

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. 700008754
OF A CIVIL PENALTY AGAINST,)	
)	AWCB Decision No. 24-0061
RAMA BUILDERS, LLC,)	
)	Filed with AWCB Anchorage, Alaska
Respondent.)	on November 6, 2024.
)	

The Division of Workers' Compensation, Special Investigations Unit's (Division or SIU) February 26, 2024 Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage Alaska, on August 27, 2024. Investigator Julie Milazzo, represented and testified on behalf of the SIU. Owner-representatives Rama Ishaya and Elli Ishaya appeared and testified on behalf of Rama Builders, LLC (Employer).

Following the August 27, 2024, hearing, the panel reopened the record pursuant to 8 AAC 45.120(m), until September 6, 2024, to allow Employer to file supplemental materials which Employer claims had previously been provided to the Division, but which were not in the record. On August 27, 2024, SIU supplemented the record with SIU Exhibit 17 (Uninsured Employer Worksheet). On September 3, 2024, Employer supplemented the record with 52 pages of additional materials.

On September 12, 2024, the panel notified the parties that it intended to set a written record hearing for October 2, 2024, to review the additional materials submitted by Employer and to consider whether to modify its August 27, 2024 oral findings and order. The panel provided the parties

with the option to file briefs setting forth facts and any arguments for, or against, the panel modifying its findings or order imposing a civil penalty and the amount of the civil penalty. On September 24, 2024, SIU filed a Supplemental Hearing Brief. The record closed on October 2, 2024, when the panel met and held a written record hearing.

ISSUES

The Division contends Employer operated without workers' compensation insurance for 371 days from January 3, 2023, until January 9, 2024, and that a penalty based on two aggravating factors should be assessed.

Employer admits a lapse in coverage, however, contends its insurance provider, NEXT Insurance (NEXT), failed to provide it with notice of cancellation, and as a result, the lapse was inadvertent. Employer requests the panel, in assessing a civil penalty, consider mitigating factors and its financial circumstances as a small, family-owned residential construction company.

Shall Employer be required to pay 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) Employer's uninsured status came to the Division's attention during a routine compliance check of cancelled and expired Alaska workers' compensation insurance policies maintained by the National Council for Compensation Insurance (NCCI). The NCCI Proof-of-Coverage Inquiry which SIU obtained, indicated Employer's workers' compensation insurance policy was "Non-Renewed by Insured" effective January 3, 2023. (SIU Exhibit 2).
- 2) On November 6, 2023, SIU notified Employer (by phone message and email) that its workers' compensation policy had been canceled on January 3, 2023, for non-renewal. (SIU Exhibit 3 at 2-5). Employer's principal, Rama Ishaya, responded to SIU by email on November 7, 2023, stating that Employer had switched insurers, that he would follow-up and provide the policy information, and insisting that there was no lapse in coverage. (Exhibit 3 at 1-2).

- 3) On November 9, 2023, Mr. Ishaya emailed SIU to advise that he had been mistaken in understanding Employer had workers' compensation insurance; he distinctly remembered getting insurance through NEXT; and he had no record of receiving any notice from NEXT regarding Employer's workers' compensation policy being canceled or nonrenewed. (SIU Exhibit 3).
- 4) Employer has consistently maintained to SIU and throughout these proceedings NEXT never provided it notice that its workers' compensation policy had been canceled or nonrenewed. (Isaya; Milazzo; September 2, 2024 email from Employer to Workers' Compensation, Supplemental materials filed by Employer; record).
- 5) On March 1, 2024, Ishaya emailed Milazzo with an email Employer received from NEXT on February 23, 2024. (SIU Exhibit 6). The email from NEXT represented that the "Premium Audit" of Employer's 2023 workers' compensation policy had recently been completed; an additional \$469 was due and owing; NEXT had charged Employer's credit card on file; and thanking Employer for "being a NEXT Insurance customer." (*Id.*). In his email to SIU, Ishaya shared his continuing confusion regarding the lapse in Employer's workers' compensation policy and again asserted that NEXT had not notified Employer of any cancellation or nonrenewal. (*Id.*)
- 6) After receiving Employer's March 1, 2024 email, Milazzo emailed State National on March 4, 2024, requesting a copy of any "Cancellation Notices and Renewal Notices" relating to Employer's workers' compensation policy. (SIU Exhibit 4 at 3). State National responded by email on March 7, 2024, and provided seven pages of attachments: a one-page letter from NEXT to Ishaya captioned "Non-Renewal Notice For Your Workers Compensation Policy"; and two, three-page documents titled "Policy Termination/Cancellation/Reinstatement Notice." (SIU Exhibit 4 at 5-11). The one-page letter which State National attached from NEXT (SIU Exhibit 4 at 5), included a salutation "Hi Rama Ishaya," but was undated and lacked Employer's email or mailing address. (*Id.*). The letter from NEXT stated that after reviewing Employer's account, NEXT found the "Policy was declined for Renewal" because "[w]e [NEXT] are unable to offer any coverage due to your workers compensation underwriting history." (SIU Exhibit 4 at 5). The inference regarding Employer's underwriting history is inconsistent with the testimony of SIU and Employer. (*Id.*; inferences from the above).
- 7) During the August 27, 2024, hearing, Milazzo testified Employer had no reported workers' compensation claims filed against it and no work injuries or deaths reported during the lapsed

insurance period. (Milazzo). Ishaya testified that Employer has never had an employee injury or a workers' compensation claims filed against it. (Ishaya).

8) After receiving State National's March 7, 2023, email, Milazzo sent a follow-up email to State National inquiring "if the Employer received this Non-renewal Notice by email or regular mail" and sharing that, "He [Rama Ishaya] is telling me that he did not receive it/does not remember receiving it." (SIU Exhibit 4 at 1-2). State National responded to SIU by email on March 8, 2024, stating, "We have confirmed the following: the client received their non-renewal notice on 11/08/2022. It was sent to their email on file, and we see that the email has an "Open" status in our system, meaning the email reached the inbox and was opened successfully." (SIU Exhibit 4 at 1). Milazzo forwarded copies of State National's emails to Employer. (SIU Exhibit 5.)

9) The March 8, 2024, email from State National included no attachments. Specifically, the email did not include a copy of NEXT's email transmittal to verify the non-renewal notice purportedly emailed by NEXT to Employer on November 8, 2022, was in fact emailed. (SIU Exhibit 4 at 1). Nor did the State National email include a screen shot (or any other form of proof) from its database to verify the representation that the email, as purportedly transmitted to Employer, had "an 'Open' status on our system." (*Id.*). State National's representation that the non-renewal notice had been emailed to Employer on November 8, 2022, is inconsistent with the Proof-of-Coverage Inquiry SIU received from NCCI indicating that notice had been "mailed to Insured on November 9, 2022." (SIU Exhibits 2 and 4; Observations; inferences from the above).

10) Ishaya testified Employer had several business insurance policies with NEXT, including liability and workers' compensation, and that the premiums for all policies were automatically charged by NEXT and paid monthly through Employer's business credit card on record. (Ishaya).

11) After being notified by SIU on November 6, 2023, and after confirming that its workers' compensation insurance had been unilaterally canceled or nonrenewed, Employer undertook efforts to secure a replacement policy through other insurance carriers. (Ishaya). Ishaya testified to difficulties contacting and communicating with NEXT and that NEXT's failure to provide information required by the other carriers significantly delayed Employer's ability to obtain workers' compensation insurance. (*Id.*). To collaborate his testimony regarding difficulties in communicating with NEXT, Ishaya submitted several complaints filed with the Better Business Bureau by various NEXT insureds, and a copy of an insurance proposal from CHI listing information which CHI needed from NEXT to process Employer's insurance request. (Record;

Employer's supplemental materials filed September 3, 2024; observations; and inferences drawn from the above).

12) Employer obtained workers' compensation insurance from Alaska National Insurance Company effective January 9, 2024, through January 9, 2025, at an estimated premium of \$19,208 -- approximately four times its premium with NEXT (\$4,269). (SIU Exhibit 8; observations).

13) SIU contends Employer was uninsured for 371 days, from January 3, 2023, through January 9, 2024. (SIU Hearing Brief). It initially asserted there were three aggravating factors to consider in assessing a civil penalty: (1) a violation that exceeded 180 days; (2) Employer's failure to obtain workers' compensation insurance within 10 days after being notified by the Division; and (3) cancellation of a workers' compensation policy due to Employer's failure to comply with the carriers' request or procedures. (SIU Hearing Brief). During the August 27, 2024, hearing, SIU withdrew the third aggravating factor, acknowledging that because NEXT had unilaterally canceled or nonrenewed Employer's policy, Employer had not failed to comply with any carrier request or procedure. (Record).

14) The daily pro-rated premium for Employer's current policy with Alaska National is \$52.63 per day; ($\$19,208 / 365 = \52.63). (Observations).

15) Milazzo testified Employer is a Limited Liability Company formed in 2019, is in good standing, and has timely paid its monthly premiums to prevent future lapses of its workers' compensation insurance coverage. (Milazzo; SIU Hearing Brief). Milazzo also testified that Employer cooperated fully with SIU's investigation, seemed surprised when told Employer's workers' compensation policy had been canceled, and consistently maintained that Employer never received notice from NEXT advising Employer that its workers' compensation policy had been cancelled or nonrenewed. (Milazzo; observations; inferences).

16) Employer's principals, Rama and Elli Ishaya, testified that Employer is a small family-owned residential construction and remodeling company, which until very recently had been operating out of the Ishaya's garage, and that virtually all company profits have gone to building a shop and purchasing equipment to grow the business. (Rama and Elli Ishaya). The Ishayas also testified that although the company's payroll has been increasing, the increase is attributed to the cost of having to pay more to retain employees in a highly competitive market and not to the fact that the company is making significantly more money; very little company income is paid to the Ishayas

personally; and whatever penalty is assessed will have an impact on the company's financial abilities going forward. (*Id.*)

17) At the conclusion of the August 27, 2024 hearing the panel issued two oral findings: (1) Employer's lapse in workers' compensation coverage exceeded 180 days; and (2) Employer failed to obtain workers' compensation within 10 days after being notified by the Division. (Record). The panel imposed a civil penalty in the amount of \$39,044.04, representing twice Employer's current prorated premium for the 371 days Employer was determined uninsured, suspended one-half of the penalty amount, (\$19,522.20), and ordered the unsuspended amount (\$19,522.20) be paid by Employer in quarterly installments. (*Id.*).

18) On October 2, 2024, the panel held a written record hearing to review the supplemental materials filed by SIU and Employer, the evidence previously submitted as part of the agency record, and to consider whether to modify the panel's August 27, 2024 oral findings and order. (Agency file.)

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 21.36.220. Notice of cancellation. . . .

(b) An insurer may not exercise its right to cancel a policy of business or commercial insurance unless a written notice of cancellation is mailed to the named insured as required by AS 21.36.260 and to the agent or broker of record at least 60 days before the effective date of cancellation. . . .

. . . .

(e) A notice of cancellation of insurance to be given under this section must include or be accompanied by a statement of the reason for cancellation.

AS 21.36.260. Proof and method of mailing notice. If a notice is required from an insurer under this chapter, the insurer shall

- (1) mail the notice by first class mail to the last known address of the insured and
- obtain a certificate of mailing from the U.S. Postal Service; or

(2) transmit the notice by electronic means, to the last known electronic address of the intended recipient, if the insurer can obtain an electronic confirmation of receipt by the intended recipient.

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 . . . or shall furnish the board 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. . . .

Alaska's penalty provision is one of the highest in the nation and underscores that an employer's failure to insure for workers' compensation liability will not be tolerated. *In re Alaska Native Brotherhood #2*, AWCBC Dec. No. 06-0113 (May 8, 2006); *In re Alaska Salmon Purchasers, Inc.*, AWCBC Dec. No. 12-0215 (December 1, 2012). The legislature made its intentions clear; uninsured employers are subject to a severe penalty if, without having workers' compensation insurance in place they permit employees to work. *In re Pearl Bay Seafoods, LLC*, AWCBC Dec. No. 24-0013 (March 5, 2024); *Miller s Market v. State of Alaska*, AWCAC Dec. No. 161 (May 14, 2012).

AS 23.30.080. Employer's failure to insure. (a) If an employer fails to comply with AS 23.30.075 the employer may not escape liability for personal injury or death sustained by an employee when the injury sustained arises out of and in the usual course of the employment. . . .
. . . .

(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 the security required by AS 23.30.075.

When an employer subject to AS 23.30.075 fails to comply, the Board has discretion to assess a civil penalty up to \$1,000 per employee per day for the duration of the employer's noncompliance. *In re Alaska Native Brotherhood #2; In re Pearl Bay Seafoods; In re Visionary Construction, LLC* AWCB Dec. No. 24-0049 (September 6, 2024). The primary goal of a penalty under AS 23.30.080(f) is not to be unreasonably punitive, but to bring the employer into compliance, deter future lapses, ensure the continued employment of the business' employees in a safe work environment, and to satisfy the community's interest in fairly penalizing the offender. *In re Brooks*, AWCB Dec. No. 24-0011 (February 26, 2024); *Alaska R & C Communications, LLC v. State of Alaska, Division of Workers Compensation*, AWCAC Dec. No. 088 (September 16, 2008); *Ivan Moore d/b/a Ivan Moore Research v. Alaska, Div. of Workers Comp.*, AWCAC Dec. No. 092 (Nov. 17, 2008). A penalty is not intended to destroy a business or cause lost employment. *In re R&C Communications; In re Visionary Construction; In re Alaska Salmon Purchasers*. In assessing a civil penalty, the Board must consider the employer's ability to pay the penalty and, in its discretion, may suspend part of an assessed civil penalty. *Id.*; *In re Brooks*, AWCB Dec. No. 24-0011 (February 26, 2024); *Denali Care Services, LLC*, AWCB Dec. No. 23-0084 (December 29, 2003); *In re R&C Communications*.

The Board is granted broad discretion in determining the amount of a penalty under AS 23.30.080(f) and has discretion to suspend a portion of the penalty. *In re R&C Communications; In re Moore*. However, suspending an entire penalty is incompatible with the deterrent and punitive purposes of AS 23.30.080(f), and absent a finding that such a suspension is necessary to provide for continued, safe employment, a minimum civil penalty should be imposed. *State of Alaska, Division of Workers Compensation v. Lawn Ranger of Alaska, LLC*, AWCAC Dec. No. 224 (March 7, 2016); *In re Pearl Bay Seafoods*. It is an abuse of discretion, however, "to impose a penalty that (1) does not serve the purpose of the statute, (2) does not reflect consideration of appropriate factors, (3) lacks substantial evidence to support findings regarding those factors, or (4) is so excessive or minimal as to shock the conscience." *Titan v. Alaska, Division of Workers' Compensation*, AWCAC Dec. No. 227 (July 11, 2016), quoting *In re R&C Communications*.

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... is conclusive even if the evidence is conflicting or susceptible to contrary conclusions....

The Board's credibility findings and the weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 2024 P.2d 1001, 1008 (Alaska 2009).

AS 23.30.130. Modifications of awards. (a) Upon its own initiative, or upon the application of any party in interest . . . because of a mistake in its determination of a fact, the board may. . . review a compensation case. . . . Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

"The importance of providing "mistake in its determination of fact" as grounds for the Board, on its own initiative, to review its earlier decision, is to "vest the board with broad discretion to correct mistakes of fact, whether demonstrated by wholly new, cumulative evidence, or merely further reflection on the evidence initially submitted." *Nina v. Mammoth of Alaska, Inc.*, AWCB Dec. No. 94-0257 (October 7, 1994), quoting *Interior Paint Company v. Rodgers* 522 P.2d 161, 168 (Alaska 1974).

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:

(1) if an employer has an inadvertent lapse in coverage, the civil penalty assessed under AS 23.30.080(f) for the employer's violation of AS 23.30.075 may be no more than the prorated premium the employer would have paid had the employer been in compliance with AS 23.30.075; the division shall consider a lapse in coverage of not more than 30 days to be inadvertent if ... the board determines an unusual extenuating circumstance to qualify as an inadvertent lapse;

....

(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;
....

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

8 AAC 45.176(d) codified 15 possible aggravating factors to consider in determining an appropriate civil penalty. Based on these factors, a wide range of penalties have been found reasonable depending on the specific circumstance of the violation. *In re Denali Care*. The number of aggravating factors an employer has is an important consideration; the greater the number of aggravating factors the larger the penalty. *In re Whittier Seafood, LLC*, AWCBC Dec. No. 24-0014 (March 5, 2024); citing *Anchorage Midtown Motel v. State of Alaska*, AWCAC Dec. No. 159 (February 14, 2012); *In re Pearl Bay*.

The Division has the burden of establishing the absence of proof of insurance and having done so, the burden of proof shifts to the employer to establish coverage. *In re R&C Communications*. The burden of proving the factors that the Board must consider in assessing a penalty rests on the Division, because there is no presumption that a particular penalty within the range established by AS 23.30.080(f) is appropriate. *Id.*; *In re Lawn Ranger*. Proving grounds for imposing a penalty is part of the Division’s initial burden of proof, before the amount of the penalty becomes an issue. *Id.*; *In re Pearl Bay*; SIU has the burden of production and persuasion to support imposition of a civil penalty, and the Board bases its findings upon facts in evidence. *In re Whittier Seafoods*. The employer has the burden to establish facts and circumstances that may be considered to excuse or mitigate a penalty. *In re R&C Communications*; *In re Lawn Ranger*.

The Alaska Supreme Court has held that “statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty.” *Titan*

Enterprises, LLC, AWCAC Dec. No. 175 (January 8, 2023); citing, *Alaska Public Offices Comm n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009).

ANALYSIS

Shall Employer be required to pay a civil penalty for failure to insure for workers' compensation liability?

Alaska's penalty provision, which is one of the highest in the nation, underscores that an employer's failure to insure for worker's compensation liability will not be tolerated. *In re Alaska Native Brotherhood #2*. The consequences to an employer for failing to have workers' compensation insurance are significant, both in terms of a potential civil penalty and in terms of losing the liability protections afforded by the Act. AS 23.30.080(f); 8 AAC 45.176(a). Employers who operate without workers' compensation insurance are held liable for an employee's personal injury that arises out of and in the course of employment. AS 23.30.080.

8 AAC 45.176 sets forth the parameters that the panel must consider in assessing a civil penalty based on the gravity of the offense. The greater the number of aggravating factors, the larger the potential fine. *In re Whittier; In re Pearl Bay*. There are situations, however, where an Employer's lack of insurance is inadvertent and, in such situations, the civil penalty is appropriately less severe. 8 AAC 45. 176(a). The goal in imposing a civil penalty is not to put employers out of business or destroy employment, but rather to bring employers into compliance, deter future lapses, ensure continued employment for workers in a safe environment and fairly penalize offenders. *In re R&C Communications; In re Visionary Construction*.

SIU contends Employer operated without workers' compensation insurance for a period of 371 days from January 3, 2023, until January 9, 2024, and that a penalty based on two aggravating factors should be assessed: (1) Employer operated without workers' compensation insurance for more than 180 days (8 AAC 45.176(d)(3)), and (2) Employer failed to obtain workers' compensation insurance within 10 days after being notified by the Division, (8 AAC 45.176(d)(1)). Proving that there are grounds for imposing a penalty is part of the Division's initial burden of proof, before the amount of the penalty becomes an issue. *In re Pearl Bay; In re Whittier Seafoods*.

There is no presumption that a particular penalty within the range established by AS 23.30.080(f) is appropriate. *In re R&C Communications; In re Lawn Ranger.*

A) Does aggravating factor 8 AAC 45.176(d)(3) apply?

As relates to the first aggravating factor alleged, a violation of 8 AAC 45.176(d)(3), SIU asserts Employer operated without workers' compensation insurance for a period exceeding 180 days. The record indicates that Employer's workers' compensation insurance policy was purportedly canceled or nonrenewed effective January 3, 2023 (SIU Exhibits 2 and 4), and that on January 9, 2024, Employer obtained workers' compensation insurance through Alaska National (SIU Exhibit 8). The duration between January 3, 2023, and January 9, 2024, is 371 days -- a period more than sufficient to conclude a violation of 8 AAC 5.176(d)(3). *Rogers & Babler.* Employer, however, has consistently maintained that it did not receive notice from NEXT that its workers' compensation insurance policy was being cancelled or nonrenewed. AS 23.30.080(f) creates a rebuttable presumption; the Division has the burden of establishing the absence of proof of insurance and, assuming it does, the burden of proof shifts to the employer to establish coverage. *In re R&C Communications.*

AS 21.36.220(b) provides that an insurer may not cancel a business or commercial insurance policy without first providing written notice to the named insured as required by AS 21.36.260. Proof and method of mailing notice is set forth in AS 21.36.260 and can be either by mail or, as specified in AS 21.36.260(2), by electronic means "if the insurer can obtain an electronic confirmation of receipt by the intended recipient." Absent notice of cancellation, the policy continues in effect. The question thus presented is whether NEXT provided proper written notice to Employer before canceling or nonrenewing Employer's insurance policy.

Aware of Employer's insistence that it was never notified of any cancellation or nonrenewal, SIU is to be commended for inquiring with State National, to confirm whether notice of cancelation had been provided to Employer and by what means (SIU Exhibit 4). However, the response SIU received from State National by email on March 8, 2024, although representing that notice had been emailed to Employer and opened by Employer, failed to provide the required proof. *Rogers & Babler.* Missing from State National's March 8, 2024, email is any tangible proof in the form of a copy of the actual email transmittal purportedly provided to Employer on November 8, 2023,

or a screen shot (or other form of documentation) to confirm the representation that the email from NEXT to Employer had been received and opened. Absent some form of tangible proof, the representation in State National's March 8, 2024, email constitutes hearsay not supported by direct evidence. Therefore, this decision may not rely on it to support a factual finding. 8 AAC 45.120(e). State National's March 8, 2024, email does not provide credible proof that NEXT met AS 21.26.220(b) notice requirements or AS 21.36.260(2) proof of mailing requirements. *Smith; Rogers & Babler*.

SIU relied on State National's March 8, 2024 email in concluding Employer had been properly notified of nonrenewal and the notice had been transmitted by email and opened on November 8, 2023. *Rogers & Babler*. In so doing, SIU logically, but incorrectly, concluded Employer was uninsured for the full period from January 3, 2023 (the date Employer's policy with NEXT purportedly terminated) until January 9, 2024 (the date Employer obtained workers' compensation insurance through Alaska National); a period of 371 days. However, as a matter of law Employer's workers' compensation policy could not be considered canceled because, at least based on the record, NEXT failed to take the steps required by AS 21.36.220 and AS 21.36.260 to cancel Employer's policy. Alternately, if they did, the admissible evidence so demonstrating was not provided in the agency file. *Rogers & Babler*.

Ishaya's testimony that Employer did not receive notice of cancellation or nonrenewal from NEXT is credible. AS 23.30.122; *Smith*. The March 8, 2024 email from State National to Milazzo is not credible. Although State National's email asserts notice of non-renewal was given and Employer opened it, the email does not constitute credible evidence that the panel can rely on to support a finding that notice was actually provided to Employer by email and opened by Employer on November 8, 2023, as represented, because it is hearsay and lacks supporting physical evidence. *Rogers & Babler*; 8 AAC 45.120(e). Representing something that occurred is not the same as proving something occurred with the actual email.

There are additional reasons why State National's March 8, 2024, email is not credible. In representing that a non-renewal notice had been emailed to Employer on November 8, 2022, State National's representation is inconsistent with the Proof-of-Coverage Inquiry the SIU received from

NCCI indicating notice had been “mailed to Insured on November 9, 2022” and the policy “Non renewed by Insured” [Employer]. (SIU Exhibits 2 and 4). Additionally, the one-page notice of nonrenewal letter, which State National represented NEXT emailed to Employer on November 8, 2022, (SIU Exhibit 4), is undated and lacks Employer’s email or mailing address. Further, the letter’s representation that Employer’s workers’ compensation policy was not renewed because of “your [Employer’s] workers’ compensation underwriting history” is inconsistent with the testimony of Milazzo and Ishaya; both of whom testified that Employer had no workers’ compensation claims filed against it and no injury reports. *Rogers & Babler*.

The Alaska Supreme Court has held that “statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty.” *In re Titan*, citing *Alaska Public Offices Comm’n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009). Proving there are grounds for imposing a penalty is part of the Division’s initial burden of proof, before the amount of a penalty becomes an issue. *In re R&C Communications; In re Lawn Ranger*. Since there is no credible evidence in the record to substantiate that NEXT took the steps required to comply with AS 21.36.220(b) and AS 21.36.260(2), as a matter of law Employer’s workers’ compensation policy could not be considered cancelled.

Notwithstanding that NEXT may have failed to provide the requisite notice of cancellation, Employer was nonetheless notified by SIU on November 6, 2023, that its workers’ compensation insurance had been canceled effective January 3, 2023, and that Employer needed to obtain insurance within the next 10 days. (SIU Exhibit 3). November 6, 2023, therefore, is the start date for determining the 180-day period required by aggravating factor 8 AAC 45.176(d)(3). The record establishes Employer secured workers’ compensation insurance through Alaska National on January 9, 2024. The duration between the date of the SIU’s notice (November 6, 2023) and the date Employer secured insurance with Alaska National is 63 days -- not 180 days plus as the SIU asserted. *Rogers & Babler*. Absent a finding that Employer received notice of cancellation or nonrenewal, aggravating factor 8 AAC 45.176(d)(3) does not apply.

B) Does aggravating factor 8 AAC 45.176(d)(1) apply?

As relates to the second aggravating factor alleged, a violation of AS 2.3.176(d)(1), the SIU asserts Employer failed to obtain workers' compensation insurance within 10 days after the SIU first notified Employer it lacked insurance. The record establishes that the SIU first contacted Employer on November 6, 2023, and that Employer obtained workers' compensation insurance through Alaska National on January 9, 2024 -- a period of 63 days. Implicit, however, in 8 AAC 45.176(d)(1) is a finding that an employer was dilatory or otherwise culpable in failing to secure workers' compensation insurance within 10 days after the Division's notice. *Rogers & Baber*. Here, there is no evidence that Employer failed to act promptly or diligently to obtain workers' compensation insurance. *Id.* Culpability is a factor that must be addressed as a measure of intent; that is, whether the lapse in coverage was caused by an excusable error or omission, negligence, gross negligence, knowing omission, or by a willful intent. *In re R&C Communications*. An excused error should result in no, or very little, culpability attaching. *Id.*

Employer testified that once notified by the SIU, and once it confirmed that its policy had been canceled or nonrenewed, it immediately undertook efforts to obtain replacement coverage. Employer also testified that despite diligent efforts, it had difficulty communicating with NEXT and that NEXT failed to provide information required by the other carriers through whom Employer was attempting to obtain workers' compensation insurance, which in turn delayed Employer's efforts to promptly secure a replacement policy. (*Id.*) The supplemental materials which Employee submitted in the form of complaints filed by NEXT insureds with the Better Business Bureau and the insurance proposal from CHI are relevant in collaborating Employer's credibility.

SIU objected to the Better Business Bureau (BBB) complaints filed by various NEXT insureds as constituting inadmissible hearsay since SIU did not have the opportunity to question the authors of the various complaints. In contrast to the email the SIU relied upon, discussed above, the BBB business records are not hearsay because they are not being proffered by Employer to prove the truth of the complaints, but rather as supportive evidence of Employer's assertion that it had difficulty communicating with NEXT, which is why it took Employer more than 10 days to secure a replacement workers' compensation policy. *Smith; Rogers & Babler*.

Although Employer did not obtain workers' compensation insurance within 10 days of first being notified by the SIU, the delay was not from any fault of Employer, but rather due to circumstances beyond its control. *Rogers & Babler*. There is no evidence in the record to the contrary. *Id.* Employee met its burden to establish circumstances sufficient to excuse a violation of 8 AAC 45.176(d)(1). *In re Lawn Ranger*.

C) Assessing an Appropriate Civil Penalty.

Having found no aggravating factors warranting a civil penalty under 8 AAC 45.176(a)(3), Employer's insurance lapse is deemed inadvertent. 8 AAC 45.176(a)(1) provides in relevant part that when an employer has an inadvertent lapse of coverage, the appropriate civil penalty may not be more than the prorated premium the employer would have paid had the employer complied. *Id.*; *In re Lawn Ranger*. Employer's daily prorated premium for the 63 days it lacked insurance is \$52.63 per day - ($\$19,208 / 365 = \52.63) equating to a maximum potential civil penalty of \$3,315.69 (63 days X \$52.63 per day = \$3,315.69).

In determining the amount of a civil penalty under AS 23.30.080(f), the panel has broad discretion, subject to 8 AAC 45.176. *In re Lawn Ranger*; *In re Moore*. The panel also has discretion to suspend any portion of a civil penalty, and with the unsuspended portion payable in a lump-sum or installments. *In re R&C Communications*. It is an abuse of discretion, however, to impose a penalty that (1) does not serve the purposes of the statute, (2) does not reflect consideration of appropriate factors, (3) lacks substantial evidence to support findings regarding those factors, or (4) is so excessive or minimal as to shock the conscience. *In re Moore*. In determining an appropriate civil penalty, the panel must also consider an employer's ability to pay the penalty. *In re R&C Communications*. There is no presumption that an employer can pay a particular penalty simply because the penalty is within the range established by statute. *Id.*

Imposing a penalty of any amount under the circumstances of this case may seem harsh, particularly where Employer operated with the good faith belief and understanding that it was properly insured, and there is no credible evidence that Employer was ever notified by its insurer that its workers' compensation policy had been unilaterally cancelled or nonrenewed. Nonetheless, the underlying policy considerations of the Act underscore the importance of an

employer obtaining and maintaining insurance to ensure that its employees are insured against work-related injuries. *In re Alaska Native Brotherhood #2*. Given the circumstances of this case, the fact that the lapse was inadvertent, Employer's diligence in securing insurance once notified by SIU, and the fact Employer has never previously been in violation and has a history of a safe and fully-insured workplace, assessing the minimum penalty under the regulation is appropriate. *Rogers & Babler*.

A civil penalty of \$3,315.69, which is consistent with the penalty specified in 8 AAC 45.176(a)(1) for an inadvertent lapse in coverage is not so significant as to impose a hardship on Employer's ability to pay and there is no evidence in the record that Employer lacks the financial ability. However, to the extent that the assessed penalty does impose some degree of hardship, Employer is provided the option to either pay the full amount of \$3,315.69 in one lump-sum on or before December 1, 2024, or pay it in four equal monthly installments of \$828.92 over four months beginning December 1, 2024, and monthly thereafter with the last payment due on March 1, 2024. Employer is directed to contact the SIU to coordinate payment and to notify the SIU whether it elects to pay the civil penalty in one lump-sum or in four equal monthly installments. If Employer elects to pay the civil penalty in installments and thereafter fails to timely pay the installments, the Division director may declare Employer in default and seek collection of the full balance through the Superior Court. AS 23.30.080(g).

CONCLUSION OF LAW

Employer shall be required to pay a civil penalty for failure to insure for workers' compensation liability.

ORDER

1) The oral findings and order issued during the August 27, 2024 hearing that (1) Employer's lapse in workers' compensation coverage exceeded 180 days; and (2) Employer failed to obtain workers' compensation within 10 days after being notified by the Division were based on mistakes in fact. Therefore, consistent with AS 23.30.130(a), the panel, on its own initiative because a mistake in the determination of crucial facts, and after reviewing the supplemental materials filed by

In re RAMA BUILDERS LLC

Employer and all materials in the record, and after reevaluating its previous findings, modifies its August 27, 2024 oral findings and order and issues this Decision and Order in their place.

2) The SIU's February 27, 2024 petition is granted in part and denied in part. Rama Builders, LLC, is determined to have been without workers' compensation insurance. However, based on findings of fact and the circumstances, the lapse is deemed inadvertent. There exist no aggravating factors to justify imposing a civil penalty greater than specified in AS 23.30.176(a)(1).

3) Consistent with AS 23.30.176(a)(1), Rama Builders, LLC, is assessed a civil penalty in the amount of \$3,315.69 representing the prorated premium it would have paid during the 63 days it was uninsured between the date the Division first notified Employer that it lacked workers' compensation insurance and the date it obtained insurance. Rama Builders, LLC, is given the option to pay the civil penalty in one lump-sum on or before December 1, 2024, or in four equal monthly installments of \$828.92 with the first payment due on December 1, 2024, and the final payment due on March 1, 2025. If, based on the panel's August 27, 2024 oral order, Rama Builders, LLC has already made a payment to the Benefits Guaranty Fund in excess of \$3,315.69, Rama Builders, LLC may petition the Board for a refund.

4) At any time Rama Builders, LLC, has employees, it shall maintain workers' compensation insurance in accord with AS 23.30.075 and shall file evidence of compliance in accord with AS 23.30.085.

5) Rama Builders, 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. Payments are ordered to be paid by check(s) made payable to the Alaska Workers' Compensation Benefits Guaranty Fund. Checks must include AWCB Case Number 700008754, and AWCB Decision Number 24-0061. If Rama Builders, LLC, fails to make timely civil penalty payments as ordered in this decision, the entire balance of \$3,315.69 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 in accord with this Decision and Order, jurisdiction is maintained.

6) The Division's collection officer is ordered to prepare a proposed Liability Discharge Order within 120 days of Rama Builders, LLC's, full, timely, civil penalty payment as set forth in this decision and order. The proposed order will be addressed in accord with 8 AAC 45.130.

Dated in Anchorage, Alaska on November 7, 2024.

ALASKA WORKERS' COMPENSATION BOARD

/s/ John Burns
John Burns, Designated Chair

/s/ Randy Beltz
Randy Beltz, 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.

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CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Rama Builders, LLC; Employer / respondent; Case No. 700008754; 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 November 8, 2024.

_____/s/ Rochelle Comer_____
Rochelle Comer, Workers Compensation Technician