly installments of \$1,130 must be paid on the fifteenth (15th) day of each succeeding month until the assessed penalty is paid in full.

CONCLUSIONS OF LAW

Employer shall be assessed a civil penalty.

ORDER

- 1) The division's June 17, 2020 and February 24, 2021 petitions are granted.
- 2) At any time Northern Contracting, 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), Northern Contracting, LLC is directly liable for any and all benefits payable under the Act for compensable injuries to employees during the uninsured periods.
- 4) Pursuant to AS 23.30.080(f), Northern Contracting, LLC is assessed a civil penalty of \$115,515, which it must pay in accordance with this decision.
- 5) A payment plan is ordered as follows: **Northern Contracting, LLC shall pay \$2,515.00 within seven (7) days of this decision in accord with AS 23.30.080(g). Thereafter, on the 15th day of each month Northern Contracting, LLC shall make monthly payments in the sum of \$1,130 for 100 months until the total civil penalty of \$115,515 is paid in full.**
- 6) Northern Contracting, 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.

Northern Contracting, LLC is ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700007067. If Northern Contracting, LLC fails to make timely civil penalty payments as ordered in this decision, the entire \$115,515 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.

7) The SIU is directed to monitor Northern Contracting, LLC for five (5) years from this decision's date for continued compliance with the Act's insurance requirements.

8) The division's Collection Officer is ordered to prepare a proposed Liability Discharge Order within 120 days of Northern Contracting, 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 June 17, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, 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 NORTHERN CONTRACTING, LLC; Employer / respondent; Case No. 700007067; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties by certified U.S. Mail, postage prepaid, on June 17, 2021.

/s/
Kimberly Weaver, Office Assistant II