Case: *Alaska R & C Communications, LLC vs. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (September 16, 2008)

Facts: The Division sought a fine under AS 23.30.080(f) against R & C Communications for its failure to maintain workers' compensation insurance. Scott Romine (Romine), the president of the company, made arrangements with the board to testify over the telephone at the hearing but missed the board's calls and so the hearing proceeded without him. The board heard testimony from the division investigator who noted the company's failure to regularly maintain workers' compensation insurance, the Division's difficulty in obtaining discovery, that Romine had previously appeared before the board for the same violation, and Romine's failure to attend the hearing. He testified the only mitigating factor was that the employer promptly became reinsured when notified by the Division and he stated that he did not know whether a penalty on the higher end would put the company out of business.

The board listed the following factors to be considered in assessing the penalty: the number of days of uninsured employee labor, the size of the business, the record of injuries of the employees, both general and during the uninsured period, the extent of the employer's compliance with the Workers' Compensation Act, the diligence exercised in remedying the failure to insure, the clarity of notice of cancellation of insurance, the employer's workplace, the impact of the penalty on the employer's ability to continue to conduct business, the impact of the penalty on the employees, the impact of the penalty on the employer's community, whether the employer acted in blatant disregard for the statutory requirements, whether the employer violated a stop order, and the credibility of the employer's promises to correct its behavior.

The board made the following findings regarding aggravating and mitigating factors for the purpose of assessing the civil penalty:

> [T]he board finds the employer was fully aware of the fact that it was using employee labor in violation of AS 23.30.075, as it had received notices of cancellation of its workers' compensation insurance from both Liberty Northwest Insurance Company and Business Insurance Associates. Further, the Board finds the employer was fully aware [of] its obligation to provide workers' compensation insurance as it had appeared before the Board for a prior violation of AS 23.30.075. The Board finds the employer did not resolve its failure to comply with AS 23.30.075 until February 9, 2007, nearly two months after the employer was served with the Division's petition; and only after notification by the Division of failure to comply. The Board finds that the employer knowingly operated its business without workers' compensation liability coverage and exposed 14 employees to 1,478 days of uninsured labor. Further, we find that the employer failed to cooperate with

> the Division's investigation and did not provide the requested discovery until 121 days after receipt of the Division's demand. Finally, we find employer's failure to appear display [sic] a lack of regard for the seriousness of the employer's obligation to provide workers' compensation insurance for its employees. We consider these aggravating factors. In the instant matter, we find the employer exhibited a blatant disregard for its obligation under the Act.

To avoid putting the employer out of business but because the board considered the employer's actions egregious, the board set the penalty at $125 per uninsured employee per work day for 1,478 days, for a total civil penalty of $184,750.00. The board suspended $73,900 of the penalty and ordered the employer to pay the remaining $110,850.

Romine filed a timely request for modification asking the board to consider the accidental reasons he missed the board's calls the day of the hearing, his inability to pay the fine and the impact on his business. The board denied his request to reduce the penalty amount but it did modify the payment schedule. Romine appeals.

Applicable law: AS 23.30.080(f) provides:

> If an employer fails to insure . . . 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 . . . . 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 . . . .

The commission stated that it is an abuse of the board's discretion to impose a penalty under .080(f) 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." Dec. No. 088 at 22.

The commission described the statute's purposes:

> The chief purpose of the requirement that employers obtain insurance is to insure that their employees have access to coverage, thus sparing the employee from possible destitution and the inability to obtain medical treatment, the employer from exposure to ruinous lawsuits, other employers from unfair competition, and the community from the burden of paying for the care of injured workers. In considering the fine to be imposed, the board should keep in mind the principle that the workers' compensation system protects employer, employee, and the

> community as a whole. Thus, the first goal of a penalty under AS 23.30.080(f) is restorative; it must 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. *Id.* at 22.

Rebuttable presumption applies only to lack of coverage. "The Division has the burden of production and persuasion of the facts . . . to support imposition of a particular penalty, including factors supporting an enhanced penalty; the employer has the burden of establishing the facts . . . that may be considered in excuse or mitigation of a penalty." *Id.* at 23.

On culpability the commission stated on page 26 of the decision:

> The culpability of the person responsible for insuring the business is a factor that must be addressed as a measure of intent; that is, whether the lapse in coverage was caused by an excusable error or omission, negligence, gross negligence, knowing omission, or by a willful intent to profit at the expense of the employees. Factors going to the culpability of the person responsible for insuring the business include: clarity of notice to the employer of non-renewal or lapse in coverage, prior lapses in coverage that have been addressed by board decision, prior stop orders or warnings by the Division investigators or the board, the resources available to the person responsible, such as special training or knowledge or other employees, partners or officers; the existence of a plan or process for renewal; whether the person responsible for insuring the business has ever personally secured the insurance; and the actual and imputed knowledge of the person responsible. . . . Lack of culpability does not mean that the board may not award a penalty; however, it should not *enhance* a penalty for culpability if the absence of coverage is the result of excusable error or simple neglect.
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> Similarly, a credible statement of amendment of the behavior that led to the lapse and efforts to mitigate the harm to employees that may have resulted, especially if supported by evidence, may be taken in mitigation of the penalty; but absence of a promise of amendment should not be considered an aggravator, since a person's promise to conform to the law is a promise to simply do what must be done in any event. On the other hand, evidence that demonstrates a hardened opposition to the requirement of insurance, exploitation or endangerment of employees, or an open and repeated disregard of the requirements of the workers' compensation law warrants an increase in the penalty.

On the impact on the community, the commission stated on pages 27-28:

> The purpose of bringing employers into compliance includes the avoidance of closure of businesses and resultant unemployment unless the danger to the community presented by the continued operation of the business outweighs the public interest in preserving it. . . . Thus, the board should consider the number of employees who may be affected by closure or reduction in force, the likely impact of the penalty on the employees of the business, the availability of employment in the employer's community, the importance of the employer's product to the local and state economy, support for the business in the community, and, if it is a family business, the impact of a penalty on the family unit. The board should also consider the community reputation of the business for safety, the employer's record of injuries and their severity, and, if there is evidence of community outcry against the employer, the degree to which local expression of community condemnation is a result of passion or prejudice. Finally, the board is cautioned that the goal of deterrence is not served by imposition of excessive penalties, as they are more likely to encourage more egregious conduct instead of prompt compliance. (An employer who faces a penalty that it cannot pay for a small lapse may be more likely to continue uninsured rather than voluntarily come into compliance, as it has nothing to lose by trying to beat the odds of discovery).

Issues: Did the board fail to allow the employer an opportunity to have its evidence fairly considered? Did the board err in applying aggravating and mitigating factors? Did the board have substantial evidence to support its assessment of a $125 per employee workday penalty totaling $184,750?

Holding / analysis: First, the commission decided that the board abused its discretion in denying the employer an opportunity to present mitigating evidence.

> [T]he board's refusal of a prompt request for rehearing on modification of a decision to impose a very substantial penalty, based in part upon the non-appearance of the self-represented party at the original hearing (after the board had cancelled hearings at which the party appeared) and the accused party's consequent failure to offer evidence at the hearing, is inconsistent with the legislative mandates that hearings be on the merits and that parties have an opportunity to have their argument and evidence fairly considered. *Id.* at 19.

The commission cited the following facts in support of its decision that the board abused its discretion: Romine's efforts to attend the hearing; the lack of

evidence on the subjects raised by his request for reconsideration; his self-represented status; evidence of dependence for advice on the investigator, who told him about appealing and petition for reconsideration (but not modification) when the board, not his accuser, has a duty to inform him about how to pursue his case; the board's comment on the absence of "documentary evidence . . . to support the employer's assertions"; the fact that much of the evidence against Romine were in the form of admissions he made to the investigator when Romine was not present to contradict or explain the purported admissions; and the lack of notice to the employer of the conduct that could result in increased penalties, specifically failing to appear at hearing, failing to timely provide discovery, and past insurances lapses.

Second, the commission found that the board failed to make adequate findings on the aggravating and mitigating factors:

(1) The board failed to assess the scope of the risk to uninsured employees; although the board found that the employer was uninsured for about 355 days, its 14 employees were not uninsured over all of those workdays as many were short-term employees. The commission suggested that the board consider the median or average number of days a short-term or part-time employee was employed, compared to the full-time employees.

(2) The board also failed to evaluate the risk of injury in the employer's business; a low risk of injury, either because of the nature of the line of work or the employer's safety practices, would make being uninsured less risky.

(3) The board should focus on the actions the employer took between contact from the workers' compensation Division and the effective date of obtaining insurance, rather than focusing on all the employer's actions when it was uninsured, when considering whether an employer diligently tried to remedy its failure to insure. However, all of the employer's actions during the period of no insurance are relevant when assessing the employer's culpability. The commission described circumstances that show diligence that is exceptional (a mitigating factor) to reasonable (no impact on the penalty amount) to unreasonable (aggravating factor when setting penalty amount).

(4) The board should have counted only the days *after* the deadline to comply with discovery as noncooperation. Instead, the board's count started with the date of the Division's initial request for discovery. The commission described

> a scale of non-cooperation, ascending from careless delay or omission, to lack of cooperation, to obstruction, to concealment or fraud. A good faith effort to comply within 30 days is the neutral point on the scale, but delivery that is exceptionally prompt, thorough, organized or responsive may be considered as a mitigating factor. *Id.* at 24-25.

Third, the commission concluded that the board had substantial evidence to support its finding the employer's prior lapse in coverage indicated he was culpable because he knew the law's requirements and engaged in a pattern of repeated disregard of law.

Fourth, the commission concluded the board failed to consider the impact on community in assessing the penalty. Moreover, the commission concluded the Division must show that the penalty sought is payable by the specific employer. Here, the penalty exceeded the employer's quarterly payroll, which was the only evidence that the board had of the employer's ability to pay.

> 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. The board's decision to impose a penalty of such magnitude on the evidence before it reflects a lack of consideration of the evidence of the size of the business and its ability to pay the penalty. *Id.* at 29.

The commission remanded to the board with instructions to re-determine the penalty.

Note: Dec. No. 102 clarified that Dec. No. 088 does not impose an affirmative duty on the division to obtain evidence favorable to the employer. Instead, as "the proponent of the fact that a requested penalty is payable by the accused employer, the division has the burden to produce evidence tending to show that the employer could pay the penalty." Dec. No. 102 at 15-16. Other than that one clarification, the commission denied the motion for reconsideration of Dec. No. 088. Dec. No. 102 also noted that the board was working on regulations addressing the penalties for uninsured employers.