Case: *Coalition, Inc. vs. Alaska Department of Labor and Workforce Development, Division of Workers' Compensation,* Alaska Workers' Comp. App. Comm'n Dec. No. 071 (February 15, 2008)

Facts: The board found the appellant was an uninsured employer and imposed civil penalties pursuant to AS 23.30.080(f) and (g). The employer argued that it was not uninsured because the insurer had failed to effectively cancel its policy since the insurer kept the employer's late premium payment. The only witness who testified against the employer was the Department of Labor's investigator and he was not sworn in as a witness.

Applicable law: AS 23.30.075(a) requires an employer to "either insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to transact the business of workers' compensation insurance in this state, or . . . furnish the division satisfactory proof of the employer's financial ability to pay directly . . . ."

An employer must file the evidence of compliance with this obligation with the Division of Workers' Compensation, "in the form prescribed by the director." The employer also must file evidence of compliance "within 10 days after the termination of the employer's insurance by expiration or cancellation." AS 23.30.085(a).

Failure to provide evidence of compliance under AS 23.30.085 "creates a rebuttable presumption that the employer has failed to insure or provide security as required by AS 23.30.075." AS 23.30.080(d) and (f).

AS 23.30.030(5) provides in part that:

> If the employer has a contract with the state . . . and the employer's policy is cancelled due to nonpayment of a premium, the termination of the policy is not effective as to the employees of the insured employer covered by it until 20 days after written notice of the termination has been received by the contracting agency, and the agency has the option of continuing the payments on behalf of the employer in order to keep the policy in force.

8 AAC 45.120(a): "Witnesses at a hearing shall testify under oath or affirmation."

Issues: Did the employer rebut the presumption that it failed to keep its workers insured? Does the board have the power to decide whether an insurance cancellation was effective? Did the board err in failing to place the Department of Labor's investigator under oath before testifying? If so, was this error harmless?

Holding/analysis: The commission determined the board had sufficient evidence to attach the presumption that the employer was uninsured. The Department of Labor presented a photocopied National Council on Compensation Insurance (NCCI) computer screen showing that Coalition's insurer cancelled Coalition's policy effective October 26, 2005, the investigator presented a copy of an e-mail from Alaska National Insurance stating it had no record of insurance for Coalition from October 26, 2005, to August 19,

2006, and related at hearing that he contacted the insurer's audit manager who verified to him that coverage had lapsed.

The commission agreed that the Division of Insurance has the sole administrative authority to regulate insurers, agents, brokers, adjusters and managers, to approve insurance contracts and policies, and to investigate possible violations of Title 21 of the Alaska Statutes, per AS 21.06.080. But the board nevertheless had the power to make findings of fact necessary to adjudicate claims before it under AS 23.30.135(a), it could make an inquiry of the Division of Insurance and it need not wait until the Division of Insurance completed an investigation.

Once the presumption attached, the employer had to produce evidence that, standing alone, would rebut the presumption of no insurance. Without such evidence, the board could find that the employer failed to insure. The employer, who had three part-time employees working under a state contract, argued that no cancellation occurred because it paid the premium and that premium was never returned. The employer interpreted AS 21.36.220(c) as requiring return of a premium before a cancellation is effective. But the commission noted that this argument did not rebut the presumption as to the failure to provide insurance from June 27, 2006, the date after expiration of the 2005-06 policy, to the day before August 19, 2006, when a new policy became effective. Moreover, the commission concluded that AS 21.36.220(c) seemed to be a mandate to return the premium 45 days after notice of cancellation, rather than a condition precedent to cancellation, and the employer should have provided evidence from the Division of Insurance's policy or regulations on its statutory interpretation. Thus, the commission concluded that the employer needed more evidence than the sole fact that the premium was not returned to rebut the presumption.

But the commission nevertheless remanded to the board to rehear the case for two reasons:

(1) "[W]hether the board is able to make a finding that the employees of Coalition were not insured is an issue that we believe must be revisited in light of AS 23.30.030(5)." Dec. No. 071 at 13. Because the evidence strongly suggested the employer had a state contract, AS 23.30.030(5) imposed a written notice requirement before the termination was effective. The commission noted that "the employer may still be liable for non-compliance penalties under AS 23.30.085[,]" even if .030(5) was not satisfied.

(2) The board failed to place the Department of Labor's investigator Richard Degenhardt, who testified against the accused employer under oath. The error was not harmless because the board relied on his testimony to decide the case.

> The board's use of the word 'testimony' tells us that it may have imbued his statements with more weight, solemnity, or credence because they were thought to be made under oath. In light of this reliance, the importance of Mr. Degenhardt's statements in forming a basis for the board's findings, the potential consequences to the accused, the appearance of unfairness and the requirement of the regulation, we do not find the board's oversight was harmless error. To the extent that the

board's findings rest on statements that were not given as sworn testimony, but believed to be, the board's findings are not supported by substantial evidence. Dec. No. 071 at 15.