Alaska Workers' Compensation Appeals Commission

Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson, Appellants, vs. State of Alaska, Division of Workers' Compensation, Appellee.	Decision Decision No. 175 January 8, 2013 AWCAC Appeal No. 11-011 AWCB Decision No. 11-0095 AWCB Case No. 700002789M

Decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 11-0095, issued at Anchorage on June 30, 2011, by southcentral panel members Laura Hutto de Mander, Chair, Patricia Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: David A. Nesbett, Nesbett & Nesbett, PC, for appellants, Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson; Michael C. Geraghty, Attorney General, and Aesha Pallesen, Assistant Attorney General, for appellee, State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appeal filed August 1, 2011; briefing completed September 28, 2012; oral argument held on December 12, 2012.

Commissioners: James N. Rhodes, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The Alaska Workers' Compensation Board (board) issued two decisions leading to this appeal. The first, an interlocutory decision,[1] related to a petition for failure to

[1] *In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability and Assessment of a Civil Penalty Against Titan Enterprises, LLC, Todd Christianson,* Alaska Workers' Comp. Bd. Dec. No. 09-0114 (June 16, 2009)(*Titan I*).

obtain and maintain workers' compensation insurance, as required by the provisions of AS 23.30.075,[2] against a limited liability company, Titan Enterprises, LLC (Titan), and its sole member, Todd Christianson (Christianson). In *Titan I*, the board heard evidence to the effect that Christianson was an owner or member of, or a shareholder in, other businesses or entities that might have failed to maintain workers' compensation insurance. As a result, the board ordered the Division of Workers' Compensation (Division) to file separate petitions against each of these entities.[3] In the second, final decision,[4] the board, among its rulings, ordered Titan, Titan Topsoil, Inc. (Titan Topsoil), CCO Enterprises, LLC (CCO),[5] and Christianson, without distinguishing between them, to pay a civil penalty in the amount of $6,392,601, pursuant to the

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[2] **AS 23.30.075. Employer's liability to pay.** (a) An employer under this chapter, unless exempted, shall . . . 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[.]
(b) If an employer fails to insure and keep insured employees subject to this chapter . . . , upon conviction, the court shall impose a fine of $10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured[.]

[3] *See Titan I*, Bd. Dec. No. 09-0114 at 12.

[4] *In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability and Assessment of a Civil Penalty Against Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, Todd Christianson,* Alaska Workers' Comp. Bd. Dec. No. 11-0095 (June 30, 2011)(*Titan II*).

[5] It appears that CCO Enterprises, like Titan, is a limited liability company, although it was initially a sole proprietorship. *See* n.18, *infra*.

provisions of AS 23.30.080(f).[6] Titan, Titan Topsoil, CCO, and Christianson (collectively Appellants) have appealed the board's decision in *Titan II* to the Workers' Compensation Appeals Commission (commission). We reverse and remand the matter to the board.

2. Factual background and proceedings.

As a result of a routine inspection of Department of Labor and Workforce Development records, the Division asserted that Titan was operating without workers' compensation insurance from March 5, 2006, through October 18, 2007,[7] and January 3, 2008, through January 16, 2008.[8] The Division prepared a Petition for Finding of Employer's Failure to Insure Workers' Compensation Liability pursuant to AS 23.30.075 (Petition), and for Assessment of Civil Penalty under AS 23.30.080, as well as a Discovery Demand, dated June 5, 2008.[9] The Petition indicated that Titan was an employer, using employee labor, and did not have workers' compensation insurance in the timeframes

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[6] Subsection (f) of the statute reads:

> **AS 23.30.080. Employer's failure to insure.**
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> . . . .
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> (f) 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.

[7] *See Titan I*, Bd. Dec. No. 09-0114 at 2. Elsewhere, the Division acknowledged that Titan had workers' compensation coverage for its employees from July 31, 2006, to September 10, 2006, provided through NANA Management Services, LLC (NMS), an employment agency. Exc. 100.

[8] Exc. 233-34. *See Titan I*, Bd. Dec. No. 09-0114 at 2.

[9] Exc. 219-26.

reflected by the records inspection.[10] The board held a hearing on the Petition on April 1, 2009.[11]

At that hearing, evidence was presented that Titan had some workplace injuries, one occurring while it was uninsured.[12] The Division also introduced evidence that, in addition to Titan, Christianson was an owner, officer, or registered agent of several businesses, including Titan Topsoil and CCO.[13] Other evidence was presented, and Christianson acknowledged, that Titan was uninsured from March 5, 2006, through July 30, 2006, September 11, 2006, through September 24, 2006, September 26, 2007, through October 17, 2007, and January 4, 2008, through January 15, 2008.[14] Christianson also stated that Titan Topsoil is a separate business entity, he is the sole owner, and its only business, which is seasonal, is to provide topsoil to Titan.[15]

For the timeframe during which it was alleged that Titan was uninsured for workers' compensation liability, most of 2006 and 2007, Christianson explained that he could not place workers' compensation insurance with Alaska National Insurance Company (ANIC).[16] Consequently, shortly after discontinuing the relationship with NMS on September 10, 2006,[17] he arranged with CCO, a professional employment

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[10] Exc. 219-26.

[11] *See Titan I*, Bd. Dec. No. 09-0114 at 1.

[12] *See id*. at 3 (citing *Aubert v. Titan Enterprises, LLC*, Alaska Workers' Comp. Bd. Dec. No. 07-0015 (Jan. 31, 2007)). As a result, the Division filed two petitions for failure to insure. *See Titan I*, Bd. Dec. No. 09-0114 at 3.

[13] *See Titan I*, Bd. Dec. No. 09-0114 at 3-4.

[14] Hr'g Tr. 26:11-25, April 1, 2009, and R. 4121.

[15] Hr'g Tr. 34:2-7, 26:13-17, April 1, 2009.

[16] Hr'g Tr. 34:24–38:16, April 1, 2009. There had been a dispute with ANIC giving rise to litigation, which was resolved in August 2007. Shortly thereafter, ANIC issued Titan Topsoil a workers' compensation insurance policy on October 18, 2007. Exc. 003-04. The policy was cancelled on January 3, 2008. Exc. 049.

[17] *See* n.7, *supra*.

organization established by a friend, Chad Oyster,[18] to provide workers' compensation insurance for Titan beginning September 25, 2006. A policy naming Chad Curtis Oyster d/b/a CCO Enterprises as insured went into effect on that date.[19] Christianson asserted that Titan's employees continued to be covered by CCO's workers' compensation insurance policy after March 30, 2007, when Oyster's interest in CCO was sold to Christianson.[20] However, the Division considered Titan to be uninsured, introducing evidence that Christianson did not apply for his own policy and the policy issued to CCO would be voided by the sale of Oyster's interest.[21]

The Division also presented evidence that multiple entities/businesses in which Christianson had been or continued to be involved were, at times, apparently insured for workers' compensation liability under a single policy. As examples, there were the Titan/CCO policy with an effective date of September 25, 2006,[22] and the Titan/Titan Topsoil policy effective October 18, 2007.[23]

The Division maintained that Titan, Titan Topsoil, and CCO were instrumentalities of Christianson, and, therefore, the various forms of business they were operating under should be ignored so that the board might penalize all of them for violating AS 23.30.075.[24] Christianson asserted the entities were separate.[25]

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[18] CCO was originally formed by Chad Oyster as a sole proprietorship on August 30, 2006. It was converted to a limited liability company on October 2, 2006. Its business address and phone number were the same as those of Titan and Titan Topsoil. Oyster sold his interest in CCO to Christianson on March 30, 2007. *See Titan I*, Bd. Dec. No. 09-0114 at 5.

[19] Exc. 046-47.

[20] R. 4121.

[21] Exc. 005.

[22] Exc. 087.

[23] Exc. 004.

[24] *See Titan I*, Bd. Dec. No. 09-0114 at 10.

[25] Hr'g Tr. 28:15-16, April 1, 2009.

The board ordered the Division to file separate petitions with respect to each entity whose business the Division asserted was commingled with Titan's and that these petitions may then be joined in the interest of judicial economy. It ordered Christianson to provide more information regarding his ability to pay any civil penalty it might impose. A prehearing and another hearing were ordered.[26]

A prehearing was held on July 17, 2009, at which time the petitions filed by the Division against Titan, Titan Topsoil, and CCO were consolidated under AWCB case number 700002789M.[27] After another hearing on April 27, 2010,[28] the board made the following factual findings. Titan Topsoil was incorporated on April 21, 1995; Christianson was the sole shareholder.[29] The board found that Titan was formed on January 13, 2003,[30] with Christianson listed as the only member of the limited liability company.[31] On March 30, 2007, Christianson acquired sole ownership of CCO, also an LLC.[32] The board's decision refers to these entities and Christianson collectively as "Employer."[33] The commission will do likewise, unless it is appropriate to distinguish between them.

The board found that Christianson was the person actively in charge of Titan, Titan Topsoil, and CCO, during the periods they were uninsured,[34] and that Employer

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[26] *See Titan I*, Bd. Dec. No. 09-0114 at 12-13.

[27] R. 4026-28.

[28] The board's decision inadvertently identifies the hearing date as March 23, 2010. *See Titan II*, Bd. Dec. No. 11-0095 at 1.

[29] *See Titan II*, Bd. Dec. No. 11-0095 at 3; R. 0042-43.

[30] Titan was actually formed on November 14, 2002; R. 0038.

[31] *See Titan II*, Bd. Dec. No. 11-0095 at 3; R. 0038.

[32] *See Titan II*, Bd. Dec. No. 11-0095 at 4.

[33] *See id.* at 1.

[34] *See id.* at 9.

had a history of workers' compensation claims with thirteen injuries,[35] including a leg amputation, upper and lower extremity injuries, and back injuries.[36] It found that Employer had previous violations of AS 23.30.075, from October 6, 1992, to February 6, 1993, January 10, 1994, to April 11, 1995, March 29, 1998, to April 1, 1998, April 1, 2000, to May 4, 2000, October 29, 2000, to June 19, 2001, and September 18, 2002, to May 22, 2003.[37] Christianson, while doing business as Great Alaska Lawn and Landscaping, was before the board on September 11, 2002, at which time he was uninsured.[38]

The board also found that Employer was using employee labor, and had neither workers' compensation insurance, nor approval to self-insure.[39] Employer was uninsured from March 5, 2006, to July 30, 2006, September 10, 2006, to October 17, 2007, and January 3, 2008, to January 15, 2008.[40] Employer was uninsured for 563 calendar days and 6,399 uninsured employee workdays after November 7, 2005.[41] Employer obtained workers' compensation insurance on January 16, 2008.[42] The Employment Security Division (ESD) tax records indicate Employer paid taxes for ten to forty-seven employees in 2006 and 2007.[43]

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[35] *See Titan II*, Bd. Dec. No. 11-0095 at 3; Hr'g Tr. 20:17-21, April 1, 2009; R. 0154-66, 3952; *See Aubert,* Bd. Dec. No. 07-0015 (Jan. 31, 2007).

[36] *See Titan I*, Bd. Dec. No. 09-0114 at 3; R. 0154-66.

[37] R. 2828.

[38] *See Titan II,* Bd. Dec. No. 11-0095 at 3 (citing *In re Todd Christianson, d/b/a Great Alaska Lawn & Landscaping,* Alaska Workers' Comp. Bd. Dec. No. 02-0207 (Oct. 8, 2002)).

[39] *See Titan II,* Bd. Dec. No. 11-0095 at 3.

[40] *See id.* at 2-3.

[41] *See id* at 3-4; Exc. 100. November 7, 2005, is the effective date of AS 23.30.080(f).

[42] Exc. 001-02.

[43] *See Titan II,* Bd. Dec. No. 11-0095 at 4; Hr'g Tr. 13:21-23, April 1, 2009; R. 0059-72.

Christianson filed a 2006 US Income Tax Return for an S Corporation for Titan Topsoil, which showed total assets of $526,328, gross receipts of $279,606, and a loss of $2,554. The return reflected a deduction of $1,800 for employee leasing, as well as assets and liabilities owed to and/or received from Titan and another of Christianson's businesses.[44] On the 2007 corporate tax return for Titan Topsoil, assets were reported as $548,105, gross sales as $240,206, and business income as $65,404. Titan Topsoil again claimed a deduction for employee leasing, in the amount of $34,600, as well as assets and liabilities owed to and/or received from Titan and the other Christianson businesses.[45]

Christianson's individual tax return for 2007 showed a total income of $184,913, an adjusted gross income of $181,974, and a taxable income of $89,437. This return included the schedule C for Profit or Loss from Business for Titan, which showed gross sales of $1,680,969, gross income of $1,680,969, and a net profit of $138,182. A deduction was taken by Titan for employee leasing in the amount of $439,778, as well as wages in the amount of $96,797.[46] A schedule C for CCO was also filed in 2007, which showed gross receipts and gross income of $427,260, and a loss of $151,901. CCO claimed a deduction of $442,328 for wages, and $60,000 for insurance.[47]

The board found Employer's estimated annual premium would have been $70,577, which is equal to a daily prorated amount of $193.36.[48] At that daily rate, Employer would have paid a premium in the amount of $109,055.04 for the 564 calendar days it was uninsured after November 7, 2005.[49]

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[44] R. 3055-67.

[45] R. 3081-88.

[46] R. 3093-97, 3122.1.

[47] R. 3098-99.

[48] *See Titan II*, Bd. Dec. No. 11-0095 at 9; R. 3193, 3949.

[49] *See Titan II*, Bd. Dec. No. 11-0095 at 9. Elsewhere, the Division indicated the number of calendar days Employer was uninsured was 563. *See* n.41, *supra*. We do not view the discrepancy as significant.

In calculating the civil penalty it would impose under AS 23.30.080(f), as guides, the board used the aggravating factors in 8 AAC 45.176,[50] a board regulation that went

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[50] Relevant portions of the regulation read as follows:

> **8 AAC 45.176. Failure to provide security: assessment of civil penalties.** (a) If the board finds an employer to have failed to provide security as required by AS 23.30.075, the employer is subject to a civil penalty under AS 23.30.080(f), determined as follows:
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> . . . .
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> (5) if an employer is found to have no fewer than seven and no more than 10 aggravating factors, the employer will be assessed a civil penalty of no less than $500 and no more than $999 per uninsured employee workday; however, the civil penalty may not be less than four times the premium the employer would have paid had the employer complied with AS 23.30.075[.]
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> . . . .
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> (d) For the purposes of this section, "aggravating factors" include
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> (1) failure to obtain workers' compensation insurance within 10 days after the division's notification of a lack of workers' compensation insurance;
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> (2) failure to maintain workers' compensation insurance after previous notification by the division of a lack of coverage;
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> (3) a violation of AS 23.30.075 that exceeds 180 calendar days;
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> (4) previous violations of AS 23.30.075;
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> . . . .
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> (7) failure to comply with the division's initial discovery demand within 30 days after the demand;
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> . . . .
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> (10) a history of injuries or deaths sustained by one or more employees while employer was in violation of AS 23.30.075;
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> (11) a history of injuries or deaths while the employer was insured under AS 23.30.075;
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> . . . .
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> (13) cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures;
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> (14) lapses in business practice that would be used by a reasonably diligent business person, including
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> (A) ignoring certified mail;
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> (B) failure to properly supervise employees; and

(footnote continued)

into effect on February 28, 2010, subsequent to the uninsured periods at issue here. It found that Titan, Titan Topsoil, CCO, and Christianson, without distinguishing between them, violated nine of the aggravating factors in 8 AAC 45.176(d). The board concluded that they would be subject to a penalty of $6,392,601 ($999 per uninsured employee workday).[51]

The board found Christianson was not a credible witness.[52]

For convenience, before proceeding with the discussion sections of this decision, we summarize chronologically the parties' respective positions on the evidence relating to workers' compensation liability coverage.[53]

(C) failure to gain a familiarity with laws affecting the use of employee labor[.]

[51] *See* n.6, *supra*, quoting AS 23.30.080(f).

[52] *See Titan II*, Bd. Dec. No. 11-0095 at 19.

[53] Periods during which the parties agree whether there was or was not coverage are indicated in **bold**; the period during which they disagree whether there was or was not coverage is indicated in *italics*.

- **03/05/2006 – 07/30/2006 (148 days) Titan and Titan Topsoil uninsured;**
- **07/31/2006 – 09/10/2006 (42 days) Titan insured through NMS;**
- **07/31/2006 – 09/10/2006 (42 days) Titan Topsoil uninsured;**
- **09/11/2006 – 09/24/2006 (14 days) Titan and Titan Topsoil uninsured;**
- *09/25/2006 – 09/25/2007 (366 days) Titan, Titan Topsoil, and CCO insured through CCO's coverage according to Christianson; uninsured according to the Division;*
- **9/26/2007 – 10/17/2007 (22 days) Titan, Titan Topsoil, and CCO uninsured;**
- **10/18/2007 – 01/02/2008 (77 days) Titan and Titan Topsoil insured by ANIC;**
- **10/18/2007 – 01/02/2008 (77 days) CCO uninsured;**
- **01/03/2008 – 01/15/2008 (13 days) Titan, Titan Topsoil, and CCO uninsured.**

3. Standard of review.

"The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission."[54] The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[55] 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.[56] We exercise our independent judgment when reviewing questions of law and procedure.[57] The board's exercise of its discretion is reviewed for abuse; an abuse of discretion occurs if we are left with a "definite and firm conviction" that the decision reviewed was a mistake.[58]

4. Discussion.

a. The board's finding that Titan, Titan Topsoil, and CCO were "mere instrumentalities" of Christianson is supported by substantial evidence, warranting its decision to pierce the corporate veil.

Under Alaska law, if a corporation is a "mere instrument" of a sole shareholder, it is permissible to "pierce the corporate veil" and hold the shareholder personally liable for the corporation's financial obligations.[59] The board made findings that Titan, Titan

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[54] AS 23.30.128(b).

[55] Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

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

[57] *See* AS 23.30.128(b).

[58] *See Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005).

[59] *See, e.g., L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1125 (Alaska 2009) (citing *Uchitel Co. v. The Telephone Co.*, 646 P.2d 229 (Alaska 1982)).

Topsoil, and CCO[60] were "mere instrumentalities" of Christianson.[61] Having done so, the board proceeded to "pierce the corporate veil" to hold Christianson personally liable for the civil penalty it imposed.[62]

Piercing the corporate veil is a common law doctrine.[63] If certain factors are present, the board has the authority to apply the doctrine and impose personal liability on the shareholder.[64] The factors are whether:

> (a) the shareholder sought to be charged owns all or most of the stock of the corporation; (b) the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation; (c) the corporation has grossly inadequate capital; (d) the shareholder uses the property of the corporation as his own; (e) the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest; and (f) the formal legal requirements of the corporation are observed.[65]

In one case, the Alaska Supreme Court (supreme court) observed: "'It is not necessary for all six factors to be satisfied before instrumentality can be found,' but the factors

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[60] The parties conceded that it is appropriate to apply the doctrine of piercing the corporate veil to limited liability companies like Titan and CCO, which do not have shareholders, *per se*.

[61] *See Titan II*, Bd. Dec. No. 11-0095 at 20.

[62] Appellants argue that a previous commission decision, *Anchorage Midtown Motel, Inc. v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 159 (Feb. 14, 2012), holds that an individual cannot be liable for a civil penalty under AS 23.30.080(f) imposed on a corporation. Appellants' Br. 14-16. The decision in *Anchorage Midtown Motel* is inapposite. Whether the doctrine of piercing the corporate veil could be used to impose personal liability for a civil penalty on a corporation was not at issue in that appeal.

[63] *See, e.g., Roberts v. State, Dept. of Revenue*, 162 P.3d 1214, 1221 (Alaska 2007).

[64] "[T]he Board, may be required to apply equitable or common law principles in a specific case[.]" *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 36 (Alaska 2007) (footnote omitted).

[65] *L.D.G.,* 211 P.3d at 1126.

help the fact-finder to decide whether the evidence favors piercing the veil."[66] Moreover, another supreme court case recognized the possibility that instrumentality could be found on the basis of only two out of the six factors being proven.[67]

Here, the board considered whether any of the foregoing six factors applied in deciding whether to pierce the corporate veil. Immediately thereafter, the discussion focused on Christianson's conduct that, in the board's view, demonstrated his manipulation of the three businesses, Titan, Titan Topsoil, and CCO, to suit whatever his particular objective was.[68] Moreover, the record otherwise reflects 1) that Christianson was the sole shareholder or member of Titan, Titan Topsoil, and after Oyster's sale of the company to Christianson, CCO; 2) that he caused Titan and Titan Topsoil's incorporation; 3) that to some extent, he used the corporations' property as his own; and 4) that there was no one else involved with the corporations who could act independently of Christianson.[69]

We agree with the board that there is substantial evidence in the record as a whole to support these findings. Furthermore, in that four of the factors for piercing the corporate veil are present here, applying our independent judgment, the board's application of the doctrine to hold Christianson personally liable for the civil penalty was warranted.

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[66] *L.D.G.,* 211 P.3d at 1126 (citing and quoting *Nerox Power Systems, Inc. v. M-B Contracting Co.*, 54 P.3d 791, 802 (Alaska 2002)).

[67] *See Murat v. F/V Shelikof Strait*, 793 P.2d 69, 76-77 (Alaska 1990).

[68] *See Titan II*, Bd. Dec. No. 11-0095 at 19-20.

[69] *See id*.

b. The board's finding that Titan and Titan Topsoil were uninsured from September 25, 2006, through September 25, 2007, when they were claiming coverage through CCO's policy, was not supported by substantial evidence.

Based on an email from an individual working for CCO's workers' compensation carrier,[70] the board concluded that Titan and Titan Topsoil were not covered by the policy issued to CCO and in effect beginning September 25, 2006. As a result, the board included the 366 days that the policy covered in its calculation of the total number of days Titan and Titan Topsoil were uninsured. Appellants take the position that the board erred in making this finding.

The gist of the email was 1) that the insurer was not notified of Oyster's sale of CCO to Christianson on March 30, 2007, and 2) that Oyster would have needed to cancel the policy so that Christianson could apply for coverage. The board inferred that the change in ownership voided the policy as of that date,[71] even though the email does not state that it was. In any event, the board treated the policy as void for the entire life of the policy, as that is the only means by which it could reach a total number of uninsured days of 563 or 564.[72]

Appellants argued that the email is hearsay and inadmissible.[73] We agree. It was wrongly admitted by the board and is the only support for its finding that the CCO policy was voided. Because the email was inadmissible, the board's finding that the CCO policy was voided is not supported by substantial evidence. Consequently, the 366 days the policy was in effect should not have been part of the board's calculation of the number of days Titan, Titan Topsoil, and CCO were uninsured.

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[70] Exc. 005. The email is dated June 27, 2008, nine months after the policy's expiration date.

[71] *See Titan II*, Bd. Dec. No. 11-0095 at 5.

[72] *See* n.41 and n.49, *supra*.

[73] "Hearsay is a statement, other than one made by the declarant while testifying at the . . . hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is not admissible[.]" ER 802.

Ordinarily, the commission would remand this issue to the board, so that other evidence might be offered at another hearing to prove the CCO policy was canceled, and thereby voided. However, we decline to do so here, on the basis of another argument. Citing AS 21.36.220,[74] Appellants also maintained that the insurer could not unilaterally cancel CCO's policy without first notifying the insured, which it did not do. Our reading of this statute leads us to the same conclusion. As a matter of law, the policy could not be considered void by the board because the insurer did not take the steps necessary to cancel it.

c. Should Titan, Titan Topsoil, and CCO, be distinguished and treated separately for the purposes of imposing the civil penalty?

In *Titan II*, the board cited supreme court authority that, analogous to piercing the corporate veil to make an individual personally liable for a corporation's obligations, one corporation can be liable for a brother/sister corporation's obligations.[75] The criteria for doing so are derived from the same criteria that are utilized to determine the personal liability of an individual.[76] It appears to us that it was on the basis of this authority that the board did not distinguish between Titan, Titan Topsoil, and CCO when it calculated the total number of uninsured employee workdays, and held each entity liable for the entire civil penalty.[77]

We note that, pursuant to the holding in *Husky*, the board could, and did, make each entity liable for the entire civil penalty, in effect, making each liable for the other two corporations' obligation. Nevertheless, in its decision, even though the board discussed its factual findings which caused it to hold Christianson personally liable for

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[74] AS 21.36.220(b) provides that an insurer may not cancel a business or commercial policy without first providing written notice to the insured.

[75] *See Titan II*, Bd. Dec. No. 11-0095 at 19 (citing *Husky Oil N.P.R. Operations, Inc. v Sea Airmotive, Inc.*, 724 P.2d 531 (Alaska 1986)).

[76] *See Husky*, 724 P.2d at 534 (citing *Jackson v. General Electric Co.*, 514 P.2d 1170 (Alaska 1973)).

[77] *See Titan II*, Bd. Dec. No. 11-0095 at 22-24.

the civil penalty, the decision lacks a similar discussion of the factual findings on which the board based its implicit conclusion that each entity was liable for the entire civil penalty. As a consequence, we are unable to identify the factual underpinning for the board's holding in this regard, and unable to exercise our independent judgment whether the quantum of evidence was substantial evidence enough to support this legal conclusion. Consequently, we believe a remand is necessary on this issue.

d. Was it appropriate for the board to use 8 AAC 45.176 in calculating the amount of the civil penalty?

The supreme court has held that "statutory or regulatory requirements must be strictly construed in favor of the accused before an alleged breach may give rise to a civil penalty."[78] Accordingly, we strictly construe 8 AAC 45.176. First, the regulation was not in effect during the timeframes Titan, Titan Topsoil, and CCO were found to be uninsured. Thus, there is no regulation for us to construe, strictly or otherwise. 8 AAC 45.176 cannot be applied in this case. Nevertheless, as it had in the past, the board utilized the same aggravating factors as guides for calculating the amount of the civil penalty it imposed, because those aggravating factors had been developed and recognized in earlier board decisions.[79] It was appropriate for the board to do so.

The commission's concern though, is that the board might have applied the regulation's provision *requiring* "a civil penalty of no less than $500 and no more than $999 per uninsured employee workday[,]" because Titan, Titan Topsoil, and CCO were "found to have no fewer than seven and no more than 10 aggravating factors[.]"[80] The board found nine aggravating factors, although it did not specify whether all nine aggravating factors applied to each of the three entities. Despite its disclaimer that it was not applying the regulation retroactively,[81] the commission concludes that the

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[78] *Alaska Public Offices Comm'n v. Stevens*, 205 P.3d 321, 326 (Alaska 2009) (footnote omitted).

[79] *See Titan II*, Bd. Dec. No. 11-0095 at 12-17.

[80] 8 AAC 45.176(a)(5).

[81] *See Titan II*, Bd. Dec. No. 11-0095 at 23.

board might still have been unduly influenced by paragraph .176(a)(5) of the regulation, calling for a civil penalty of up to $999 per uninsured employee workday where, as here, nine aggravating factors were found. It imposed the maximum penalty, $999 per uninsured employee workday.[82] A remand in this respect in also necessary.

e. 8 AAC 45.176 notwithstanding, the board should determine whether the disputed aggravating factors are applicable or whether a mitigating factor is applicable.

On one hand, the commission has concluded that 8 AAC 45.176 should not be strictly applied in the circumstances of this case, in the process of determining an appropriate amount for the civil penalty. On the other, in pre-regulation decisions,[83] the board has routinely applied the same aggravating factors when determining the amounts of civil penalties. Moreover, Appellants do not contest the propriety of the board's application of those aggravating factors here, for those aggravating factors that are supported by substantial evidence.[84]

The Division conceded that two of the aggravating factors that the board applied were not supported by the evidence. They are: 1) the failure to obtain workers' compensation insurance within 10 days of the Division providing notice of that failure; and 2) the failure to comply with the Division's initial discovery demand within 30 days.[85] Similarly, at least initially, Appellants conceded that five of the aggravating factors were supported by substantial evidence: 1) the failure to maintain workers' compensation insurance after previous notification by the Division of a lack of coverage; 2) previous violations of AS 23.30.075; 3) a history of injuries while uninsured; 4) a

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[82] We acknowledge that the statute, AS 23.30.080(f), which was in effect, allowed for a civil penalty of up to $1,000 per uninsured employee workday. However, the board appeared to be following the dictates of the regulation.

[83] *See Titan II*, Bd. Dec. No. 11-0095 at 13-14.

[84] Appellants' Br. 22.

[85] Appellee's Br. 25-26.

history of injuries while insured;[86] and 5) a violation of AS 23.30.075 that exceeds 180 calendar days.[87] Appellants disputed whether there was substantial evidence supporting application of two other aggravating factors: 1) cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures; and 2) lapses in business practice that would be used by a reasonably diligent business person.[88] Also, Appellants maintained that, in accordance with a commission decision,[89] exceptional diligence in procuring coverage following a lapse is a mitigating factor and should be considered by the board.[90] However, in their reply brief, after initially conceding it was an aggravating factor, Appellants disputed whether there was substantial evidence they were uninsured for 180 days.[91]

On remand, the board should hear evidence on any disputed aggravating factors and the mitigating factor. Any factors that are supported by substantial evidence should be considered by the board in calculating the civil penalty it imposes.

g. Did the board abuse its discretion in setting the amount of the civil penalty?

The board cited numerous decisions predating 8 AAC 45.176 in which it imposed civil penalties on employers for failing to insure for workers' compensation liability.[92] In all those cases, with the exception of one employer, the highest penalty "rate" per uninsured employee workday that the board imposed against any employer was

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[86] Appellants' Br. 22-27. This initial concession can be inferred from the absence of any argument in the Appellants' opening brief against the applicability of these aggravating factors.

[87] Appellants' Br. 6.

[88] Appellants' Br. 26-27.

[89] *See Alaska R & C Communications, LLC v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008).

[90] Appellants' Br. 28-33.

[91] Appellants' Reply Br. 24-25.

[92] *See Titan II*, Bd. Dec. No. 11-0095 at 13-14.

$75.00. The exception was Wrangell Seafoods, Inc. (Wrangell). In one decision pertaining to Wrangell, the penalty rate was $500;[93] in another, it was $1,000.[94]

In *Wrangell II*, the board characterized Wrangell as "an egregious offender[,]"[95] pointing out 1) that it had been before the board a number of times for failure to insure, and 2) that it had violated a stop-work order issued by the board on one occasion for failure to insure.[96] The board noted that it had imposed a reduced penalty rate of $500, had ordered Wrangell to pay a civil penalty in the amount of $102,000, and had later allowed Wrangell to pay the penalty in installments over three years.[97] The installments were not timely paid.[98] The board ultimately issued another stop-work order, imposed a civil penalty rate of $1,000, and ordered Wrangell to pay a civil penalty in the amount of $15,000.[99]

Here, the board imposed a penalty in the amount of $6,392,601, "which is the maximum penalty for an uninsured employer with nine aggravating factors."[100] The primary considerations leading to the board's calculation of a penalty in that amount were 1) that there had been earlier periods when Titan was uninsured, 2) that Titan and Titan Topsoil were uninsured for lengthy periods of time, and 3) that the Appellants

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93 *In the Matter of the Accusation of the Employer's Failure to Insure Workers' Compensation Liability Against Wrangell Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 06-0055 (March 6, 2006)(*Wrangell I*).

94 *In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability and Assessment of a Civil Penalty Against Wrangell Seafoods, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0093 (April 20, 2007)(*Wrangell II*).

95 *Wrangell II*, Bd. Dec. No. 07-0093 at 3.

96 *See id*.

97 *See Wrangell II*, Bd. Dec. No. 07-0093 at 4-5 (citing the decision in *Wrangell I*).

98 *See Wrangell II*, Bd. Dec. No. 07-0093 at 6-7.

99 *See id*. at 11, 13.

100 *Titan II*, Bd. Dec. No. 11-0095 at 23.

had "shown a blatant disregard for the law[.]"[101] Like Wrangell's, the conduct here was egregious. The total period of time that Titan and Titan Topsoil were uninsured was inordinately long. However, unlike Wrangell, there was no violation of any stop-work order and none of the businesses, Titan, Titan Topsoil, or CCO, had previously been *before the board* for failure to insure. Moreover, the Division has already conceded that two of the nine aggravating factors are not present, others might be eliminated on further hearing, and the mitigating factor might be found applicable.

The commission has previously stated:

> 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. 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.[102]

The board necessarily had to have found the Appellants to be worst offenders because it imposed the maximum penalty in terms of both the rate and the total amount. Nevertheless, the commission is left with a definite and firm conviction that the board abused its discretion.[103] The civil penalty, $6,392,601, is a shocking amount, appears to be purely punitive, and does not serve the purposes of AS 23.30.080(f). We

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101 *Titan II*, Bd. Dec. No. 11-0095 at 23.

102 *Alaska R & C Communications*, App. Comm'n Dec. No. 088 at 22.

103 *See* n.58, *supra*.

think that, on remand, the board might view the matter differently, once it has held another hearing and had the opportunity to reflect on its judgment.

h. Scope of remand?

On remand, in the interest of judicial economy, the board may again consolidate for hearing the petitions against Titan, Titan Topsoil, CCO, and Christianson. However, we believe it is imperative for the board to make separate findings of fact as to each entity. Specifically, the number of uninsured employee workdays should be calculated separately for each entity and the aggravating factors applicable to each entity should be separately determined. This would enable the board to calculate a separate civil penalty for each entity. Once this exercise is completed, the board should make factual findings that would support making each entity jointly and severally liable for any part of the civil penalty separately imposed on the other two entities.[104] Similarly, the board should make factual findings that would support making Christianson personally, jointly, and severally liable for any part of the civil penalty imposed on any of the three entities.[105]

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[104] This requirement relates to the discussion in Part 4(c), *supra*.

[105] This requirement relates to the discussion in Part 4(a), *supra*.

5. Conclusion.

Based on the foregoing, the commission REVERSES the board's decision, VACATES the board's order imposing a civil penalty in the amount of $6,392,601, and REMANDS the matter to the board, in accordance with the foregoing instructions. The commission does not retain jurisdiction.

Date: *8 January 2013* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

This is a non-final decision as to the appeals commission's remand of the matter to the board. The non-final decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below. To see the date of distribution look at the box below. The appeals commission is not a party.

Petition for Review

A party may petition the Alaska Supreme Court for review of the commission's non-final decision. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.

If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612
More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that, with the exception of a correction of a typographical error, this is a full and correct copy of the Final Decision No. 175 issued in the matter of *Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson v. State of Alaska, Division of Workers' Compensation,* AWCAC Appeal No. 11-011, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on January 8, 2013.

Date: *January 9, 2013*

K. Morrison

K. Morrison, Deputy Commission Clerk