Case: *Mario Velderrain v. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 083 (July 9, 2008)

Facts: On July 19, 2006, the board decided that Mario Velderrain, who operated Hot Tamale restaurant in Fairbanks, had failed to secure workers' compensation insurance from January 8, 2006, through the hearing date of June 22, 2006. On December 12, 2006, a workers' compensation investigator petitioned for assessment of civil penalties. The petition was heard June 21, 2007. The investigator testified that Velderrain had not obtained workers' compensation insurance until April 25, 2007. The board found, based on Velderrain's credible testimony, that he believed his finance company had been paying the insurance for a period of time. But, the board found, an Account Statement, which Velderrain testified he received on June 28, 2006, and which demanded payment by August 13, 2006, gave the employer "clear notice" he was uninsured. Thus, the board concluded that Velderrain was "in violation of the July 19, 2006, Stop Order for the period from the August 13, 2006, Account Statement until the employer secured an insurance policy, effective April 11, 2007; a total of 255 days." The board assessed a penalty under AS 23.30.080(d) in the amount of $255,000. Velderrain appeals, arguing the penalty is so excessive as to be unconstitutional and disputing when he knew he was not in compliance with the stop work order.

Applicable law: AS 23.30.080(d) provides that

> the board may issue a stop order . . . prohibiting the use of employee labor by the employer until the employer insures or provides security as required by AS 23.30.075. . . . If an employer fails to comply with a stop order issued under this section, the board shall assess a civil penalty of $1000 per day. The employer may not obtain a public contract with the state, or a political subdivision of the state for three years following the violation of the stop order.

Issues: Did the board have substantial evidence on which to base its assessment of the mandatory civil penalty of $1,000 per day for violation of a valid stop order? Was the assessed penalty unconstitutionally excessive?

Holding/analysis: The commission concluded that, even accepting that Velderrain's testimony was credible, the board did not have substantial evidence to support its finding that he reasonably thought he had workers' compensation insurance between June 22, 2006, and August 13, 2006. Velderrain was informed he had no insurance at hearing and in the written decision. Velderrain's argument that the stop order was not effective because when it was issued he believed he was in compliance due to a mistaken premium refund is not persuasive because Velderrain had clear notice from the board that his policy was cancelled and the board made no findings that Velderrain could reasonably believe his policy was reinstated based on the refund. In addition, Velderrain admitted that he soon understood that the refund was paid to him by mistake and so he could not have believed that the policy had been retroactively reinstated after that. Third, his testimony that he *hoped* making payments on the

mistaken refund would cause the insurer to reinstate his policy does not support an inference that he reasonably believed that he had insurance in place.

In addition, the board lacked sufficient evidence to determine the actual number of days Velderrain used employee labor while not insured. Nothing in the record explains how the board decided that Velderrain's fine should be based on 255 days of violation of the stop order.

> [T]he board assessed a fine based on only 255 days up to April 11, 2007, which would mean that the period of violation of the stop order began Saturday, July 29, 2006, or Sunday, July 30, 2006. On the other hand, 255 days from August 13, 2006 is April 25, 2007; 255 days from June 28, 2006, is Saturday, March 10, 2007. Dec. No. 083 at 8.

In addition,

> [t]he evidence of the handwritten payroll sheets from 2006 is that Velderrain's business generally operated every day of the week and that he used employee labor every day. However, the low wages reported for the first quarter in 2007 suggest that there may have been a closure of his business during that quarter. No evidence was presented establishing the number of days in 2007 that Velderrain used employee labor." *Id.* at 9.

The commission remanded to the board to take further evidence to recalculate the penalty owed.

The power to declare a statute unconstitutional is reserved to the courts, *AKPIRG v. State,* 167 P.3d 27, 36 (Alaska 2007). Thus, the commission did not address whether the AS 23.30.080(d) fine violates Article 1, sec. 12 of the Alaska constitution, banning "excessive fines." But the commission noted that the .080(d) penalty was "not outside the range of other fines levied for violation of protective administrative stop orders issued by the state, as in occupational safety and health proceedings involving unsafe work conditions." Dec. No. 083 at 2. It also observed that the statutory language left the board with no discretion in imposing the penalty; thus, "accumulation of the fine in this case was not the result of the exercise of the board's discretion, but of the violating employer's discretion and judgment." *Id.* at 14.

Concurring opinion: Commissioner concurring wrote separately to express support for "a requirement that the state notify assigned risk employers that they are in default when it receives notice from [National Council on Compensation Insurance] NCCI." *Id.* at 18. Assigned risk employers are those who cannot get affordable compensation coverage on the open market; the state, acting through its representative NCCI, takes applications from such employers and then assigns the business to one of the licensed insurers doing business in the state. (The state requires all insurers to cover a proportion of the assigned risk pool.) NCCI also provides data to the state on employers' workers' compensation coverage.

> I believe that the state has the obligation to notify the [assigned risk] employer of its default as soon as it receives the information from NCCI. Because the state oversees the assigned risk process, it is acting like an insurance broker. Brokers owe a duty of care to their clients and can be held liable for failing to warn their clients that they are uninsured, *see Clary Ins. Agency v. Doyle*, 620 P.2d 194 (Alaska 1980). I believe in some cases that the state may get notice of an employer's lapse in workers compensation coverage before the employer knows that it is uninsured. Instead of holding onto the NCCI notice and waiting to use that information to seek penalties against the uninsured employer, the state should send its own independent notice to the employer. This is fair to an employer that faces substantial penalties for being uninsured pursuant to AS 23.30.075(b) and AS 23.30.080. *Id.* at 18 (Philip Ulmer, concurring).

Note: Dec. No. 065 concluded that Velderrain's appeal was timely filed.