Alaska Workers' Compensation Appeals Commission

Coalition, Inc.,
Appellant,

vs.

Alaska Department of Labor and Workforce Development, Division of Workers' Compensation,
Appellee.

Final Decision and Order
Decision No. 071 February 15, 2008

AWCAC Appeal No. 07-025
AWCB Decision No. 07-0067
AWCB Case No. 7000001772

Appeal from Alaska Workers' Compensation Board Decision No. 07-0067, issued on March 29, 2007, by the southcentral panel at Anchorage, Alaska, Krista M. Schwarting, Designated Chair, and John Abshire, Member for Labor.[1]

Appearances: Paul D. Kelly, Kelly and Patterson, for appellant Coalition, Inc. Talis J. Colberg, Attorney General, and Larry A. McKinstry, Assistant Attorney General, for the appellee, Alaska Department of Labor and Workforce Development, Division of Workers' Compensation.

Commissioners: John Giuchici, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The board found the appellant was an uninsured employer and imposed civil penalties pursuant to AS 23.30.080(f) and (g). The commission determines that the only witness against the employer did not give testimony under oath; therefore, the board's reliance on his statements as testimony was insufficient to support its findings. The commission concludes that the board found the employer was uninsured without first deciding that the employer's insurance policy was cancelled. The appellant argues that the policy was not cancelled; we find that there is an unanswered question

[1] The board proceeded as a quorum of two members. AS 23.30.005(f).

whether the policy was properly cancelled under AS 23.30.030(5). We vacate the board's decision and remand the case to the board for rehearing.

1. Factual background.

Coalition, Inc., is a nonprofit corporation that operates a reimbursement program for nutrition and child nutrition education to child care providers.[2] It reports to the State of Alaska and is reimbursed for what it pays; there are no excess funds.[3] It reports as part of the Child and Adult Care Food Program,[4] a program of the State of Alaska Department of Education and Early Development's Child Nutrition Services.[5] It employs three part-time staffers who manage the program, monitor day care providers and do clerical work. In addition, Jacquelyn Wingfield serves as a Director on the Board of Directors, but she is not a paid employee.[6]

Coalition had a policy through Alaska National Insurance Co. for the period from June 24, 2004 to June 24, 2005. On June 23, 2005, Jacquelyn Wingfield signed a check for $925.00, marked on the check for workers' compensation policy "05FW90645." Alaska National renewed the policy for June 25, 2005 to June 25, 2006.[7] On August 6, 2005, Jacquelyn Wingfield signed the final payroll audit report for the period June 24, 2004 to June 24, 2005 period.[8]

On August 24, 2005, Alaska National Insurance Co. sent Coalition an official "Notice of Cancellation" referring to Policy No. 05F WW 90645, effective "06/25/05 – 06/25/06."[9] The notice stated:

> Your policy is cancelled as of 12:01 a.m. 10/26/05. The cancellation is for the following reason(s):

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2 Hrg Tr. 17:20-18:9, R. 0015, 0020.

3 Hrg Tr. 17:24-25, R. 0015, 0021-22.

4 R. 0023-25.

5 *See* http://www.eed.state.ak.us/tls/cns/CACFP.html.

6 R. 0015.

7 R. 0061.

8 R. 0063.

9 R. 0098.

> 1) Non-Compliance with Underwriting Final Audit on 04F WW 90645.
>
> 2) _____
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> In order to rescind a notice for non-payment of premium, all outstanding premiums must be paid by 10/25/05.[10]

On September 12, 2005, Alaska National generated an invoice for the final audit of $109.00, and sent a second request on October 14, 2005, with a stamp advising "Payment must be received within 10 days or policy will be cancelled."[11]

On October 26, 2005, the National Council on Compensation Insurance posted notice that the policy number 05FW90645 was "cancelled by underwriter or plan administrator."[12] On October 31, 2005, Jacquelyn Wingfield signed a check for $109.00 to Alaska National Insurance for "Workers' Comp Audit Balance."[13] It was received November 8, 2005.[14] On November 2, 2005, Alaska National sent a letter to Coalition, referencing Policy No. 04FWW90645.[15] The letter read:

> If you have sent payment and this billing has crossed your payment in the mail, thank you and please disregard the following. This letter constitutes the final notice of payment due in the amount of $109.00 for the final audit on your Workers' Compensation policy described above. We need to advise you that if payment is not received by 11/12/2005, we will be forced to turn the matter over to a collection agency or attorney. It is imperative that you contact us regarding the outstanding balance so that we can avoid taking further unnecessary action. This is the final notice you will receive.[16]

In Ms. Wingfield's response to discovery, she explained she was unavailable when the usual renewal packet (which would have arrived before expiration of the policy

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10 *Id.*

11 R. 0064.

12 Hrg Ex. 2, page 15.

13 R. 0117.

14 *Id.*

15 R. 0140.

16 R. 0140.

purchased for June 26, 2005 to June 26, 2006) did not arrive.[17] On August 21, 2006, an investigator with the Alaska Department of Labor and Workforce Development, Division of Workers' Compensation, (hereafter "Department of Labor"), filed an accusation of Employer's Failure to Insure Workers' Compensation Liability and mailed a copy to Coalition.[18] When Ms. Wingfield returned, she was told by the program manager that the Department of Labor notified Coalition of a non-compliance problem. She told the investigator that she had not received notice of a cancellation or refund of a premium for the 2005-2006 policy period.[19] On August 30, 2006, Alaska National sent Coalition a "return premium notice" referencing Policy number *04FWW90645* (the policy in effect from 2004-2005), referring to a premium returned of $54.56.[20] Coalition subsequently obtained insurance from Alaska National for its workers' compensation liability for the period from August 19, 2006 to August 19, 2007.[21]

2. Proceedings before the board.

The Department of Labor, through its investigator, Richard Degenhardt, filed an accusation of Failure to Insure on August 21, 2006.[22] This was returned by the board because "the attachments were not included."[23] On November 15, 2006, the Department of Labor filed a second Petition for finding of failure to insure and for assessment of a civil penalty.[24] The Department of Labor also served a Discovery Demand on Coalition.[25] On December 5, 2006, Coalition responded to the Discovery

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17 R. 0016.

18 R. 0001-04.

19 R. 0016.

20 R. 0139.

21 R. 0073.

22 R. 0001-04.

23 R. 0103.

24 R. 0011.

25 R. 0007-10.

Demand.[26] The Department of Labor filed a request for hearing on December 27, 2006, with a notice of the evidence it intended to rely on at hearing.[27]

The Petition was heard by the board on February 28, 2007.[28] Paul Kelly appeared on behalf of Coalition, Inc. The Department of Labor was represented by the investigator, Richard Degenhardt. In the hearing, brief testimony was received from Jacquelyn Wingfield, one of the Directors of Coalition, Inc.[29] However, the investigator who reviewed and explained the exhibits was not sworn as a witness. There were no objections to the exhibits. In the hearing, Coalition's attorney represented that Alaska National had retained the premium for the 2005-2006 policy year, without objection from the Department of Labor's representative.[30] Coalition contended that there had been no valid cancellation, as Coalition had made payment of the $109 audit premium in time to avoid a cancellation and no premium refund occurred.[31] Coalition asserted that no finding of lack of insurance could be made, and no penalty was due.[32] Coalition also asserted it was not within the board's jurisdiction to find that coverage had been cancelled, but that it rested with the Division of Insurance.[33]

The Department of Labor asked the board to make a finding of no insurance[34] and refer the case to the Division of Insurance, but hold the record open pending the

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[26] R. 0013-73.

[27] R. 0074, 0077.

[28] *In re Coalition, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0067, 1 (March 29, 2007).

[29] Hrg Tr. 14:16 – 15:7.

[30] Hrg Tr. 11:6, 12:3, 15:8-10.

[31] Hrg Tr. 15:8-21.

[32] Hrg Tr. 16:23-25.

[33] Hrg Tr. 17:1-4. The Division of Insurance is located in the Department of Commerce, Community, and Economic Development, AS 21.06.010. Coalition had filed a complaint with the Division of Insurance. Hrg Tr. 15:19-21.

[34] The investigator suggested that this be done to make sure the employees had recourse during that time, Hrg Tr. 17:12-14, presumably to an action against the employer under AS 23.30.080 or against the benefits guaranty fund, AS 23.30.082.

outcome of the investigation, before determining if a penalty should be assessed.[35] If the Division of Insurance determined that the cancellation was ineffective and that Coalition was insured for the period from October 26, 2005 to June 26, 2006, then the finding could be amended.[36]

In its decision, the board found that the employer was required to insure for workers' compensation liability under the Alaska statutes.[37] It found, based on the documents in the record, that the employer was uninsured from October 26, 2005 through August 17, 2006.[38] It determined, based on a series of mitigating factors, that an appropriate penalty was $3.00 per day uninsured employees worked.[39] It also determined that it could not "hold the fine in abeyance" due to the strict liability nature of the statute.[40] Notwithstanding its concern that the insurer acted improperly, the insurer was not a party to the proceeding, so the board referred the matter to the Division of Insurance for further investigation.[41] It retained jurisdiction "over this matter pending the investigation by the Division of Insurance."[42]

April 5, 2007, Coalition sought reconsideration on the grounds that the board overlooked three points of law.[43] First, it argued that the board could not find the employer was uninsured because Alaska National was the insurer by operation of law owing to the ineffective cancellation of coverage.[44] Second, it argued that because the Division of Insurance had not decided if the cancellation was proper, the board's

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35 Hrg Tr. 17:7-16.

36 Hrg Tr. 17:16-19.

37 *In re Coalition, Inc.*, Dec. No. 07-0067 at 3.

38 *Id.*

39 *Id.* at 7.

40 *Id.*

41 *Id.*

42 *Id.*

43 R. 0089-94.

44 R. 0089.

assessment of a fine was premature.[45] Third, it argued that the failure to return the premium established a statutory extension of the coverage under AS 21.36.220(2)(c).[46] Without considering the merits, the board denied the motion for reconsideration by allowing the time for its authority to reconsider to pass.[47] This appeal followed.

3. Standard of review.

AS 23.30.128(b) and AS 23.30.122, *read together*, set out the standard of review the commission applies when it reviews board decisions. The board's findings regarding credibility of a witness who appears before the board are binding upon the commission.[48] The board's determination of the credibility of other witnesses, including medical testimony and reports, is subject to the same standard as a jury's findings.[49] The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[50] On questions of law or procedure, the commission is required to exercise its independent judgment.[51]

4. Discussion.

The parties do not dispute the facts presented in the documents.[52] The appeal instead challenges the legal basis for the board's finding that Coalition was uninsured. The appellant argues that because the insurer was mistaken in cancelling the policy, the

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45 R. 0090.

46 R. 0091.

47 R. 0096.

48 AS 23.30.128(b).

49 AS 23.30.122.

50 AS 23.30.128(b).

51 AS 23.30.128(b). On those occasions that we must exercise our independent judgment to discern a rule not previously addressed by the Alaska Supreme Court or the Alaska State Legislature, we adopt the "rule of law that is most persuasive in light of precedent, reason, and policy," *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979), drawing upon the commission's expertise in the workers' compensation field.

52 At oral argument, the chair questioned the parties whether there was any dispute regarding Mr. Degenhardt's statements at hearing, as it was clear that he was not sworn as a witness.

insurer became the insurer by operation of law.[53] The appellant argues there was no break in coverage because the policy was never effectively cancelled.[54] It also argues that the notices sent by the insurer "confirm the continuation of coverage."[55] The Department of Labor argues that, regardless of the reason for the cancellation, the evidence supports the board's finding that there was no policy in place for the employer from October 26, 2005 to August 18, 2006.[56] The Department of Labor also argues that the board exercised appropriate discretion in determining a penalty and that the penalty should be affirmed.[57]

> *a. Once the charging agency presented evidence that would support a finding of failure to comply with proof of coverage requirements, the burden is on the employer to prove that the employer insured and kept insured liability for workers' compensation.*

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 . . . ." AS 23.30.085(a) requires an employer to file the evidence of compliance with this obligation with the Division of Workers' Compensation, "in a form prescribed by the director." The employer also is required to file evidence of compliance "within 10 days after the termination of the employer's insurance by expiration or cancellation."[58] Failure to provide evidence of compliance under AS 23.30.085 "creates

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53 Appellant's Br. at 6.

54 Appellant's Br. at 7.

55 Appellant's Reply Br. at 4.

56 Appellee's Br. at 4.

57 Appellee's Br. at 6.

58 AS 23.30.085(a).

a rebuttable presumption that the employer has failed to insure or provide security as required by AS 23.30.075."[59]

The Department of Labor presented evidence in the form of a photocopied National Council on Compensation Insurance (NCCI) computer screen showing that Coalition's insurer cancelled Coalition's policy effective October 26, 2005.[60] 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.[61] The investigator related at hearing that he contacted Alaska National Insurance's audit manager, Sheila Burnham, who verified to him that coverage had lapsed.[62] Shortly before the hearing, he also verified that NCCI's computer record still showed the lapse in coverage.[63]

We agree that this was sufficient evidence to support a *prima facie* case that the employer failed to comply with the proof of compliance requirements of AS 23.30.085(a) and thereby raise the rebuttable presumption that the employer has

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[59] AS 23.30.080(d) and (f).

[60] Hrg Ex. 2, at 15. In DLWD Bulletin No. 03-04 (October 15, 2003) the Commissioner of the Department of Labor and Workforce Development and Alaska Workers' Compensation Board announced that after January 1, 2004, the Division of Workers' Compensation would "accept Proof of Coverage . . . exclusively in the international association of Industrial Accident Boards and Commission (IAIABC) Electronic Data Interchange . . . format, Release 2." Bulletin No. 03-04 at 1. Insurers, the bulletin continued,

> in Alaska have three options to achieve compliance with [the proof of coverage] requirement: Utilize the National Council on Compensation Insurance's (NCCI) IPOC service for your [proof of coverage] electronic reporting (default option); Select another approved third party vendor for . . . electronic reporting; or Report electronically directly to the Alaska [Division of Workers' Compensation].

Bulletin No. 03-04 at 1. Since the "form prescribed by the director" includes electronic notice to NCCI, the notice to NCCI is sufficient to establish that coverage was in place.

[61] Hrg Ex. 5.

[62] Hrg Tr. 5:2-17.

[63] Hrg Tr. 8:5-8.

failed to insure and keep insured its workers' compensation liability. It is the employer's burden to produce evidence that, standing alone, would rebut the presumption of no insurance. The employer may do so by establishing, for example, that the NCCI record is not correct, or that, if it is correct, that, notwithstanding the NCCI cancellation record, the employer continues to be insured, or that other insurance has been obtained that satisfies the requirements of AS 23.30. In the absence of such evidence to rebut the presumption, the board may find that the employer failed to insure or keep insured its liability for workers' compensation.

> *b. The board failed to consider whether the insurer complied with AS 23.30.030(5) and therefore whether the policy was in effect as to the employees of the employer.*

Coalition argued that the insurer failed to properly cancel the policy of insurance, based on the correspondence between Alaska National and Coalition. The board made no findings on this issue, apparently accepting Coalition's argument that it had no authority to do so. We agree 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 whether a violation of Title 21 of the Alaska Statutes has occurred.[64] However, the board has the power to make findings of fact necessary to adjudicate the claims and petitions before it, including those findings necessary to determine if the presumption established by AS 23.30.085(f) has been rebutted.[65] In doing so, it is free to make inquiry of the Division of Insurance before making its own findings of fact.[66] We therefore reject Coalition's argument that the board lacked authority to make findings of fact and impose a penalty until an investigation was completed by the Division of Insurance.

Coalition also argues that by retaining the premium, the insurer failed to comply with AS 21.36.220(c), which Coalition interprets as requiring return of a premium

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64 AS 21.06.080.

65 AS 23.30.135(a).

66 AS 23.30.135(a).

before a cancellation is effective. Since the premium for the 2005-06 policy was not returned, it argues, no cancellation occurred. This argument, if supported by the evidence and the statute, does not apply 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. Coalition's evidence fails to rebut the presumption of no insurance for this period.

In addition, there is a possible legal fault in Coalition's argument. Coalition's argument depends on a reading of AS 21.36.220(c)(1) as establishing a condition precedent to cancellation rather than a mandate to return the premium 45 days after notice of the cancellation is given. Since notice of cancellation is only required to be given 20 days before the effective date of cancellation for failure to provide information, AS 21.36.220(b), the two sections read together suggest that the cancellation occurs 20 days after notice, but the insurer has 45 days after notice (25 days after the effective date of cancellation) to return the premium. Coalition failed to subpoena staff from the Division of Insurance to provide evidence of the Division of Insurance's policy or regulations interpreting this statute in its favor. Therefore, we cannot say that evidence of that the premium was not returned *alone* would rebut the presumption raised by the investigator's evidence.

However, we find that Coalition's evidence raised a question that was not addressed by the board. AS 23.30.030(5) provides

> A termination of the policy by cancellation 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 division. If the employer has a contract with the state or a home rule or other political subdivision of 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. If, however, the employer has secured insurance with

> another insurance carrier, cancellation is effective as of the date of the new coverage.[67]

The evidence provided by Coalition strongly suggests that Coalition "has a contract with the state." If so, termination of the policy for non-payment of the audit premium is not effective as to the employees of the insured employer until 20 days after "written notice" is received by the contracting agency and that agency has had the option to keep the policy in force. The reason for this provision is readily understandable, as the state may choose to terminate the contract or to keep the policy in force under AS 23.30.045(e). Failure to provide written notice to the contracting agency deprives the state of this opportunity to protect both the employees of the contractor and the public purse.

Provision of electronic notice of cancellation to NCCI may satisfy AS 23.30.085, but it does not satisfy AS 23.30.030(5) requirement of *written notice to the contracting agency.* The contracting agency is not NCCI. Moreover, AS 09.80.050 provides in pertinent part that

> (b) If a law other than this chapter requires a record to be posted or displayed in a certain manner, to be sent, communicated, or transmitted by a specified method, or to contain information that is formatted in a certain manner, the following rules apply:
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> (1) the record must be posted or displayed in the manner specified in the other law;
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> (2) except as otherwise provided in (d)(2) of this section, the record shall be sent, communicated, or transmitted by the method specified in the other law;
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> (3) the record must contain the information formatted in the manner specified in the other law.
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> * * *
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> (d) The requirements of this section may not be varied by agreement, but
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> (1) to the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but

[67] AS 23.30.030(5). As used in this statute, the word "division" means the Division of Workers' Compensation, AS 23.30.395(17).

> permits that requirement to be varied by agreement, the requirement under (a) of this section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and
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> (2) a requirement under a law other than this chapter to send, communicate, or transmit a record by regular United States mail may be varied by agreement to the extent permitted by the other law.

Thus, the notice must be sent to the contracting agency *in writing*, or, if the agency has established rules for electronic transmission of records under AS 09.80.150, it must be in a form capable of retention by the contracting agency. Nothing in the record presented to the board by either party establishes that Alaska National gave written notice to the responsible contracting agency within the Department of Education and Early Development.

The parties did not raise this issue below. The statute is mandatory, however, and may not be ignored because the parties neglected to address the issue, without the possibility of imposing liability upon the state and serious sanctions on Coalition under AS 23.30.045(d). We agree that the employer may still be liable for non-compliance penalties under AS 23.30.085; but whether 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).

c. Failure to swear the primary witness against the accused employer is not harmless error.

The board made findings that specifically relied on the testimony of the Department of Labor's investigator, Richard Degenhardt.[68] The transcript reveals that Mr. Degenhardt was not sworn on his oath by the board; his statements are not sworn testimony. 8 AAC 45.120(a) requires that "Witnesses at a hearing shall testify under

[68] *In re Coalition, Inc.*, Dec. No. 07-0067 at 5. Nothing in the record suggests that Mr. Degenhardt's statements were untrue, or that the failure to place him on oath was more than an oversight.

oath or affirmation." The Alaska Supreme Court has said of the similar requirement in Alaska Evidence Rule 603[69] that the Rule

> requires every witness to declare that he or she will testify truthfully. The intent of the rule is expressed in its requirement that a witness be sworn in a manner "calculated to awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully]."[70]

Similarly, the importance of the oath does not lie only in the fact that the regulation requires a witness in a board hearing to testify under oath or affirmation:

> The oath may be important in two aspects. As a ceremonial and religious symbol, it may induce a feeling of special obligation to speak the truth, and it may also impress upon the witness the danger of criminal punishment for perjury, to which the judicial oath or an equivalent solemn affirmation would be a prerequisite condition. Wigmore considered the oath requirement incidental and not essential and supported his argument by reference to the practice of excluding hearsay statements made under oath.[71] But the fact that the oath is not the only requirement of the rule against hearsay does not prove it is unimportant. Similarly, the fact that the oath lacks the power that it had in an earlier age does not mean it no longer has significance; although affirmation is now commonly permitted as a substitute, the oath (or affirmation) requirement remains firm.[72]

Moreover, the parties' right to cross-examine a witness effectively depends in part on the witness being aware of the legal duty to tell the truth, however unwilling he or she may be, unless the witness's right to protection against self-incrimination is invoked or

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[69] Alaska Rule of Evidence 603 states: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

[70] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 383 (Alaska 2007) (holding the court's reminder to the witness, appearing in several proceedings, that he was still under oath, was sufficient to satisfy the intent of the rule.).

[71] 5 Wigmore, Evidence § 1362, at 10 (Chadbourn rev. 1974).

[72] 2 John W. Strong, et al., *McCormick on Evidence* § 245, at 93-94 (5th ed. 1999).

the board excuses the witness from answering. We do not regard the board's failure to put the witness upon his oath lightly.

The requirement that a witness be sworn on oath or solemn affirmation does not render the unsworn statements of the Department of Labor's representative a nullity, but they are not witness testimony. They are simply the statements of the accusing agency's representative. The accused employer did not expressly assent to their truth during the hearing; Coalition appeared as unaware as the board that Mr. Degenhardt had not been sworn on his oath.[73] The board's omission is likely to present an appearance of unfair treatment in view of its interruption of the employer's witness, Ms. Wingfield, to administer the oath.[74]

The board relied on Mr. Degenhardt's "testimony" to arrive at a decision and assess a penalty. 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. We conclude that a remand to the board for rehearing is required.

5. Conclusion and order.

We have found that the board failed to make adequate findings of fact regarding rebuttal of a presumption that Coalition failed to keep insured employees from October 26, 2005 through June 26, 2006. We also found that the board failed to make adequate findings of fact regarding whether Coalition's employees were insured under AS 23.30.030(5) and whether the state was provided opportunity to assume the policy

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[73] We note that in oral argument before the commission Coalition's counsel disclaimed challenge to the factual accuracy of the witness's statements, although he contested the legal basis for the board's decision.

[74] Hrg Tr. 14:12-17.

or terminate Coalition's contract under AS 23.30.045(e). We found that the transcript of the hearing demonstrated a failure to place the most significant witness against the accused employer under oath.

We therefore VACATE Alaska Workers' Compensation Board Decision No. 07-0067 and REMAND the case to the board for rehearing in accord with this decision. We do not retain jurisdiction.

Date: *15 Feb. 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal, but it is NOT a final decision on the Alaska Department of Labor and Workforce Development, Division of Workers' Compensation petition against the appellant, Coalition, Inc. The commission's decision returns the case to the board to rehear the petition and to make additional findings of fact, which may, or may not, result in a change in the board's decision.

This decision becomes effective when the commission mails or otherwise serves this decision to the parties, unless proceedings to reconsider it or seek Alaska Supreme Court review are instituted. To see the date of mailing or other distribution, look at the certificate of distribution in the box on the last page.

Effective November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. However, because this is not a final administrative agency decision on the petition against Coalition, Inc., the Supreme Court may decide not to accept an appeal. Other forms of review may be available under the Alaska Rules of Appellate Procedure. A petition for review or hearing must be instituted in the Alaska Supreme Court within 10 days after this decision is mailed or otherwise distributed.

If you wish to seek review by 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 appeals 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 delivery or mailing of this decision.

If a request for reconsideration of this 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, whichever is earlier. AS 23.30.128(f).

CERTIFICATION

I certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 071, the final decision and order in the appeal of *Coalition, Inc.; vs. Alaska Department of Labor and Workforce Development Division of Workers' Compensation*, AWCAC Appeal No. 07-025; filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *15th* day of *February*, 200*8*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Decision and Order in AWCAC Appeal No. 07-025, Alaska Workers' Comp. App. Comm'n Dec. No. 071, was mailed on *2/15/08* to: P. Kelly and L. McKinstry at their addresses of record, and faxed to Kelly, McKinstry, Director WCD, AWCB-Anch, and AWCB Appeals Clerk at their numbers of record.

Signed *2/15/08*
L. Beard, Appeals Commission Clerk Date