Alaska Workers' Compensation Appeals Commission

Alaska R & C Communications, LLC,
Appellant,

vs.

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

Final Decision and Order
Decision No. 088 September 16, 2008

AWCAC Appeal No. 07-043
AWCB Decision No. 07-0328
AWCB Case No. 700001977

Appeal from Alaska Workers' Compensation Board Decision No. 07-0328, issued on October 26, 2007, by southcentral panel members Janel Wright, Chair; Janet Waldron, Member for Industry; and Mark Crutchfield, Member for Labor.

Appearances: Krista M. Schwarting, Griffin & Smith, for appellant Alaska R & C Communications, LLC. Talis J. Colberg, Attorney General, and Rachel L. Witty, Assistant Attorney General, for appellee State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appeal filed November 20, 2007. Oral argument on appeal presented June 17, 2008.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

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

By: Jim Robison, Appeals Commissioner, and Kristin Knudsen, Chair.[1]

1. Introduction.

This appeal arises from the board's assessment of a $184,750.00 civil penalty for failure to maintain workers' compensation insurance as required by AS 23.30.075. Appellant Alaska R & C Communications, LLC,[2] asserts that the board's imposition of the penalty ($125 per employee workday) was not supported by substantial evidence. Appellant also asserts that the board erred in its application of aggravating and

[1] The commission acknowledges the contribution of its summer law intern, Matthew J. Prieksat, University of Iowa College of Law, to the research for this opinion.

[2] "R & C Communications."

mitigating factors. Appellant claims that the board abused its discretion by not considering evidence of its financial condition. Appellee State of Alaska, Division of Workers' Compensation,[3] counters that the record contains adequate evidence to support the board's assessment and that the penalty is in line with other similar cases and the legislative purpose of AS 23.30.080(f).

The parties' assertions require the commission to decide whether the board had substantial evidence to support its assessment of a $125 per employee workday penalty totaling $184,750.00. The commission must also decide whether the board erred in its application of aggravating and mitigating factors. Finally, the commission must determine whether the board failed to allow the appellant an opportunity to have his evidence fairly considered.

The commission determines that the board abused its discretion in denying the appellant an opportunity for rehearing on modification in order to allow the appellant to present his exculpatory or mitigating evidence. The board failed to make adequate findings on the factors to be considered in assessing a penalty. The board did not consider the nature of the business and lacked substantial evidence that the business can survive imposition of a penalty to pay that exceeds its average quarterly payroll and that totals, with the suspended portion, approximately 80% of its annual payroll. Therefore, the commission remands to the board with instructions to re-determine the penalty.

2. Factual background.

In June 2005, R & C Communications received notice from its insurance agent, Business Insurance Associates, that Business Insurance would no longer be R & C Communications' agent when R & C Communications' current policy lapsed.[4] The policy was written by Liberty Northwest Insurance Co.[5] and effective from March 17, 2005, to

---

[3] "Division" when referring to the enforcement function and staff of the Department of Labor and Workforce Development's Division of Workers' Compensation.

[4] R. 0069.

[5] "Liberty."

February 19, 2006.[6] Business Insurance also wrote to Liberty to request that they handle the renewal of R & C Communications' policy.[7]

Liberty sent R & C Communications an invoice on February 14, 2006, with a due date of March 13, 2006, for prepayment of premium to insure for the following policy year.[8] R & C Communications received a letter from Liberty on March 12, 2006 stating that the 2005-2006 policy had expired and that Liberty had not received the premium deposit for the 2006-07 policy period.[9] On April 21, 2006, Liberty sent R & C Communications a "Final Premium Audit Billing" for the expired 2005-06 policy totaling $113.04.[10] R & C Communications paid the invoice. A second "Final Premium Audit Billing" for the expired policy was not sent until December 19, 2006; it totaled $3,173.33.[11]

3. Proceedings before the board.

On December 15, 2006, Richard Degenhardt Jr., of the Fraud Investigation Unit for the Workers' Compensation Division, sent R & C Communications a petition for finding of failure to insure for workers' compensation coverage and assessment of a civil penalty.[12] Investigator Degenhardt also sent R & C Communications a discovery demand the same day, requesting it be returned within 30 days.[13] Investigator Degenhardt sent another discovery request to R & C Communications on February 5, 2007.[14]

---

6 R. 0066-67.

7 R. 0070.

8 R. 0062.

9 R. 0072.

10 R. 0073-0075. At the bottom of the "summary" page, R.0075, it states "This audit invoice is based on estimated payroll and will be revised upon receipt of actual payroll information for the period 03/17/05 to 02/19/06 and tax forms for the 1st,2nd, 3rd, 4th quarters 2005."

11 R. 0077.

12 R. 0001-003.

13 R. 0004.

14 R. 0017.

R & C Communications asked Business Insurance if workers' compensation insurance coverage was in place for 2006-2007. R & C Communications received a letter February 9, 2007, stating that the payment received by Liberty was for the 2005-2006 final audit and that R & C Communications had been without workers' compensation insurance since February 19, 2006.[15] R & C Communications obtained new coverage that day. Investigator Degenhardt filed a petition to compel discovery on March 28, 2007, and R & C Communications complied with the petition.[16]

The board heard the Division's petition to assess a penalty for failure to insure on September 4, 2007.[17] The president of R & C Communications, Scott Romine, was unable to attend, but had previously received permission to participate by telephone. He was informed that the board would call when the proceedings began. The board attempted to reach Romine before commencing the hearing, but Romine missed the board's calls.[18] The proceedings continued in Romine's absence.[19]

a. Arguments before the board.

At the hearing, Investigator Degenhardt represented the Division. He was the only witness. He testified that R & C Communications was uninsured for 355 days[20] and that R & C Communications had been uninsured on two prior occasions,[21] one of which resulted in board action.[22] He testified that he had "an extremely difficult time" obtaining discovery from Romine and that discovery was not provided until the board

---

15 R. 0079.

16 R. 0007-0008.

17 Tr. 3:11.

18 Tr. 3:19-20.

19 Tr. 3:20-21.

20 Tr. 8:23-25, 9:1-5.

21 Tr. 4: 18-20, 8: 23-9:5. The two prior lapses in coverage occurred before enactment of AS 23.30.080(f) allowed assessment of a civil penalty "up to $1,000 for each employee for each day an employee is employed while the employer failed to insure or provide the security required . . . .".

22 *In Re Scott Romine,* Alaska Workers' Comp. Bd. Dec. No. 04-0063 (March 16, 2004) (D. Donley, Chair).

issued a petition to compel.[23] He also testified that during the time R & C Communications was uninsured it employed 14 employees for a total of 1,478 employee workdays, a figure that was reached by the investigator prior to the hearing in consultation with Romine.[24]

In his testimony, Investigator Degenhardt recommended that the board consider aggravating factors, including: failure to regularly maintain workers' compensation insurance,[25] difficulty in obtaining discovery,[26] the fact that Romine had previously appeared before the board for the same violation,[27] and Romine's failure to attend the hearing.[28]

Investigator Degenhardt testified that the only mitigating factor was that Romine became insured again as of February 9, 2007.[29] Investigator Degenhardt suggested that assessing the maximum penalty would "severely curtail the company's operations," but said "it is unknown if it would put him out of business" and did not suggest the board consider R & C Communications' financial situation a mitigating factor.[30] He recommended that, due to similar aggravating and mitigating factors, penalties be assessed in line with the board's decision in *In re Rendezvous, Inc.*,[31] in which the board imposed a $75 per employee workday penalty. He added, however, that the present case was "a little more egregious" due to the lack of cooperation with discovery requests.[32]

---

[23] Tr. 6:23-8:11.

[24] Tr. 10:20-11:22.

[25] Tr. 11:23-12:1-8.

[26] Tr. 12:17-13:24.

[27] Tr. 13:25-14:7.

[28] Tr. 17:18-18:5.

[29] Tr. 18:6-10.

[30] Tr. 14:8-13.

[31] Alaska Workers' Comp. Bd. Dec. No. 07-0072 (April 4, 2007) (J. Wright, Chair).

[32] Tr. 15:5.

b. The board's decision.

The board found that R & C Communications failed to file evidence of compliance with workers' compensation insurance requirements, as mandated by AS 23.30.085(a), from February 19, 2006, until it reacquired coverage on February 9, 2007.[33] The board found that R & C Communications "failed to insure for workers' compensation liability while still using employee labor from February 19, 2006, until February 9, 2007, and was in violation of AS 23.30.075(a)."[34] The board also found that a stop order was "not necessary at present" because R & C Communications obtained workers' compensation insurance coverage February 9, 2007, and the Division did not request a stop order.

After finding that R & C Communications failed to insure for workers' compensation liability, the board "consider[ed] the Division's petition for assessment of a civil penalty under AS 23.30.080(f) . . . ."[35] The board found it had discretion to

---

[33] *In Re Alaska R & C Commc'ns,* Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 8 (Sept. 28, 2007) (J. Wright, Chair). AS 23.30.085(a) provides that an employer, "unless exempted, shall initially file evidence of compliance with the insurance provisions of this chapter with the division, in the form prescribed by the director. The employer shall also give evidence of compliance within 10 days after the termination of the employer's insurance by expiration or cancellation."

[34] *In Re Alaska R & C Commc'ns,* Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 9. AS 23.30.075(a) provides that an employer, "unless exempted, shall 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 shall furnish the division satisfactory proof of the employer's financial ability to pay directly the compensation provided for."

[35] *In Re Alaska R & C Commc'ns,* Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 10. AS 23.30.080(f) provides that

> If an employer fails to insure or provide security 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 or provide the security required by AS 23.30.075. 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 or provide security as required by AS 23.30.075.

assess a penalty between zero and $1,000 per day per uninsured employee and that R & C Communications was subject to those penalties.[36]

The board next discussed its use of aggravating and mitigating factors when assessing a civil penalty for failure to insure. The board cited five cases[37] and listed a number of factors that the board had considered in those cases.[38]

Following a discussion of the purpose of the civil penalty and the use of funds acquired through civil penalty assessments, the board found that, based on the administrative record, R & C Communications "used 1,478 days of uninsured employee labor."[39] The board found that the maximum assessable penalty under AS 23.30.080(f) was $1,478,000.[40] However, the board also found the maximum penalty to be "excessive" given the "unique circumstances of this case" and found the board "shall

---

[36] *In Re Alaska R & C Commc'ns,* Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 11.

[37] *In re Edwell John, Jr.,* Alaska Workers' Comp. Bd. Dec. No. 06-0059 (Mar. 8, 2006) (J. Wright, Chair); *In re Hummingbird Services,* Alaska Workers' Comp. Bd. Dec. No. 07-0013 (Jan. 26, 2007) (J. Wright, Chair); *In re Wrangell Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 06-0055 (Mar. 6, 2006) (J. Wright, Chair); *In re Absolute Fresh Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0014 (Jan. 30, 2007) (J. Wright, Chair); and *In re Alaska Native Brotherhood #2,* Alaska Workers' Comp. Bd. Dec. No. 06-0113 (May 8, 2006) (J. Wright, Chair).

[38] *In re Alaska R & C Commc'ns,* Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 11. The board listed the following factors to be considered: 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.

[39] *Id.* at 12.

[40] *Id.*

exercise discretion to determine the appropriate penalty assessment in the instant case."[41]

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.[42]

Although the board found the circumstances of the case "egregious," the board stated that "it is not the Board's intention to put R & C Communications out of business" and found that the maximum penalty would "curtail Alaska R & C Communications' ability to continue in business."[43] Thus, the board found the Division's recommendation that R & C Communications' penalty be greater than the penalty assessed in *In re Rendezvous Inc.*, ($75 per uninsured employee per day), to have merit.[44] The board

---

41 *Id.*

42 *Id.* at 12-13

43 *Id.* at 13.

44 *Id.*

found that, like Rendezvous, Inc., R & C Communications had previously appeared before the board for failure to insure.[45] The board also found, however, that unlike Rendezvous, R & C Communications did not fully comply with the Division's requests for discovery.[46]

After making these findings, the board reduced the "daily penalty rate to $125.00 per uninsured employee per work day for 1,478 days, for a total civil penalty of $184,750.00."[47] The board also decided to suspend $73,900 of the penalty in an effort to "provide the employer encouragement in maintaining its workers' compensation insurance" and ordered R & C Communications to pay the remaining $110,850.[48] The board ordered that the suspended portion of the penalty became immediately due "if the employer fails to provide workers' compensation insurance for its employees at any time in the next five years, or if the employer fails to timely pay the civil penalty assessed."[49] The board, noting the Division's concerns that a large penalty could put R & C Communications out of business, referred the matter to Investigator Degenhardt to arrange with R & C Communications a proposed payment schedule to submit for consideration within 30 days.[50] The board suggested that an appropriate payment plan would include "an initial payment of $10,850.00 with monthly payments of $2,083.33 for four years."[51] The final portion of the board's order directs the Fraud Investigation Unit to monitor R & C Communications quarterly for five years to insure compliance with AS 23.30.075 and AS 23.30.085.[52]

---

45 *Id*.

46 *Id.*

47 *Id.* at 14.

48 *Id.*

49 *In re Alaska R & C Commc'ns*, Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 14.

50 *Id.*

51 *Id.*

52 *Id.* at 14-15.

c. Reconsideration.

R & C Communications filed a timely petition for reconsideration.[53] In his request for reconsideration, Mr. Romine apologized for his failure to attend the hearing and attributed his absence to his lack of a receptionist and inability to hear the telephone, not a disregard for the board.[54] He also stated that he did not believe the board had all of the facts before arriving at a decision.[55] His letter stated that he was unaware before December 2006 that R & C Communications was uninsured.[56] Romine wrote that "[a]t no time was I trying to hide that [sic] fact I had no insurance, in fact I was so confused I was still sure that there must have been a mistake and in fact when all was said and done it would show that I did have insurance."[57] Instead, he wrote, "there was no mistake, just mass confusion and miscommunication."[58]

Romine's petition also addressed the financial burden the penalty would put on his company. He claimed that R & C Communications was experiencing financial hardship and that his 2006 tax return showed losses exceeding $50,000.[59] He wrote that he pays over $8,000 per month in payroll taxes, as well as, inventory and property taxes.[60] He also wrote that he pays in excess of $40,000 annually for workers' compensation, general liability, theft, fire, and property insurance.[61] He goes on to say:

> At this time any amount of penalty would be a hardship on my company. I am just making ends meet; even weekly payroll is hard at this time. I fear that a penalty of this magnitude would put my company over the edge and into bankruptcy and possible [sic] force me to close my doors and put all my employees out of

---

53 R. 0137.

54 *Id*.

55 *Id.*

56 R. 0137-8.

57 R. 0138.

58 *Id.*

59 R. 0138.

60 *Id.*

61 *Id*.

> work at the beginning of winter. Destroying many families that depend on this income and destroying a business I have spent 20 years building.[62]

However, he did not provide any documentary evidence to support these assertions.[63]

The board reviewed Romine's request for reconsideration. It found Romine's supposed confusion about his policy lacked credibility.[64] The board also found that instead of learning from past mistakes, "the employer has displayed a pattern and practice of permitting its workers' compensation insurance to lapse . . . ."[65] Further, the board found that "Mr. Romine has displayed the same tendency to delay compliance [with] the requirements of his workers' compensation insurance carrier as he has in providing the Board with the requested discovery, which took four months."[66]

In its Final Decision and Order on Reconsideration, the board refused to reconsider the assessment of the $184,750 penalty, with $73,900 suspended, for a total balance due of $110,850.[67] The board reconsidered the payment schedule and altered it to require R & C Communications "to make an initial payment of $4,260.00, with monthly payments of $855.25 for 120 months thereafter."[68] The board also extended the Division's Fraud Unit monitoring period to quarterly investigations over a period of 10 years.[69] R & C Communications appealed the decision to this commission.

---

62 R. 0138-9.

63 *In re Alaska R & C Commc'ns, LLC,* Alaska Workers' Comp. Bd. Dec. No. 07-0328 at 6 (Oct. 26, 2007).

64 *Id.* at 8 ("Having been in business for 20 years, we do not find Mr. Romine's assertion that he was unaware of how to complete an audit credible.")

65 *Id.* at 7-8.

66 *Id.* at 8.

67 *Id.*

68 *Id.*

69 *Id.* at 8-9.

4. 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.[70] The commission does not consider evidence that was not in the board record when the board's decision was made.[71] A board determination of credibility of a witness who appears before the board may not be disturbed by the commission.[72]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[73] 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.[74] 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'

---

[70] AS 23.30.128(b).

[71] AS 23.30.128(a). Appellant's brief raises an issue regarding the contents of the hearing note prepared by Hearing Officer Wright. Appellant's Br. 14-15. The hearing note is not a part of the record on appeal. Accordingly, the commission does not address this issue. The commission views the deliberations of the board hearing panel as similar to that of a jury panel, so that a member of a board panel, including the hearing officer, may not be questioned as to any matter or statement occurring during the course of the panel's deliberations on a hearing, or to the effect of any matter or statement upon that or any other panel member's mind or emotions as influencing the member to assent to or dissent from the opinion of another, or concerning the member's mental processes in connection with reaching a decision in the case after hearing, except that a member may testify on the question whether *extraneous* prejudicial information was improperly brought to the panel's attention or whether any *outside* influence was improperly brought to bear upon any member. *See* Alaska Rule of Evidence 606; *McCormick on Evidence*, § 68 325-27 (Kenneth S. Broun, et al. eds., 2006). A hearing panel member's private, confidential hearing notes are similarly protected.

[72] AS 23.30.128(b).

[73] *Id*.

[74] *Land & Marine Rental Co. v. Rawls,* 686 P.2d 1187, 1188-89 (Alaska 1984) (citing *Miller v. ITT Arctic Serv.,* 577 P.2d 1044, 1046 (Alaska 1978)).

compensation[75] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[76]

5. Discussion.

a. The board should have provided an oral hearing on R & C Communications' request for modification.

The record indicates that R & C Communications was notified of a right to request reconsideration and modification in the text at the end of the board decision.[77] Romine telephoned the Division's investigator on October 1, 2007. Investigator Degenhardt wrote to the board that

> I informed Mr. Romine of his 'Appeal Procedures and Reconsideration' as outlined in his decision on page #17. I further informed Mr. Romine that his appeal and/or petition for reconsideration are time sensitive as outlined in the decision. I told Mr. Romine that if he were to file a petition of

---

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

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

[77] The text reads as follows:

> RECONSIDERATION
>
> A party may ask the Board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the Board within 15 days after delivery or mailing of this decision.
>
> MODIFICATION
>
> Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the Board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.160 and 8 AAC 45.050.

In re Alaska R & C Commc'ns, Alaska Workers' Comp. Bd. Dec. No. 07-0298 at 17. 8 AAC 45.160 deals with submission of agreed settlements; 8 AAC 45.050 concerns the pleadings to "start a proceeding before the board." 8 AAC 45.050. Citation to these two sections of the board's regulations in the paragraph on modification may be more confusing than helpful. The board probably meant to refer to 8 AAC 45.150.

> reconsideration, he should do it quickly as he only has fifteen days after delivery or mailing of his decision. I suggested if Mr. Romine were to file a petition for reconsideration, that it be completed and filed by Wednesday, October 3, 2007, avoiding the possibility of being deemed late. Additionally, Mr. Romine should provide the AWCB with documentation to his assertions of financial hardships; prohibiting him from paying or agreeing to a payment plan as outlined in the decision.[78]

Romine wrote a letter to the board, which was treated as a petition for reconsideration. Romine's letter does not ask the board to change the finding that he was uninsured. It asks the board to take into consideration (1) the accidental nature of his failure to pick up the telephone, (2) his inability to pay the fine, (3) the likely effect of the fine on his business. In effect, it is a request for modification of the penalty.

The board has the power to rehear evidence on a petition for modification.[79] The record does not demonstrate that Romine was notified of the right to request

---

[78] R. 0156.

[79] 8 AAC 45.150 provides in pertinent part:

> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> > (1) the facts upon which the original award was based;
> >
> > (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
> >
> > (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
>
> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence

rehearing on a petition for *modification* by Investigator Degenhardt, or that the procedural difference between modification and reconsideration was explained. The only evidence Romine was informed regarding the process to seek modification or reconsideration is Investigator Degenhardt's statement that he spoke to Romine and the text at the end of the decision referring, in the instance of modification, to the wrong regulation. The commission does not suggest Investigator Degenhardt chose to withhold information or mislead Romine. Nonetheless, he is not a disinterested staff member, such as a Workers' Compensation Officer who conducts pre-hearing conferences.[80] He is the representative of the state's police power, the Division's enforcement authority and Romine's accuser.

Richard v. Fireman's Fund Ins. Co.[81] instructs the board that it must advise the self-represented litigant how to pursue their claims (or in this case, how to request reconsideration or modification) and to inform them of the important facts that bear upon their claims – or, as in this case, their liability for penalty. While the statute gives adequate notice of the range of penalty that may be assessed for failure to insure, it

---

> presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

[80] *See Bohlmann v. Alaska Constr. & Eng'g, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 023 (Dec. 8, 2006). The commission described the role of the staff that assists the adjudications section:

> The board, and the division staff that act as the board's designees and support the adjudication functions, are required to be fair and impartial. Acting on behalf of one party against another or pursuing a claim on behalf of one party in a matter before the board would violate the duty of the adjudicators. The division staff that assists the board in the adjudication process also must be impartial. The workers' compensation officer who conducts a pre-hearing conference conducts it as the designee of an impartial board.

Id. at 10, citing *Robles v. Providence Hospital*, 988 P.2d 592, 596 (Alaska 1999) ("In determining whether due process has been observed by an administrative agency, this court reviews the proceedings: [T]o assure that the trier of fact was an impartial tribunal . . .") and AS 23.30.001(4).

[81] 384 P.2d 445, 449 (Alaska 1963).

gives no notice of the conduct that the board considers in determining the seriousness of the particular employer's violation. Employers should not be required to guess whether a certain course of conduct is apt to subject them to severe civil penalties.[82]

Romine was not notified prior to the hearing that failure to appear at hearing could result in an increase in the penalty assessed against R & C Communications. There is no evidence he was notified that failure to provide timely discovery could result in an increased penalty. He was not notified that the board would consider past insurance lapses in determining the penalty for this instance. There is no record of a pre-hearing conference before the hearing, or that Romine was informed of his right to request a pre-hearing conference. In short, Romine was informed that he was subject to penalty for not having insurance – but he was not informed that his penalty could be increased if he showed "disregard" for the board or his obligations under the workers' compensation act or failed to promptly remedy the lack of insurance.[83]

The failure to provide Romine with a hearing on modification is troubling in light of the fact that Romine promptly sought reconsideration and provided an explanation for his absence.[84] He also provided information regarding the evidence he sought to introduce regarding R & C Communications' financial situation. If it had it been admitted and considered by the board, it may have had an impact on the board's decision.

The record shows the hearing on the accusation against R & C Communications was previously cancelled by the board. Romine made arrangements to participate

---

[82] *See VECO Intern., Inc. v. Alaska Pub. Offices Com'n*, 753 P.2d 703, 714 (Alaska 1988), *Gottschalk v. State,* 575 P.2d 289, 290 (Alaska 1978); *Stock v. State,* 526 P.2d 3, 8 (Alaska 1974).

[83] *See also Skvorc v. State, Personnel Bd.*, 996 P.2d 1192, 1205 (Alaska 2000) (holding State's broad assertion that employee had "used state equipment on other occasions for his private business interests" inadequate to give notice of specific conduct to be presented in hearing.).

[84] The letter attached to Romine's Petition for Reconsideration stated that he lacked a receptionist and did not hear the board's call over the noise of his shop. Unlike an employee who loses a right to hearing on failure to file a request for hearing within *two years,* AS 23.30.110(c), Romine was advised he had only *15 days* to act to preserve his rights.

telephonically in the third scheduled hearing, with the agreement of the Division. He offered a plausible reason for his absence from the telephone and the board had no evidence to contradict the offered reason or his claim that he telephoned back and was told the hearing was concluded.[85]

The board's original decision and assessment of the civil penalty rested in part on Romine's failure to attend the hearing before the board. The board notes Romine's absence several times in its decision and considers this an aggravating factor leading the board to a finding of Romine's "blatant disregard" of his obligations. However, the record also indicates that Romine appeared for the hearing prior to the one he missed, which was cancelled without advance notice to him. Romine made arrangements with the board prior to the latest scheduled hearing so that he could participate telephonically. The board agreed to these arrangements, but did not give Romine a precise time the hearing would start.[86] Romine asserts he attempted to call in prior to the conclusion of the hearing, but was told the hearing had ended. The record does not show that Romine was given the telephone number of the hearing room – only the workers' compensation division's main office number.[87] On its face, Romine's failure to appear does not support a finding of "blatant" disregard of his obligations. The board clearly considered Romine's non-appearance an "important fact" bearing on the penalty it would assess, or, in the second decision, refuse to lower.[88]

---

[85] *Compare Izaz Kahn v. Adams & Assoc.,* Alaska Workers' Comp. Bd. Dec. No. 06-0203 (July 21, 2006) (dismissing employee's claim after board investigation of self-represented employee's claim that he had telephoned division office from jail but was unable to reach division or employer's attorney to advise he was unable to attend scheduled medical examination), *appeal dismissed,* Alaska Workers' Comp. App. Comm'n Dec. No. 057 (Sept. 27, 2007), *appeal dismissed by Clerk's Order for want of prosecution,* S-12930 (Alaska Supreme Ct., Aug. 15, 2008).

[86] The hearing notice states that "Hearings start at 9:00 AM. You are Hearing #6. Call the day before for the approximate time." R. 0152.

[87] R. 0152. The hearing notice instructs parties to "Report to Room 304 for Hearing Room Assignment." *Id.*

[88] *In re Alaska R&C Commc'ns, LLC*, Alaska Workers' Comp. Bd. Dec. 07-0328, 8 (Oct. 26, 2007).

The commission recognizes the difficulties that face self-represented litigants, both employee and employer, even those that have appeared before the board in the past. It has long been a practice of the board to afford self-represented employee litigants more tolerance than represented employees. This tolerance does not mean ignoring the rules and statutes and it should not rise to the level of violating the rights of the opposing party. It does, however, mean that a self-represented litigant, whether employee or employer, who has made a good faith effort to attend a scheduled hearing, should not be subjected to the severe discipline of losing the right to testify to the board on a timely petition to modify and to present exculpatory evidence before assessing a penalty exceeding $150,000.[89]

The evidence against R & C Communications consisted in significant part of Romine's admissions to Investigator Degenhardt. Admissions of a party opponent are admissible as non-hearsay, but part of the reason they are admissible is that the party is available to explain or contradict the accuser's account of his purported admission and to cross-examine the accuser. There are mechanisms in place to assure that the parties have opportunities to discover the evidence against them. However, Romine was not present and the accuser's testimony was not subjected to cross-examination.[90]

Romine's letter was not sworn testimony and R & C Communications' tax records were not attached to his letter. 8 AAC 45.150(e) does not require the party to attach the evidence to support the allegations of mistake, but to specify "details sufficient to permit the board to identify the facts challenged." This was what Romine did. The board's comment on the lack of supporting documentary evidence suggests that the request for a rehearing was rejected because it did not include what it was not required to provide.

---

[89] *Compare Metcalf v. Felec Services*, 784 P.2d 1386, 1388-89 (Alaska 1990) *and Wolford v. Hanson*, Alaska Workers' Comp. App. Comm'n Dec. No. 030 (Feb. 2, 2007) *with Williams v. Abood*, 53 P.3d 134, 148 (Alaska 2002) (reconsideration on the record adequate where case had been "fully and capably argued by both parties.").

[90] Romine was notified of the number of hours claimed by the division's investigator. R. 0097-98.

Romine's letter was a request to open the record and allow him to present his evidence that he was prevented by circumstance from presenting. The focus of the evidence he wished to present was pertinent to the board's findings that (1) he (as the business owner) was "fully aware" (instead of informed or on notice) of the lapse in coverage, (2) "knowingly operated its business without . . . insurance," (3) "fail[ed] to appear display[s] a lack of regard for the seriousness of the employer's obligation," (4) "exhibited a blatant disregard" for the law, and (5) the business would be able to absorb payment of the sum of $110,850 and carry on its books the suspended fine of $73,900.

The board may find that a party witness's testimony lacks credibility and, if the witness appears before the board, the board's finding is binding upon the commission.[91] However, the 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.[92] Given Romine's efforts to attend the hearing, the lack of evidence on the subjects raised by the request for reconsideration, the employer's self-represented status, evidence of dependence on the adverse witness for advice, the board's comment on the absence of "documentary evidence . . . to support the employer's assertions," and the lack of notice to R & C Communications of the conduct that could result in increased penalties,[93] the board abused its discretion by denying

---

[91] AS 23.30.128(b).

[92] AS 23.30.001(2), AS 23.30.001(4). See *Whitesides v. State, Dep't of Pub. Safety, Div. of Motor Vehicles,* 20 P.3d 1130, 1137 (Alaska 2001) ("case law indicates that in-court testimony has persuasive characteristics absent from testimony given out of the presence of the trier of fact. Where the witness's truthfulness is disputed, demeanor can be important. In such cases, denying an in-person hearing denies a party an opportunity to present evidence in the most effective way possible.").

[93] *See Skvorc*, 996 P.2d at 1207.

Romine the opportunity for a rehearing on modification to present evidence regarding R & C Communications' financial status and have it fairly considered.

b. The board failed to make adequate findings on "aggravating and mitigating" factors.

The determination of whether an uninsured employer's conduct aggravates or mitigates its offense is a finding of fact. The commission reviews the board's findings of fact to determine if they are supported by substantial evidence in light of the whole record. However, the choice of what factors should be considered in fixing a penalty is a question of law. Thus, the commission examines board's findings on specific factors to determine if substantial evidence supports them in light of the whole record, but the commission examines the board's choice to consider particular aggravating or mitigating factors using its independent judgment.

The commission does not conduct a *de novo* review of the penalty. The commission lacks the statutory authority to abate or increase the penalty because the commission views the evidence differently than the board. However, if the penalty is, as a matter of law, an abuse of the board's discretion, as when it is so excessive as to shock the conscience, a manifestly unjust result of passion or prejudice, lacks substantial evidence to support the underlying findings, or demonstrates a failure to apply the correct legal standard, the commission may modify the board's order or, if further findings of fact are required, it may remand the case to the board for rehearing or recalculation of the penalty.[94]

---

[94] *Compare U.S. v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (civil fine imposed for submitting false Medicare claims, "We review de novo whether a fine is unconstitutionally excessive.") *and Stillwater Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 142 F.3d 1179, 1182 (9th Cir. 1998) (in mine operator's appeal of civil penalty for violating general safety regulation prohibiting use of equipment beyond its design capacity, the court stated that "[O]ur review is limited to determining whether [commission]'s decision to apply the regulation is arbitrary or capricious.") *with Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1001 (9th Cir. 2000) ("We review for abuse of discretion the amount of a civil penalty under the [Clean Water Act].") *and Krull v. Securities & Exchange Comm'n*, 248 F.3d 907, 908-09 (9th Cir. 2001):

In any case there may arise unique circumstances falling outside the factors discussed below but deserving of special consideration. Such unique circumstances may be considered by the board on a case-by-case basis, but are subject to commission review.

Most of the factors which the board should examine in assessing a penalty have been addressed in a number of prior board decisions.[95] Although often referred to as aggravators or mitigators, in reality they are factors to be used in assessing the impact of the employer's conduct as much as the employer's conduct itself. Some are

---

> The outcome of this appeal from a disciplinary action involving a registered securities representative rests in large part on the standard of review. The National Association of Securities Dealers found violations of its Rules of Fair Practice regarding unsuitable switches in mutual fund investments and imposed a disciplinary sanction on a registered securities representative. The Securities and Exchange Commission independently reviewed the record, upheld the finding of violations, and modified the sanction. After a multi-step review process, the scope of our review is limited. We affirm the Securities and Exchange Commission because substantial evidence supports the findings and the sanction is not "unwarranted in law or [ ] without justification in fact."

[95] A list of decisions reviewed includes *In re Pro Nails, LLC,* Alaska Workers' Comp. Bd. Dec. No. 08-0087 (May 18, 2008) (W. Walters, Chair) (reviewing some board cases to date); *In re Happy Nails,* Alaska Workers' Comp. Bd. Dec. No. 07-0359 (Nov. 23, 2007) (D. Jacquot, Chair); *In re Juneau Tours, LLC*, Alaska Workers' Comp. Bd. Dec. No. 07-0346 (Nov. 19, 2007) (R. Briggs, Chair); *In re Sea Dawgs, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 07-0338 (Nov. 9, 2007) (R. Briggs, Chair); *In re Casa Grande, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0288 (Sept. 21, 2007) (J. Wright, Chair); *In re ZW Pizza Co*., Alaska Workers' Comp. Bd. Dec. No. 07-0165 (June 19, 2007) (R. Foster, Chair); *In re Rendevous, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0072 (Apr. 4, 2007) (J. Wright, Chair); *In re Good Karma*, Alaska Workers' Comp. Bd. Dec. No. 07-0035 (Feb. 27, 2007) (K. Schwarting, Chair); *In re Cooker Inc*., Alaska Workers' Comp. Bd. Dec. No. 07-0032 (Feb. 23, 2007) (W. Walters, Chair); *In re Alaska Native Brotherhood #2*, Alaska Workers' Comp. Bd. Dec. No. 06-0113 (May 8, 2006) (J. Wright, Chair); *In re Edwell John*, Alaska Workers' Comp. Bd. Dec. No. 06-0059 (Mar. 8, 2006) (J. Wright, Chair) (reviewing application of penalties in other states); *In re Wrangell Seafoods*, Alaska Workers' Comp. Bd. Dec. No. 06-0055 (Mar. 6, 2006) (J. Wright, Chair). The variation in penalties assessed reflects both the variety of industry in Alaska and the approaches taken by different panels.

evaluated on a sliding scale rather than simply by their presence or absence. They may or may not reflect the culpability of conduct of an individual person. Some factors measure the culpability of an employer's officers, owners, or managers responsible for securing insurance. Other factors are not related to the conduct of the employer's officers or manager, or the employer, but should be considered in assessing a penalty in light of the interest of the community; these should be considered without weighing culpability. Finally, the ability of the employer, or its officers, to pay the penalty must be considered.

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.

The board is granted broad discretion in determining the penalty under AS 23.30.080(f). However, 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.

AS 23.30.080(f) establishes a rebuttable presumption of failure to insure established by failure to provide proof of insurance. The Division has the burden of establishing the absence of proof of insurance; having done so, the burden of proof shifts to the employer to establish coverage. However, the burden of proving the factors that the board must consider in assessing a penalty continue to rest on the Division, because there is no presumption that a particular penalty within the range

established by § .080(f) is appropriate. The Division has the burden of production and persuasion of the facts and circumstances to support imposition of a particular penalty, including factors supporting an enhanced penalty; the employer has the burden of establishing the facts and circumstances that may be considered in excuse or mitigation of a penalty.

i. Factors to be evaluated on a sliding scale.

The design of the penalty in AS 23.30.080(f) establishes fines that are proportional to the duration and scope of the risk; that is, the number of days each employee was exposed to risk, and the number of employees exposed. In this case, the board calculated a total number of employee workdays, but the record establishes that the duration of the risk to most of the 14 employees was actually very short, because they were not long-term employees. Thus, the board's finding that R & C Communications was uninsured for 355 days is insufficient to assess the duration of risk to employees unless an employee was employed 355 days. If all 14 employees had been exposed to risk 355 days, the number of employee "workdays" would have been almost 5,000, instead of 1,478 as calculated by the Division's investigator. A short duration of risk mitigates the conduct; a lengthy duration of risk aggravates it. A small number of employees exposed to a short duration of risk is not as serious an exposure as a large number of employees exposed to a lengthy duration. Here, the board failed to establish how the lack of insurance should be assessed in light of the duration and scope of risk.[96]

The board also failed to evaluate the risk of injury in R & C Communications' business. If the risk of injury in the employer's business is low, either because of the nature of the business or the particular safety practices and supervision of the employer, then the failure to obtain insurance has less impact than if the employer is engaged in a business or industry with a high risk of injury or of severe injuries or the

[96] For example, the board may wish to look to the median or average number of days employed by the part-time or short-term employees, the number of part-time or short-term employees, and the number of full-time employees, to have a better understanding of the duration and scope of risk.

employer's safety practices are demonstrated to be poor. The investigator recited the risk classification of R & C Communications' employees, and the general corporate description of R & C Communications, but there was no direct evidence of the kinds of work the employees actually did. A driver-installer has a different risk than an installer in a shop, notwithstanding the breadth of the insurer's risk classification. There was no evidence of the nature of the equipment installed and whether it presents any particular hazards. There is no evidence regarding the actual nature and operation of the business, and no assessment of where risk of injury in the business falls on the scale.

The board did consider whether Romine, as a responsible owner and manager, showed diligence in remedying the failure to insure. However, it equated "diligence" with "tenaciously pursu[ing] assistance in completing the audit and providing the required information." Setting aside that the law requires a businessman to act reasonably and prudently, not tenaciously, the board's finding of lack of diligence is not based on the period between Division contact and securing insurance. Instead, the board focused on the period between February 19, 2006, the end of the policy period, and December 19, 2006, when Romine received a "final audit billing" for $3,173.73 from Liberty. The board suggests that until the final audit billing was paid, Romine was unable to purchase insurance and that the delay in generating a billing or payment was the result of Romine's culpable conduct. It is not clear from the record that Romine's failure to pay the audited premium was the reason the insurance policy for R & C Communications was not renewed or that Romine was informed that no insurance policy would be written by an Alaska carrier until he paid the final audit bill. While this evidence is appropriate to consider as evidence of culpability of the responsible person, evidence of remedial action should focus on the actions taken by the employer between contact from the Division and the effective date of insurance.

The board had evidence of the date Romine was contacted by the Division, correspondence indicating contacts between Romine, a broker, and his insurer, and proof of coverage in February 2007. The question is whether Romine acted with reasonable diligence in this period. For example, if R & C Communications had no employees in January 2007 except the Romines, there was no need for insurance;

reasonable diligence for a corporation with no employees at work except its officers is necessarily different than an employer with a construction crew working uncovered.[97] The number of days from notice by the state of lack of coverage to securing coverage is one measure of diligence, but it must not be isolated from other circumstances and should not be considered an aggravator unless it is demonstrated to be *unreasonable*. On the other hand, an employer who sends workers home rather than operate uncovered and also promptly remedies the lack of coverage has demonstrated exceptional diligence. Exceptional diligence should be regarded as a "mitigating" factor.

Similarly, the board regarded lack of cooperation with the Division's investigator as an aggravator because Romine did not provide requested information for 121 days, beginning with the date of the Division's initial request. The employer was given 30 days to assemble and submit the requested material, so failure to provide requested discovery through the 30th day is not conduct that is in any way obstructive of the investigation. Therefore, only a delay of 91 days is to be considered on 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.[98]

---

[97] The board decision juxtaposed the period of "diligence" to come into compliance with the statement that "the employer knowingly operated its business without workers' compensation liability coverage and exposed 14 employees." However, there was no evidence that R & C Communications had 14 employees from Dec. 16, 2006, to Feb. 8, 2007. Its reported quarterly payroll for the first quarter of 2007 was $83,708 (an average of 27,902 per month, or, for the nine reported employees, about $3,100 each). It is not known if the payroll included Romine.

[98] Evidence developed in the investigation of an employer is evidence that may also be used in a criminal proceeding. Therefore, the board must be careful to ensure that enhancement of civil penalties for non-cooperation does not intrude upon the constitutional rights of criminal defendants to protect themselves from self-incrimination or coercive interrogation and to be fully informed of aggravators the division may use to seek an enhanced criminal (or civil) penalty. *Compare State v. Auliye*, 57 P.3d 711, 715 (Alaska App. 2002) (discussing administrative revocation of minors' driving licenses); *State v. Niedermeyer,* 14 P.3d 264, 269-71 (Alaska 2000) (holding the State could not impose administrative license revocation unless it accorded

ii. Factors concerning employer culpability.

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. An excused error would result in no, or very little, culpability attaching to the person responsible for insuring the business; simple negligence is neutral because it is unexcused but lacks the indicia of reckless or intentional conduct. 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.

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. The board considered this factor. The board found R & C

---

the minor "[all] the safeguards of criminal process that normally apply to criminal punishment").

Communications' prior lapse in coverage (from October 10, 2002 to February 19, 2004) for 16 months indicated Romine's knowledge of the requirements of the law and evidence of a pattern of repeated disregard of the obligation to obtain workers' compensation insurance. The commission concludes the board had substantial evidence to support these findings.

iii. Factors bearing on the community.

The object of a penalty is not to destroy businesses or to reduce employment, but to bring employers into compliance, deter future lapses, and express the community's condemnation of uninsured employers. 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. The impact on the community is a factor that must be considered by the board in fixing the penalty, both in terms of the avoidance of closure of otherwise viable businesses and resultant unemployment in the larger community, and in terms of the particular business or industry. These are not "aggravators" and "mitigators" but factors that bear on whether the penalty fits the purposes of the statute. 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.[99] In this case, the board's findings do not reflect consideration of these factors.

iv. The employer's ability to pay.

The penalty is not intended to cause businesses to fail or employees to become unemployed. Such an outcome does not restore the employer to compliance, provide security for injured workers[100] or continued employment, or deter future lapses, and it goes beyond the community's interest in condemnation of the offense. There are employers so grossly incompetent in business or so exploitive of their employees that there is little public interest in their continued viability; however, there is a strong public interest in preserving employment opportunities where possible. Thus, the board's evaluation of the employer's ability to pay a fine should be based on evidence of the particular employer's business and resources and its ability to pay the penalty assessed without adversely affecting the continued employment of its workers and its contribution to the economy. There is no presumption that an employer is able to pay a particular penalty simply because the penalty is within the range established by statute; therefore, since the Division seeks imposition of the penalty, it is the Division's burden to show that the penalty sought is payable by the employer.

In this case, the penalty assessed by the board far exceeded the employer's average quarterly payroll.[101] There was no other evidence before the board that the

---

[99] 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.

[100] The board noted the penalty payments fund the workers' compensation benefits guaranty fund, which serves as a source of payment of claims by employees of uninsured employers, AS 23.30.082. Penalties cannot be paid, and the fund supported, by businesses that no longer exist.

[101] R. 0041. The penalty was more than $184,000; the employer's annual taxable payroll for all of 2006 was $228,085. R. 0042. Thus, the penalty was approximately 80% of annual payroll. The board required payment of $110,000 immediately; on reconsideration, it lowered the immediate payment to $4,260 and imposed a monthly penalty payment of $888 for *ten years*, with the full penalty due if the employer failed in any monthly payment. This is the equivalent of a payment of

business possessed the resources to pay a penalty exceeding its quarterly payroll, or that it would be able to secure credit to do so. The amount of quarterly payroll is not the only measure of an employer's ability to pay a penalty, but in this case it was the *only* evidence of the employer's expenses or resources. No evidence of the employer's assets or profits was introduced. 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.

The board modified the payment *schedule* on reconsideration, but did not reduce the total penalty. The board directed the employer to pay more than $10,000 per year for ten years, with the threat of the full penalty becoming due if the employer failed in any one payment. No evidence was presented of the projected lifetime of the business; that is, that the employer would be able to remain in business, or had even planned to continue to operate the business, for 10 years. No evidence was presented to support a finding that the impact of an additional $184,000 obligation on the business would not impair the continued operation of the business, including its ability to obtain credit for other business purposes or its ability to meet other expenses, or impair the ability of the owners to sell the business. No evidence was presented that the business could support annual payments of $10,000 for ten years. There was no evidence of the business's resources, such as land, accounts receivable, bank funds, or inventory, that might have been liquidated to pay the penalty. The board did not have substantial evidence of the employer's ability to pay a penalty of $184,000 – or even $110,000. The board's modification of the penalty payment on reconsideration addressed the immediate impact of the penalty, but it failed to address the ability of the business to sustain payment of $10,000 per year for ten years.

---

more than $10,000 per year for ten years. The order did not clearly provide for exoneration of the suspended portion of the penalty at the end of ten years.

6. Conclusion.

The commission concludes the board abused its discretion in denying the request for a rehearing on modification. The commission REVERSES the decision to deny an oral hearing on R & C Communications' petition. The board had substantial evidence to support imposition of a penalty on the employer for failure to secure insurance for its workers' compensation liability. However, the board failed to consider all the factors necessary to determine an appropriate penalty. The board lacked substantial evidence to support a finding that the employer was able to pay a fine of $184,000. Therefore, the board's decision imposing a penalty under AS 23.30.080(f) is VACATED and the appeal is REMANDED to the board for rehearing on the penalty to be imposed on the appellant. The commission does not retain jurisdiction.

Date: *Sept. 16, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision of the commission on this appeal. This is a not a final administrative agency decision on the Division's petition for assessment of a civil penalty against R & C Communications. The commission reversed the board's decision denying a hearing on the petition for modification. The commission vacated part of the board's decision and order and remanded the case to the board for rehearing on the petition for assessment of a civil penalty. The commission did not retain jurisdiction. The effect of the commission decision is to correct errors of law and to direct the board to complete its proceedings in this case and issue a final decision on the petition for assessment of a civil penalty. The board's final decision may be appealed to the commission.

This decision becomes effective when it is distributed (mailed) by the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of distribution, look at the clerk's Certificate of Distribution box on the last page.

Proceedings to appeal must be instituted in the **Alaska Supreme Court** within 30 days of mailing 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. Because this is not a final decision on the Division's petition for assessment of a civil penalty, the Supreme Court may, or may not, accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. The commission's decision directs the board decide the penalty the employer must pay for failure to have workers' compensation insurance, so that a final administrative decision has yet to be issued. However, if you believe grounds for review exist under the Appellate Rules, you should file your petition at the Supreme Court within 10 days after the date of this decision. For more information, contact

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. A motion for reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

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).

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 088, the final decision in the appeal of *Alaska R & C Communications, LLC v. State, Division of Workers' Compensation,* Appeal No.07-043; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *16th* day of *Sept.*, 200*8*.

Signed
L. Beard, Deputy Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision No. 088 issued in AWCAC Appeal No. 07-043 was mailed on *9/16/08* to Witty & Schwarting at their addresses of record and faxed to Witty, Schwarting, Director WCD, & AWCB Appeals Clerk.

Signed
J. Ramsey, Deputy Appeals Commission Clerk Date