

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION)
FOR A FINDING OF THE FAILURE TO)
INSURE WORKERS' COMPENSATION) FINAL DECISION AND ORDER
LIABILITY, AND ASSESSMENT)
OF A CIVIL PENALTY AGAINST,) AWCB Case No. 700008631M, 700008632J
)
BARBARA WASHER DBA: BABAMS,) AWCB Decision No. 24-0051
)
and) Filed with AWCB Anchorage, Alaska
) on September 16, 2024
BABAMS, LLC)
Respondents.)
_____)

The Division of Workers' Compensation, Special Investigations Unit's (SIU or Division) August 17, 2023 petitions for failure to insure workers' compensation liability and assessment of a civil penalty were heard in Anchorage, Alaska on August 22, 2024, a date selected on May 15, 2024. An April 4, 2024 hearing request gave rise to this hearing. No one appeared for Barbara Washer dba BABAMS or BABAMS, LLC (collectively, Employers). The record closed at the hearing's conclusion on August 22, 2024.

ISSUES

No one appeared for Barbara Washer dba BABAMS or BABAMS, LLC, and attempts to contact her at her telephone number of record were unsuccessful. The panel issued an oral order to proceed in Employers' absence.

- 1) Was the oral ruling to proceed with the hearing in Employers' absence correct?**

The SIU contends Employers were uninsured for workplace injuries in Alaska from February 1, 2018 to December 31, 2019, and from January 1, 2023 to February 2, 2024. It contends BABAMS, LLC, was uninsured from October 7, 2022 to December 31, 2022. The SIU contends a civil penalty should be assessed against Barbara Washer dba BABAMS based upon 1,095 uninsured calendar days and three aggravating factors and against BABAMS, LLC, for 85 uninsured calendar days and three aggravating factors.

Employers did not answer or provide any defenses; their positions on the SIU's petitions are unknown but are presumed in opposition.

2) Should Employers be assessed a civil penalty for failure to insure for workers' compensation liability?

FINDINGS OF FACT

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

- 1) From February 24, 2015 through December 31, 2017, Barbara Washer licensed BABAMS for "Transportation and Warehousing" and its North American Industry Classification System (NAICS) was "Postal Service" as a sole proprietor. The mailing and physical address was **** S. Frontier Dr. Palmer, AK 99645 (Alaska Division of Corporations, Business & Professional Licensing, License Details #1017213).
- 2) On May 9, 2015, policy 6JUB0G02710915 from Travelers Property Casualty Company of America became effective for Barbara Washer dba BABAMS. (National Council on Compensation Insurance (NCCI) Proof of Coverage Inquiry, Accessed July 24, 2024).
- 3) On May 9, 2016, policy 6JUB0G02710915 expired and policy 6JUB0G02710916 from Travelers Property Casualty Company of America became effective. (NCCI Proof of Coverage Inquiry, Accessed July 24, 2024).
- 4) On May 9, 2017, policy 6JUB0G02710916 expired. (NCCI Proof of Coverage Inquiry, Accessed July 24, 2024).
- 5) On October 25, 2019, BABAMS, LLC, was organized as a limited liability company. Its line of business was "Transportation and Warehousing" and its NAICS was "Postal Service." Barbara Washer was the 100 percent manager and member. The mailing address is P.O. Box 21**, Palmer, AK 99645 and the physical address is ***** E. Center St. Palmer, AK 99645 (Alaska Division of

Corporations, Business & Professional Licensing, License Details #2094286; Entity Details #10116355).

6) In May 2020, BABAMS received a \$20,833 Paycheck Protection Program (PPP) loan through Cross River Bank. (PPP Loan Data – BABAMS).

7) On December 1, 2021, Barbara Washer organized BABAMS as a sole proprietor. Its line of business was “Transportation and Warehousing” and its NAICS was “Postal Service.” The mailing address is P.O. Box 21**, Palmer, AK 99645 and the physical address is ***** E. Center St. Palmer, AK 99645. (Alaska Division of Corporations, Business & Professional Licensing, License Details #2144739).

8) Alaska National Insurance Company issued policy 20AWW76559 for BABAMS, LLC, which was effective January 4, 2020 to January 4, 2021. It issued policy 21AWW76559, which was effective January 4, 2021 to January 4, 2022. (NCCI Proof of Coverage Inquiry, Accessed July 24, 2024).

9) On January 4, 2022, National Liability & Fire Insurance Company issued policy A9WC328073 for BABAMS, LLC effective January 4, 2022. (NCCI Proof of Coverage Inquiry, Accessed July 24, 2024).

10) On October 7, 2022, National Liability & Fire Insurance Company cancelled policy A9WC328073 for nonpayment of premium. (NCCI Proof of Coverage Inquiry, Accessed July 24, 2024).

11) On June 8, 2023, Chief Investigator Rhonda Gerharz emailed Barbara Washer at babams.82**@gmail.com:

I have now left three voicemail messages for you at your number of record . . . and you have yet to return my call to discuss the fact you do not have a current workers’ compensation insurance policy to cover your employees. Your most recent policy with National Liability & Fire Insurance, A9WC328073, was cancelled on 10/7/2022 for nonpayment of premium. As you are aware, your contract with the USPS requires that you purchase and maintain workers’ compensation insurance for employees. We are aware that an occupational injury occurred after your most recent policy lapsed. We need to work together ensure this does not happen again, and ensure that your business is protected and that your employees are protected. (Email, June 8, 2023).

12) On August 17, 2023, the SIU petitioned for a finding of failure to insure for workers’ compensation liability against BABAMS, LLC from October 7, 2022 to December 31, 2022, and

against Barbara Washer dba BABAMS from May 9, 2017 to December 31, 2019, and from January 1, 2023 to the date insurance was obtained. It also requested Barbara Washer dba BABAMS and BABAMS, LLC, provide discovery. The SIU served Barbara Washer dba BABAMS and BABAMS, LLC, with both petitions at P.O. Box 21**, Palmer, AK 99645 by certified mail, return receipt requested. (Petitions, August 17, 2023).

13) On August 18, 2023, the Division served Barbara Washer dba BABAMS and BABAMS, LLC, with notice of a prehearing conference on September 26, 2023, by first-class mail to P.O. Box 21**, Palmer, AK 99645 and **** S. Frontier Dr., Palmer, AK 99645. (Prehearing Conference Noticed Served, August 18, 2023).

14) On September 14, 2023, a person illegibly signed for the envelopes containing the August 17, 2023 petitions. (United States Postal Service Green Cards Tracking 70201810000059452729 and 70201810000059452736, September 14, 2023).

15) On September 26, 2023, Barbara Washer and Investigator Christensen agreed to join AWCB 700008631 and 700008632 and to make AWCB 700008631 the master case. (Prehearing Conference Summary, September 26, 2023).

16) On December 14, 2023, the Benefits Guaranty Fund (the Fund) reported an employee, Kelsey Akers, was injured on October 28, 2022, when she “was side swiped by another vehicle while in the course of her work as a mail carrier and courier” for BABAMS, LLC. (FROI, December 14, 2023).

17) On January 29, 2024, Investigator Christensen emailed Barbara Washer at babams.82**@gmail.com:

To follow up on my voice message of today, I have been trying to contact you for the last couple months with no response from you. The Division is still reviewing the two cases against you and Babams LLC for failure to maintain workers' compensation and incurring an uninsured injury. It is my understanding that you have paid all the medical bills for the injured worker and she has not filed any further claims for benefits. If I remember correctly, last time we talked you had lost one of the contracts but were still operating the other. If you could please let me know the status of your contracts with USPS, I can make a decision as to what to do with the two cases against you.

Please call or email me by February 2, 2024 at the number or email below with the current status of the business. (Email, January 29, 2024).

18) On February 1, 2024, National Liability & Fire Insurance Company issued Barbara Washer dba “BABAMS” a Certificate of Liability Coverage for workers’ compensation and employers’ liability N9WC597632. The estimated annual cost was \$3,293. The address of record for the policy is P.O. Box 21**, Palmer, AK 99645. (Certificate of Liability Insurance; Policy Information Page, February 1, 2024).

19) On February 1, 2024, Barbara Washer emailed Investigator Christensen a copy of the certificate of insurance by email from email address babams.82**@gmail.com:

Sorry for the delayed response. I was able to finally get Work Comp coverage. I have attached the COI to this email. I am currently in the process of trying to payoff the Alaska National and the National Fire & Liability policies. The one finally got back to me last week with the final cost following their audit.

Since my income has decreased substantially this will take some time. I was having a hard time acquiring coverage due to my financial situation and compliance issues. I do apologize for this ongoing issue. I have also forwarded the COI to Mr. Shish at the USPS Contracting Office for his reference as well.

I really appreciate your help in this matter. I will call you tomorrow after I finish working my route. (Email, February 1, 2024).

20) On February 6, 2024, Investigator Christensen emailed Barbara Washer at babams.82**@gmail.com regarding the outstanding discovery requests and requested she respond and provide discovery no later than February 21, 2024. (Email, February 6, 2024).

21) On February 22, 2024, Barbara Washer emailed Christensen zip files regarding both petitions from email address babams.82**@gmail.com. (Emails, February 22, 2024).

22) On February 23, 2024, Investigator Christensen emailed Barbara Washer back at babams.82**@gmail.com and informed her that she could not open the zip files. She instructed Barbara Washer that she could submit them through ZendTo or by multiple emails. (Email, February 23, 2024).

23) On March 20, 2024, Investigator Christensen followed up with Barbara Washer by email at babamsllc@gmail.com and instructed her to resend the files through ZendTo or by multiple emails. (Email, March 20, 2024).

24) On April 4, 2024, the SIU requested a hearing on the August 17, 2024 petitions. (Affidavits of Readiness for Hearing (ARHs), April 4, 2024). Investigator Christensen emailed Barbara Washer at babams.82**@gmail.com a copy of the ARHs and the August 17, 2023 petitions and informed

her the SIU still had not received the requested discovery and she could submit the discovery by email, ZendTo, hand delivery or by mail. (Email, April 4, 2023).

25) On April 9, 2024, the Division served BABAMS, LLC, and Barbara Washer dba BABAMS with notice of a prehearing conference on April 24, 2024, by first-class mail to P.O. Box 21**, Palmer, AK 99645. (Prehearing Conference Notice Served, April 9, 2024).

26) On April 17, 2024, Investigator Christensen emailed Barbara Washer at babamsllc@gmail.com and babams.82**@gmail.com:

I just left a voice message regarding the discovery documentation for the failure to insure case against BABAMS LLC and Barbara Washer dba: BABAMS. As we discussed previously, the information you provided in the ZIP file was inaccessible as I asked that you can send it in a different forum. I provided the information for Zendto to send large documents or I asked that you send them in multiple emails. I have yet to receive the requested information. Due to your lack of cooperation in this matter, the Division has filed an affidavit of readiness with the board to schedule a hearing, and a prehearing conference has been scheduled for April 24, 2024.

To avoid going to hearing, you will need to provide the requested discovery prior to the prehearing schedule on April 24, 2024. You can provide the documentation electronically either by going to Zendto and following the instructions or via multiple emails. You can also provide a hard copy by hand delivering copies to our office or putting a hard copy in the mail and mailing it to me at the address below. (Email, April 17, 2024).

27) On May 2, 2024, Investigator Christensen emailed Barbara Washer at babamsllc@gmail.com and babams.82**@gmail.com:

On April 24, 2024 the Workers' Compensation Board attempted to conduct[sic] you for a prehearing conference, however, there was no response from you. As such the Division has requested a second prehearing be scheduled to schedule a hearing in the failure to insure for workers' compensation matter against Babams, LLC and Barbara Washer dba; Babams.

Attached is a copy of the request for prehearing conference that was filed with the Board today.

The Division has yet to receive the requested discovery from you. As discussed in previous phone calls and emails, the information you provided via zip drive/file was inaccessible and you will need to provide that information in a different format such as email (can be divided into multiple emails if necessary), regular mail to the address below, or Zendto. Simple go to Zendto and follow the instructions.

Not responding to the Divisions requests is cause for increased penalties. If you have any questions or concerns regarding the discovery or this email, please contact me via phone or email. (Email, May 2, 2024).

28) On May 3, 2024, the Division served Barbara Washer dba BABAMS with notice of a May 15, 2024 prehearing conference to P.O. Box 21**, Palmer, AK 99645 and to Barbara Washer at **** S. Frontier Dr., Palmer, AK 99645. (Prehearing Conference Notice Served, May 3, 2024).

29) On May 15, 2024, Investigator Wall-Rood attended the prehearing conference; Employers did not attend. The Board designee attempted to call Barbara Washer three times at her telephone number of record and left messages for each call. Investigator Wall-Rood requested to have a hearing scheduled. The designee scheduled an oral hearing for August 22, 2024, and ordered the parties to file witness lists and briefs by August 15, 2024, and evidence by August 2, 2024. (Prehearing Conference Summary, May 15, 2024).

30) On May 22, 2024, the Division served Barbara Washer dba BABAMS by certified mail, return receipt requested with the August 22, 2024 hearing notice and May 15, 2024 prehearing conference summary at P.O. Box 21**, Palmer, AK 99645. It also served Barbara Washer to **** S. Frontier Dr., Palmer, AK 99645 by first-class mail with a copy of the August 22, 2024 hearing notice and May 15, 2024 prehearing conference summary at **** S. Frontier Dr., Palmer, AK 99645. (Hearing Notice Served, May 22, 2024; Prehearing Conference Summary Served, May 22, 2024).

31) On June 11, 2024, the August 22, 2024 hearing notice and May 15, 2024 prehearing conference summary mailed by certified mail, return receipt requested to Barbara Washer dba: BABAMS at P.O. Box 21**, Palmer, AK 99645, were returned as “Unclaimed, Unable to Forward.” (Returned Mail, June 11, 2024).

32) On June 20, 2024, Paul Shish, Contracting Officer emailed Investigator Christensen and stated, “The CDS [Contract Delivery Service] Office has 2 contracts with Barbara Washer. . . . ; both are in Palmer AK.” (Email June 20, 2024).

33) On July 30, 2024, the SIU filed the annual payroll Barbara Washer dba BABAMS reported to the Department of Labor and Workforce Development:

Table I.

Year	Quarter	Reportable Wages	Employees Month 1	Employees Month 2	Employees Month 3
2018	1	\$2,202.00	0	1	1

In re BARBARA WASHER DBA: BABAMS and BABAMS, LLC

	2	\$17,200.00	2	2	2
	3	\$21,220.00	2	3	3
	4	\$26,600.00	3	3	3
	Total	\$67,222.00			
2019	1	\$28,737.47	3	4	4
	2	\$19,850.00	3	3	3
	3	\$17,575.00	2	2	2
	4	\$23,425.00	3	3	3
	Total	\$89,587.47			
2023	1	\$22,217.86	3	3	3
	2	\$47,253.33	3	3	3
	3	\$37,088.50	3	3	3
	4	\$16,450.86	1	1	1
	Total	\$123,010.55			
2024	1	\$0.00	0	0	0
	2	\$0.00	0	0	0
	Total	\$0.00			

It also filed the annual payroll BABAMS, LLC, reported to the Department of Labor and Workforce Development:

Table II.

Year	Quarter	Reportable Wages	Employees Month 1	Employees Month 2	Employees Month 3
2020	1	\$29,285.00	4	5	4
	2	\$33,845.00	5	5	5
	3	\$29,360.00	6	1	3
	4	\$36,140.00	4	5	5
	Total	\$128,630.00			
2021	1	\$44,567.64	7	4	4
	2	\$42,213.23	3	3	3
	3	\$72,288.76	5	7	4
	4	\$63,045.40	6	5	5
	Total	\$222,115.03			
2022	1	\$77,563.41	5	6	4
	2	\$66,399.83	5	5	5
	3	\$66,871.32	5	5	2
	4	\$41,214.39	3	3	3
	Total	\$252,048.95			

2023	1	\$0.00	0	0	0
	2	\$0.00	0	0	0
	3	\$0.00	0	0	0
	4	\$0.00	0	0	0
	Total	\$0.00			

(Notice of Evidence to be Introduced at Hearing, July 30, 2024).

34) On August 14, 2024, the SIU filed a hearing brief, contending Barbara Washer dba BABAMS utilized employees while uninsured from February 1, 2018 to December 31, 2019, for a total of 698 calendar days and from January 1, 2023 to February 2, 2024, for 397 calendar days, totaling 1,095 calendar days, with three aggravating factors applied: (1) failure to obtain workers' compensation insurance within 10 days after the Division's notification of a lack of workers' compensation insurance; (2) a violation that exceeded 180 calendar days; and (3) failure to comply with the Division's initial discovery demand within 30 days after the demand. It contended that BABAMS, LLC, utilized employees while uninsured from October 7, 2022 to December 31, 2022, for 85 calendar days, with three aggravating factors applied: (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 comply with the Division's initial discovery demand within 30 days after the demand; and (3) a history of injuries or death while the employer was uninsured under AS 23.30.075. (Hearing Brief of the Special Investigations Unit, August 14, 2024).

35) At hearing, the designated chair attempted to contact Barbara Washer at her telephone number of record but was not successful and left a voicemail requesting she call back to participate in the hearing. (Record).

36) Employers did not produce the discovery sought in the SIU's August 17, 2023 discovery demands. They also did not provide any evidence regarding their income or ability to pay a civil penalty, if assessed. (Agency file).

37) At hearing Investigator Christensen requested the hearing proceed in Employers' absence. (Record).

38) Investigator Christensen stated the SIU would not oppose a payment plan for an assessed civil penalty. (Christensen).

39) Barbara Washer dba BABAMS utilized employees while uninsured from February 1, 2018 to December 31, 2019, for 698 calendar days. (Observation).

- 40) BABAMS, LLC, utilized an employee while uninsured from October 7, 2022 to December 31, 2022, for 85 calendar days. (Observation).
- 41) Barbara Washer dba BABAMS utilized employees while uninsured from January 1, 2023 through December 31, 2023, for 365 calendar days. (Observation).
- 42) There is no direct evidence Barbara Washer dba BABAMS utilized employees while uninsured from January 1, 2024 through February 2, 2024. (Observation).
- 43) Barbara Washer dba BABAMS failed to obtain workers' compensation within 10 days from the SIU's notification of a lack of workers' compensation insurance. (Observation).
- 44) BABAMS, LLC, failed to obtain workers' compensation within 10 days from the SIU's notification of a lack of workers' compensation insurance. (Observation).
- 45) Barbara Washer dba BABAMS violated AS 23.30.075 for a period greater than 180 days. (Observation)
- 46) Babara Washer dba BABAMS and BABAMS, LLC, failed to comply with the SIU's initial discovery demand within 30 days after the demand. (Observation).
- 47) BABAMS, LLC, has a history of an injury while in violation of AS 23.30.075 when Kelsey Akers, was injured on October 28, 2022, while in the course of her work for BABAMS, LLC. (Observation).
- 48) The prorated premium for the current policy is \$9.02 per day, which equates to \$9,588.26 for the 1,063 (698 + 365 = 1,063) uninsured calendar days for Barbara Washer dba BABAMS ($\$9.02 \times 1,063 = \$9,588.26$), and \$766.70 for the 85 uninsured calendar days for BABAMS, LLC ($\$9.02 \times 85 = \766.70). Twice the prorated premium is \$19,176.52 ($\$9,588.26 \times 2 = \$19,176.52$) and \$1,533.40 ($\$766.70 \times 2 = \$1,533.40$), respectively. (Inferences drawn from above).

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 23.30.075. 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. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

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. 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. . . .

Alaska's penalty provision is one of the highest in the nation. *In re Alaska Native Brotherhood #2*, AWCBC Dec. No. 06-0113 (May 8, 2006). Alaska's statute's severity is a policy statement -- *i.e.*, 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 Dec. 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*, AWCAC Dec. No. 088 (September 16, 2008). A penalty is not intended to destroy a business or cause employment loss. In assessing a penalty, consideration is given to the period the employer was uninsured, and injury history. Injury history helps determine if the work is dangerous. The employer's ability to pay the penalty must be assessed. *Id.* at 27.

AS 23.30.110. Procedure on claims. . . .

(c) The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

8 AAC 45.060. Service. . . .

(b) A party may file a document with the board, other than the annual report under AS 23.30.155(m), personally, by mail, or by electronic filing through facsimile transmission or electronic mail in compliance with 8 AAC 45.020(d). Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done personally, by facsimile, by electronic mail, or by mail, in accordance with due process. Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

. . . .

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties.

(f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the claim or petition;
- (2) dismiss the claim or petition without prejudice; or
- (3) adjourn, postpone, or continue the hearing.

8 AAC 45.074. Continuances and cancellations. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

. . . .

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel 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:

. . . .

(3) if an employer has not previously violated AS 23.30.075, and is found to have no more than three aggravating factors, the employer will be assessed a civil penalty of no less than \$10 and no more than \$50 per uninsured employee workday; however, the civil penalty may not be less than two times the premium the employer would have paid had the employer complied with AS 23.30.075; 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 (2) 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;

....

(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;

....

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

ANALYSIS

1) Was the oral ruling to proceed with the hearing in Employer’s absence correct?

Where a party does not appear at hearing, but was properly served with notice of the hearing, the first option in order of priority under 8 AAC 45.070(f) is to proceed with the hearing in the party’s absence. On May 22, 2024, the Division properly served Employers with the August 22, 2024 hearing notice at their address of record, P.O. Box 21**, Palmer, AK 99645, by certified mail return receipt requested. AS 23.30.110(c); 8 AAC 45.060(b), (e). It was returned as “unclaimed, unable to forward.” Employers never provided notice that the address changed; thus, they were properly served with the August 22, 2024 hearing notice. AS 23.30.110(c); 8 AAC 45.060(b), (e), (f). At the beginning of the hearing, the chair tried to contact Employers by telephone. Employers were accorded the opportunity to participate in the hearing but chose not to appear. AS 23.30.001(2), (4); AS 23.30.110(c).

As the hearing was scheduled on the SIU’s petitions, it would penalize the SIU for Employers’ failure to appear, if the hearing went forward. 8 AAC 45.070(f)(3). The only other option would be to adjourn, postpone or continue the hearing. 8 AAC 45.070(f)(3). No one requested a

continuance of the August 22, 2022 hearing. Parties have a basic due process right to notice of a hearing and have a right to participate. AS 23.30.110(c). There was insufficient evidence to merit a continuance. 8 AAC 45.074(b). Employers last contacted Investigator Christensen by email on February 22, 2024; subsequently, it did not attend the April or May 2024 prehearing conferences even though notices were properly served to its address of record by first-class mail. It is unknown why Employers did not appear or otherwise participate in the August 22, 2024 hearing. 8 AAC 45.074(b)(1)(B), (C), (D). While 8 AAC 45.074(b)(1)(N)'s "irreparable harm" provision may address due process issues and justify a continuance even if neither party requests one, there is no evidence of Employers' due diligence in preparing for or making themselves available for the hearing, even though the Division served notice in conformity with the statute and regulation. The hearing notice provided to Employers was pursuant to the law and did not violate their due process rights. 8 AAC 45.070(a). Employers did not respond to the ARH, did not file a brief or request discovery, did not attend the last two prehearing conferences and never requested a continuance. Given the totality of the circumstances in this case, the oral ruling to proceed in Employers' absence was correct. 8 AAC 45.070(a), (f)(1).

2) Should Employers be assessed a civil penalty for failure to insure for workers' compensation liability?

The SIU contended Employers failed to insure for workers' compensation liability. Employers did not specifically address this contention, but the insurance policies, NCCI information and the annual payroll Employers reported to the Department of Labor and Workforce Development establish Barbara Washer dba BABAMS utilized employee labor while uninsured for workplace injuries in Alaska from February 1, 2018 to December 31, 2019, for 698 calendar days, and from January 1, 2023 to December 31, 2023, for 365 calendar days, and BABAMS, LLC, was uninsured from October 7, 2022 to December 31, 2022, for 85 calendar days. Therefore, Employers should be assessed a civil penalty for failure to insure for workers' compensation liability.

The SIU contended the appropriate penalty should be at least two times the prorated premiums based upon three aggravating factors. Employers' positions are unknown, but the panel assumes it is opposed to any penalty. Employers failed to obtain workers' compensation insurance within 10 days after Chief Investigator Gerharz first notified Barbara Washer of the lack of coverage for

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BABAMS, LLC, on June 8, 2023, because coverage was not obtained for Barbara Washer dba BABAMS until February 2, 2024. 8 AAC 45.176(d)(1). Barbara Washer dba BABAMS' first lapse from February 1, 2018 to December 31, 2019, exceeds 180 calendar days. 8 AAC 45.176(d)(3). Barbara Washer sent Investigator Christensen zip files in response to the SIU's discovery request, which were inaccessible on February 22, 2024, and then failed to provide the information in a format accessible by the SIU after being instructed to do so on multiple occasions. Employers failed to comply with the SIU's initial discovery demand within 30 days after the demand. 8 AAC 45.176(d)(7); *Rogers & Babler*. Kelsey Akers was injured while working for BABAMS, LLC, on October 28, 2022; thus, BABAMS, LLC, has a history of an injury while it was in violation of AS 23.30.075. 8 AAC 45.074(d)(10). Thus, Barbara Washer dba BABAMS and BABAMS, LLC, had three aggravating factors. 8 AAC 45.176(d)(1), (3), (7), (10).

The law provides stiff civil penalties for uninsured employers. AS 23.30.080(f); 8 AAC 45.176(a); *In re Alaska Native Brotherhood #2*. However, the goal in assessing a civil penalty is not to put employers out of business or destroy employment. The purpose in assessing a civil penalty is to bring them into compliance, deter future lapses, ensure continued employment for their workers in a safe environment, and fairly penalize them as offenders. *In re Alaska R&C*. This decision must also consider Employers' ability to pay. *Id.* However, Employers did not provide any evidence regarding their income, so it is not possible to assess their ability to pay a civil penalty. *Rogers & Babler*.

Because both Employers have no more than three aggravating factors, have not previously violated AS 23.30.075, and because Employers did not agree to a stipulation of facts, the appropriate penalty range is determined by 8 AAC 45.176(a)(3). Under that section, the penalty ranges from \$10.00 to no more than \$50.00 per uninsured employee workday, but not less than two times the premium Employers would have paid if insured. Because Employers did not comply with the discovery requests, it is unknown how many uninsured employee workdays each had during the lapse periods. *Rogers & Babler*. Therefore, the only way to calculate the penalty is to use the premium Employer would have paid if it had been insured. Two times the prorated premium for the current policy equates to \$19,176.52 for Barbara Washer dba BABAMS and \$1,533.40 for BABAMS, LLC, for the lapsed periods, had they been insured. *Id.* Neither of the civil penalty

amounts assessed will be suspended as they are the minimum penalty. 8 AAC 45.176(a)(3); *Lawn Ranger*. Therefore, Barbara Washer dba BABAMS will be assessed a civil penalty in the amount of \$19,176.52 and BABAMS, LLC, will be assessed a civil penalty in the amount of \$1,533.40. The SIU does not oppose a payment plan; a payment plan will be ordered.

CONCLUSIONS OF LAW

- 1) The oral order to proceed with the hearing in Employers absence was correct.
- 2) Employers should be assessed a civil penalty for failure to insure for workers' compensation liability.

ORDER

- 1) The Division's August 17, 2023 petitions are granted.
- 2) At any time Barbara Washer and BARBARA WASHER DBA: BABAMS and BABAMS, LLC, has employees, they shall maintain workers' compensation insurance coverage in accord with AS 23.30.075, and shall file evidence of compliance in accord with AS 23.30.085.
- 3) Pursuant to AS 23.30.060(a), Barbara Washer and BARBARA WASHER DBA: BABAMS 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 23.30.060(a) and AS 23.30.075(b), BABAMS, LLC, and Barbara Washer are personally, jointly, severally and directly liable for any and all benefits payable under the Act for compensable injuries to employees during the uninsured period.
- 5) Pursuant to AS 23.30.080(f), Barbara Washer and BARBARA WASHER DBA: BABAMS are assessed a civil penalty of \$19,176.52. Barbara Washer and BARBARA WASHER DBA: BABAMS must timely pay **\$19,176.52**.
- 6) Pursuant to AS 23.30.080(f), BABAMS, LLC, is assessed a civil penalty of \$1,533.40. BABAMS, LLC, must timely pay **\$1,533.40**.
- 7) A payment plan is ordered for Barbara Washer and BARBARA WASHER DBA: BABAMS and BABAMS, LLC.
- 8) **Barbara Washer and BARBARA WASHER DBA: BABAMS shall pay \$2,376.52 within seven (7) days of this decision in accord with AS 23.30.080(g). Thereafter, on the 15th day of**

each month beginning on October 15, 2024, Barbara Washer and BARBARA WASHER DBA: BABAMS shall make monthly payments in the sum of \$350 for 48 months until the total civil penalty of \$19,176.52 is paid in full.

9) Barbara Washer and BARBARA WASHER DBA: BABAMS are ordered to make all payments to the Alaska Department of Labor, Division of Workers' Compensation, P.O. Box 115512, Juneau, Alaska 99811-5512. **Barbara Washer and BARBARA WASHER DBA: BABAMS are ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700008631, and AWCB Decision Number 24-0051.** If Barbara Washer and BARBARA WASHER DBA: BABAMS fail to make timely civil penalty payments as ordered in this decision, the entire \$19,176.52 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.

10) **BABAMS, LLC, shall pay \$183.40 within seven (7) days of this decision in accord with AS 23.30.080(g). Thereafter, on the 15th day of each month beginning on October 15, 2024 BABAMS, LLC, shall make monthly payments in the sum of \$150 for nine months until the total civil penalty of \$1,533.40 is paid in full.**

11) BABAMS, 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. **BABAMS, LLC, is ordered to make its checks payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700008632, and AWCB Decision Number 24-0051.** If BARBARA WASHER DBA: BABAMS fails to make timely civil penalty payments as ordered in this decision, the entire \$1,533.40 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.

12) The SIU is directed to monitor Barbara Washer and BARBARA WASHER DBA: BABAMS and BABAMS, LLC, for two (2) years from this decision's date for continued compliance with the Act's insurance requirements.

13) The Division's Collection Officer is ordered to prepare a proposed Liability Discharge Order within 120 days of Barbara Washer's and BARBARA WASHER DBA: BABAMS' and

