

Alaska Workers' Compensation Appeals Commission

Anchorage Midtown Motel, Inc.,
Appellant,

vs.

State of Alaska, Division of Workers'
Compensation,
Appellee.

Final Decision

Decision No. 159 February 14, 2012

AWCAC Appeal No. 11-002
AWCB Decision No. 11-0021
AWCB Case No. 700003119

Final decision on appeal from Alaska Workers' Compensation Board Decision and Order No. 11-0021, issued at Anchorage on February 28, 2011, by southcentral panel members William J. Soule, Chair, David Robinson, Member for Labor, and Robert C. Weel, Member for Industry.

Appearances: William H. Ingaldson, Ingaldson, Maassen & Fitzgerald, P.C., for appellant, Anchorage Midtown Motel, Inc.; John J. Burns, Attorney General, and Thomas A. Dosik, Assistant Attorney General, for appellee, State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appeal filed March 31, 2011; briefing completed November 21, 2011; oral argument was not requested.

Commissioners: David W. Richards, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

In a final decision and order,¹ the Alaska Workers' Compensation Board (board):
1) determined that appellant, Anchorage Midtown Motel, Inc. (AMM),² had failed to

¹ *In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability and Assessment of a Civil Penalty Against Anchorage Midtown Motel, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 11-0021 (Feb. 28, 2011)(*Anchorage Midtown Motel*).

² Anchorage Midtown Motel, Inc. is a corporation in which Corey Millen has a 50 percent ownership interest and holds several offices and Kelly Millen has a 50

(footnote continued)

obtain and maintain workers' compensation insurance coverage, as required by law, between February 2009 and May 2010;³ 2) ordered AMM and the Millens to pay a civil penalty; and 3) ordered the Special Investigations Unit (SIU) of the Alaska Department of Labor and Workforce Development, to investigate, etc., whether there were other timeframes when AMM was not insured.⁴ AMM has appealed to the Alaska Workers' Compensation Appeals Commission (commission), contesting certain aspects of the board's decision and order. We affirm the board in part, reverse the board in part, and remand to the board as more fully set forth below.

2. Factual background and proceedings.

AMM was not insured for workers' compensation liability between February 3, 2009, and May 14, 2010, a period of 465 calendar days.⁵ It also did not provide evidence of compliance with workers' compensation insurance requirements for the same time period.⁶ Thereafter, AMM obtained coverage at an estimated annual premium of \$11,295, which equals \$30.95 per day.⁷

According to the Millens, AMM is intended to serve as a rooming house, with five rooms per bathroom.⁸ Nevertheless, they describe it as a crack house frequented by

percent ownership interest and holds several offices. *See Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 2. The board found that both Kelly Millen and Corey Millen had the authority to insure AMM for workers' compensation liability and that Kelly Millen was the person actively in charge of the business. *See Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 8.

³ *See Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 3 and 6.

⁴ *See id.* at 23 and 24. Mark Lutz of SIU conducted the original investigation that led to the board's decision and order that is the subject of this appeal. It appears there may have been other timeframes when AMM was not insured, *see Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 3, 4, and 17. However, they are not at issue here.

⁵ *See Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 3 and 6.

⁶ *See id.* at 4.

⁷ *See id.*

⁸ *See id.* at 3.

prostitutes and drug dealers.⁹ Other than the maintenance man, many of the employees work part-time and there is high employee turnover.¹⁰ AMM employed a total of 39 workers at various times during the period it was not insured, February 3, 2009, to May 14, 2010, and up to 15 employees at various times between February 28, 2010, the effective date of 8 AAC 45.176,¹¹ and May 14, 2010.¹² Although there were no reported injuries during the February 3, 2009, to May 14, 2010, timeframe, two injuries were reported when AMM was insured for workers' compensation liability.¹³ The business is having financial problems and the Millens are trying to sell the facility.¹⁴ They maintain they cannot afford to pay a civil penalty in any amount.¹⁵

The board held a hearing on February 2, 2011. Based on the foregoing evidence, it calculated a civil penalty as follows. First, for the timeframe from February 3, 2009, to February 27, 2010, before 8 AAC 45.176 went into effect, the board established a penalty rate of \$57.92 per uninsured employee workday (of which there were 2,188), for a total of \$126,728.96 ($\$57.92 \times 2,188 = \$126,728.96$).¹⁶ Second, for the timeframe between February 28, 2010, and May 14, 2010, applying criteria provided for in 8 AAC 45.176, the board set a penalty rate of \$500 per uninsured employee workday (of which there were 442), for a total of \$221,000 (\$500

⁹ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 3.

¹⁰ See *id.* Other employees worked as housekeepers, an expeditor who drove around obtaining supplies, a front desk clerk/manager, and a bookkeeper. See *id.* at 5.

¹¹ This regulation, which provides criteria for the board to apply in assessing civil penalties when employers are uninsured, is quoted in its entirety *infra*.

¹² See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 5. According to the division's investigation, AMM accrued 2,630 uninsured employee workdays from February 3, 2009, to May 14, 2010, which included 442 uninsured employee workdays from February 28, 2010, to May 14, 2010.

¹³ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 5.

¹⁴ See *id.* at 7.

¹⁵ See *id.*

¹⁶ See *id.* at 20.

X 442 = \$221,000). The total civil penalty the board assessed was \$347,728.96 (\$126,728.96 + \$221,000 = \$347,728.96).¹⁷

In its decision, in relevant part, the board concluded:

- 1) AMM was subject to and in violation of AS 23.30.085(a) and (b) requiring that employers provide evidence of compliance with workers' compensation insurance requirements from February 3, 2009, to May 14, 2010;¹⁸
- 2) AMM was subject to and in violation of AS 23.30.075 from February 3, 2009, to May 14, 2010, and subject to the penalties in AS 23.30.080 or 8 AAC 45.176;¹⁹ and
- 3) AMM would be assessed a civil penalty for its failure to insure from February 3, 2009, to May 14, 2010, in the total amount of \$347,728.96.²⁰

Also of relevance here, the board ordered:

- 1) the personal, joint, several, and direct liability of AMM, Kelly Millen, and Corey Millen, for compensable workers' compensation claims arising between February 3, 2009, and May 14, 2010, pursuant to AS 23.30.060²¹ and AS 23.30.075(b);²²
- 2) the personal, joint, several, and direct liability of AMM, Kelly Millen, and Corey Millen, for the penalties provided for in AS 23.30.080;²³

¹⁷ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 20-21. The basis for the board imposing two different penalty rates is explained *infra*.

¹⁸ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 22.

¹⁹ See *id.*

²⁰ See *id.* at 23.

²¹ AS 23.30.060 provides a presumption that an employer elects to pay compensation directly if it fails to post a notice of insurance on its premises.

²² See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 23.

²³ See *id.*

- 3) the personal, joint, several, and direct liability of AMM, Kelly Millen, and Corey Millen, for the civil penalty in the amount of \$347,728.96;²⁴ and
- 4) the personal, joint, several, and direct liability of AMM, Kelly Millen, and Corey Millen, for payment of the civil penalty within seven days of the board's decision.²⁵

3. Standard of review.

The commission must uphold the board's findings of fact if supported by substantial evidence in light of the record as a whole.²⁶ We exercise our independent judgment when reviewing questions of law and procedure.²⁷ The question "whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind" is a question of law.²⁸

4. Discussion.

a. Applicable law.

Certain sections of the Alaska Workers' Compensation Act, AS 23.30.001 — .395, and a board regulation, 8 AAC 45.176, provide the legal framework for the board's and our analysis in this matter. They read, in relevant part, as follows:

AS 23.30.070. Report of injury to division.

(a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall send to the division a report

(b) Additional reports with respect to the injury and to the condition of the employee shall be sent by the employer to the division at the times and in the manner that the director prescribes.

²⁴ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 23.

²⁵ See *id.*

²⁶ See AS 23.30.128(b).

²⁷ See *id.*

²⁸ *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984) (citing *Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978)).

. . . .

(f) An employer who fails or refuses to send a report required of the employer by this section or who fails or refuses to send the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

AS 23.30.075. Employer's liability to pay.

(a) An employer under this chapter, unless exempted, shall . . . 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

(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. 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

AS 23.30.080. Employer's failure to insure.

. . . .

(f) If an employer fails to insure or provide security as required by AS 23.30.075, the division may petition the board to assess a civil penalty of up to \$1,000 for each employee for each day an employee is employed while the employer failed to insure or provide the security required by AS 23.30.075. The failure of an employer to file evidence of compliance as required by AS 23.30.085 creates a rebuttable presumption that the employer failed to insure or provide security as required by AS 23.30.075.

AS 23.30.085. Duty of employer to file evidence of compliance.

(a) An employer subject to this chapter, unless exempted, shall initially file evidence of compliance with the insurance provisions of this chapter with the division, in the form prescribed by the director. The employer

shall also give evidence of compliance within 10 days after the termination of the employer's insurance by expiration or cancellation.

(b) If an employer fails, refuses, or neglects to comply with the provision of this section, the employer shall be subject to the penalties provided in AS 23.30.070 for failure to report accidents; but nothing in this section may be construed to affect the rights conferred upon an injured employee or the employee's beneficiaries under this chapter.

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 employer has changed carriers, ownership of the employer has changed, the form of business entity of the employer has change, the individual responsible for obtaining workers' compensation coverage for the employer has changed, or the board determines an unusual extenuating circumstance to qualify as an inadvertent lapse;

(2) if an employer has not previously violated AS 23.30.075, and is found not to have aggravating factors, and agrees to a stipulation of facts and executes a confession of judgment without action, without a board hearing, the employer will be assessed a civil penalty of two times the premium the employer would have paid had the employer complied with AS 23.30.075;

(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;

(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;

(5) if an employer is found to have no fewer than seven and no more than 10 aggravating factors, the employer will be assessed a civil penalty of no less than \$500 and no more than \$999 per uninsured employee workday; however, the civil penalty may not be less than four 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 (4) of this subsection;

(6) if an employer is found to have more than 10 aggravating factors, the employer will be assessed a civil penalty of \$1,000 per uninsured employee workday.

(b) A civil penalty assessed under (a) of this section may not exceed the maximum civil penalty allowed under AS 23.30.080(f).

. . . .

(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;

(4) previous violations of AS 23.30.075;

(5) issuance of a stop order by the board under AS 23.30.080(d), or the director under AS 23.30.080(e);

(6) violation of a stop order issued 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;

(8) failure to pay a penalty previously assessed by the board for violations of AS 23.30.075;

(9) failure to provide compensation or benefits payable under the Act to an uninsured injured employee;

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

(11) a history of injuries or deaths while the employer was insured under AS 23.30.075;

(12) failure to appear at a hearing before the board after receiving proper notice under AS 23.30.110;

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

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

(A) ignoring certified mail;

(B) failure to properly supervise employees; and

(C) failure to gain a familiarity with laws affecting the use of employee labor;

(15) receipt of government funding of any form to obtain workers' compensation coverage under AS 23.30.075, and failure to provide that coverage.

(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.

b. The commission is not empowered to decide issues based on the application of constitutional law.

AS 23.30.080(f) and 8 AAC 45.176 provide for payment of civil penalties by employers in the form of fines, for failing to insure for workers' compensation liability.²⁹ AMM argues that the civil penalties imposed on it by the board, pursuant to the foregoing statute and regulation, violate both the Eighth Amendment of the United

²⁹ See AS 23.30.080(f) and 8 AAC 45.176, *supra*.

States Constitution and Art. I, section 12 of the Alaska Constitution.³⁰ These constitutional provisions, among other things, prohibit the imposition of excessive fines.

Irrespective of any merit to this argument, we are unable to consider it in deciding this appeal. As appellee, the State of Alaska, Division of Workers' Compensation (Division) pointed out in its brief,³¹ we do not have that authority. The commission is a "quasi-judicial agency" that was created and is controlled by statutes duly enacted for those purposes by the Alaska legislature in 2005.³² The Alaska Supreme Court has held that, as a quasi-judicial administrative agency, the commission has adjudicative power, but not judicial power.³³ Its "jurisdiction is limited to 'hearing and determination of all questions of law and fact' arising under the Alaska Workers' Compensation Act in matters that have been appealed to the Appeals Commission."³⁴ However, as an administrative agency, the commission "do[es] not have jurisdiction to decide issues of constitutional law."³⁵ In a prior decision, we inferred from this pronouncement that the commission cannot decide issues involving the application of constitutional law principles.³⁶

c. Did the board err in ordering the personal, joint, and several liability of Kelly Millen and Corey Millen for the civil penalty it assessed?

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

³⁰ See Appellant's Br. at 6-9.

³¹ See Appellee's Br. at 5-6.

³² See *Alaska Public Interest Research Group v. State, et al.*, 167 P.3d 27, 34-38 (Alaska 2007)(*AKPIRG*).

³³ See *id.* at 35-36.

³⁴ *Id.* at 36 (quoting AS 23.30.008(a)).

³⁵ *Id.* at 36 (footnote omitted).

³⁶ See *Rockstad v. Chugach Eareckson Support Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 140, 27 (November 5, 2010).

rise to a civil penalty.”³⁷ Under AS 23.30.080(f), the board can impose a civil penalty against an *employer* for failing to insure for workers’ compensation liability, as required by AS 23.30.075. Pursuant to this subsection, the board assessed the civil penalty against AMM.³⁸ There is no question that the board had the authority to do so. Whether the board had the authority to order the personal, joint, and several liability of Kelly Millen and Corey Millen is another matter.³⁹ In answering this legal question, the commission applies its independent judgment.

The statute from which the board ostensibly derived the authority to order the personal liability of the Millens, AS 23.30.075(b), when strictly construed,⁴⁰ does not provide that authority. Paraphrased, the statute provides that, upon *conviction* for failing to insure and keep insured employees, a *court* shall impose a *fine* and may impose a sentence of imprisonment against an *employer*. If the employer is a corporation, all persons *at the time of the injury or death*, who had authority to insure the corporation, and the person actively in charge of the business of the corporation, shall be subject to the *penalties* provided for in .075(b) and shall be personally, jointly,

³⁷ *Alaska Public Offices Comm’n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009)(footnote omitted).

³⁸ *See Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 23.

³⁹ *See id.*

⁴⁰ *See Larson v. Welker*, WL 11657229 (Alaska 1991). With respect to AS 23.30.075(b), in *Larson*, an unpublished, non-precedential decision, *see* Appellate Rule 214(d), the supreme court, adopting the superior court’s decision, stated:

[W]orkers’ compensation statutes are considered remedial legislation, rather than penal, and legislative intent should be construed liberally to allow full recovery where possible. The doctrine of strict construction, on the other hand, applies to statutes which impose penalties or “liabilities upon persons not primarily liable for injuries sustained.” *Sutherland Stat. Const.* § 60.03 (4th ed.). In this case, the statute[is] both remedial and penal: “A statute which extends a benefit to one person at the expense of another will be remedial to the former and penal to the latter.” *Sutherland Stat. Const.* § 60.03 (4th ed.). *Larson*, WL 11657229 at 3.

and severally liable together with the corporation for the *payment of all compensation or other benefits* for which the corporation is liable.⁴¹

First, the board is not a *court*. Like the commission, the board is a quasi-judicial agency.⁴² It has no criminal jurisdiction⁴³ under which it may *convict* anyone or impose a *fine* or sentence of imprisonment.⁴⁴ Second, even though the board found that both Kelly and Corey Millen had authority to insure AMM and that Kelly Millen was actively in charge of the business, the *penalties* provided for in AS 23.30.075(b) to which they might be subject consisted of a criminal *fine* in the amount of \$10,000 and possible imprisonment. Subsection .075(b) does not provide for imposition of a *civil* penalty against anyone. Third, the subsection states that corporate officers can be personally liable for the *compensation or benefits* the corporation owes. The board ordered payment of a *civil penalty*, payable to the Division.⁴⁵ We do not consider the civil penalty owed the Division to be *compensation or benefits* and the Division is not an injured employee. Fourth, there was evidence that no injuries were reported during the timeframe that AMM was uninsured for workers' compensation liability, February 3, 2009, to May 14, 2010.⁴⁶ Under subsection .075(b), neither the penalties, nor the liability for compensation, can be imposed against individuals with authority to insure the corporation or in charge of its business *unless* an injury occurs in the timeframe the corporate employer is uninsured.⁴⁷

⁴¹ *Cf.* AS 23.30.075(b).

⁴² *See AKPIRG*, 167 P.3d at 39-40.

⁴³ *See generally* AS 23.30.005.

⁴⁴ *See* AS 12.55.035(a), which provides that, upon conviction, a criminal defendant may be ordered to pay a fine as part of the sentence.

⁴⁵ *See Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 23.

⁴⁶ *See id.* at 5.

⁴⁷ The absence of any injury distinguishes this matter from *Larson*, *see* n.40, *supra*, in which an injured employee was attempting to obtain compensation from corporate officers.

The commission concludes that the board erred in ordering the personal, joint, several, and direct liability of Kelly Millen and Corey Millen for the civil penalty it assessed. It appears that the board borrowed the “personal, joint, and several liability” language from AS 23.30.075(b) and combined it with the language in AS 23.30.080(f) providing for a civil penalty against an employer for failing to insure for workers’ compensation liability, impermissibly resulting in its imposition of personal liability on the Millens for the civil penalty. According to our analysis, to do so is inconsistent with the strict construction of AS 23.30.075(b).⁴⁸

d. Did the board err in terms of its rulings in calculating the amount of the civil penalty it assessed?

This is an unusual appeal in that it may be the only one that will come before the commission in which 8 AAC 45.176 went into effect during the employer’s ongoing failure to provide workers’ compensation coverage. This development caused the board to bifurcate its calculation of the civil penalty it imposed. It applied the provision in AS 23.30.080(f) allowing it to assess a civil penalty of up to \$1,000 for each employee workday in the 390 calendar days AMM was uninsured between February 3, 2009, and February 27, 2010. From the effective date of 8 AAC 45.176, February 28, 2010, to May 14, 2010, a period of 75 calendar days, the board applied the provisions of sub-subsections 8 AAC 45.176(a)(5) and .176(d)(1) – (15), which allow the board to assess a civil penalty of \$500 to \$999 for each employee workday AMM was not insured.

The board applied a penalty rate of \$57.92 per uninsured employee workday for the pre-regulation timeframe in calculating the civil penalty for that period in the amount of \$126,728.96. We review this penalty rate in light of board⁴⁹ and commission

⁴⁸ In its briefing, *see* Appellee’s Br. at 5, the Division concedes that the board erred in this respect. However, we have set forth our reasoning on the point for board guidance in the future.

⁴⁹ *See, e.g., In re Edwell John, Jr.*, Alaska Workers’ Comp. Bd. Dec. No. 06-0059 (March 8, 2006); *In re Hummingbird Services*, Alaska Workers’ Comp. Bd. Dec. No. 07-0013 (January 26, 2007); *In re Wrangell Seafoods, Inc.*, Alaska Workers’ Comp. Bd. Dec. No. 06-0055 (March 6, 2006); *In re Absolute Fresh Seafoods, Inc.*, Alaska

(footnote continued)

decisions⁵⁰ involving the imposition of civil penalties prior to 8 AAC 45.176 going into effect. Citing *Alaska R&C*, in *Ivan Moore*, we noted:

“[T]he board is granted broad discretion in determining the penalty under AS 23.30.080(f).” A grant of broad discretion is not a grant of unfettered discretion. The commission has held that “it is an abuse of the board’s discretion 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.”⁵¹

In a footnote to its decision in this matter,⁵² the board cited a number of pre-regulation decisions which, when having considered the circumstances of each case, the board ordered uninsured employers to pay a civil penalty varying between \$0 to \$1,000 per uninsured employee workday. Although the board decided that the factors in 8 AAC 45.176(d)(1) – (15) should not be applied retroactively to AMM’s pre-regulation conduct, nevertheless, the board found them to be “useful guides in determining the severity of the penalty during this period.”⁵³ Accordingly, the significant factors in the board’s assessment of a penalty rate of \$57.92 per uninsured employee workday were

Workers’ Comp. Bd. Dec. No. 07-0014 (January 30, 2007); *In re Alaska Native Brotherhood #2*, Alaska Workers’ Comp. Bd. Dec. No. 06-0113 (May 8, 2006); *In re Alaska Sportfishing Adventures, LLC*, Alaska Workers’ Comp. Bd. Dec. No. 07-0040 (March 1, 2007); *In re Rendezvous, Inc.*, Alaska Workers’ Comp. Bd. Dec. No. 07-0072 (April 4, 2007); *In re Corporate Chiropractic, Inc.*, Alaska Workers’ Comp. Bd. Dec. No. 07-0098 (April 24, 2007).

⁵⁰ See *Velderrain v. State, Division of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 083 (July 9, 2008); *Alaska R&C Communications v. State, Division of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 088 (September 16, 2008)(*Alaska R&C*); *Ivan Moore d/b/a Ivan Moore Research v. State, Division of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 092 (November 17, 2008)(*Ivan Moore*).

⁵¹ *Ivan Moore*, App. Comm’n Dec. No. 092 at 13 (quoting *Alaska R&C*, App. Comm’n Dec. No. 088 at 22).

⁵² See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 12, n.1.

⁵³ *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 20.

1) the length of time AMM had no workers' compensation coverage, and 2) its history of being uninsured.⁵⁴

We agree that the board used appropriate factors in assessing a civil penalty for the period AMM was uninsured between February 3, 2009, and February 27, 2010, in the amount of \$126,728.96. The commission acknowledges that this penalty is a substantial amount of money and, according to AMM, is one it cannot afford to pay. On the other hand, we do not view the analytical process the board followed in assessing a civil penalty in this amount as flawed in any way or that it abused its discretion in ruling as it did.

The board applied a penalty rate of \$500 per uninsured employee workday for the 75-day period the regulation was in effect and AMM was uninsured, calculating the civil penalty for that period in the amount of \$221,000. This penalty rate was set by the board pursuant to the provisions of 8 AAC 45.176. That regulation is structured in such a way as to provide criteria, called "aggravating factors,"⁵⁵ to be applied in determining the egregiousness of the employer's conduct when calculating the amount of a civil penalty. The criteria were adopted, at the commission's urging,⁵⁶ from board and commission decisions⁵⁷ involving the imposition of civil penalties for failure to insure. The board found that AMM had violated seven of the aggravating factors in 8 AAC 45.176(d):

- (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;

⁵⁴ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 19.

⁵⁵ See 8 AAC 45.176(d)(1) – (15).

⁵⁶ See *Ivan Moore*, App. Comm'n Dec. No. 092 at 12-17.

⁵⁷ See n.49 and n.50, *supra*.

- (4) previous violations of AS 23.30.075;
- (7) failure to comply with the division's initial discovery demand within 30 days after the demand;
- (11) a history of injuries or deaths while the employer was insured under AS 23.30.075; [and]
- (13) cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures[.]⁵⁸

As the ensuing discussion shows, the number of aggravating factors an employer has violated is an important consideration under the regulation. The penalty rate increases with the number of aggravating factors violated.⁵⁹

On appeal, AMM argued that it was unfair to take its pre-regulation conduct into account in determining whether it had violated a number of aggravating factors.⁶⁰ For example, prior instances when AMM was not insured occurred between 2004 and 2008.⁶¹ The Division countered that it was appropriate for the board to consider pre-regulation conduct because, prior to the regulation, AS 23.30.080(f) allowed for a civil penalty of up to \$1,000 per uninsured employee workday.⁶² Irrespective of these arguments, for two reasons, we conclude the board erred in assessing a civil penalty in the amount of \$221,000 for the 75 days AMM was uninsured and subject to 8 AAC 45.176.

First, of the seven aggravating factors the board identified as having been violated by AMM,⁶³ the last, *cancellation* of a policy for failing to comply with the

⁵⁸ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 8-9.

⁵⁹ Cf. 8 AAC 45.176(a)(3) – (6).

⁶⁰ See Appellant's Br. at 9-16. A number of its arguments were based on due process grounds or the prohibition of *ex post facto* laws. Again, the commission cannot consider constitutional issues. See Part 4(b), *supra*.

⁶¹ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 22.

⁶² See *generally* Appellee's Br. at 10-14.

⁶³ See *Anchorage Midtown Motel, Inc.*, Bd. Dec. No. 11-0021 at 8-9. Our review of the board's decision reveals that it made insufficient findings relative to an

(footnote continued)

insurer's requests, was not supported by substantial evidence.⁶⁴ Investigator Mark Lutz stated: “. . . I reviewed the reasons for cancellation[.] . . . They were nonpayment of premium. There was never . . . a failure to comply with the insurance company's audit, and on further review, I noticed that that hadn't been the occasion.”⁶⁵ According to Kelly Millen's testimony, AMM could not *obtain* insurance because it had failed to pay for an audit by AMM's former workers' compensation carrier.⁶⁶ Strictly construing 8 AAC 45.176(d)(13), as we must,⁶⁷ AMM's workers' compensation coverage was not *cancelled* for failing to pay for an audit or otherwise comply with the carrier's requests. New coverage could not be placed, which does not implicate the aggravating factor in question.

Concluding that this criterion is inapplicable is significant in terms of our analysis. It reduces the number of aggravating factors that AMM violated from seven⁶⁸ to six. Under 8 AAC 45.176(a)(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[.]” Thus, AMM is subject to a civil penalty of \$51 to \$499 per uninsured employee workday.

Second, the penalty rate of \$500 per uninsured employee workday was approximately *nine* times the penalty rate the board imposed for AMM's pre-regulation conduct, \$57.92, even though AMM's conduct for which it was being penalized *was not significantly different*. Having found that AMM had violated seven aggravating factors, the board may have felt constrained by the regulation to impose the civil penalty for the

eighth aggravating factor, corresponding to 8 AAC 45.176(d)(14), lapses in business practices, which was among the factors initially identified at the hearing as being at issue. Feb. 2, 2011, Hr'g Tr. 12:9-17. *See also* Appellant's Exc. 064.

⁶⁴ See AS 23.30.128(b).

⁶⁵ Feb. 2, 2011, Hr'g Tr. 13:9-15.

⁶⁶ See Feb. 2, 2011, Hr'g Tr. 14:11–15:18 and 28:23-25.

⁶⁷ See discussion at 11, *supra*.

⁶⁸ See 8 AAC 45.176(a)(5).

February 28, 2010, to May 14, 2010, timeframe at the rate it did, namely \$500 per uninsured employee workday.⁶⁹ With one of the aggravating factors having been eliminated, the board may revisit the issue on remand and impose a civil penalty at the rate provided for in 8 AAC 45.176(a)(4), in conformity with this opinion.

5. Conclusion.

We AFFIRM the board insofar as it assessed Anchorage Midtown Motel, Inc. a civil penalty for its pre-regulation failure to obtain and maintain workers' compensation insurance coverage in the amount of \$126,728.96. We REVERSE the board's order imposing personal, joint, and several liability on Kelly Millen and Corey Millen for payment of any part of the civil penalty it assessed in the amount of \$347,728.26. The commission VACATES the board's order assessing Anchorage Midtown Motel, Inc. a civil penalty in the amount of \$221,000 for its failure to insure between February 28, 2010, and May 14, 2010, and REMANDS the matter to the board to reassess the civil penalty it imposed for that timeframe. The commission does not retain jurisdiction.

Date: 14 February 2012

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

⁶⁹ As the commission stated in *Ivan Moore*, "it is an abuse of the board's discretion to impose a penalty that . . . is so excessive[.]" *Ivan Moore*, App. Comm'n Dec. No. 092 at 13 (quoting *Alaska R&C*, App. Comm'n Dec. No. 088 at 22). "Abuse of discretion is established if the [board] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." *Manthey v. Collier*, 367 P.2d 884, 888 n.12 (Alaska 1962). Had the regulation not gone into effect when it did, the nine-fold increase in the penalty rate would have constituted an abuse of discretion on the board's part.

This is a final decision on the merits of this appeal as to the appeals commission's affirmation of the board's decision in part and reversal of the board's decision in part. This is a non-final decision as to the appeals commission's remand of the matter in part to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to 1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal Procedures sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL PROCEDURES

Appeal

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed⁷⁰ and be

⁷⁰ A party has 30 days after the service or distribution of a final decision of the commission to file an appeal with the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However,

(footnote continued)

brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

More information is available on the Alaska Court System's website:

<http://www.courts.alaska.gov/>

Petition for Review

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.⁷¹

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*.

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Anchorage, AK 99501-2084
Telephone: 907-264-0612

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no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

⁷¹ A party has 10 days after the service or distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was served by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). *See* n.70 for Rule of Appellate Procedure 502(c).

I certify that this is a full and correct copy of the Final Decision No. 159 issued in the matter of *Anchorage Midtown Motel, Inc. v. State of Alaska, Division of Workers' Compensation*, AWCAC Appeal No. 11-002, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on February 14, 2012.

Date: February 21, 2012



Signed

B. Ward, Appeals Commission Clerk