Alaska Workers' Compensation Appeals Commission

Ivan Moore d/b/a Ivan Moore Research,
Appellant,

vs.

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

Final Decision
Decision No. 092 November 17, 2008

AWCAC Appeal No. 07-044
AWCB Decision Nos. 07-0307 & 07-0330
AWCB Case No. 700002045

Appeal from Alaska Workers' Compensation Board Decision No. 07-0307, issued October 3, 2007, by southcentral panel members Janel Wright, Chair, Janet Waldron, Member for Industry, and Mark Crutchfield, Member for Labor, and from Decision No. 07-0330, issued on reconsideration November 1, 2007, by southcentral panel members Janel Wright, Chair, Janet Waldron, Member for Industry, and Mark Crutchfield, Member for Labor.

Appearances: Ivan Moore, *pro se*, for appellant Ivan Moore d/b/a Ivan Moore Research. Talis J. Colberg, Attorney General, and Rachel Witty, Assistant Attorney General, for appellee State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appeal filed November 30, 2007. Appellant's request for extension of time to file opening brief granted March 13, 2008. Appellant's second request for extension of time granted April 11, 2008. Oral argument presented August 28, 2008.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Ivan Moore Research was found to have been an uninsured employer by the Alaska Workers' Compensation Board for about two weeks in August 2005 and from

April 7, 2006 to April 6, 2007.[1] The board assessed a penalty under AS 23.30.080(f) of $66,745.00, with $38,140.00 suspended and the remaining $28,605.00 due in seven days.[2] He requested reconsideration and the board modified its order to require Moore to make an initial payment of $4,000, monthly payments of $500 for 12 months, monthly payments of $388 for four years thereafter, with the final payment due in November 2012; the suspended fine of $38,140.00 to become immediately due if he fails to make any monthly payment as ordered or otherwise "fails to fully comply with AS 23.30.075 or other provisions of the [Alaska Workers' Compensation] Act."[3]

Moore appeals the penalty as excessive and unfair. He argues the penalty, based on a rate of $35 per employee per uninsured day, is inconsistent with the median established by board panels of $14.67 per employee per uninsured day. He argues it is unfair because the hearing officer who presided at his hearing "hands down penalties significantly higher than average" and the language of the decision reflects hostility toward him, notably a characterization of him as an "atrocious businessman." He argues that the penalty order is arbitrary because, unlike the penalties in the cases cited by the board as similar cases, the penalty in his case is 55 times the financial gain he had by not paying his insurance premium, but in the cases cited the penalties were 7, 3, and about 8 times the avoided premium. Finally, he argues that the board erred as a matter of fact in comparing his practice of leaving mail for employees to open to the act of willfully refusing certified mail.

The Division opposes and argues that a record of a hearing officer imposing higher penalties than average is not a legal basis for finding the hearing panel abused its discretion in a particular case. The Division argues that an "imprecise word choice"

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[1] *In re Ivan Moore, d/b/a Ivan Moore Research,* (*Ivan Moore Research I*), Alaska Workers' Comp. Bd. Dec. No. 07-0307 (Oct. 3, 2007) (Janel Wright, Chair).

[2] *Ivan Moore Research I,* Bd. Dec. No. 07-0307 at 14. The penalty was calculated on the period from April 7, 2006 to April 6, 2007, *Id.* at 11-12; the division did not seek a penalty for the two weeks in 2005. R. 0005-6.

[3] *In re Ivan Moore d/b/a Ivan Moore Research,* (*Ivan Moore Research II*), Alaska Workers' Comp. Bd. Dec. No. 07-0330, 11-12 (Nov. 1, 2007) (Janel Wright, Chair).

does not demonstrate bias. The Division argues that the penalty of $35 per uninsured employee workday is within the range of similar cases; and, although the Division concedes that Moore did not refuse certified mail, he failed to cooperate with the Division by not responding to the requests for information for 100 days. The board had, the Division argues, substantial evidence on which to base the penalty, so the board's decision should be affirmed.

The parties' contentions require the commission to decide if a pattern of disparity in penalty decisions, based on the assigned hearing officer, is evidence of arbitrary or capricious decision-making marked by an improper predisposition to severity. The parties' contentions require the commission to decide whether unsuspended penalties assessed under AS 23.30.080(f) should be subject to a presumptive cap based on the uninsured employer's financial gain as represented by the unpaid insurance premium. The commission must decide if the board had substantial evidence to support its findings on aggravating factors and that the penalty imposed was reasonable.

The commission concludes that the argument that a disparity among hearing officers is indicative of board bias in assessing penalties is flawed. Nonetheless, a lack of penalty guidelines may lead to a lack of consistency and fairness in assessing penalties. Therefore, the commission, in absence of department regulation, establishes a presumptive cap on unsuspended penalties assessed for first violations against uninsured employers where no aggravating factors have been found by the board. The commission concludes that the board does not have authority to impose, as it did in this case, a lifetime suspended penalty without a final discharge date. The commission reverses the board in part because the board lacked substantial evidence to support some findings on aggravating factors in this case, but affirms its findings on others. The commission modifies the board's order assessing a penalty.

1. Factual background and board proceedings.

Ivan Moore operates a market research business, Ivan Moore Research. He employs part-time telephone interviewers, a phone center manager, and a research analyst. He also has an accountant. In December 2005, the person who handled insurance for the business, his research analyst, left. Moore, who does not handle the

payroll and associated tasks of managing his business personally, did not renew his workers' compensation insurance in April 2006.

During the relevant period, he had only one year-round, full-time employee, the phone center manager; another employee worked as a weekend phone center manager plus two week days of substitute time. The rest of his employees were part-time, called in as needed for surveys. His interviewers are paid by the completed interview, plus "admin time" at $10 per hour for cleaning or wait time. The other employees were paid on an hourly basis.

a. The initiation of proceedings.

On January 23, 2007, the Division served Moore with a Petition for Finding of Failure to Insure Under AS 23.30.075 and Assessment of Civil Penalty Under AS 23.30.080(f) and a Discovery Demand. The Petition recited that "the below employer may be an uninsured employer as defined in AS 23.30.075(a) on or between the date(s) of 4/07/2006."[4] The discovery demand asked for wage records for any employee between April 7, 2006 and January 23, 2007.[5] The petition and discovery demand were delivered by certified mail on January 25, 2007.[6]

On March 2, 2007, the Division sent a second discovery demand, by certified mail, with a letter explaining further that the Division would ask for a subpoena if the requested discovery was not delivered by March 9, 2007.[7] The Division filed a Petition to Compel and Request for Pre-hearing conference on April 10, 2007, and served it by certified mail.[8] On April 13, 2007, Moore contacted the Division Investigator by e-mail and stated insurance had been reinstated, and his office manager was gathering the "information you need."[9] On May 3, 2007, Moore sent a letter to the Division

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4 R. 0008.

5 R. 0009.

6 R. 0014.

7 R. 0015-18.

8 R. 0019-22.

9 R. 0167.

Investigator, explaining why the division's first request had not been acted upon and how the lapse in coverage occurred, and supplying a payroll audit.[10] No pre-hearing conference was held. Although originally set on for July 11, 2007, the hearing was continued to August 15, 2007, and finally heard on September 4, 2007.

b. The board hearing.

Moore appeared telephonically. He was not represented. Investigator Degenhardt appeared for the Division. Investigator Degenhardt testified to the discovery of the lapse of insurance coverage for workers' compensation liability. He also testified that Moore's coverage lapsed for non-payment of premium in August 2005. He testified to the service of the Petition in January 2007, and the contact from Moore in April 2007. He testified that the total employee workdays the Division recognized as being uninsured was 1,907.[11]

Moore testified that Degenhardt had provided a "very fair summary."[12] He testified that when the person formerly responsible for workers' compensation insurance left, he assigned the responsibility to the call center manager. He testified she paid the audit premium,[13] and, as he understood it, thought that was the renewal premium.[14] He did not contest that he was an uninsured employer from April 7, 2006, until April 6, 2007.

When Moore received the first Petition in January, he put it unopened in the mailbox for his call center manager who works in the business location in downtown

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[10] R. 0204-0211.

[11] Tr. 15.

[12] Tr. 15.

[13] When workers' compensation insurance is purchased, the initial annual premium is based on estimated annual payroll and employee classification. At the end of the year, the payroll is audited, and a supplemental premium, known as an "audit premium," may be demanded if the payroll exceeds estimates. In this case, the audit premium was $659. Tr. 17.

[14] Tr. 17.

Anchorage[15] or for his bookkeeper.[16] It was not acted on. The March discovery demand was put in the mailbox for his bookkeeper.[17] The bookkeeper brought the matter to his attention and, when he talked to his employee, her first reaction was that there was coverage; she pulled the check to the insurer to show it to him.[18] Coverage was later obtained and Moore testified that he has hired a part-time office manager who works in the office with him so that "nothing like this is going to happen again."[19] Moore emphasized that neither the lapse in coverage nor the failure to respond to the first Petition and Discovery Demand was willful, but was due to his delegation to an employee who did not understand that coverage was not in place.[20]

The board chair questioned Moore regarding his annual income, and what he thought he could pay as a penalty monthly.[21] Moore testified that business gross revenues were "anywhere from $400,000 up to a million dollars" and taxable income "somewhere in that hundred to hundred and fifty thousand dollar range."[22] The chair told Moore there was "a whole string of cases where they're assessed $15 per uninsured employee per day, and in your case, if that was the amount assessed, it would be $28,605."[23] She asked if his business could afford to pay that amount, and Moore responded "No."[24] Moore argued that he imagined some multiple of the premium he should have paid for the period he was uninsured.[25] Putting him out of

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15 Tr. 18:12 -13.

16 Tr. 18:13-14.

17 Presumably this is the same person who is his accountant.

18 Tr. 16:24 – 17:10.

19 Tr. 17:23 – 18:1.

20 Tr. 17:16-19, 19:1-6.

21 Tr. 20:5-6, 23:18-19.

22 Tr. 23:22 – 24:1.

23 Tr. 21:2-5.

24 Tr. 21:7-9.

25 Tr. 21:15-19.

business or imposing a fine so large that he could not pay his employees as much as he does would, he argued, make no sense.[26]

The hearing officer then asked Investigator Degenhardt "Can you identify any cases that this case is similar to besides the – I mean, I know we have the set of non-egregious cases that are $15 dollar per uninsured employee per day, but I mean, can you pin point any?"[27] An unidentified voice responded, "For not receiving the Certified mailings or responding back to the Division, ZW Pizza, Sole Food of Alaska, Green Dragon Slayer."[28] The chair replied, "Does EM Enterprises come to mind?"[29] The unidentified voice responded, "EM Enterprises, Dr. Batiste and his chiropractic firm. Those are the only ones I can think of off the top of my head. . . . Those cases are anywhere between, I believe, $15 dollars a day and, I think it was, $45 dollars per day."[30]

c. The first board decision.

The board issued a decision on October 3, 2007.[31] The board found that, "[ba]sed on our administrative records, the hearing testimony, and the admissions of Ivan Moore, . . . the employer had employees and is subject to the Alaska Workers' Compensation Act."[32] The board then found that "the employer failed to insure his employee, and was in violation of AS 23.30.075(a) from the period August 6, 2005 to August 21, 2005, and from April 7, 2006 to April 6, 2007."[33]

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26 Tr. 22:15-20.

27 Tr. 24:9-12.

28 Tr. 24:13-15.

29 Tr. 24:16.

30 Tr. 24:17-24.

31 *In re Ivan Moore, d/b/a Ivan Moore Research,* (*Ivan Moore Research I*), Alaska Workers' Comp. Bd. Dec. No. 07-0307 (Oct. 3, 2007).

32 *Ivan Moore Research I,* Bd. Dec. No. 07-0307 at 8.

33 *Id.*

The board discussed the range of penalty that might be assessed and the "aggravating and mitigating factors" it had considered in *In re Edwell John, Jr.,*[34] *In re Hummingbird Services,*[35] *In Re Wrangell Seafoods, Inc.*[36], *In re Absolute Fresh Seafoods, Inc.,*[37] and *In re Alaska Native Brotherhood #2*.[38] The board found "that between April 7, 2006 and April 6, 2007, the employer used 1,907 days of uninsured employee labor."[39] The board found that Ivan Moore Research had "displayed an irresponsible lack of regard for its responsibilities to insure for workers' compensation liability; to comply with the Act; and to cooperate with the Division in its investigation."[40] The board stated it "concurs with the Division's recommendation for assessment of civil penalties consistent with those assessed in the cases of ZW Pizza, EM Enterprises and Corporate Chiropractic. In those cases, amongst other aggravating factors, the employers failed to accept certified mail."[41] Although, the board noted,

> certified mail was accepted, . . . Mr. Moore chose to stick his head in the sand and ignore his obligation to insure for workers' compensation liability. The Board takes note of Mr. Moore's admission that he . . . is incapable of dealing with the nuts and bolts of running a business. The Board does not consider this a mitigating factor and reminds Mr. Moore that provision of workers' compensation is not part of the nuts and bolts of

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[34] Alaska Workers' Comp. Bd. Dec. No. 06-0059 (March 8, 2006) (J. Wright, Chair).

[35] Alaska Workers' Comp. Bd. Dec. No. 07-0013 (January 26, 2007) (J. Wright, Chair).

[36] Alaska Workers' Comp. Bd. Dec. No. 06-0055 (March 6, 2006) (J. Wright, Chair).

[37] Alaska Workers' Comp. Bd. Dec. No. 07-0014 (January 30, 2007) (J. Wright, Chair).

[38] Alaska Workers' Comp. Bd. Dec. No. 06-0113 (May 8, 2006) (J. Wright, Chair).

[39] *Ivan Moore Research I,* Bd. Dec. No. 07-0307 at 11.

[40] *Id.* at 12.

[41] *Id.*

> running a business, but rather the engine that keeps the machine running when employees are injured on the job.[42]

The board found Moore failed to cooperate with Division's discovery requests and did not provide the requested information until after the third request in the form of a Board ordered subpoena and 100 days passed.[43] The board, after a brief discussion of other factors, stated its reasons for assessing a certain penalty:

> The Board finds Mr. Moore's testimony that he is an atrocious businessman credible. Considering the amount of the assessed penalty, the employer's record of noncompliance with AS 23.30.075 on two occasions, and Mr. Moore's admissions that he . . . chooses not to address the employer's financial and legal obligations under the Act due to scars created by past events in his life, the Board finds that in order for this employer to maintain its workers' compensation insurance in compliance with the Act, it is appropriate in this case to provide the employer encouragement. We shall suspend a portion of the $66,745.00 penalty. The suspended portion shall immediately become due if the employer fails to provide workers' compensation insurance for its employees at any time in the next 10 years, or if the employer fails to timely pay the civil penalty assessed. The Board shall suspend $38,140.00 of the civil penalty and order the employer to pay the remaining $28,605.00.[44]

d. Reconsideration.

Moore filed a petition for reconsideration, arguing that the board misconceived the facts related to Moore's available income, debts and net assets. The petition argued that if Moore had been aware of the "potential scope of the penalty, he would have provided more detailed information at the hearing as to his financial inability to meet a substantial penalty."[45] He requested reduction of the penalty to $10,000 with $4,000 as an initial payment and payments on the balance thereafter.[46] Finally, he

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42 *Id.*

43 *Id.*

44 *Id.* at 13 (footnote omitted).

45 R. 0180.

46 R. 0182.

requested consideration of the privacy interests that his business had in its financial standing.[47] The division did not oppose the petition.[48]

The board issued its decision on reconsideration on November 1, 2007. The board stated:

> The Board reiterates it is not our intention to place any employer out of business. As such, we have approved and tailored payment plans which enable employers to continue in business and, at the same time, meet their obligations to pay civil penalties assessed under AS 23.30.080(f). Considering the significant effort required by the Division to address Ivan Moore Research's failure to insure, Mr. Moore's egregious lack of regard for the requirements of the Act, and comparison of the facts of this case with former cases with similar aggravating factors, the Board finds that to further suspend the civil penalty will be inconsistent with our line of cases addressing employers' failure to insure. Therefore, the Board shall exercise its discretion and deny reconsideration of the unsuspended portion of the civil penalty. Despite our finding that the financial statements provided are not an accurate reflection of the employer's financial status, and at the risk of proceeding without a complete record, we shall reconsider our order that the employer pay the unsuspended portion of the penalty in a lump sum.
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> We find Mr. Moore is able to make an initial payment of $4,000.00, with monthly payments of $500.00 for one year based upon his proposed payment schedule. The Board shall order Mr. Moore to make an initial payment of $4,000.00 in accord with AS 23.30.080(g), with monthly payments of $500.00 beginning in December 2007 through November 2008. Thereafter, we shall order the employer to make monthly payments of $388.00 for four years, commencing in the month of December 2008, with the final payment in November 2012.[49]

This appeal followed.

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47 R. 0182-3.

48 R. 0191.

49 *Ivan Moore Research II*, Bd. Dec. No. 07-0330 at 10.

2. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the board's findings.[50] The commission does not consider evidence that was not in the board record when the board's decision was made.[51] A board determination of credibility of a witness who appears before the board is binding on the commission.[52] The board's determination of the credibility of other witnesses, including medical testimony, is subject to the same standard of review as a jury's findings.[53]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[54] 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.[55] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation[56] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[57]

3. Discussion.

Some of the appellant's arguments are based on his analysis, which he asserted was based on his expertise in the field of statistical research, of the penalty assessment patterns of decisions issued by panels distinguished only by the hearing officer assigned

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[50] AS 23.30.128(b).

[51] AS 23.30.128(a).

[52] AS 23.30.128(b).

[53] *See* AS 23.30.122.

[54] AS 23.30.128(b).

[55] *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)).

[56] AS 23.30.007, 008(a). *See also Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002) *and Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.,* 746 P.2d 896, 903 (Alaska 1987).

[57] *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

to the panel. He assumes that each hearing officer is assigned randomly;[58] he concedes that he based this assumption on what he has heard instead of any official declaration of policy or procedure. He did not count, or control for, the board members. He argues that he determined that the hearing officer assigned to his case had "unpredictable and significantly elevated penalties."[59]

The appellant's data suffers from serious flaws. It fails to consider the role of the board members assigned to each case, fails to establish by reliable evidence that the assignment of cases is not necessarily random, and, was gathered and interpreted by the appellant, who is not a disinterested person. Finally, while the data on which appellant's conclusions are based[60] (Alaska Workers' Compensation Board decisions) is a matter of public record, his expert interpretation of the data constitutes the kind of new or additional evidence that the commission cannot consider with respect to the appeal.[61] Therefore, the commission undertakes its analysis of the appeal without considering the opinion evidence offered by the appellant.

a. A lack of penalty guidelines may lead to a lack of consistency and fairness in assessing penalties.

The core of the division's argument is that so long as the penalty falls beneath the cap established by the legislature, and does not greatly exceed penalties assessed in the cases cited by the board, the board has not abused its discretion. The appellant's argument is that the board's discretion is so wide, the results of its exercise from case to case so unpredictable, and the amount of penalty so disproportionate to the offense, that the penalties assessed by the board are unfair.

The legislature authorized the division, upon a finding that an employer failed to insure or provide security for workers' compensation liability, to petition the board to assess a civil penalty of "up to $1,000 for each employee for each day an employee is

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58 Appellant's Br. at 3.

59 Appellant's Br. at 8.

60 Alaska Workers' Compensation Board decisions are public record and appellant's brief lists the 167 decisions included in his data set. Appellant's Br. at 3.

61 AS 23.30.128(a).

employed while the employer failed to insure or provide the security required by AS 23.30.075."[62] This is a broad grant of discretion that permits some variance in assessment of penalty, depending on the facts of each case. The legislature clearly intended that the penalty should reflect the extent of exposure of employees to an uninsured workplace, because the penalty is couched in terms of being assessed "for each employee for each day an employee is employed." The legislature also gave the division discretion to pursue criminal sanctions instead of civil penalties for the same conduct, but the fine the court may impose in such a case is limited to $10,000.[63]

The commission has acknowledged that "the board is granted broad discretion in determining the penalty under AS 23.30.080(f)."[64] 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."[65]

In *Velderrain v. State*, *Div. of Workers' Comp.,*[66] the commission described other state statutes permitting administrative agencies to impose penalties on persons in a case involving the penalty for disobeying a stop order. The commission noted that the criminal penalties provided in AS 23.30.255 were not an apt comparison to the penalties

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[62] AS 23.30.080(f). AS 23.30.075(a) requires employers to either insure and keep insured for the employer's workers' compensation liability or to furnish the division satisfactory proof of financial ability to pay compensation directly.

[63] AS 23.30.075(b). However, under that section, the court may also sentence the owner to a term of imprisonment, and, if the business is a corporation, may imprison "all persons who had authority to insure" the business.

[64] *Alaska R&C Communications v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088, 22 (Sept. 16, 2008).

[65] *Id.*

[66] *Velderrain v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 83, 11-13 (July 9, 2008).

that might be assessed under AS 23.30.080(d).[67] In *Alaska R&C Communications v. State, Div. of Workers' Comp.*, the commission provided guidance to the board on the factors it should consider in assessing penalties under AS 23.30.080(f), in the absence of regulation. The commission examined board decisions,[68] and developed a synthesis of those decisions, using, as it is authorized by the legislature to do in questions of law or procedure, "its independent judgment."[69]

In the Alaska workers' compensation system, each agency within the executive branch of the State has a different role. The Department of Labor and Workforce Development may adopt regulations to carry out the statutes enacted by the Alaska State Legislature.[70] The board has the power to approve or disapprove the regulations adopted by the Department.[71] It does not have the authority under the act to propose and adopt regulations independent of the Department. The commission, on the other hand, has the power to adopt regulations proposed by its chair "implementing the commission's authority and duties under this chapter."[72] The board has the power to adjudicate individual cases, but it cannot establish interpretations of the statutes that bind other board panels. The commission's decisions are binding on the board and itself; it has the authority, in adjudicating appeals, to determine how the workers'

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[67] *Velderrain*, App. Comm'n Dec. No. 83 at 13-14. Velderrain argued the civil penalty under AS 23.30.080(d) should not exceed the fine that may be imposed for a class C felony under AS 23.30.255, but the commission noted that a fine was "not the only punishment that the court may impose. In light of the additional burdens imposed by a criminal conviction, the discretion accorded the trial judge, and the employer's lack of control over the amount of the fine, the comparison to a criminal fine is not apt." *Id.* at 14. *See also State v. O'Neill Investigations, Inc.,* 609 P.2d 520, 525-26 (Alaska 1980) ("The use of civil monetary penalties, woven into the fabric of many regulatory statutes as a sanction for non-compliance, has become commonplace.").

[68] *Alaska R&C Communications*, App. Comm'n Dec. No. 088 at 21, n.95.

[69] AS 23.30.128(b).

[70] AS 23.30.005(h).

[71] AS 23.30.005(l).

[72] AS 23.30.008(c).

compensation statutes and regulations are to be interpreted and applied, until reversed or corrected by the Alaska Supreme Court.[73]

Agencies may develop a "rule" by adjudication. The United States Supreme Court rejected the exclusive reliance on regulation over administrative adjudication as a potential source of generally applicable rules as early as 1947:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administrative of a statute can or should be cast immediately into the mold of a general rule.[74]

The practice is well established, albeit sometimes criticized, in the field of labor law.[75]

As the Alaska Supreme Court noted in *State v. O'Neill Investigations,*[76] the "use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication."[77] The commission would prefer to see the department adopt, and the board approve, comprehensive penalty guidelines as a matter of regulation.[78] However, the commission would be remiss in its

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[73] AS 23.30.008(a).

[74] *S.E.C. v. Chenery Corp.,* 332 U.S. 194, 202 (1947), quoted in I Richard J. Pierce, *Administrative Law Treatise* § 6.9 (4th ed. 2002).

[75] *See N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), *Wash. Hosp. Ctr. V. D.C. Dep't of Employment Servs.,* 743 A.2d 1208, 1211 (D.C. Cir. 1999); *Tearney v. Nat'l Transp. Safety Bd.,* 868 F.2d 1451, 1453-54 (5th Cir. 1989); *State Bank of India v. N.L.R.B.,* 808 F.2d 526, 537 (7th Cir. 1986); *Sewell Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n,* 686 F.2d 1066, 1069-70 (4th Cir. 1982); *N.L.R.B. v. Maywood Do-Nut Co., Inc.*, 659 F.2d 108, 110 n.1 (9th Cir. 1981).

[76] 609 P.2d 520 (Alaska 1980).

[77] *Id.* at 534 n.49 (quoting *Nat'l Petroleum Refiners Ass'n v. F.T.C.,* 482 F.2d 672, 681 (D.C. Cir. 1973).

[78] *See State v. O'Neill Investigations*, 609 P.2d at 534 n.49. The commission notes that the first criminal sentencing guidelines were drawn up by a Sentencing Guidelines Committee organized in 1979 by the Supreme Court as an aid to bringing consistency to sentencing decisions. The guidelines reflected sentencing practices of

duty to review the "discretionary actions" of the board[79] if it held that the board's exercise of discretion in assessing a penalty was unreviewable because penalty assessment was committed by the legislature to the board's discretion. The commission rejects the argument that it is unable to review the board's decision because the board is granted discretion to assess a penalty.

This case highlights an effect of lack of regulation or guidelines.[80] The offender should have notice of both the conduct that must be avoided and the range of penalties that may be imposed for different levels of conduct. While adjudication allows flexibility to tailor the penalty to different circumstances, it is not a good method of providing notice to the public. There is no floor evident in the cases decided by the board and no clear starting point. The board's comment in its decision that it *could* assess a penalty against the appellant of almost two million dollars[81] demonstrates both the board's understanding of the limits of its discretion and the absence of guidance to the offending employer as to how that discretion may be exercised. The lack of guidelines encourages arbitrary decisions, especially in the case of unrepresented first offenders who are least likely to be prepared for the penalty phase of a hearing on the division's petition.

The lack of employer preparation and understanding of the scope of the board's discretion was obvious in Moore's testimony to the board. Moore clearly did not

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superior court judges statewide over a three year period. The Court referred to them as "barometers of the collective judgment of the judiciary, which are useful for the purpose of comparison." *Anderson v. State,* 621 P.2d 1345, 1346 n.3 (Alaska 1981). *See also In re Reinstatement of Wiederholt*, 24 P.3d 1219, 1223 (Alaska 2001) (considering guidance "by the American Bar Association's Standards for Imposing Lawyer Sanctions," while exercising independent judgment as to sanctions in the particular case).

[79] AS 23.30.128(b).

[80] The lack of guidelines for consistent and predictable civil penalties encourages concealment of offending conduct. If the only rule states the conduct may result in a penalty "up to $1000" per employee per day, the opportunity to conceal the violation becomes more valuable than the apparent cost of coming into compliance.

[81] *Ivan Moore Research I,* Bd. Dec. No. 07-0307 at 11-12.

consider his conduct egregious. The board asked Moore if he could pay a fine of $28,605, based on $15.00 per day for each employee, which it characterized as the fine assessed in "non-egregious cases."[82] Moore replied, "No."[83] The board then invited comparable cases from the division and an unidentified voice offered a list, which it said resulted in penalties ranging from $15 to $45 per day.[84] By not making it clear to Moore that $28,605 represented, in the board's view, the *floor* from which the fine would be calculated, the board forced Moore to argue against himself, a process not unlike telling a convicted felon to propose his own sentence without telling him the likely term of imprisonment. The process used by the board to develop the information for penalty assessment in this case placed the accused employer at an unfair disadvantage because the employer did not understand the range of penalty he was facing.[85]

> *b. In the absence of department regulation, penalties assessed against uninsured employers, not previously found to be in violation, that exceed four times the financial gain resulting from the offending employer's conduct will be considered excessive by the commission, provided no aggravating factors have been found by the board.*

The commission regards penalties assessed under AS 23.30.080(f) as principally restorative. In *Alaska R&C Communications* the commission said the penalty "must

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[82] Tr. 21:2-8.

[83] Tr. 21:9.

[84] Tr. 24.

[85] The colloquy between the board and the unknown male voice regarding other cases, and the board's proposal of *In re EM Enterprises,* Alaska Workers' Comp. Bd. Dec. No. 07-0104 (April 25, 2007) (J. Wright, Chair), as a comparable case, demonstrates the unfairness. Tr. 24. The names of the cases clearly had meaning to the board, but did not mean anything to Moore. The board also erroneously attributed the suggestion of *EM Enterprises* to the division in its decision, although the transcript shows the suggestion originated with the board. *Ivan Moore Research I,* Bd. Dec. No. 07-0307 at 6; Tr. 24:16. EM Enterprises resulted in a $35 per employee per uninsured day penalty to a drywall company, a riskier business with a history of workers' compensation injuries.

bring the employer back into compliance, deter future lapses, provide for the continued, safe employment of the employees of the business, and satisfy the community's interest in punishing the offender, but without vengeance."[86] In that case, the commission synthesized prior board decisions into four groups of factors that the board ought to consider in assessing a penalty. Included in those factors were the duration, scope and severity of the risk associated with the offending employer's conduct, the culpability of the employer's conduct, the impact on the community and employees, and the employer's ability to pay.[87] The commission concluded that, in that case, a "penalty of approximately 80% of annual taxable payroll on a business with no known assets or profits and no known reports of injury in the lapse period with exposure of less than 1500 employee workdays (the equivalent of about 5 full time employees) shocks the conscience."[88]

In this case the appellant was assessed a fine of $66,745.00 in a business that produced, according to the evidence before the board, $135,000 in annual taxable income in each of the preceding two years.[89] The resulting fine represents almost one-half of the taxable income of the business, which has a low risk and no reported injuries, and which employs a number of Alaskans, mostly as part-time employees. It exceeds the first quarter of annual taxable payroll.[90] There was no evidence that the employer was motivated by greed or malice. The board lowered the penalty "to pay" by suspending about 60 percent of the total penalty, but provided no means of discharging the unsuspended portion of the penalty and extended the period of payment and liability for the unsuspended portion for ten years. Therefore, the entire sum of the penalty and other conditions is considered in determining if the penalty is excessive.

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86 *Alaska R&C Communications v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088, 22 (Sept. 16, 2008).

87 *Id.* at 22-29.

88 *Id.* at 29.

89 R. 0190.

90 R. 0031-34.

The appellant argues that the penalty is disproportionate to the financial gain he had from his conduct. The commission recognizes that AS 23.30.080(f) was designed to be proportionate to the duration and scope of the exposure to employees caused by the failure to insure. The entire harm caused by failure to insure is not measured by the value of the premium the appellant failed to pay.[91] However, the board's exercise of its discretion should not result in penalties that ignore proportionality in all other respects. In this case, where no injury occurred, the conduct was not shown to be outrageous, greedy, or malicious, and the harm was unknown to the appellant when it occurred and until notified by the division, and the appellant has not previously been found to be in violation of the requirement to provide insurance for workers' compensation liability, the board chose to order a penalty that is 37 times the financial gain received from the conduct, one-half the business's taxable income for a year, and more than the business's quarterly payroll for the first quarter of 2007. The suspended penalty became immediately due and payable if he did not fully comply with the act for ten years and no provision was made for the appellant to discharge his liability for the unsuspended penalty at the end of the ten year period. The commission concludes that this penalty is excessive.

In the absence of regulations, the commission looked to other statutes for guidance as to the legislature's measure of a "reasonable" penalty structure, that is not tied solely to per day violations and the violation does not concern violation of an agency or court order. Some penalties are limited to a specific amount per violation.[92]

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[91] The harm that results from failure to insure for workers' compensation liability is not limited to employees of the uninsured employer. *See Velderrain,* App. Comm'n Dec. No. 083 at 14-15.

[92] AS 02.40.030(d) (penalty for each violation of statute barring contact with airplane crash survivors or dead passenger's relatives limited to $10,000 per violation); AS 04.16.205(a) (possession of alcohol in "dry" community limited to $1,000 plus forfeiture); AS 05.15.095(d) (late gaming fee payment penalty limited to 25 percent of the fee); AS 06.60.420(a) (Mortgage lender or financial institution violation limited to $10,000 per violation); AS 08.13.195(b) (hairdressers and barbers licensing violation penalty limited to $5,000 per violation; AS 08.48.295(b) (licensing violation by architects, surveyors, and engineers limited to $5,000 per violation); AS 21.27.360(c)

Some penalties include the state's costs of investigation and response plus a product of the financial gain and some other number.[93] Criminal "day fines" are proportionate to the income of the offender, established in each case by adjusting the presumptive day fine penalty for aggravating and mitigating factors, and multiplying it by the offender's net daily income.[94] In an award of punitive damages for personal injury, the courts are to examine:

> (1) the likelihood at the time of the conduct that serious harm would arise from the defendant's conduct;
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> (2) the degree of the defendant's awareness of the likelihood described in (1) of this subsection;
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> (3) the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct;
>
> (4) the duration of the conduct and any intentional concealment of the conduct;
>
> (5) the attitude and conduct of the defendant upon discovery of the conduct;
>
> (6) the financial condition of the defendant; and
>
> (7) the total deterrence of other damages and punishment imposed on the defendant as a result of the conduct, including compensatory and punitive damages awards to persons in situations similar to those of the plaintiff and the severity of the criminal penalties to which the defendant has been or may be subjected.[95]

If the conduct was motivated by financial gain, and the adverse consequence to another was known to the defendant, punitive damages are capped at the greater of

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(insurance brokers and managers, violation of fiduciary duties fine not to exceed $50,000 per violation).

[93] AS 08.88.167(b) (real estate brokers, penalty limited to amount of gain realized plus $5,000); AS 17.06.060 (penalties for selling mislabeled organic produce, set penalty, costs of investigation, plus three times financial gain); AS 21.09.210(g) (late payment fee for insurers' tax is 25% of tax due plus a specified amount); AS 36.30.115 (violation of public contract law by subletting contract, 10 percent of the value of the subcontract); AS 46.03.758(b) (amount per gallon of oil spilled plus multiplication by factor of five in certain circumstances).

[94] AS 12.55.036.

[95] AS 09.17.020(c).

"(1) four times the amount of compensatory damages awarded to the plaintiff in the action; (2) four times the aggregate amount of financial gain that the defendant received as a result of the defendant's misconduct; or (3) the sum of $7,000,000."[96] Thus, in cases involving personal injury or death, in which punitive damages are awarded based on clear and convincing evidence of outrageous conduct, malice, greed, and knowledge of harm to another,[97] four times the financial gain received is considered an appropriate penalty by the legislature.

AS 23.30.080(f) was designed to be proportionate to the duration and scope of the employees' exposure to work-related injury caused by the failure to insure. However, the board's exercise of its discretion should not result in penalties that ignore proportionality in all other respects. The commission holds, in the absence of department regulation otherwise, that the unsuspended penalty imposed on an employer, who has not previously been found by the board to fail to insure, is presumed excessive if it exceeds the greater of four times the offending employer's financial gain as a result of the failure to insure or the audited premium owed for the period of violation, *provided* that the board finds no aggravating factors present, or *minor* aggravating factors are outweighed by mitigating factors. For example, it will not apply in cases where the uninsured employees have suffered compensable injury or death, or the employer's conduct is motivated by greed, or exploitation of employees, or the employment is historically hazardous. These concern three factors previously discussed in *Alaska R&C Communications*: the duration, scope and severity of the risk associated with the offending employer's conduct, the culpability of the employer's conduct, and the impact on the community and employees.[98] The presumptive first violation cap on the unsuspended portion of the penalty addresses the employer's ability to pay without requiring extensive discovery of the employer's finances.

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[96] AS 09.17.020(g).

[97] AS 09.17.020(b).

[98] App. Comm'n Dec. No. 088 at 22-29.

Until the department adopts and the board approves regulations, the commission adopts this rule in order to promote the restorative objectives of the AS 23.30.080(f) penalty, to bring the employer back into compliance (by not making a prospective penalty so high that concealment or closure is preferable), deter future lapses, provide for the continued, safe employment of the employees of the business (by a penalty that does not impact the ability to operate the business safely without layoffs), and satisfy the community's interest in punishing the conduct.

c. The board does not have authority to impose a lifetime suspended penalty without a final discharge date.

The board ordered Moore to pay $28,605 of the $66,750 penalty it assessed, "upon the condition that if the employer fails to timely pay the unsuspended portion of the civil penalty assessed, or fails to fully comply with AS 23.30.075 or other provisions of the Act, the entire suspended amount shall be due and owing."[99] On reconsideration, the board reduced the immediate payment and ordered that the appellant make payments until November 2012. On reconsideration the board reaffirmed its

> order that $38,140.00 of the penalty is suspended and reaffirms our order that Ivan Moore and Ivan Moore Research pay a civil penalty in the sum of $28,604.00, upon the condition that if the employer fails to timely pay the unsuspended portion of the civil penalty assessed, fails to make timely payments under the Board ordered and approved payment plan, or fails to fully comply with AS 23.30.075 or other provisions of the Act, the entire suspended amount shall be due and owing and subject to a collection action by the Division.[100]

However, neither order contains a provision for discharge of the unsuspended portion of the penalty. The effect of the board's failure to provide for discharge is that the business must carry the liability on its books until the business is wound up, affecting its

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[99] Ivan Moore Research I, Bd. Dec. No. 07-0307 at 14. The commission notes the board stated in the decision text that "the suspended portion shall immediately become due if the employer has no workers' compensation insurance at any time in the next ten years." *Id.* at 13. The order text contains no year limitation.

[100] *Ivan Moore Research II,* Bd. Dec. No. 07-0330 at 11.

ability to obtain loans, to be sold or transferred, and reducing the value of the business. In effect, it is a lifetime penalty that is not authorized by AS 23.30.080(f).[101]

The legislature authorized the board to order *payment* of a civil penalty. The board may suspend payment of a portion of the penalty assessed, but it may not leave the unpaid, suspended portion of the penalty hanging like a sword of Damocles over the business. When a penalty is suspended, it does not disappear as a legal liability. If the board suspends part of a penalty and conditions the suspension on, for example, the prompt payment of an unsuspended penalty and completion of a period of time with no violations of the requirement to insure, the board must discharge the employer's liability for the suspended penalty upon satisfaction of the conditions. Otherwise, the penalty remains unpaid but suspended. An order of discharge relieves the business of the liability and allows it to be freely operated, sold, or transferred. The board's order makes no provision for discharge of liability for the suspended portion on successfully completing payment of the unsuspended portion of the penalty. Therefore, the board's order does not serve the purposes of the statute and the penalty imposed is excessive because it cannot be discharged.

d. The board lacked substantial evidence to support some findings on aggravating factors in this case, but the commission affirms its findings on others.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the board's findings.[102] The commission examines the board's findings on the factors supporting its imposition of a penalty of $35 for each

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[101] The board conditioned the suspension on adherence to "other provisions of the Act" instead of those provisions wholly within the employer's control or related to failure to insure. The act already provides penalties, such as those in AS 23.30.155, for other violations. The issue is not before the commission in this case, but the commission is concerned that by imposing an *additional* penalty in the event of an employer's insurer's late payment of future compensation five years later, the board is over-reaching its authority. Courts do not revoke probation if a probationer's insurer engages in misconduct; the board should hesitate before assuming authority that even courts do not have.

[102] AS 23.30.128(b).

employee per day employed and uninsured. The appellant challenges the board's findings (1) that the employer testified credibly that he was an "atrocious businessman;"[103] (2) that his delegation of the task of opening certified mail was equivalent to refusing certified mail; and (3) that he failed to cooperate with the investigation.

The division concedes that "atrocious" is a poor word choice, but argues that the import of the board's findings were that Moore ignored his responsibility to insure his employees. The division also argues that Moore's lack of response to the initial petition and discovery demand was indicative of lack of cooperation.

The commission finds that the use of the word "atrocious" is not a poor word choice; it is a misreading of Moore's testimony. According to the Webster's Third International Dictionary, "atrocious" means

> 1 : marked by or given to extreme wickedness, 2.a: marked by or given to extreme brutality or cruelty; grossly inhumane b: outrageous: violating the bounds of common decency : uncivilized : barbaric, 3a: extremely painful: marked by intense distress: grievous, b: marked by extreme violence: savagely fierce: murderous, 4 : of such a kind as to fill with fright or dismay, appalling, terrible, 5 a: utterly revolting : abominable, b: markedly inferior in quality.[104]

Nothing in Moore's testimony regarding his qualities as a businessman contains a synonym for "atrocious." The board's use of the term to characterize his testimony is not supported by the record. The board's finding that Moore's testimony was credible is not disturbed; but the finding that Moore testified he was an atrocious businessman is reversed.

The board based its penalty assessment on comparison to other cases in which the employer had refused certified mail. The board found that "although certified mail was accepted, we find Mr. Moore chose to stick his head in the sand and ignore his obligation to insure for workers' compensation liability." The board's finding reflects

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[103] *Ivan Moore Research I,* Bd. Dec. No. 07-0307 at 13.

[104] Webster's Third New International Dictionary 139 (2002) (examples of use omitted).

that it conflated two different responsibilities. The failure to accept certified mail in the comparison cases concerned the employer's lack of cooperation with investigation, not a choice to ignore the responsibility to insure in the first place. Moore's testimony regarding treatment of certified mail in his office was offered to explain the delayed response to the investigation. It does not support the board's finding that the appellant ignored responsibility to insure for workers' compensation liability by delegating it to his office manager.

A business owner is responsible for the actions of staff; if a delegation of authority is made to an employee, the business owner is responsible for the exercise of that authority by the employee. The appellant did not seek to evade responsibility for his staff's conduct. However, because a business owner may lawfully delegate various operational obligations of the business to employees or agents, including the responsibility to pay an insurance premium, the business owner may not be found to willfully ignore his obligation to insure by doing so.

Moore's testimony that he delegated such matters may be interpreted as a responsible recognition of his limitations. Business owners employ persons to fulfill responsibilities they cannot personally fulfill; if they did not, there would be no employees to insure. If the employee willfully disregards the delegated responsibility, that conduct is imputed to the business. The board's finding that the appellant "chose . . . to ignore his responsibility to insure" is based on a misreading of the business owner's obligations. Because there is no evidence the delegated employee acted willfully to ignore the delegated responsibility, the board's finding of willful conduct is not supported by substantial evidence in light of the whole record. Similarly, the board's finding that the appellant was "irresponsible" is based on its failure to recognize that an employer may make a lawful delegation of responsibility to an employee.[105]

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[105] No evidence was presented that the employer received notice of expiration or of non-renewal of insurance. The testimony that the employer acted promptly to obtain insurance once the issue was brought to his attention by his staff was not challenged by the division.

The board's finding that the appellant failed to cooperate with the investigation is based on two findings: that he did not respond to the discovery demands "until after the third request in the form of a Board ordered subpoena,"[106] and, implicitly, that he failed to respond to discovery requests sent by certified mail. A petition to compel was served by certified mail on April 10, 2007,[107] by April 13, 2007, the appellant had responded to the investigator.[108] The appellant had obtained workers' compensation insurance before the petition to compel was served. The record contains no return of service of a subpoena and no evidence that a subpoena was issued against the employer. Therefore, the board's finding that the appellant did not respond to discovery demands "until after the third request in the form of a Board ordered subpoena" is without substantial evidence to support it in the record.

However, the board's finding that the appellant did not promptly respond to the discovery requests is supported by substantial evidence. The appellant's delegation to a subordinate was not unlawful, but the appellant is responsible for the subordinate's failure to act on receiving notice. Although the board may not include the first 30 days of response time when calculating how long the employer delayed,[109] the evidence of record supports the board's finding that the appellant did not respond in a timely fashion to the discovery request. Therefore, the board's application of an aggravating factor of failure to cooperate by not timely responding to discovery requests is affirmed.

The evidence that the appellant did not secure compensation promptly on receiving notice of the lack of insurance is also supported by substantial evidence. The failure of the delegated employee to act promptly on the investigator's petition and discovery demand is imputed to the employer. Insurance was not secured until April 6, 2007;[110] more than 30 days after the second discovery demand was served on March 2,

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106 *Ivan Moore Research I*, Bd. Dec. No. 07-0307 at 12.

107 R. 0021.

108 R. 0167-68.

109 *Alaska R&C Communications*, App. Comm'n Dec. No. 088 at 25.

110 R. 0162.

2007.[111] No evidence was presented to support a legal excuse for the delay or to excuse the requirement that insurance be obtained for the period. The board's application of an aggravating factor is affirmed.

e. Modification of the board's order.

The commission exercises its authority under AS 23.30.128(d) to modify the board's order, as there is no need to remand to the board for additional findings. Based on the evidence of the amount of the appellant's annual workers' compensation insurance premium for the period the appellant was not insured, the "first violation" presumptively reasonable unsuspended penalty to pay would be $7,436.

However, the commission has upheld the board's findings of two aggravating factors. The appellant failed to cooperate in a timely way with the investigation, although there is no evidence the appellant attempted to conceal information. The appellant failed to timely respond to notice he was not insured by promptly obtaining insurance. The evidence showed the business has 3 primary employees, 17 to 35 part time employees per month, and the board found a total of 54 employees in the uninsured period. The board found the business presented a low risk of injury, had no reports of injury, and was uninsured for a period of 364 days. The board found no evidence of intent to defraud or mislead, or motivation by greed at the expense of employee safety. The board noted the evidence of correction of the internal business process that led to the lapse in insurance. The commission, in light of all these factors found by the board, the employer's credibility also found by the board, and in consideration of the findings reversed because of the lack of supporting evidence, determines that the board's order shall be modified as follows:

1. The assessment of a civil penalty, pursuant to AS 23.30.080(f), is reduced to $12.00 for each employee for 1,907 days the employees were employed while the employer failed to insure or provide the security required by AS 23.30.075, for a total civil penalty of $22,884.00. The board's order that Ivan Moore Research pay an unsuspended civil penalty

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[111] R. 0015-18.

is reduced to the sum of $9,381.00, upon the condition that if the employer fails to timely pay the unsuspended portion of the civil penalty assessed, fails to make timely payments under the Board ordered and approved payment plan, or fails to fully comply with AS 23.30.075 for a period of two years from the date of the board's order finding the employer in violation of AS 23.30.075, the entire suspended amount shall be due and owing and subject to a collection action by the division.

2. The board's order that Ivan Moore and Ivan Moore Research pay the unsuspended portion of the civil penalty is modified to the following plan: The employer shall make an initial payment of $4,000.00 within seven days after the date of service of the board's order upon the employer. The employer shall make monthly payments of $500.00 for 12 months, commencing in December 2007, with the last payment of the remaining penalty to pay made during October 2008. Any payments made in excess of the unsuspended penalty shall be returned to the appellant by the division.

3. The board's order requiring the employer to make an initial payment of $4,000.00 within seven days after the date of service of the board's order upon the employer in accord with AS 23.30.080(g) and requiring remaining payments on or before the 15th day of each month is affirmed.

4. The board's order that payments shall be made to the Alaska Department of Labor, Division of Workers' Compensation, Juneau Office, P.O. Box 115512, Juneau, Alaska 99811-5512, and that checks shall be made payable to the Alaska Workers' Compensation Benefits Guaranty Fund, is affirmed.

5. If Ivan Moore and Ivan Moore Research failed to make the initial payment within seven days of issuance of the board's decision and order or any of the remaining monthly payments within seven days of the monthly due date, the balance of the civil penalty, including the suspended penalty of $13,503, shall immediately come due and, pursuant to AS 23.30.080(g),

the Director of the Division of Workers' Compensation may declare Ivan Moore, d/b/a Ivan Moore Research in default.

6. The board's order directing monitoring by the division is reduced to two years from the date of the board's order finding the employer in violation.

7. The board shall issue an Order of Discharge of Liability for Penalty to Ivan Moore, d/b/a Ivan Moore Research within 30 days of the full, timely payment of the unsuspended portion of the penalty and proof of maintenance of insurance in compliance with AS 23.30.075 for two years from the date of the board's order finding the employer in violation.

4. Conclusion.

The board's decision is REVERSED in part, AFFIRMED in part and the board's order is MODIFIED as provided in the numbered paragraphs above.

Date: *17 November, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is the final decision in this appeal, filed by Ivan Moore, d/b/a Ivan Moore Research, from Alaska Workers' Compensation Board Decisions No. 07-0307 and No. 07-0330, assessing a penalty for failure to insure for workers' compensation liability. The effect of this decision is to reverse some of the board's findings, affirm other findings, and modify the board's order assessing a penalty against the appellant. The commission did not retain jurisdiction.

This is a final administrative decision in this appeal.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box on the last page.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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).

If you wish to appeal (or petition for review or hearing) 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

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after distribution or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision in Alaska Workers' Compensation Appeal Commission Appeal No.07-044, *Ivan Moore d/b/a/ Ivan Moore Research v. State of Alaska, Division of Workers' Compensation,* dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *17th* day of November, 2008.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on *11/17/08* a copy of this Final Decision in Appeal No. 07-044 was mailed (certified) to: I. Moore and mailed to: R. Witty at the addresses above and faxed to: I. Moore, R. Witty, AWCB Appeals Clerk and Director, WCD.

Signed
J. Ramsey, Deputy Appeals Commission Clerk