Alaska Workers' Compensation Appeals Commission

Mario Velderrain,
Appellant,

vs.

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

Final Decision
Decision No. 083 July 9, 2008

AWCAC Appeal No. 07-032
AWCB Decision No. 07-0196
AWCB Case No. 700001708

Appeal from Alaska Workers' Compensation Board Decision No. 07-0196, issued on July 11, 2007, by northern panel members Jeffrey P. Pruss, Member for Labor, and William Walters, Chair.

Appearances: Zane D. Wilson, Cook, Schuhmann & Groseclose for appellant Mario Velderrain. Talis J. Colberg, Attorney General, and Rachel Witty, Assistant Attorney General, for State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appellant's motion to accept a late-filed appeal heard October 25, 2007. Memorandum Decision and Order on motion to accept a late-filed appeal, Dec. No. 065, issued November 29, 2007. Oral Argument on appeal presented April 10, 2008.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Philip Ulmer, Appeals Commissioner, concurring.

Mario Velderrain appeals the board's decision assessing a $255,000 civil penalty for violation of a stop order pursuant to AS 23.30.080(d). Velderrain asserts that the penalty is so excessive as to be unconstitutional. Velderrain also asserts that the board's finding that he was not in violation of the stop order until August 13, 2006, necessarily precludes a finding that he violated the July 19, 2006, order. The State contests these assertions, arguing that the penalty set by the legislature is not

excessive and was correctly assessed. The State also argues that the stop order was effective when issued verbally, and continued to be valid.

This appeal requires the commission to examine whether the board had substantial evidence on which to base its assessment of the mandatory civil penalty of $1000 per day for violation of a valid stop order. The commission is also asked to determine whether the penalty assessed is unconstitutionally excessive.

The commission determines that although the board had substantial evidence to find Velderrain used employee labor in violation of the stop order, the board did not have substantial evidence in the record as a whole that Velderrain used employee labor *every day* between August 13, 2006, and April 11, 2007. The commission also finds the board lacked sufficient evidence in the record to support a finding that Velderrain reasonably believed that he was insured between June 22, 2006, and August 13, 2006. The commission remands the case to the board for further findings of fact and recalculation of the penalty that is owed. The commission may not decide the constitutional question raised. The power to declare a statute unconstitutional is reserved to the courts. However, the commission notes that a penalty of $1000 per day for violation of a state order not to use employee labor is not outside the range of other fines levied for violation of protective administrative stop orders issued by the state, as in occupational safety and health proceedings involving unsafe work conditions.

1. Factual background and board proceedings.

Mario Velderrain operates a business called "Hot Tamale" in Fairbanks. On July 19, 2006, the board issued a decision finding Velderrain had failed to secure insurance for his workers' compensation liability to his employees from January 8, 2006, through the date of hearing on June 22, 2006.[1] The board wrote that "at hearing, we issued an oral stop order. By way of this decision and order, we memorialize the stop

[1] *Mario Velderrain,* Alaska Workers' Comp. Bd. Dec. No. 06-0197, 4-5 (July 19, 2006).

order."[2] In the order, the board stated, "We hereby memorialize a Stop Order under AS 23.30.080(d), prohibiting the employer from using employee labor within the territorial jurisdiction of the State of Alaska until he comes into compliance with AS 23.30.075 and AS 23.30.085."[3]

On December 12, 2006, State Division of Workers' Compensation Investigator Sandra Stuller filed a Petition for assessment of civil penalties under AS 23.30.080(d)-(f). The petition was heard June 21, 2007.

Investigator Stuller testified that Velderrain had not obtained insurance that provided workers' compensation coverage until April 25, 2007.[4] She testified that the Department of Labor and Workforce Development, Employment Security Division records showed Velderrain had employed 10 people in the first quarter of 2007 and that, based on discovery from Velderrain and his admissions, he employed 17 different people from January 8, 2006, through December 12, 2006.[5] The board found this information yielded "a total of 974 uninsured employee work days for that period."[6]

The board found that Velderrain was a credible witness.[7] The board found, based on Velderrain's testimony, that he believed his finance company had been paying the insurance for a period of time.[8] However, the board found, the "Account Statement gave the employee [sic] clear notice that his employees were not covered by workers' compensation insurance and that he was in violation of AS 23.30.075 and AS 23.30.085, and that he was in violation of the Stop Order."[9] The board concluded that Velderrain was "in violation of the July 19, 2006, Stop Order for the period from

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2 *Id.* at 5.

3 *Id.* at 7.

4 Tr. 8:3-7 (June 21, 2007).

5 Tr. 8:19-9:4.

6 *In re Mario Velderrain*, Alaska Workers' Comp. Bd. Dec. No. 07-0196, 5 (July 11, 2007).

7 *Id.* at 9.

8 *Id.*

9 *Id.*

the August 13, 2006 Account Statement until the employer secured an insurance policy, effective April 11, 2007; a total of 255 days."[10] The board concluded that "we must assess a penalty under AS 23.30.080(d), in the amount of $255,000.00."[11]

2. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the findings.[12] The commission does not consider evidence that was not in the board record when the board's decision was made.[13] A board determination of the credibility of testimony of a witness who appears before the board is binding upon the commission.[14]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[15] 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.[16] 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' compensation[17] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[18]

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10 *Id.*

11 *Id.*

12 AS 23.30.128(b).

13 AS 23.30.128(a).

14 AS 23.30.128(b).

15 AS 23.30.128(b).

16 *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

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

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

3. Discussion.

a. The board's finding that Velderrain violated the stop order for 255 days is not supported by substantial evidence in light of the whole record.

The board found that Velderrain was "in violation of the July 19, 2006 Stop Order for the period from the August 13, 2006, Account Statement until the employer secured an insurance policy, effective April 11, 2007; a total of 255 days." As support for this finding the board cited the confusing nature of his correspondence with the insurer and Velderrain's credible testimony.

Velderrain testified:

> [T]he first time [I] was here, I immediately got insurance because we cannot proceed or – the problem started when we had the two restaurants going. It lasted for two months and then we stopped the restaurant – the restaurant. So then for some reason we stopped the insurance. It was an outrageous insurance. And I could never get it down to where I'm up to this point right now. I presented a letter showing that I had insurance and my insurance expired in October of 2006. The insurance company refund me money for the policy that I had. They wouldn't refund me money if I wasn't insured.[19] . . . We've processed the papers to the insurance company and the insurance company refund us the money.[20]
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> [T]wo weeks later, they sent me a letter saying that money was sent by mistake. Then . . . they wouldn't restore the insurance, that if I pay it, they would restore it. So I – I tried to emphasize that please insure me if I send payments; we will do it immediately. We send the first check and, I don't know, but I got the feeling that they weren't going to insure me or they wanted the money back.[21]
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> So I contacted a lawyer for the insurance company and they told me, well we didn't insure you because you weren't complying. But you promised me that I will get insurance immediately as

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19 Tr. 14:18-15:3 (June 21, 2007).

20 Tr. 15:7-9.

21 Tr. 15:10-17.

> soon as I send the payment. So I went to Rural Alaska and I give them $5000.[22]
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> But I do supply the letter that when we're claiming that I wasn't insured, my policy was still visioned. [*sic*] I do have and insurance for all the 2006.[23]

Velderrain testified that he requested the audit of his premium in June of 2006, but he did not request an audit before then.[24] Velderrain testified that, notwithstanding the board's July 19, 2006, decision and order that he was not covered, that "I was covered all the way to October."[25] "[W]hy would they [send] me money if I'm cancelled?" he asked.[26] In support of this belief, he referred to a letter "they sent me with the policy when it was expired."[27] He did not receive a letter that said his policy was reinstated; the letter he was referring to proved to be the State's exhibit 10, a "bill to pay the monthly payment of my insurance and that was received in June 28th of '06."[28] Velderrain testified that he made payments to the premium funding corporation, that had paid for his workers' compensation insurance and "that made me think that it was still on."[29]

The letter Velderrain referred to is a billing from the premium funding corporation.[30] It states that his insurance has been cancelled. Since it contains a late payment fee of more than $300, an unpaid balance of more than $10,000, and a new, additional late payment fee of more than $100, it would not be the first such notice sent to Velderrain. Velderrain did not testify *when* he stopped making payments to the

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22 Tr. 16:20-24.

23 Tr. 16:3-5.

24 Tr. 28:24-29:9.

25 Tr. 26:22-23.

26 Tr. 28:18-19.

27 Tr. 26:22-27:2.

28 Tr. 30:23-31:07.

29 Tr. 31:25-32:1.

30 Tr. 31:4-11., R. 0325.

funding corporation. He did not testify that he *had* made any partial monthly payments after he "stopped the insurance."

Velderrain testified that "so then for some reason we stopped the insurance."[31] His testimony established that after he learned the insurance company would not restore his insurance, he asked the insurance company, "I tried to emphasize that please insure me if I send payments; we will do it immediately."[32] But he acknowledged that he "got the feeling that they weren't going to insure me or they wanted the money back."[33] Thus, Velderrain's testimony established that he stopped the insurance, but he hoped by making payments or coming to an arrangement, he could get the insurance restored. The refund payment from the insurance company was dated July 20, 2006, well after the June 22, 2006, hearing, in which he was informed he was uninsured and that he was barred from the use of employee labor.

The board found that Velderrain may have believed the premium funding corporation was paying the insurance. However, the board found that the Account Statement (the letter demanding a payment by August 13, 2006) gave clear notice that he was uninsured. Velderrain testified he received the letter containing the Account Statement June 28, 2006. Thus, when Velderrain received the board's decision containing the stop order sometime after July 19, 2006, Velderrain had already received "clear notice" his policy had been cancelled.[34]

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[31] Tr. 14:22.

[32] Tr. 15:13-14.

[33] Tr. 15:16-17.

[34] Velderrain's testimony could support an inference that he thought that his insurance had been, or could be, restored between the time he received the refund check and the time he talked with the insurance company lawyer. However, the board made no finding that Velderrain held that belief or that such a belief was reasonable. Velderrain knew his insurance policy, if it was in effect, ended in September 2006. A belief that his former policy had been restored, or a belief that he could persuade the insurer to reinstate the policy, could not support an inference that Velderrain thought he had insurance after the policy expiration date. He presented no evidence that he sought to secure insurance after the policy would have expired in September 2006. He did not testify that he thought additional time would be added to the policy. He did not

Notwithstanding this "clear notice," the board assessed a fine based on only 255 days up to April 11, 2007, which would mean that the period of violation of the stop order began Saturday, July 29, 2006, or Sunday, July 30, 2006. On the other hand, 255 days from August 13, 2006 is April 25, 2007; 255 days from June 28, 2006, is Saturday, March 10, 2007. The decision does not explain why the board picked the dates it chose. Nothing in the board record explains how the board reached a decision that Velderrain's fine should be based on 255 days of violation of the stop order. If the Account Notice provided "clear notice," then the *first* such notice would constitute the earliest date that began the period of non-compliance; Velderrain would have simply *remained* uninsured, rather than lapsing in and out of a belief he was uninsured.

Velderrain's argument that the stop order was not effective because when it was issued he believed he was in compliance due to the premium refund is not persuasive. First, Velderrain testified, "The insurance company refund me money for the policy that I had. They wouldn't refund me money if I wasn't insured. . . . We've processed the papers to the insurance company and the insurance company refund us the money." Whether this belief that his insurance had been reinstated from the day he stopped payments was rational in the face of clear notice his policy was cancelled was not determined by the board and the board made no findings that Velderrain could reasonably believe his policy was reinstated based on the refund. Second, Velderrain admitted that he soon understood that the refund was paid to him by mistake. He could not have believed that the policy had been retroactively reinstated after that. Third, Velderrain testified that the insurance company "wouldn't restore the insurance, that if I pay it, they would restore it. So I – I tried to emphasize that please insure me if I send payments; we will do it immediately. We send the first check and, I don't know, *but I got the feeling that they weren't going to insure me or they wanted the money back*." Velderrain's testimony was that he *hoped* making payments on the

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testify to when his efforts to obtain new insurance through Alaska Rural occurred, although there is documentary evidence that he paid a cash premium on April 10, 2007. R. 0330. The documentary evidence is that the insurance binder was effective April 26, 2007. R. 0313.

mistaken refund would cause the insurance company to reinstate his policy, but not that he reasonably believed his insurance had been restored. It does not support an inference that when he used employee labor after he stopped his insurance, he reasonably believed that he had insurance in place.

Although the board cited confusing correspondence with the insurer, it made no findings as to *when* Velderrain's belief that his insurance premiums were paid by the funding corporation ended. Velderrain's testimony is not clear. He does not say when he thought he was still insured. Investigator Stuller testified she saw Velderrain and told him he needed to get insurance, but she did not testify when, or how often, this occurred.[35] She testified Velderrain told her he was working on getting insurance.[36] The unanswered question is, "Was there a period of time between July 19, 2006, and April 26, 2007, that a person in Velderrain's position could have had a reasonable belief that he had workers' compensation liability insurance in place?" There is no evidence in the record to support a finding responding to that question. Velderrain's apparent belief that he could persuade the insurer to reinstate his insurance retroactively is not relevant to whether, on each day he used employee labor, he knew he was, or was not, insured that day.

The board's choice to base the fine on 255 days is not fully explained by the documentary evidence. August 13, 2006, was a Sunday. Velderrain could not have received the Account Statement on that day. The evidence of the handwritten payroll sheets from 2006 is that Velderrain's business generally operated every day of the week and that he used employee labor every day. However, the low wages reported for the first quarter in 2007 suggest that there may have been a closure of his business during that quarter. No evidence was presented establishing the number of days in 2007 that Velderrain used employee labor.

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[35] Tr. 11:8-10.

[36] Tr. 11:11-12.

The board had sufficient evidence to support a finding that Velderrain knowingly used employee labor when he lacked insurance in violation of the stop order.[37] The board did not have evidence to support a finding that a reasonable person in Velderrain's position would have believed that he had insurance immediately after the hearing on June 22, 2006, in which the board informed him of the stop order, or July 19, 2006, when the stop order was issued.[38] The board made no findings, and had insufficient evidence to support a finding, that a reasonable person in Velderrain's position would have believed that he had obtained insurance for any period between June 22, 2006, and the date he was served with the State's petition in December 2006. The board lacked sufficient evidence to determine how many days Velderrain used employee labor in 2007. The commission therefore remands the case to the board to take further evidence, and to recalculate the penalty owed.

b. The commission may not decide if the civil penalty in AS 23.30.080(d) is unconstitutionally excessive; however, the commission notes that it is within the range of other fines for violation of state agency stop orders.

The commission, as a quasi-judicial agency within the executive branch of government, cannot decide whether a statute or regulation is constitutional; that is exclusively within the sphere of the court's authority.[39] Therefore, the commission does not address whether the $1000 per day fine established in AS 23.30.080(d) is a violation of Article 1, sec. 12 of the Alaska constitution, banning "excessive fines" imposed on an employer.

The commission notes, however, that the penalty is imposed for disobeying a lawful order of the state not to use employee labor anywhere in the State of Alaska. AS 23.30.080(d) provides that "the board may issue a stop order prohibiting the use of

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[37] *See, e.g.*, R. 0171-72, showing employee payroll for the days immediately after the June 22, 2006, hearing.

[38] *See, e.g.*, R. 0183-93, employee pay records for the period from July 17, 2006 through July 30, 2006.

[39] *AKPIRG v. State,* 167 P.3d 27, 36 (Alaska 2007).

employee labor by the employer until the employer insures or provides security as required by AS 23.30.075." Velderrain does not challenge the board's right to impose a stop order against him or the validity of the order.

Velderrain's testimony does not explain why he used employee labor from June 22, 2006, (or July 19, 2006), until he obtained an insurance binder. The order was to stop using employee labor. No part of the order authorized the use of uninsured employee labor *if* the employer later obtained insurance to cover the employees retroactively. Velderrain violated the board's stop order every day that he used employee labor in his business from the effective date of the stop order until he obtained insurance.[40]

The Alaska State Legislature permits the board to issue a stop order only upon finding that an employer is using employee labor and is, at the time the order issues, not insured or failing to provide security for its workers' compensation liability. AS 23.30.080(d) provides in part that, "If an employer fails to comply with a stop order issued under this section, the board shall assess a civil penalty of $1000 per day. The employer may not obtain a public contract with the state, or a political subdivision of the state, for three years following the violation of the stop order." This is clear and specific language. The penalty is not subject to the board's discretion. It is a conditional penalty, controlled by the employer subject to the stop order. If the employer does not violate the stop order, the employer does not accumulate a penalty.

The Legislature has established other civil fines or penalties for violation of state orders. In many cases, the fine or penalty may be multiplied by each day the person

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[40] Although the board's decision states the stop order was issued verbally in the June 22, 2007, hearing, no transcript of the hearing was provided as part of the record to demonstrate that the order was affirmatively endorsed by a majority of the panel. The board must "prepare and serve" its orders, 8 AAC 45.130; AS 23.30.110(e) provides that the board's orders "shall be filed in the office of the board; AS 23.30.125(a) provides that an order of the board "becomes effective when filed with the office of the board;" and AS 44.62.510(a) requires decisions of administrative agencies to be "written" and served by certified mail. Therefore, although Velderrain was told June 22, 2006, not to use employee labor, the board's order was not effective until written, signed and filed July 19, 2006.

remains in violation of an order, statute, regulation, or permit. For example, a person who violates an order to stop selling food or produce is liable for a "civil fine established by . . . regulation plus the state's estimated costs of investigating and . . . enforcement actions for the violation, including attorney fees and an additional civil penalty of three times the value of the product."[41] Nursing homes are subject to civil fines up to $10,000 per day for each day the home is or was out of compliance with any of the federal or state statutes or regulations listed in AS 18.20.310.[42] A timber operator, owner, or forest landowner who violates a stop order issued under AS 41.17.138 is liable for a civil fine in an amount not to exceed $10,000 to be assessed by the Commissioner of the Department of Natural Resources.[43] Violation of the statute barring contact by an attorney for an air carrier with an injured passenger for 45 days following injury is punishable by a civil penalty up to $10,000 for each violation.[44] For violation of a cease and desist order by a money services licensee, the commissioner of the Department of Commerce, Communities, and Economic Development may assess a civil penalty up to $1,000 for each day the violation is outstanding.[45] The same commissioner may assess a fine of up to $1,000 per day for violation of a stop order under the Business Industrial and Development Corporation Act.[46] A home inspector or contractor who violates AS 08.18 is subject to a civil penalty up to $1000 per violation, for each day in violation.[47] The board of marine pilots may assess a civil penalty up to $10,000 for each entry into state waters by a foreign registered vessel without a licensed pilot in violation of AS 08.62.[48] An employer who willfully or repeatedly violates

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41 AS 03.58.060(b).

42 AS 18.20.340.

43 AS 41.17.131.

44 AS 02.40.030(d).

45 AS 06.55.605.

46 AS 10.13.830.

47 AS 08.18.131.

48 AS 08.62.040(f).

an occupational safety and health statute, may be assessed a fine of up to $70,000 for each violation, but shall be assessed a minimum of $5,000 per violation.[49] If the employer then fails to correct a violation within the period permitted for correction, a civil penalty of not more than $7,000 for each day during which the failure to correct the violation continues may be assessed. Each of these fines punish the violation of a state order or permit that was issued to protect a population that is in some way subject to exploitation or injury.

The civil penalty established by the Legislature for violation of board stop orders is within the range of other fines for violation of similar orders. In addition to the $7,000 per day per violation fine in AS 18.60, for example, a person who violates a cessation order issued by the Commissioner of Natural Resources under the Surface Mining Control and Reclamation Act shall be assessed a penalty of $750 per day, in addition to the penalties for the violation that resulted in the cessation order.[50] A person who violates an order issued by the oil and gas conservation commission is liable for a civil penalty of not more than $100,000 for the initial violation and not more than $10,000 for each day the violation continues.[51] A person violating an order of the Regulatory Commission of Alaska under AS 31.15 shall be assessed a civil penalty of not less than $1,000 nor more than $10,000 for each day a violation continues.[52] In all these instances, the person penalized has the power to avoid the civil penalty by obeying the state's order.

Appellant argues that the civil penalty under AS 23.30.080(d) should not exceed the fine that may be imposed for a class C felony under AS 23.30.255 (failure to pay compensation owed to an employee). The failure to pay compensation to an employee may rise to a class B felony if the amount owed is $25,000 or more,[53] an amount that is

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49 AS 18.60.095(a).

50 AS 27.21.250(a), (h).

51 AS 31.05.150(a).

52 AS 31.15.040.

53 AS 23.30.255(a).

easily reached if surgery is required for an injury. A class C felony is punishable by a fine up to $50,000 *and* imprisonment *and* probation *and* restitution. A class B felony is punishable by a fine up to $100,000, *and* imprisonment *and* probation *and* restitution. The fine is not the only punishment that the court may impose. In light of the additional burdens imposed by a criminal conviction, the discretion accorded the trial judge, and the employer's lack of control over the amount of the fine, the comparison to a criminal fine is not apt. The accumulation of the fine in this case was not the result of the exercise of the board's discretion, but of the violating employer's discretion and judgment. Velderrain always retained the power to stop the violation and thus avoid accumulating the penalty.[54]

Velderrain's argument that he believed he was in compliance "for almost a month following the issuance of the Stop Order"[55] is based on a board finding that lacked substantial evidence to support it. Velderrain testified that he received the Account Statement on June 28, 2006. August 13, 2006, was the date the Account Statement showed that a previously unpaid amount was due with an additional late payment fee. The Account Statement indicates that previous late payment fees had been added to the balance. There is no evidence in the record that Velderrain first received "clear notice" of lapse in coverage on Sunday, August 13, 2006.

Finally, Velderrain argues that there is no harm to the public as a result of his conduct.[56] An uninsured employer undercuts the costs borne by insured employers, who pass the cost of insurance on to their customers. The lawful business is thus less competitive, and the unlawful business profits at its expense. Operating a business using employee labor without workers' compensation insurance injures society in the same way that other forms of unfair competition do. The uninsured employer also puts pressure on his competitors to lower their personnel costs, including wages, or to avoid

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[54] This is not a case in which the employer was unaware that he was accumulating a civil penalty, as he had been informed of the amount of the penalty in the board's decision containing the stop order.

[55] Appellant's Br. 9.

[56] Appellants' Br. 8.

expanding their workforces. Most importantly, an uninsured employer's employees are placed at risk of injury without the quick, efficient, predictable, no-fault remedy that workers' compensation insurance provides. The lack of reported injuries does not eliminate the possibility that an employee was pressured not to report injuries that may otherwise result in the loss of their fellow employee's employment as well as their own. As a result, the cost of injury and future disability is borne by the employee and, ultimately, the public if the employee cannot absorb it. The Alaska State Legislature determined that a fine of $1000 per day for violation of a board stop order represents an appropriate penalty for violation of a state protective order and a deterrent to future violations.

The commission panel's experience is that harm results to both employees and other employers by the open, frequent disregard of both the law requiring coverage and the board's orders to stop using employee labor until workers' compensation insurance is obtained. The Legislature, instead of giving the board discretion to levy a fine "up to" $1000 per day for past conduct in violation of the board's order, as it did other agencies, put the employer, who has already violated the law, on notice that knowing violation of the board's prospective order would be more costly than just another fine for past conduct. The commission believes that the Legislature had a rational basis for its determination to establish this form of penalty in view of the potential personal injury to employees, the economic harm to other employers, and range of fines that may be levied by other administrative agencies, especially the Occupational Safety and Health Review Board.

4. Conclusion.

The commission VACATES the board's order directing payment of a penalty of $255,000 by the appellant and REMANDS this case to the board with instructions to

take additional evidence as directed in this decision and to recalculate the penalty owed by the appellant. The commission does not retain jurisdiction.

Date: *July 9, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

Philip Ulmer, Appeals Commissioner, concurring.

I agree with my colleagues that the board did not make a sufficient finding regarding the actual number of days Velderrain used employees in his business while not insured and that the board did not have substantial evidence to support its finding that Velderrain reasonably thought he was carrying workers compensation insurance between June 22, 2006, and August 13, 2006. I agree to vacate the penalty and to remand to the Board for further findings. Nevertheless, I write a concurrence to address my belief that the State of Alaska should bear some responsibility to warn employers of a lapse in workers compensation insurance.

I am troubled that the board relies extensively on data from the National Council on Compensation Insurance (NCCI), when employers may not have ready access to this data. Although Velderrain did not raise the issue of access to the NCCI data, the evidentiary findings before the board focused on the NCCI documentation.[57] The state's investigating officer Sandra Stuller noted that the NCCI database indicated that Velderrain's policy was cancelled effective January 8, 2006, because of nonpayment of

[57] After Jan. 1, 2004, the Division of Workers' Compensation will "accept Proof of Coverage . . . exclusively in the international association of Industrial Accident Boards and Commission (IAIABC) Electronic Data Interchange . . . format, Release 2." Dep't of Labor & Workforce Dev. Bull. No. 03-04 at 1 (Oct. 15, 2003). Insurers, may use the National Council on Compensation Insurance's (NCCI) IPOC service for proof of coverage electronic reporting (default option); select another approved third party vendor for electronic reporting; or, report electronically directly to the division. *Id*.

premium[58] and insurance was reinstated as of April 26, 2007.[59] Moreover, the board relied at least in part on the NCCI data to reach its conclusion that Velderrain was uninsured for a period of time.[60]

I am equally troubled that the board and the division's investigator may not be fully aware of the relationship of NCCI to the State of Alaska. Most states, including Alaska, have an assigned risk process to assure all employers domiciled in the state, regardless of risk issues and injury experience, can obtain workers' compensation insurance.[61] This is critical for the welfare of injured workers. Assigned risks include employers who cannot obtain workers' compensation insurance on the open market. Generally, all insurance companies licensed to write workers' compensation policies within the state must assume assignment of a proportionate amount of the assigned risk business. When an assigned risk employer makes a proper application with the state or its assigned representative (NCCI) and pays a minimum advanced premium, the state establishes a process that allows the state or its assigned representative to collect the premium and assign the business to one of the licensed carriers. In doing this, the state is effectively acting in the role of a broker. Insurers accept the premium collected by the state or its assigned representative and assume coverage. At that point, the employer then sees its business relationship with the carrier no differently than if it had its coverage written directly with the carrier. The insurer collects any future premiums that are due and sends out coverage notices directly to the employer.

At the time Velderrain was in business, the state used NCCI as its agent to manage its assigned risk pool. Similarly, today NCCI collects the premium with the employer's application and then assigns the business to an insurer. If a premium default

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[58] Tr. 5:8-12.

[59] Tr. 7:15-17.

[60] *In re: Mario Velderrain d/b/a Hot Tamale,* Alaska Workers' Comp. Bd. Dec. No. 07-0196, 2 (July 11, 2007) (W. Walters). *See also Coalition, Inc., vs. Alaska Dep't of Labor and Workforce Dev.*, Alaska Workers' Comp. App. Comm'n Dec. No. 071, 6, 9-10 (February 15, 2008) (in which the Board relied on NCCI data showing a lapse of coverage in deciding to fine an uninsured employer).

[61] AS 21.39.155, 3 Alaska Admin. Code 30.010-30.040.

occurs by an assigned risk employer, then the carrier notifies the employer to give it time to pay the premium and thus retain coverage. The carrier also notifies NCCI of coverage defaults and NCCI gives notice to the state.

I believe that the state has the obligation to notify the employer of its default as soon as it receives the information from NCCI. Because the state oversees the assigned risk process, it is acting like an insurance broker. Brokers owe a duty of care to their clients and can be held liable for failing to warn their clients that they are uninsured.[62] I believe in some cases that the state may get notice of an employer's lapse in workers compensation coverage before the employer knows that it is uninsured. Instead of holding onto the NCCI notice and waiting to use that information to seek penalties against the uninsured employer, the state should send its own independent notice to the employer. This is fair to an employer that faces substantial penalties for being uninsured pursuant to AS 23.30.075(b) and AS 23.30.080.

Employees in Alaska are best served as well because the state-provided notice may decrease the likelihood of their employer not providing coverage. The state has an active interest in protecting injured employees. The state should express this active interest by sending its own notice to the employer, which may motivate that employer to resolve the problem before a state investigation ensues.

Consequently, although I agree with my colleagues' decision in this case, I would support a requirement that the state notify assigned risk employers that they are in default when it receives notice from NCCI.

Date: _____*07/09/08*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

_____*Signed*_____
Philip Ulmer, Appeals Commissioner

[62] *See Clary Ins. Agency v. Doyle*, 620 P.2d 194 (Alaska 1980) (holding an insurance agency liable for negligently failing to obtain workers compensation insurance and for failing to warn the employer that he was uninsured).

APPEAL PROCEDURES

This is a final decision on this appeal from the Alaska Workers' Compensation Board's order assessing a penalty against Mario Velderrain for violating a stop order. The effect of this decision is to send the case back to the board with instructions to make further findings of fact and to recalculate the amount of the penalty. However, since the commission did not reverse the decision to assess a penalty, the commission's decision is a final decision that a penalty is owed under AS 23.30.080(d) for failing to obey a board stop order. The commission did not rule on the constitutional challenge to the statute on which the penalty is based (that is, that the $1000 per day of violation of a stop order is unconstitutionally excessive), but the commission provided comment that the commission considers it to be within the range of other statutory penalties.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the service 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. See AS 23.30.129.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

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).

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of Final Decision No. 083 issued by the Alaska Workers' Compensation Appeal Commission in Appeal No. 07-032, *Mario Velderrain v. State of Alaska, Division of Workers' Compensation,* dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *9th* day of July, 2008.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *7/9/08* a copy of this Final Decision No. 083 in AWCAC Appeal No. 07-032 was mailed to Velderrain (certified), Wilson, and Witty at their addresses of record, and faxed to AWCB Appeals Clerk, WCD Director, Wilson and Witty.

Signed *7/9/08*
J. Ramsey, Deputy Clerk Date