Alaska Workers' Compensation Appeals Commission

Alaska R & C Communications, LLC,
Appellant,

vs.

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

Final Decision on Reconsideration
Decision No. 102 March 18, 2009

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

Motion for Reconsideration of Alaska Workers' Compensation Appeals Commission Decision No. 088, issued September 16, 2008, on appeal from Alaska Workers' Compensation Board Decision No. 07-0328, issued October 26, 2007, by southcentral panel members Janel Wright, Chair; Janet Waldron, Member for Industry; and Mark Crutchfield, Member for Labor.

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

Commission proceedings: Appeal filed November 20, 2007. Oral argument on appeal presented June 17, 2008. Final decision on appeal issued September 16, 2008. Motion for reconsideration filed by appellee October 16, 2008. Opposition filed by appellant November 5, 2008. Order on Motion for Reconsideration issued November 10, 2008. Briefing on reconsideration completed December 9, 2008. Oral argument on reconsideration presented January 23, 2009.

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

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

By: Kristin Knudsen, Chair.

The State of Alaska, Division of Workers' Compensation requests reconsideration of the commission's Decision No. 088.[1] The State argues that it may raise a new issue on reconsideration if the new issue is "created by the commission's order."[2] Thus, the State argues, it could not have anticipated that the commission would "impose new administrative burdens" on the Division and thus exceed its statutory authority.[3] The

---

[1] *Alaska R & C Communications v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008). In its order granting reconsideration, the commission limited reconsideration to whether the commission overlooked, misapplied, or failed to consider a statute, court decision, or legal principle directly controlling the law regarding the following points:

> (1) whether the commission may examine a legal issue on reconsideration requested by appellee that was not raised in appellee's brief on the merits of the appeal;
>
> (2) the power of the commission to interpret the workers' compensation statutes and provide guidance to the board on the application of the statutes in the absence of department regulation;
>
> (3) the power of the commission to direct rehearing instead of reversal or modification of the amount of the penalty on a conclusion the board lacked substantial evidence to support all the penalty imposed;
>
> (4) whether, in reviewing a decision, the commission may determine if the board abused its discretion as a matter of law;
>
> (5) whether, in view of the legislative intent regarding due process in AS 23.30.001, the commission must consider the adjudicatory burden on the board, instead of the administrative burden placed on the division;
>
> (6) whether, in considering the burden of notice requirements, the commission exceeded the standards in *Baker v. State, Dept. of Health and Social Services*, 191 P.3d 1005 (Alaska 2008); or the commission failed to consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" under *Whitesides v. State, Dep't of Pub. Safety, Div. of Motor Vehicles*, 20 P.3d 1130, 1135 (Alaska 2001).

[2] Div. Mem. in Support of Reconsideration, 2 (filed Nov. 28, 2008).

[3] *Id.*

State argues that "a decision by the commission *may* have precedential effect on the board's determination of other cases," but that "implementing whole-scale reforms through the vehicle of an individual case decision exceeds the commission's authority."[4] The State argues that the commission "has gone beyond ruling on the particular circumstances of the case to impose many new requirements for all cases," and so exceeded its statutory authority and its function as a quasi-adjudicatory body.[5]

The State argues that the board should follow the "abuse of discretion standard" in reviewing procedural decisions by the board and should "consider whether the decision can be upheld on other stated grounds" instead of remanding the case to the board.[6] The State argues that providing its citizens due process imposes "additional adjudicatory burdens for the board and the investigatory burdens for the Division."[7] Finally, the State argues that requiring notice and an opportunity to be heard before a penalty is imposed under AS 23.30.080(f) is "not applicable to penalizing employers"[8] because "curbing the serious economic and health consequences posed by uninsured employers" quickly and efficiently, and funding the benefits guaranty fund, is more important.[9]

The appellant opposes and argues that the State waived arguments it now raises by not raising them below.[10] The appellant noted that it had asked the commission to give guidance to the board to prevent an exercise of unfettered discretion and the State

---

[4] *Id*. at 3. The commission assumes the State means reform on such a scale that it may be considered "wholesale reform."

[5] *Id*.

[6] *Id.* at 5

[7] *Id.* at 7.

[8] *Id*. at 7.

[9] *Id.* at 8.

[10] Appellant's Reply Br. on Appellee's Mot. for Reconsideration, 2 (filed Dec. 9, 2008).

did not oppose the request on grounds the commission lacked authority to do so.[11] The appellant also argues that the commission has the power to interpret the statutes and provide guidance in their application in the absence of regulation.[12] The appellant argues the commission may direct rehearing when key factual findings are missing rather than attempt to shore up a board decision on other grounds.[13] The appellant argues the commission correctly considered the appropriate due process concerns when an individual's property interests are affected by state action.[14]

1. Discussion.

The State's request for reconsideration, emphasizing the burden placed on the board in penalty cases, raised the issue of which agency the State's attorney was

---

[11] The characterization of the commission's decision as a "whole-scale reform" exaggerates the impact of the commission's decision. The commission clearly drew heavily on the board's prior decisions and the factors individual board panels had applied in different cases. To suggest, as the State does, that individual board panels may develop and apply factors *arbitrarily* but the commission, directed by the legislature to apply its independent judgment to questions of law, may not *systematize* those factors, turns the relationship between the reviewing body and the hearing body on its head. The State's argument vests the board hearing panels with greater authority to interpret the law than the commission, which is plainly not the intent of AS 23.30.008, .127 and .128. It also suggests, paradoxically, that the hearing panels have more power to develop *ad hoc* "regulation by example" than the full board possesses to enact. The hearing panels have no regulatory authority and the board's authority is limited. The Department of Labor and Workforce Development may adopt regulations to implement the workers' compensation statutes, AS 23.30.005(h), which become effective when approved by a "majority of the full board." AS 23.30.005(l). The commission, by reviewing the rationales advanced by individual panels in individual cases, and presenting an organized synthesis of the approach the commission will take in future cases, in the absence of adopted and approved regulations, has not invaded the legislative role of the "majority of the full board" which is to approve (or disapprove) regulations adopted by the Department.

[12] Appellant's Reply Br. on Appellee's Mot. for Reconsideration, 2.

[13] *Id*. at 3.

[14] *Id*. at 4.

representing.[15] The division was a party before the commission and the board. The division was the accusing agency, not a neutral adjudicating body. In proceedings before the commission, the adjudicating board panel is not represented as a party. Because the State did not argue before the commission that the board panels would be unable to engage in a systematic analysis of penalty factors, or should have unfettered discretion to set a penalty, the commission deems this argument waived.

a. The commission may review the factors used to assess penalties as a matter of law.

The State argues the commission may not assess the reasonableness, in light of the penalty statute, of the factors used by the board in fixing penalties.[16] The commission rejects the argument that the commission's review is strictly limited to determining if the board had substantial evidence to support the facts it relied upon to find the employer was subject to a penalty. AS 23.30.128(b) states the commission "*shall* exercise its independent judgment" in reviewing matters of law and procedure. The reasonableness of factors considered by the board in assessing penalties generally, when no guidance is provided by regulation or statute, is a matter of law the commission may review, because those factors are the basis of the board's application of the statute.[17] The process by which the accused employer was brought before the

---

[15] Div.'s Mem. in Support of Reconsideration, 1 (referring to "new administrative duties and procedures for the Division"), 4 ("new requirements on the Division and the Board"), and 6 ("mandates the board to follow a . . . list").

[16] The State's argues that by giving the board guidance the commission invaded the legislature's province. However, because the State points to no specific new procedure the commission's decision requires, or new duty imposed, the commission is not persuaded it has exceeded its authority by "legislating." The heart of the State's complaint appears to be that the commission's decision restricted the board's exercise of discretion by reminding the board that if it is going to impose penalties based on certain factors, it must apply those factors fairly and consistently. The board and the commission are both within the executive branch.

[17] *Solomon v. Interior Regional Housing Authority*, 140 P.3d 882, 883 (Alaska 2006) (application of statute of limitation is a matter of law); *Therchik v. Grant Aviation, Inc.*, 74 P.3d 191, 193 (Alaska 2003) (interpretation of statutes and regulations is matter of law); *Johnson v. State,* 636 P.2d 47, 61 (Alaska 1981) (interpretation of, and engineer's understanding of, regulation is a matter of law).

board, the hearing conducted, and evidence admitted are matters of procedure. In reviewing the board's findings of fact applying any particular factor, the commission will examine the record to determine if there is substantial evidence to support the board's findings of fact.

A decision that rests on findings of fact without substantial evidence to support the findings is an abuse of discretion. But, making findings of fact without support is not the only way that discretion may be abused, as the commission's decision recognizes:

> 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.[18]

The commission's decision setting out standards for abuse of discretion merely restates familiar standards for determining that an abuse of discretion exists. Abuse of discretion has been described when a decision "is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive,"[19] fails to apply law or regulation,[20] or leaves the reviewing body with "a definite and firm conviction that a mistake has been made."[21] A penalty resulting from passion or prejudice is an abuse of discretion.[22] A penalty based on an arbitrary amount instead of appropriate penalty factors or without substantial evidence to support factual findings is an abuse of

---

[18] *Alaska R & C Commc'ns v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088, 22 (Sept. 16, 2008).

[19] *Dobrova v. State, Dept. of Revenue, Child Support*, 171 P.3d 152, 156 (Alaska 2007).

[20] *Garner v. State Dept. of Health and Social Services*, 63 P.3d 264, 267 (Alaska 2003).

[21] *Black v. Municipality of Anchorage,* 187 P.3d 1096, 1099 (Alaska 2008).

[22] A jury's verdict may not be lowered by the trial court unless it is so large as to be "manifestly unjust," i.e., the result of passion, prejudice, or a disregard for evidence or rules of law. *Fruit v. Schreiner*, 502 P.2d 133, 145 (Alaska 1972).

discretion. A penalty imposed to put an unpopular company out of business, instead of the purposes of the statute, is an abuse of discretion because it stems from an improper motive. A penalty so extreme that it shocks the conscience is manifestly unreasonable, and therefore an abuse of discretion.

The State urges that the commission ought to uphold the board's decision on other grounds, although it does not specify what those grounds would be in this case. The commission has done so in appeals where there are adequate findings to support application of a different analysis,[23] or where modification may be appropriate.[24] However, in this case, the board's failure to allow the unrepresented employer to appear and present his testimony required remand so that he could do so with sufficient information to allow him to know what the board may consider in crafting a penalty.

b. The commission's decision does not impose onerous new administrative burdens.

In Decision No. 088, the commission gave notice of factor groups that are appropriate to be considered in deciding a penalty. The commission examined the board's development of these factors and provided guidance in how the factors should be applied. The commission did not instruct the board to apply each individual part of each group as a checklist, and weigh every factor in every case; obviously if there is no community interest in the employer's business, the board need not weigh the community interest. In short, the commission provided systematic guidance which should make it easier for the investigative arm of the division to present a report in support of penalty imposition, for the accused employer to know what the board may consider in setting a penalty, and for the board panel to analyze the evidence presented by the division and the accused employer.

---

[23] *Hanson v. McHoes*, Alaska Workers' Comp. App. Comm'n Dec. No. 056 (Sept. 24, 2007).

[24] *Ivan Moore Research v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 092 (Nov. 17, 2008).

Most of the State's arguments as to the burden on the division will be resolved by the adoption of regulations, a process the Department of Labor and Workforce Development has begun. The State's suggestion that the division is over-burdened by knowing the factors to be addressed in affixing a penalty – instead of guessing what might be important in every case – is without merit. If the accusing agency knows what is relevant to imposing a penalty in all cases, it may exercise discretion in accusations, assess its priorities and determine what evidence it should pursue against each accused employer with its limited resources. It will have a better understanding of the scope of the board's inquiry and, with that understanding, will be able to resolve more accusations with an agreed penalty. For this reason, the commission considers that its decision will better advance the prompt investigation and efficient resolution of penalties than leaving the board – and the division – without guidance.

The State's argument that the commission's decision imposed the burden of providing guidance to the accused employer on the division investigator is also unpersuasive. In its Decision No. 088, the commission noted that the employer had no information about evidence that might be relevant to penalty imposition, unless it came from the accusing agency's investigator. The only contact the employer had was with the investigator. The board's decision referred to the wrong regulation where it purported to inform the employer how to seek modification of the decision. There was no regulation or other guidance readily available to the unrepresented employer.[25] The commission noted that the accusing agency's investigator is not a neutral source of

[25] The division's petition provides exemplary notice of the offence charged, evidence relied on by the accuser, the highest possible penalty, and the right to a hearing. But, the accused employer here had no notice of what might be considered by the board in setting a penalty. No regulations had been adopted, no prehearing conference was conducted, and no information (except a summary of requirements to have insurance) is available on the Department's web site. While online legal research is available to find pertinent cases, it is not readily accessible to an unrepresented party. Finally, because a popular understanding of legal proceedings suggests that a sentence is imposed in a proceeding after that in which guilt is determined, an employer might believe that the board would not even decide his penalty in the same hearing that it decides he violated the requirement to have insurance.

information because the object of the investigation is to obtain evidence that may result in imposition of civil penalties or criminal prosecution against the accused.[26] The board's determination that it was fair, in these circumstances, to deny the employer a hearing on his petition for modification so that he could testify, present evidence, and answer questions relevant to the question of the ability of the accused employer's business to survive imposition of a $184,750.00 civil penalty prompted the remand to the board.[27]

This does not mean that the division's investigator must assist the uninsured employer to develop evidence against the accusation. The burden to produce exculpatory or mitigating evidence is on the accused employer, not the division's investigator.[28] The division investigator need only disclose any such evidence that it possesses to the accused. If the division files and discloses evidence that the

---

[26] Dec. No. 088 at 15.

[27] App. Comm'n Dec. No. 088 at 19 ("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 [the board assesses] a penalty exceeding $150,000.").

[28] The commission's discussion of the burden of proof and effect of the presumption in AS 23.30.080(f) does not suggest that new burdens are imposed on the division:

> 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.

App. Comm'n Dec. No. 088 at 22-23.

employer's business can support a requested penalty, the employer may exercise a right to file rebuttal evidence. Nothing in the commission's decision should be read as imposing an affirmative duty on the division's investigators to seek out evidence on the employer's behalf.

Instead, the commission's decision pointed to the lack of a presumption that an employer can pay any penalty the board imposes. The board may not assume the existence or non-existence of a fact if there is no evidence to support a finding of fact. If there is no evidence the business can survive a particular penalty, the board may not presume the accused employer will be able to pay it. The commission's statement that, "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," is a restatement of the principle that the proponent of a fact has the burden of producing evidence to support a finding of that fact.

A determination that due process requires that the accused employer be informed of the elements of the violation charged, before determining he violated the law, and informed of the factors relevant to determining a penalty for that violation, before a hearing in which a significant penalty is imposed, does not require the accusing investigator to seek out evidence that will benefit the accused. It does require that the neutral adjudicator, the board panel, assure the unrepresented accused employer a fair hearing – which includes adequate notice of the accusation, notice of what the board panel might consider in setting a penalty, and an opportunity to present evidence to defend himself from the accusation and to mitigate the severity of the penalty.

The opportunity to present evidence is meaningless if the accused has no knowledge of what evidence may be relevant to the violation and possible penalty or the facts that, if proven, might result in a reduction or increase in penalty. In the absence of regulations or any other published standards, the board's responsibility for assuring due process to unrepresented accused employers cannot be satisfied simply by relying on the good will, honesty and fairness of the division's investigators. A fair

hearing on the accusation and proposed penalty is the board panel's responsibility. The State's complaint that the commission's decision imposed onerous new administrative duties on the board panels is without merit.

c. The board must assure parties notice and a meaningful opportunity to be heard, but the decision does not require the board to go to unusual lengths to do so.

Lastly, the State argued that requiring notice and a meaningful opportunity to be heard is "not applicable to penalizing employers" because "curbing the serious economic and health consequences posed by uninsured employers" quickly and efficiently, and funding the benefits guaranty fund, are more important. The State argues that the standard set forth in *Baker v. State, Dep't of Health & Soc. Servs.,*[29] for notice and a meaningful hearing do not apply to uninsured employers. This argument is illogical and, more importantly, undermines the rights of all persons who may be accused of violations by the division.[30]

In every case brought against an uninsured employer under AS 23.30.080(f), or a person accused of fraud against the division under AS 23.30.280(b), the violation allegedly has occurred by the time the petition seeking a penalty is filed. The penalty is imposed for a past action – not to prevent future harm by forestalling it, as in cases of injunctive proceedings or quarantines in which the immediacy of grave injury outweighs the deprivation of due process before property is seized. Deterrence of violations is accomplished by published example or threat of penalty. Once the conduct has occurred, the threat of penalty is ineffective to "curb" the accused employer. Published examples of other penalties may have a general deterrent effect, but that form of deterrence is not lessened by affording accused employers under AS 23.30.080(f), or other persons accused under AS 23.30.280(b), a fair hearing – the deterrent effect is

---

[29] 191 P.3d 1005 (Alaska 2008).

[30] While AS 23.30.080(f) applies to uninsured employers, the division may also investigate and proceed administratively against an insurer who conceals information from the division, a physician who files reports of medical services not provided, or an employee who files a fraudulent report of injury. AS 23.30.280(b).

enhanced by the publicity of the hearing. Therefore, the State's argument that the board is justified in depriving an individual business owner of over $100,000 without due process because doing so will curb the consequences that flow from that individual's lack of insurance is illogical.

The State is correct that *Baker v. State* concerned the deprivation of a medical benefit (personal care attendance) to a class of Medicaid recipients, and, "as in the case of welfare recipients, courts have traditionally required that agencies go to greater lengths — incurring higher costs and accepting inconveniences — to reduce the risk of error."[31] The commission does not mean that the board is required to go to great lengths to provide adequate notice to persons subject to penalties for violations of the Workers' Compensation Act. But, the fact that the accused person's interest is largely economic does not mean that the accused should be deprived of a meaningful opportunity to be heard before a penalty is imposed.[32] On the facts of this case, the board's denial of the request for a hearing on the petition for modification deprived the employer of a meaningful opportunity to be heard.

The right not to be deprived of property without due process of law[33] protects the individual from abuse of power by the state, even when the deprivation of property

---

[31] *Id.* at 1010.

[32] *See Groom v. State, Dep't of Trans.*, 169 P.3d 626, 635 (Alaska 2007) (citations omitted):

> We have previously held that the crux of due process is the opportunity to be heard and the right to adequately represent one's interests. While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so that they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings."

[33] AS 23.30.001(4) provides that it is the intent of the Legislature that "4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered." Art. 1, § 7 of the Constitution of the State of Alaska provides: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."

serves a collective good.[34] The legislature's concern for the "serious economic and health consequences posed by uninsured employers" to Alaskan society collectively led it to create the investigation section in the division and to establish penalties on individuals who fail to insure.[35] The Benefits Guaranty Fund represents a legislative response to the concern for employees who suffer the direct consequence of the employer's failure to secure workers' compensation insurance.[36] To *prevent* immediate harm posed by uninsured employers, the legislature also authorized the director to issue a stop order barring use of employee labor *without* a hearing, after investigation by a representative of the Department of Labor and Workforce Development establishes "substantial evidence" that the employer has no insurance and the employer is notified.[37] The director's stop order prevents future harm, the Benefits Guaranty Fund mitigates the future impact of the harm on individual injured workers, but the civil penalty in AS 23.30.080(f), and the criminal penalty in AS 23.30.075(b), punish past violations in the interest of society as a whole. But, nothing in AS 23.30.080(f) suggests the legislature, in devising a broader response to the problems presented by

---

[34] *See Godfrey v. State, Dep't of Comty. & Econ. Dev.*, 175 P.3d 1198, 1203 (Alaska 2008) (holding tobacco endorsement is a valuable property interest that, like other business enterprise licenses, is protected by the due process clause of the Alaska and United States Constitutions. "Due process of law thus entitles the holder of an endorsement permitting the sale of tobacco products to a meaningful hearing before the endorsement may be removed or suspended. 'Considerations of fundamental fairness' guide our determination of what constitutes a meaningful hearing." (citing *Rollins v. State, Dep't of Revenue, Alcoholic Beverage Control Bd.*, 991 P.2d 202, 211 (Alaska 1999); *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles,* 921 P.2d 620, 622 (Alaska 1996); *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 36 (Alaska 1980) (business license protected by due process); *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1002 (Alaska 1977) (hunting guide license); *Frontier Saloon, Inc. v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 659-60 (Alaska 1974) (liquor license)).

[35] *See Velderrain v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 083, 14-15 (July 9, 2008). The immediate health consequences of lack of insurance fall on the injured employee. Lacking insurance does not put the general public, especially minors, at an inherent risk of physical injury, unlike the "inherent danger posed by commercial tobacco sales." *Godfrey,* P.3d at 1205.

[36] AS 23.30.082.

[37] AS 23.30.080(e).

uninsured employers, eliminated the right of the accused individual employer to a fair, meaningful hearing before a neutral adjudicator before a civil penalty is imposed.[38]

In *Godfrey v. State, Dep't of Comty. & Econ. Dev.*, 175 P.3d 1198 (Alaska 2008), the Supreme Court held that, because the statute (imposing a civil penalty of $300 or $500 plus a suspension of the license to sell tobacco for 45 days or less), provided a detailed statement of the issues to be determined in a hearing, Godfrey was not denied due process based on a claim that he could not intelligently prepare a defense or decide to proceed without knowing the rules that would apply at the hearings.[39] Here, the case is otherwise. AS 23.30.080(f) gives the board discretion to impose a fine up to $1000 per day per employee, but it provides no guidance to the employer of the

---

[38] AS 23.30.001(4), adopted in the same bill that amended AS 23.30.080(f), states that the legislature intended that "hearings in workers' compensation cases shall be fair to *all* parties" and that "*all parties shall be afforded due process and an opportunity to be heard.*" (emphasis added).

In his dissent in *State v. Dutch Harbor Seafoods, Ltd.,* 965 P.2d 738 (Alaska 1998) (holding a maximum fine of $3,000 for a first offender, or $6,000 for a repeat offender, does not in itself connote criminality requiring trial by jury in the context of the highly regulated fishing industry), Justice Compton noted that fish seized by the state, if owned by the fisher until he is found guilty, are "analytically indistinct from other property whose deprivation-to the tune of $158,000 or more-would be a heavy enough fine to connote criminality." *Id.* at 747. The commission does not suggest that a possible penalty imposed by the board under AS 23.30.080(f) warrants protections associated with a criminal proceeding. However, because the penalty may be very high, and its impact may be great, the basic standards of a fair hearing require that the accused employer have some notice of what the board may consider in determining a penalty before the hearing that results in the penalty. Regulations are the preferred means of accomplishing such notice. However, the board hearing panel may not use the lack of regulations adopted by the Department of Labor and Workforce Development and approved by the board to avoid the panel's responsibility to assure a fair hearing in a case before it, particularly when the alleged conduct by the employer may result in a criminal prosecution under AS 23.30.075(b). *But compare Stock v. State*, 526 P.2d 3, 10 n.35 (Alaska 1974) (suggesting that parallel administrative and criminal prosecution of environmental protection violations "may jeopardize the latter in situations where objections are raised in the criminal case to the introduction of evidence produced as a result of the civil proceeding.").

[39] 175 P.3d at 1207. Godfrey's claim of lack of knowledge was based on the agency's failure to adopt procedural rules for hearings.

specific factors the board will use to calculate a penalty within that wide range. The accusation filed against the employer provided ample notice of the alleged conduct and violation. The board developed a practice of relying on specific factors in calculating penalties in some cases, but provided no notice of those factors to accused employers before assessing penalties, and, *in this case,* denied the employer a meaningful opportunity to present evidence and argument regarding factors pertinent to the penalty assessed against him. The denial of a meaningful opportunity to be heard compelled the commission's remand for rehearing.

2. Conclusion.

The appeals commission's Decision No. 088 publishes and organizes factors developed by the board in order to provide guidance to the board and the public of those factors the commission considers the board may reasonably consider in assessing penalties under AS 23.30.080(f), in the absence of regulation. Instead of placing a greater burden on the board and the division, the commission's decisions in this case and in *Ivan Moore Research v. State, Div. of Workers' Comp*.[40] provide a means of informing the public of the factors the board may consider in determining a penalty until regulations are adopted and approved.

The commission CLARIFIES its statement regarding the production of evidence by the division on page 28 of Decision No. 088. The commission's statement that

> 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.

does not impose an affirmative duty on the division to obtain evidence favorable to the accused employer. It restates the principle that, as the proponent of the fact that a requested penalty is payable by the accused employer, the division has the burden to produce evidence tending to show that the employer could pay the penalty.

---

[40] Alaska Workers' Comp. App. Comm'n Dec. No. 092 (Nov. 17, 2008).

In other respects, the commission DENIES the motion for reconsideration of its Decision No. 088 issued September 16, 2008.

The commission clerk is requested to return the record to the board for further proceedings in accord with the commission's September 16, 2008 decision on appeal REVERSING the board's decision to deny an oral hearing on Alaska R & C Communications' petition, VACATING the board's decision, AWCB Dec. No. 07-0328, imposing a penalty under AS 23.30.080(f), and REMANDING the case to the board for rehearing on the penalty to be imposed. The commission does not retain jurisdiction.

Date: *18 Mar 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen Hagedorn, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on reconsideration of the commission's Sept. 16, 2008, decision (Decision No. 088) in this appeal. The commission's first decision in this case reversed the board's decision denying a hearing on the petition for modification, 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 effect of this decision on reconsideration is clarify its Sept. 16, 2008 decision (*Alaska R & C Commc'ns v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008). **This decision does not change the commission's direction to the board to complete its proceedings in this case and issue a final decision on the petition for assessment of a civil penalty.**

This is a not a final administrative agency decision on the Division's petition for assessment of a civil penalty against Alaska R & C Communications, AWCB Case No. 700001977. The commission decision sends this case back to the board for rehearing. The commission does not retain jurisdiction.

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.

Reconsideration of this decision is not available, because it is a decision on a motion for reconsideration.

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

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 102, the final decision on reconsideration of *Alaska R & C Communications, LLC v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008) in Appeal No.07-043; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *18th* day of *March*, 200*9*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *3/18/09* a copy of this Final Decision on Reconsideration issued in AWCAC Appeal No. 07-043 (Decision No. 102) was mailed to Witty & Schwarting at their addresses of record and faxed to Witty, Schwarting, Director WCD, & AWCB Appeals Clerk.

Signed
B. Ward, Deputy Appeals Commission Clerk Date