

# 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. 700007579  
OF A CIVIL PENALTY AGAINST, )  
 ) AWCB Decision No. 22-0043  
ALASKAN ARMOR REMODEL & )  
RENOVATION LLC, ) Filed with AWCB Anchorage, Alaska  
 ) on June 15, 2022  
Respondent. )  
\_\_\_\_\_ )

The Division of Workers' Compensation, Special Investigations Unit's (SIU) September 11, 2020 Petition and January 25, 2022 amended petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, were heard in Anchorage, Alaska on May 18, 2022, a date selected on March 23, 2022. Investigator Christine Christensen represented the Special Investigations Unit ("Division") and testified. A March 1, 2022 hearing request gave rise to this hearing. Luke DeVold-Owen appeared on behalf of Alaskan Armor Remodel & Renovation LLC (Employer) and testified. All parties appeared by Zoom. The record remained open to provide Employer the opportunity to file an updated business license and closed on May 31, 2022.

## ISSUES

The Division contends Employer failed to insure for workers' compensation liability for five time periods, totaling 1,074 calendar days and 938 uninsured employee workdays. It contends six aggravating factors apply to Employer. The Division seeks a civil penalty of \$51 to \$499 per employee workday. The Division does not object to monthly payment plan.

Employer contends it stopped using employees the day it received the Director's Stop Work Order, except Mr. DeVold-Owen's wife, Stephanie Bartel, continued to perform clerical work. It contends Ms. Bartel was supposed to be added as a 50 percent member by his accountant. Employer contends lapses occurred through miscommunications with the insurance carrier about audits and premiums, which Mr. DeVold-Owen tried to resolve as soon as possible. Mr. DeVold-Owen contends he had to take out loans on his personal property to pay company bills and employee wages; he thinks about closing his business but was hesitant to do so because it would cost a lot to start another business. He contends Employer cannot afford to pay the civil penalties, which could put it out of business, and he cannot afford to make a monthly payment at this time. Mr. DeVold-Owen submitted personal tax returns, deeds of trust and one profit and loss statement to support his position. Employer opposes a civil penalty assessment.

**1) Should Employer be assessed civil penalties for failure to insure for workers' compensation liability?**

Employer requests an order assessing a penalty against Employer for willfully violating the Director's Stop Work Order at \$1,000 per day from the date the order was served until Employer obtains coverage.

Employer opposes a penalty assessment.

**2) Should Employer be assessed a penalty for violating a stop work order?**

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) On December 1, 2016, Alaskan Armor Remodel & Renovation, LLC, was organized as a limited liability company (LLC) and its line of business was "Residential Remodelers." Mr. DeVold-Owen was the only member and 100 percent owner. (Business License Details, undated; Entity Details, undated).
- 2) On September 5, 2019, Travelers Property Casualty Company of America (Travelers) issued Employer Policy Number 6JUB-4N55170-6-19 with an effective date of August 20, 2019. (Workers Compensation and Employers Liability Policy, September 5, 2019).

3) On October 31, 2019, Travelers cancelled Policy Number 6JUB-4N55170-6-19 for nonpayment of premium effective November 30, 2019. Employer was directed to pay either the minimum balance or total balance online or by check. It was informed \$1,051.00 was due on October 20, 2019, and \$564.00 was due on November 30, 2019, and the minimum amount must be paid by 12:01 AM on November 30, 2019, to reinstate the policy. (Notice of Cancellation, October 31, 2019; Cancellation Change Slip – Commercial, October 31, 2019).

4) On December 16, 2019, Kimberly Min at Alaska Service Agency Insurance emailed Mr. DeVolld-Owen, “Just wanted to confirm. Once we get reinstatement on the Worker Comp, you do not need to add any employee payroll for roofing, you will be the only one doing roofing at this time?” (Email, December 16, 2019).

5) On March 5, 2020, the Division notified Employer it found substantial evidence it failed to file evidence it complied with the Act’s workers’ compensation insurance provisions and Employer had 10 days to provide evidence of compliance. (Division Letter, March 5, 2020).

6) On March 18, 2020, the letter was returned because Employer moved but left no forwarding address. (USPS Tracking Info, March 20, 2020).

7) On March 23, 2020, the Division re-served the 10-day compliance letter on Mr. DeVolld-Owen to two additional addresses and by email. (Division Letter, March 23, 2020; Email, March 23, 2020).

8) On April 1, 2020, Mr. DeVolld-Owen emailed the Division:

. . . . Ive already contacted my agent and travelers (they held my workmans comp) to try and figure out what happened and get it fixed. Its been a litte slower going with everyone trying to get stuff done with most people working from home with the covid and all but i am in the process of fixing it and sent the audit information that travelers requested to them in order to get this resolved quickly. I have to list who is clerical and who is in the field since i only have one person in the field other than myself nowl (Email, April 1, 2020).

9) On July 23, 2020, Travelers emailed Mr. DeVolld-Owen stating the premium audit registration was complete and informed him once he logged in, he would have the option to: “Access your Premium Audit online, Provide audit information, Submit supporting documents, Track the status of your audit” and “Access a copy of your Premium Audit Adjustment Notice.” (Email, July 23, 2020).

10) On July 24, 2020, Commercial Manager Kimberly Min for Alaska Service Agency Insurance wrote a letter stating:

This letter is to confirm that our client Luke DeVold has been to our knowledge, attempting to resolve his audit with Travelers since December of 2019 when we first advised him of it needed to be completed.

At the end of January, he advised us that his portion was completed, and he was still waiting on Tax documents from his accounting company that to submit with the audit.

He advised us recently that the tax document were received and that the audit information has been submitted to Travelers. (Letter, July 24, 2020).

11) On August 19, 2020, Alaska National Insurance Company (Alaska National) Policy Number 20HWW76788 became effective. (Workers Compensation & Employers Liability Insurance Policy, August 19, 2020).

12) On September 11, 2020, the Division petitioned for a finding of failure to insure for workers' compensation liability and assessment of civil penalty against Employer under AS 23.30.080(d). It contended Employer organized as an LLC on December 1, 2016, and did not insure until August 20, 2019, a lapse of 993 days. The Division contended Employer's insurance lapsed on November 30, 2019, and had not been reinstated, with a lapse period "To Be Determined." It requested Employer produce discovery. The Division served Employer to its address of record by certified mail. (Petition, September 11, 2020; Affidavit of Service by Mail, September 11, 2022).

13) On October 6, 2020, Alaska National cancelled Policy Number 20HWW76788 for "Non-payment of premium / NCCI" effective October 29, 2020. It directed Employer to call NCCI directly for questions about the cancellation notice. (Notice of Cancellation, October 6, 2020).

14) On October 14, 2020, the September 11, 2020 petition and discovery demand was returned as "unclaimed." (Envelope, October 14, 2020).

15) On October 20, 2020, the Division emailed Mr. DeVold-Owen a copy of the September 11, 2020 petition. (Email, October 20, 2020).

16) On October 21, 2020, Mr. DeVold-Owen confirmed receiving the September 11, 2020 petition by email and confirmed Employer's address of record. Employer was ordered to respond to the discovery request on or before November 20, 2020. (Prehearing Conference Summary, October 21, 2020).

17) On November 4, 2020, Alaska National reinstated Policy Number 20HWW76788. (National Council on Compensation Insurance (NCCI) Proof of Coverage, March Search Dated 25, 2020).

18) On November 20, 2020, Alaska National cancelled Policy Number 20HWW76788 for “Non-payment of premium 20HWW76788” effective December 13, 2020. It provided Employer a telephone number to call and ask questions regarding the cancellation notice. (Notice of Cancellation, November 20, 2020).

19) On November 23, 2020, Mr. DeVold and Ms. Bartel borrowed \$135,000 from Keller Mortgage, LLC, under a Deed of Trust secured by legal title of property they own. (Deed of Trust, November 23, 2020).

20) On November 27, 2020, the Division emailed Mr. DeVold-Owen that it had not received any discovery and reminded Employer it had been ordered to respond on or before November 20, 2020. (Email, November 27, 2020).

21) On December 3, 2020, the Division informed Employer its failure to submit discovery as ordered was interpreted as a lapse in business practice, which constituted an aggravating factor under 8 AAC 45.176(d)(14). It included the Division’s First Set of Requests for Admission and requested Employer respond to the requests for admission and the initial discovery request within 30 days. (Letter, December 3, 2020; Petitioner’s First Set of Requests for Admission to Employer, December 3, 2020).

22) On January 5, 2021, the Division petitioned to compel Employer to provide discovery, contending Employer failed or refused to respond to the September 11, 2020 discovery demand. (Petition, January 5, 2021).

23) On January 7, 2021, Mr. DeVold-Owen and Ms. Bartel borrowed \$25,000 from Northern Skies Federal Credit Union, under a Deed of Trust secured by legal title of property they own. (Deed of Trust, January 7, 2021).

24) On January 15, 2021, the Division petitioned to compel Employer to provide answers to its December 3, 2020 First Set of Requests for Admission. (Petition, January 15, 2021).

25) On January 27, 2021, Mr. DeVold-Owen attended a prehearing conference and updated Employer’s address of record. The Division’s January 5, 2021 petition to compel was granted and Employer was ordered to respond to the Division on February 10, 2021. (Prehearing Conference Summary, January 27, 2021).

26) On February 9, 2021, Employer provided the Division payroll summaries back to 2017. (Email, February 9, 2021).

27) On February 10, 2021, the Division emailed Employer and requested Employer Calculation forms for TD, SL and HT. (Email, February 10, 2021).

28) On February 22, 2021, the Division emailed Mr. DeVold-Owen to memorialize a February 19, 2021 telephone conversation. He was working with his agent to resolve an outstanding audit issue which he asserted he timely completed. Employer reported \$5,500 in assets, including hand tools, power tools and a van, and the following loans:

- a. \$22,155.00 Payment Protection Program (PPP), 4/28/2020, projected monthly payment will be \$1,031.00 and due within 24 months;
- b. \$26,790.00 PPP, 2/11/2021, projected monthly payment will be \$1,230.00 and due within 24 months;
- c. \$25,000.00 home equity line of credit against your personal residence, the line of credit was loaned to the business, the projected monthly payment is \$207.00 per month with 3.25% interest;
- d. \$8,500.00 Economic Injury Disaster Loan from the Small Business Administration from 2020, projected monthly payment will be \$756.00 and due within 12 months beginning 3/1/2021.
- e. In total, the business has incurred approximately \$82,405.00 in debt since 4/28/2020.

The Division requested Employer confirm the last date it used employees since the December 13, 2020 cancellation due to nonpayment of premiums and provide documentation confirmed the business loans and the home equity line of credit. (Email, February 22, 2021).

29) On February 24, 2021, Mr. DeVold-Owen replied, "I will go thru my emails and find the approved ppp and the heloc documents and send them over to you. As far as employees go I have already used 3 of them this quarter if you count my wife." (Email, February 24, 2021).

30) On May 12, 2021, Pennsylvania Manufacturers' Association Insurance Company (PMA) issued Policy Number WCAK000037900 effective April 3, 2020. The estimated annual total policy cost was \$3,728. (Workers' Compensation and Employer's Liability Insurance Policy, May 12, 2021).

31) On July 18, 2021, PMA cancelled Policy Number WCAK000037900 effective August 12, 2021, for failure to pay the \$1,863 premium. It stated the cancellation would not take effect if the amount shown was received prior to the cancellation's effective date and instructed Employer how to pay by check. (Cancellation Notice for Nonpayment, July 18, 2021).

32) On October 11, 2021, Mr. DeVold-Owen borrowed \$353,782 from Freedom Mortgage Corporation, under a Deed of Trust secured by legal title of property he owns. (Deed of Trust, November 23, 2020).

33) On January 25, 2022, the Division amended its petition for a finding of failure to insure for workers' compensation liability and assessment of civil penalty against Employer under AS

23.30.080(d). It contended Employer organized as an LLC on December 1, 2016, and did not insure until August 20, 2019, a lapse of 993 days. The Division contended Employer's insurance lapsed on four additional periods: on November 30, 2019, and was reinstated on August 19, 2020, a lapse of 263 days; on October 29, 2020, and was reinstated on November 4, 2020, a lapse of 6 days; on December 13, 2020, and was reinstated on April 3, 2021, a lapse of 111 days; and on August 12, 2021 but had not been reinstated, with a lapse period "To Be Determined." It also requested Employer produce discovery. The Division served Employer at its address of record by certified mail. (Amended Petition, January 25, 2022; Affidavit of Service by Mail, January 25, 2022).

34) On January 26, 2022, Mr. DeVold-Owen emailed the Investigator and stated, "Struggling with these past companies has been a nightmare so I'm giving up and trying this again with a new agency and hoping they can get stuff done the correct way and actually take care of me. I'll get you all info on new plan and what I figure out about past coverage as soon as I can." (Email, January 26, 2022).

35) On March 1, 2022, the Division requested a hearing be scheduled on its September 11, 2020 petition and January 25, 2022 amended petition. (Affidavit of Readiness for Hearing, March 1, 2020).

36) On March 3, 2022, the Division's January 25, 2022 amended petition and discovery demand were returned as "unclaimed." (Envelope; March 3, 2022)

37) On March 3, 2022, the Division mailed Employer a second copy of the January 25, 2022 amended petition and discovery demand by certified mail. (Affidavit of Service by Mail, March 3, 2022).

38) On March 21, 2022, the Division's second copy of the January 25, 2022 amended petition and discovery demand were returned as "unclaimed." (Envelope, March 21, 2022).

39) On March 23, 2022, Employer failed to attend a prehearing conference. The board designee scheduled the May 18, 2022 hearing to decide the Division's September 11, 2020 petition and January 25, 2022 amended petition. (Prehearing Conference Summary, March 23, 2022).

40) On April 5, 2022, the Director issued a Stop Work Order stating, "If you fail to comply with this Stop Order, the Division may petition the Alaska Workers' Compensation Board to assess a civil penalty for violating the Stop Order. . . ." (Director's Stop Work Order, April 5, 2022).

41) On April 9, 2022, Alaska State Trooper Charles Taylor personally served Mr. DeVold-Owen with the April 5, 2022 Stop Work Order. (State Trooper Directions for Service, April 9, 2022).

42) On April 19, 2022, the Division filed and served evidence for hearing. Payroll records provided by Mr. DeVold-Owen demonstrate the following uninsured workdays during the periods Employer lacked workers' compensation insurance:

*In re* ALASKAN ARMOR REMODEL & RENOVATION LLC

Time Period Begin	Time Period End	Employee Initials	Hours Worked	Hours / 8
December 1, 2016	August 20, 2019	WG	517.47	64.7
December 1, 2016	August 20, 2019	RM	996.18	124.5
December 1, 2016 November 30, 2019	August 20, 2019 August 19, 2020	CG	1,164.42	145.6
December 1, 2016	August 20, 2019	KH	260	32.5
December 1, 2016	August 20, 2019	ET	397.12	49.6
December 1, 2016	August 20, 2019	DS	469.48	58.7
December 1, 2016	August 20, 2019	VDO	5	0.6
December 1, 2016	August 20, 2019	JDO	5	0.6
November 30, 2019	August 19, 2020	TD	317.78	39.7
October 29, 2020	November 4, 2020	SB	30.47	3.8
October 29, 2020	November 4, 2020	TD	35.2	4.4
December 13, 2020	April 3, 2021	SB	480	60
December 13, 2020	April 3, 2021	TD	149.06	18.6
		<b>Total</b>	4,827.18	603.1

(Notice of Evidence, April 19, 2022).

43) Mr. DeVold-Owen and Ms. Bartel own land with a building in Wasilla appraised at \$237,200 in 2022, \$214,000 in 2021 and \$203,100 in 2020. (Matanuska Susitna Borough Real Property Detail, Search Dated April 11, 2022).

44) Mr. DeVold-Owen owns land with a building in Anchorage appraised at \$374,000 in 2022, \$347,800 in 2021 and \$354,800 in 2020. (Public Inquiry Parcel Details, Search Dated April 11, 2022).

45) In April 2020, Employer received a \$22,115 COVID-related PPP loan from the Small Business Administration (SBA), which has been paid in full. (Federalpay.org/paycheck-protection-program, unknown search date).

46) In February 2021, Employer received a \$26,790 COVID-related PPP loan from the SBA, which was reported as an “Ongoing loan.” (*Id.*).

47) From January 2018 through November 2019, Employer’s profit and loss statement showed income of \$280,487 after earning \$615,0707.88 in revenue and incurring \$334,583.42 in expenses.

48) In 2018, Mr. DeVold-Owen’s adjusted gross income was \$108,856 and taxable income was \$72,685; he owed \$25,938 in taxes. (2018 1040 Form, filed May 20, 2019).

49) In 2019, Mr. DeVold-Owen’s adjusted gross income was \$106,726 and taxable income was \$76,217; he owed \$4,718 in taxes. (2019 1040 Form, filed October 15, 2020).



50) Employer is currently uninsured for workers' compensation liability. (National Council on Compensation Insurance (NCCI) Proof of Coverage, Search Dated March 25, 2022).

51) Employer first reported employee wages in the third-quarter of 2018 and reported two employees worked from August 2021 through March 2022, and the following annual employee wages:

Year	Annual Wages
2018	\$19,909.50
2019	\$57,179.67
2020	\$77,892.38
2021	\$81,785.95
2022 First Quarter	\$15,510.00

(Department of Labor & Workforce Development, Secure Access Manager (SAM) Wage Report, Unknown Search Date).

52) On May 5, 2022, the Division filed a hearing brief estimating two employees working five days per week between August 21, 2021 and March 31, 2022, resulted in an additional 330 uninsured employee workdays (321 days = 33 weeks x 5 days / week = 165 days). It requested an order assessing a civil penalty based upon the employee workdays reported by Employer and the additional 330 days it estimated. The Division also requested an order assessing a penalty against Employer for willfully violating the Director's Stop Work Order at \$1,000 per day from the date the order was served until Employer obtains coverage. (Hearing Brief of the Special Investigations Unit, May 5, 2022).

53) On May 18, 2022, Mr. DeVolld-Owen testified at hearing he is married to Ms. Bartel and is supporting five children. Ms. Bartel performs office duties for Employer. His family is living on loans taken out and secured by property he and his wife own. Mr. DeVolld-Owen also used loan funds to pay business debts and employee wages. He stopped using employee labor when he received the Stop Work Order, except Ms. Bartel continued to perform office duties. Mr. DeVolld-Owen told his accountant to complete the paperwork needed to add Ms. Bartel as a 50 percent member-owner. He intended to update Employer's officials to include Ms. Bartel as a member-owner after the hearing. Mr. DeVolld-Owen attributed lapses in workers' compensation insurance coverage to difficulties communicating with the insurance company about cancellations and audits. He tried to contact the insurance company but no one would return his calls; his insurance agent tried to assist him but was unsuccessful, and he ended up switching insurance carriers due to these difficulties. But Mr. DeVolld-Owen found obtaining different insurance difficult because disputes with past insurance carriers affected the ability to obtain current insurance. He stated a civil penalty assessment may cause him

to go out of business as he cannot afford to pay any amount. He considered closing his business but was hesitant to do so because it would cost a lot to start another business. (DeVoll-Owen).

54) Employer lacked workers' compensation insurance from July 1, 2018, when it first began using employee labor, to August 19, 2019, a lapse of 414 days; from November 30, 2019 to August 18, 2020, a lapse of 263 days; from October 29, 2020 to November 3, 2020, a lapse of six days; from December 13, 2020 through April 2, 2021, a lapse of 111 days; and from August 12, 2021 to May 18, 2022, a lapse of 280 days; totaling calendar 1,074 days. (Record).

55) Employers are commonly required to complete an annual audit when the policy term expires and to provide financial, payroll and employee records to the insurance carrier to determine the class codes and premium are correct. (Experience, judgment, observations).

### PRINCIPLES OF LAW

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

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

....

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

**AS 23.30.075. Employer's liability to pay.** (a) An Employer under this chapter, unless exempted, shall either insure and keep insured for the Employer's liability under this chapter in an insurance company or association . . . .

(b) If an employer fails to insure and keep insured employees subject to this chapter . . . 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. . . .** (e) If a representative of the department investigates an employer's failure to file the evidence of compliance required by AS 23.30.085 and, after investigation, there is substantial evidence that the employer failed to insure or provide security as required by AS 23.30.075, the representative shall inform the employer. The representative may request the director to issue a stop order prohibiting the use of employee labor by the employer until the employer insures or provides security as required by AS 23.30.075. The director may issue a stop order, without a hearing, based on the representative's investigation. The director shall dissolve a stop order issued under this subsection upon receipt of substantial evidence that the employer is insured or has provided security as required by AS 23.30.075(a). If an employer fails to comply with a stop order issued under this subsection, the division may petition the board to assess a civil penalty. The board may assess a civil penalty of \$1,000 a day. An employer who is assessed a penalty under this subsection may not obtain a public contract with the state or a political subdivision of the state for the three years following violation of the stop order.

(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.

(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. Anytime 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.

When an employer subject to AS 23.30.075 fails to insure for workers' compensation liability, the law grants discretion to assess a civil penalty up to \$1,000 for each employee for each day an employee is employed while the employer fails to insure. The legislature has made its intentions clear; uninsured employers are subject to a severe penalty when employees are permitted to work without workers' compensation liability insurance in place. *Miller's Market v. State of Alaska*, AWCAC Decision No. 161 (May 14, 2012) at 5 (quoting the board's decision with approval) (citation omitted).

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, provide for the business's employees' continued employment 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) at 22. A penalty is not intended to destroy a business or cause the loss of employment. *Id.* at 27. On the other hand, while there is a strong public interest in preserving employment opportunities where possible, there are employers so grossly incompetent in business or so exploitive of their employees that there is little public interest in their continued viability. *Id.* at 28.

The board has discretion to suspend part of a penalty, such as when ordering an entire penalty to be paid would jeopardize a business's continued viability. *Miller's Market* at 7-8. However, suspending an entire penalty amount is incompatible with the deterrent and punitive purposes of AS 23.30.080(f), and absent a finding 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) at 9, 10-11. If part of a penalty is conditionally suspended, the employer's liability for the suspended portion must be discharged on satisfaction of the conditions. *Moore v. State of Alaska*, AWCAC Decision No. 092 (November 17, 2008) at 23.

**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 board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The Board's factual findings are reviewed under the substantial evidence standard. "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion in light of the record as a whole. *Id.*

**AS 23.30.135. Procedure before the board.** (a) . . . . The board may make its investigation or inquiry or conduct its hearings in the manner by which it may best ascertain the rights of the parties. . . .

The board’s authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties or the agency upon notice given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981). While the notice’s actual content is not dispositive in administrative proceedings, the parties must have adequate notice so they can prepare their cases: “[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings.” *Groom v. State, Department of Transportation*, 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm’n.*, 522 P.2d 711, 714 (Alaska 1974)).

**8 AAC 45.070. Hearings.** . . . (g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

**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; 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 (3) 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;

. . . .

(5) issuance of a stop order 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;

....

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

The number of aggravating factors an employer has is an important consideration under the regulation. The penalty rate increases with the number of aggravating factors. *Anchorage Midtown Motel v. State of Alaska*, AWCAC Decision No. 159 (February 14, 2012) at 16.

The Division has the burden of production and persuasion on facts and circumstances to support a particular penalty. The employer has the burden to establish facts and circumstances that may be considered to excuse or mitigate a penalty. *Alaska R&C Communications* at 23.

#### ANALYSIS

#### **1) Should Employer be assessed civil penalties for failure to insure for workers' compensation liability?**

Employers in Alaska are required to maintain workers' compensation insurance. AS 23.30.075(a). Substantial evidence shows Employer failed to do so for 1,074 calendar days. *Smith*. Payroll records demonstrate 603.1 uninsured workdays during the five lapses. The Division requested an additional 330 uninsured employee workdays be added because Employer reported two employees worked from

August 21, 2021 and March 31, 2022, in SAM. However, the Division has the burden of production and persuasion on facts and circumstances to support a particular penalty. *Alaska R&C Communications*. There is no evidence the two employees worked five days per week from August 21, 2021 and March 31, 2022. The Division's request to add 330 uninsured employee workdays is denied. *Id.*

Substantial evidence supports finding six aggravating factors. The Division notified Employer of the lack of insurance on March 23, 2020, and Employer obtained coverage beginning on August 20, 2020. Mr. DeVold-Owen testified he had difficulty communicating with Travelers about an audit and caused Employer to be unable to obtain coverage within 10 days. Employer has the burden to establish facts and circumstances that may be considered to excuse or mitigate a penalty. *Alaska R&C Communications*. However, 8 AAC 45.176(d)(1) does not include an exception for difficulties fulfilling audit requirements and payroll records prove Employer continued to utilize employee labor during this period. It took Employer almost six months to obtain coverage, which is a significant delay. *Rogers & Babler*. Employer failed to obtain insurance coverage within 10 days. *Smith*. Employer also failed to maintain insurance after the Division notified it of the lack of coverage on March 23, 2020, because it incurred four additional lapses, three lapses exceeded 180 days, Employer failed to comply with the Division's discovery demand within 30 days after the demand, and the Director issued a Stop Work Order on April 5, 2022. 8 AAC 45.176(d)(2), (3), (5), (7); *Smith*. Finally, Employer's failure to pick up certified mail sent by the Division three times, constitutes lapses in business practices used by a reasonably diligent businessperson. 8 AAC 45.176(d)(14)(A).

As Employer was found to have six aggravating factors, it must be assessed a civil penalty from \$51 to \$499 per uninsured employee workday. 8 AAC 45.176(a)(4). The civil penalty can be no less than \$30,753 and no more than \$300,897 ( $603 \times \$51 = 30,753$ ;  $603 \times \$499 = \$300,897$ ). *Id.* The Division has the burden of production and persuasion to support a particular penalty. *Alaska R&R Communications*.

This decision has discretion to impose an appropriate civil penalty. 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, provide for the continued employment the business's employees in a

safe work environment, and satisfy the community's interest in fairly penalizing an offender. *Alaska R&C Communications*. A penalty is also not intended to destroy a business or cause the loss of employment. *Id.* Employer's lack of reported injuries during the lapse periods is a mitigating factor. However, Employer's employees are at high risk of injuries as the work involves utilizing hand and power tools, working at height on roofs and carrying materials. *Rogers & Babler*. Its failure to insure puts its employees and the Benefits Guaranty Fund at risk for liability for uninsured injuries. In 2021, Employer reported \$81,755.95 in employee annual payroll, the highest it ever reported, yet it was insured for workers' compensation liability a total of four months and nine days (April 3, 2021 - August 11, 2021). Employer gained an unfair business advantage by not obtaining workers' compensation insurance and utilizing employee labor. It reported two employees worked from August 2021 through March 2022 in SAM but failed to provide payroll information in order to determine the hours its employees actually worked while uninsured. The Division has proven with substantial evidence that there were more uninsured employee workdays than the 603 the payroll reports Employer provided for discovery demonstrated. The record was kept open to provide Employer the opportunity to provide records showing Ms. Bartel was a member-owner but it failed to file anything. Employer is still not insured at this time even though Mr. DeVolld-Owens testified Ms. Bartel continued to perform clerical work after the Director's April 5, 2022 Stop Order was served.

Mr. DeVolld-Owen testified difficulties communicating with the insurance carriers about cancellations and audits resulted in lapses in coverage. The letters informing Employer of cancellations due to nonpayment of premium provided Employer instructions to timely pay. The July 24, 2020 letter from Employer's insurance agency is evidence Employer first knew of the audit in December 2019 for the first lapse which began on November 30, 2019. Employer had provided some records in January but still had not supplied the required financial documents because it was waiting to receive them from its accounting company. Employers are commonly required to complete an annual audit when the policy term expires and provide financial, payroll and employee records to the insurance carrier to determine the class codes and premium are correct. It is Employer's responsibility to prepare for audits and to timely provide complete and accurate records to the insurance carrier and to timely pay premiums. The six month delay in providing financial records for an audit was not



reasonable. The minimum penalty is reasonable under the circumstances and a suspension is not merited. *Lawn Ranger; Rogers & Babler*.

Mr. DeVold-Owen credibly testified a civil penalty may cause him to go out of business and he cannot afford to make any payment. AS 23.30.220; *Smith*. He and Ms. Bartel took out loans against the two properties they own and are using the loans to support their family. Employer obtained PPP loans and has \$5,500 in assets, including hand tools, power tools and a van. A payment plan for the \$30,753 will be ordered. This will help Employer to avoid default and continue operating. *Alaska R&C Communications*. Employer is advised, should it fail to make timely payments, the entire \$30,753 assessed civil penalty will be due and owing and the Director may declare this amount in default and seek collection. AS 23.30.080(g).

**2) Should Employer be assess a penalty for violating a stop work order?**

The Division's September 11, 2020 Petition and January 25, 2022 amended petition for FTI did not request a penalty under AS 23.30.080(e), only civil penalties under AS 23.30.080(d). In fact, the Director's Stop Work Order was issued after both petitions, on April 5, 2022. A penalty under AS 23.30.080(e) was not listed as an issue in the March 23, 2022 prehearing conference summary, which governs the issues for hearing. 8 AAC 45.070(g). The Division raised this issue for the first time in the May 5, 2022 hearing brief. Employer is entitled to due process and an opportunity to be heard, which includes adequate notice of issues to be decided. AS 23.30.001(4); *Simon; Groom*. Employer was not adequately noticed of the issue, nor has it been fairly heard on it. Employer should not be assessed a penalty for violating a stop work order.

CONCLUSIONS OF LAW

- 1) Employer should be assessed civil penalties for failure to insure for workers' compensation liability.
- 2) Employer should not be assessed a penalty for violating a stop work order.

ORDER

- 1) The Division's September 11, 2020 Petition and January 25, 2022 amended petition are granted.

- 2) At any time ALASKAN ARMOR REMODEL & RENOVATION, 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) and AS 23.30.075(b), ALASKAN ARMOR REMODEL & RENOVATION, LLC, and Luke DeVold-Owen are personally, jointly, severally and directly liable for any and all benefits payable under the Act for compensable injuries to employees during the uninsured periods.
- 4) Pursuant to AS 23.30.080(f), ALASKAN ARMOR REMODEL & RENOVATION, LLC, is assessed a civil penalty of \$30,753. ALASKAN ARMOR REMODEL & RENOVATION, LLC, must timely pay \$30,753.
- 5) A payment plan is ordered.
- 6) **ALASKAN ARMOR REMODEL & RENOVATION, LLC, shall pay \$253 within seven (7) days of this decision in accord with AS 23.30.080(g). Thereafter, on the 25th day of each month ALASKAN ARMOR REMODEL & RENOVATION, LLC, shall make monthly payments in the sum of \$250 for 122 months until the total civil penalty of \$30,753 is paid in full.**
- 7) ALASKAN ARMOR REMODEL & RENOVATION 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. **ALASKAN ARMOR REMODEL & RENOVATION, LLC, is ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700007579, and AWCB Decision Number 22-0043.** If ALASKAN ARMOR REMODEL & RENOVATION, LLC, fails to make timely civil penalty payments as ordered in this decision, the entire \$30,753 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 ALASKAN ARMOR REMODEL & RENOVATION, LLC, for 3 (three) 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 120 days of ALASKAN ARMOR REMODEL & RENOVATION, 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 15, 2022.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Kathryn Setzer, Designated Chair

\_\_\_\_\_  
/s/  
Michael Dennis, 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

