

Alaska Workers' Compensation Appeals Commission

Gary L. Miller, d/b/a Miller's Market,
Appellant,

vs.

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

Final Decision

Decision No. 161

May 14, 2012

AWCAC Appeal No. 11-009

AWCB Decision Nos. 10-0049 and 11-0087

AWCB Case No. 700002908

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 10-0049, issued at Anchorage on March 10, 2010, by southcentral panel members Laura Hutto de Mander, Chair, Patricia Vollendorf, Member for Labor, and Don Gray, Member for Industry, and appeal from Alaska Workers' Compensation Board Final Decision and Order on Reconsideration and Modification No. 11-0087, issued at Anchorage on June 21, 2011, by southcentral panel members Laura Hutto de Mander, Chair, Patricia Vollendorf, Member for Labor, and Don Gray, Member for Industry.

Appearances: Gary L. Miller, d/b/a Miller's Market, self-represented appellant; Michael C. Geraghty, Attorney General, and Aesha Pallesen, Assistant Attorney General, for appellee, State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appeal filed July 27, 2011; briefing completed November 21, 2011; oral argument held March 29, 2012.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

In a final decision and order,¹ the Alaska Workers' Compensation Board (board):
1) ruled that appellant, Gary L. Miller (Miller), d/b/a Miller's Market, had failed to obtain

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 Gary L. Miller d/b/a Miller's Market*, Alaska Workers' Comp. Bd. Dec. No. 10-0049 (Mar. 10, 2010)(*Miller's Market I*).

and maintain workers' compensation insurance coverage, as required by law, between November 2003 and January 2009; and 2) ordered the payment of a civil penalty pursuant to certain terms and conditions.² In a final decision and order on reconsideration,³ the board agreed with Miller's argument that it had made a factual error in *Miller's Market I* when it categorized a \$416,711.16 liability as an asset.⁴ By extension, Miller contended that the civil penalty imposed in *Miller's Market I* should be reduced because his net income was significantly lower than originally calculated. The board declined to lower the amount of the civil penalty, although it allowed for a modified plan for payment of the penalty.⁵ Miller appealed to the Alaska Workers' Compensation Appeals Commission (commission). We affirm the board's decisions.⁶

2. Factual background and proceedings.

The facts are not disputed in any significant respect.⁷ Prior to the timeframe at issue here, Miller had no workers' compensation coverage over a five-and-a-half year period.⁸ In this matter, appellee, the State of Alaska, Division of Workers'

² See *Miller's Market I*, Bd. Dec. No. 10-0049 at 12-14.

³ *In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability and Assessment of a Civil Penalty Against Gary L. Miller d/b/a Miller's Market*, Alaska Workers' Comp. Bd. Dec. No. 11-0087 (June 21, 2011)(*Miller's Market II*).

⁴ See *Miller's Market II*, Bd. Dec. No. 11-0087 at 6.

⁵ See *id.* at 7.

⁶ Miller's Market is a sole proprietorship operated by Gary L. Miller. There is an affiliated business, Little Millers. Gary L. Miller also owns Mustard Seed Development as a sole proprietorship, and owns Just Right Trucking in partnership with his wife, Deborah E. Miller. All of the business entities share the same Federal Employer's Identification Number, and, when insured for workers' compensation liability, share workers' compensation policies. See *Miller's Market I*, Bd. Dec. No. 10-0049 at 2. *N.B.* Elsewhere, the board refers to Deborah Miller as Deborah S. Miller. See *id.* at 12-14. The board's decisions cover both Gary and Deborah Miller and all of the businesses they own and operate. See *id.* and *Miller's Market II*, Bd. Dec. No. 11-0087 at 7. Where necessary, this decision will distinguish between them.

⁷ See *Miller's Market I*, Bd. Dec. No. 10-0049 at 4.

⁸ See *id.* at 3.

Compensation (Division), demonstrated to the board's satisfaction that Miller was uninsured from November 30, 2003, to January 6, 2009, a total of 1,864 calendar days.⁹ In *Miller's Market I*, the board 1) calculated Miller's net profit for 2009 at \$31,601.99, although it did so having categorized a \$416,711.16 liability as an asset; 2) calculated Miller's net profit for 2008 at \$83,212.00; 3) calculated Miller's net profit for 2007 at \$88,736.00; and 4) calculated Miller's profit for 2006 at \$81,617.00.¹⁰ The board found that Miller had failed to file proof of workers' compensation liability insurance and to provide such coverage.¹¹ It imposed a civil penalty in the amount of \$129,855.00, with one-half of that amount, \$64,927.50, suspended, on condition that Miller promptly pay the unsuspended portion and maintain workers' compensation insurance for the next ten years.¹²

In *Miller's Market II*, the board acknowledged its mischaracterization of the aforementioned \$416,711.16 liability as an asset.¹³ Nevertheless, it was not persuaded to reduce the amount of the civil penalty. However, the payment plan for the unsuspended portion of the civil penalty that the board imposed was adjusted to take into account the seasonal nature of Miller's business.¹⁴

⁹ See *Miller's Market I*, Bd. Dec. No. 10-0049 at 2. The timeframe during which Miller was uninsured included 1,156 calendar days between November 7, 2005, the effective date of the 2005 amendments to the Alaska Workers' Compensation Act, and January 6, 2009. Passage of AS 23.30.080(f), which provides for a civil penalty against an uninsured employer of up to \$1,000 a day for each employee workday the employer was uninsured, was among the 2005 amendments. Subsection .080(f) is quoted *infra*. There were at least 8,657 employee workdays during which Miller was uninsured once the subsection took effect. See *id.* at 4.

¹⁰ See *Miller's Market I*, Bd. Dec. No. 10-0049 at 3-4.

¹¹ See *id.* at 8.

¹² See *id.* at 12-14.

¹³ See *Miller's Market II*, Bd. Dec. No. 11-0087 at 6.

¹⁴ See *id.* at 7.

3. *Standard of review.*

The commission must uphold the board's findings of fact if supported by substantial evidence in light of the record as a whole.¹⁵ We exercise our independent judgment when reviewing questions of law and procedure.¹⁶ 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.¹⁷ The board has the sole power to determine the credibility of witnesses¹⁸ and its credibility findings are binding on the commission.¹⁹

4. *Discussion.*

a. *Applicable law.*

Certain sections of the Alaska Workers' Compensation Act, AS 23.30.001 — .395, provide the framework for the legal analysis in this matter. They read, in relevant part, as follows:

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

¹⁵ See AS 23.30.128(b).

¹⁶ See *id.*

¹⁷ *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)).

¹⁸ See AS 23.30.122.

¹⁹ See AS 23.30.128(b).

other benefits for which the corporation is liable under this chapter if the corporation at that time is not insured

AS 23.30.080. Employer's failure to insure.

. . . .

(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.

AS 23.30.085. Duty of employer to file evidence of compliance.

(a) An employer subject to this chapter, unless exempted, shall initially file evidence of compliance with the insurance provisions of this chapter with the division, in the form prescribed by the director. The employer shall also give evidence of compliance within 10 days after the termination of the employer's insurance by expiration or cancellation.

(b) If an employer fails, refuses, or neglects to comply with the provision of this section, the employer shall be subject to the penalties provided in AS 23.30.070 for failure to report accidents; but nothing in this section may be construed to affect the rights conferred upon an injured employee or the employee's beneficiaries under this chapter.

b. The board did not err when it imposed the civil penalty it did against Miller.

The board concisely summarized its reasoning in assessing the civil penalty in the amount of \$129,855.00, with one-half of that amount, \$64,927.50, suspended.

[W]hen an employer subject to the requirements of AS 23.30.075 fails to insure, the law grants the board discretion to assess a civil penalty of up to \$1,000.00 for each employee, for each day an employee is employed while the employer fails to insure. . . . Alaska's penalty provision at AS 23.30.080(f) is one of the highest in the nation. The severity of the statute is a statement of policy that failure to insure for worker[s] compensation liability will not be tolerated in Alaska. The legislature has made its intentions clear; uninsured employers are subject to a severe penalty when employees are permitted to work without coverage for workers' compensation liability in place.²⁰

²⁰ *Miller's Market I*, Bd. Dec. No. 10-0049 at 9 (footnotes omitted).

In assessing an appropriate civil penalty, consideration is given to a number of factors to determine whether an uninsured employer's conduct, or the impact of that conduct, aggravates or mitigates its offense. A penalty is assessed based on the unique circumstances arising in each case. The primary goal of a penalty under AS 23.30.080(f) is not to be unreasonably punitive, but rather to bring the employer into compliance, deter future lapses, ensure the continued employment of the business' employees in a safe work environment, and to satisfy the community's interest in fairly penalizing the offender. A penalty is not intended to destroy a business or cause the loss of employment.²¹

Former decisions discussed a number of aggravating and mitigating factors considered in determining appropriate civil penalties under AS 23.30.080(f). Those factors include: number of days of uninsured employee labor, the size of the business, the record of injuries of the employer, both in general and during the uninsured period, the extent of the employer's compliance with the [Alaska Workers' Compensation] Act, the diligence exercised in remedying the failure to insure, the clarity of notice of insurance cancellation, [the] employer's compliance with the investigation and remedial requirements, the risk of employer's workplace, the impact of the penalty on employer's ability to continue to conduct business, the impact of the penalty on the employees, the impact of the penalty on employer's community, whether employer acted in blatant disregard for the statutory requirements, whether employer properly accepted service of the Division's petition and whether the employer violated a stop order, and [the] credibility of employer's promises to correct its behavior. Based on these factors, a wide range of penalties ha[s] been found reasonable based on the specific circumstance[s] of the violation[s].²²

As stated above, the commission is to exercise its independent judgment when reviewing questions of law. Whether the board followed the above-quoted statutory law in imposing the civil penalty on the Millers and their businesses is a legal question. We undertake to review the penalty imposed by the board in light of the decisions cited

²¹ *Miller's Market I*, Bd. Dec. No. 10-0049 at 9 (footnotes omitted).

²² *Id.* at 10 (footnotes omitted).

by the board²³ and also commission decisions involving the imposition of civil penalties for failure to insure.²⁴ Citing *Alaska R & C*, in *Ivan Moore*, we noted:

“[T]he board is granted broad discretion in determining the penalty under AS 23.30.080(f).” A grant of broad discretion is not a grant of unfettered discretion. The commission has held that “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.”²⁵

The commission concludes that the board applied relevant factors in assessing the civil penalty in the amount and under the terms that were detailed in its decision. In the board’s view, and ours, the most important factors were: 1) that Miller had, prior to the timeframe at issue here, been uninsured for workers’ compensation liability between May 1996 and November 2001; and 2) that Miller was, relatively soon thereafter, again uninsured for over a five-year period between November 2003 and January 2009.²⁶ Ultimately, the board assessed a civil penalty in the amount of \$15.00 for each of the 8,657 uninsured employee workdays, yielding a total penalty of \$129,855.00.²⁷ Because the board decided that a penalty in that amount might jeopardize the continued viability of the businesses, it suspended payment of one-half

²³ See *Miller’s Market I*, Bd. Dec. No. 10-0049 at 10 n.25.

²⁴ See *Velderrain v. State, Div. of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 083 (July 9, 2008); *Alaska R & C Communications, LLC v. State, Div. of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 088 (September 16, 2008)(*Alaska R & C*); *Ivan Moore d/b/a Ivan Moore Research v. State, Div. of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 092 (November 17, 2008)(*Ivan Moore*); *Anchorage Midtown Motel, Inc. v. State, Div. of Workers’ Comp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 159 (February 14, 2012).

²⁵ *Ivan Moore*, App. Comm’n Dec. No. 092 at 13 (quoting *Alaska R & C*, App. Comm’n Dec. No. 088 at 22).

²⁶ See *Miller’s Market I*, Bd. Dec. No. 10-0049 at 2-3.

²⁷ See *id.* at 12.

of the amount of the penalty on certain conditions.²⁸ We conclude that the board did not abuse its discretion in ruling as it did.

At oral argument, Miller maintained that, in the exercise of the board's discretion, it should have lowered the amount of the civil penalty in *Miller's Market II*. In Miller's view, because the board's original calculation of the penalty relied on a mischaracterization of a substantial liability as an asset, it was an abuse of discretion for the board, on revisiting the issue of the amount of the penalty, to adhere to its original calculation. The board's reasoning for doing so was two-fold:

Due to the egregiousness of this case and considering the significant number of uninsured employee workdays in this case (8,657), the length of time [Miller] was uninsured (1,864 calendar days), and the unreported employee injuries suffered, reduction in the assessed civil penalty is not warranted. However, in order to promote continuation of the business in its remote location, the payment plan may be altered to reduce the dollar amount of payments and the period of time over which payments are made.²⁹

It is not the commission's prerogative to substitute our judgment for the board's. Here, in terms of our analysis in *Ivan Moore* and *Alaska R & C*, the board's decision against lowering the amount of the civil penalty was well-founded, based, as it was, on consideration of appropriate factors.

²⁸ See *Miller's Market I*, Bd. Dec. No. 10-0049 at 12.

²⁹ *Miller's Market II*, Bd. Dec. No. 11-0087 at 7.

5. *Conclusion.*

We AFFIRM the board's decisions in *Miller's Market I* and *Miller's Market II*.

Date: 14 May 2012 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decisions. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).³⁰ For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed³¹ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

³⁰ A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

³¹ *See id.*

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal 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

More information is available on the Alaska Court System's website:
<http://www.courts.alaska.gov/>

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of the Final Decision No. 161 issued in the matter of *Gary L. Miller, d/b/a Miller's Market v. State of Alaska, Division of Workers' Compensation, AWCAC Appeal No. 11-009*, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 14, 2012.

Date: May 15, 2012



Signed

K. Morrison, Deputy Commission Clerk