

Case: *Anchorage Midtown Motel, Inc., vs. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 159 (February 14, 2012)

Facts: The board found Anchorage Midtown Motel, Inc. (the Motel) was an uninsured employer from February 3, 2009, to May 14, 2010, and was subject to civil penalties. The board fined the Motel \$347,728.96, and held its owners, Kelly and Corey Millen, personally, jointly, and severally liable for the penalty and for any compensable workers' compensation claims during that period. The Motel and the Millens appealed.

Applicable law: AS 23.30.080(f) provides in part:

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.

AS 23.30.075(b) provides in part:

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

8 AAC 45.176(d) provides for aggravating factors in setting a penalty amount, including:

- (1) failure to obtain workers' compensation insurance within 10 days after the division's notification of a lack of workers' compensation insurance;
- (2) failure to maintain workers' compensation insurance after previous notification by the division of a lack of coverage;
- (3) a violation of AS 23.30.075 that exceeds 180 calendar days;
- (4) previous violations of AS 23.30.075;
-
- (7) failure to comply with the division's initial discovery demand within 30 days after the demand;
-

(11) a history of injuries or deaths while the employer was insured under AS 23.30.075; [and]

. . . .

(13) cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures[.]

8 AAC 45.176(a)(4) states in part, "if an employer is found to have no more than six aggravating factors, the employer will be assessed a civil penalty of no less than \$51 and no more than \$499 per uninsured employee workday[.]"

8 AAC 45.176(a)(5) states in part, "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[.]"

Issues: Can the board hold the Millens personally, jointly, and severally liable for the civil penalty? Did the board have substantial evidence and act within its discretion in determining the penalty amount?

Holding/analysis: The commission concluded that it lacked jurisdiction to decide the Millens' constitutional arguments.

The board could not hold the Millens personally, jointly, and severally liable for the civil penalty.

First, the board is not a *court*. . . . It has no criminal jurisdiction under which it may *convict* anyone or impose a *fine* or sentence of imprisonment. Second, . . . [s]ubsection .075(b) does not provide for imposition of a *civil* penalty against anyone. Third, the subsection states that corporate officers can be personally liable for the *compensation or benefits* the corporation owes. The board ordered payment of a *civil penalty*, payable to the Division. We do not consider the civil penalty owed the Division to be *compensation or benefits* and the Division is not an injured employee. Fourth, there was evidence that no injuries were reported during the timeframe that [the Motel] was uninsured for workers' compensation liability, . . . Under subsection .075(b), neither the penalties, nor the liability for compensation, can be imposed against individuals with authority to insure the corporation or in charge of its business *unless* an injury occurs in the timeframe the corporate employer is uninsured. Dec. No. 160 at 12.

For the purposes of assessing the penalty amount, the Motel was uninsured for a period of time before and after 8 AAC 45.176 took effect. The board considered each time period separately. Before the regulation went into effect the board assessed a penalty rate of \$57.92 per uninsured employee workday based on the length of time the Motel was without insurance and its history of being uninsured. The commission concluded these factors were appropriate and the board acted within its discretion.

After the regulation took effect, the commission concluded the board erred in assessing a penalty of \$500 per uninsured workday for two reasons:

(1) the board found the seven aggravating factors listed in the above cited regulation, but the commission concluded that substantial evidence did not support the factor of cancellation of a policy for failure to comply with insurer's request. The Motel's insurance was cancelled for lack of payment and the Motel could not obtain new insurance because it failed to pay for a previous insurer's audit. "Strictly construing 8 AAC 45.176(d)(13), as we must, [the Motel's] workers' compensation coverage was not *cancelled* for failing to pay for an audit or otherwise comply with the carrier's requests. New coverage could not be placed, which does not implicate the aggravating factor in question." *Id.* at 17.

(2) the penalty rate was excessive as it was nine times the rate imposed for the Motel's pre-regulation conduct, even though that conduct was not significantly different. With one factor eliminated, the board on remand could consider penalties from \$51-\$499 per uninsured workday per sub-subsection (a)(4).