

## 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.

### MEMORANDUM DECISION AND ORDER ON REMAND

Decision No. 210                      February 18, 2015

AWCAC Appeal No. 11-011  
AWCB Decision No. 11-0095  
AWCB Case No. 700002789M

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

Proceedings: Appeal filed August 1, 2011; Final Commission Decision No. 175 issued January 8, 2013; Motion for Attorney Fees filed March 21, 2013; Opposition to Motion for Attorney Fees filed April 25, 2013; Order on Motion for Attorney Fees issued May 10, 2013; Petition for Review filed with the Alaska Supreme Court on May 31, 2013; Alaska Supreme Court Opinion No. 6972 issued November 28, 2014; Alaska Supreme Court Return of Record issued December 16, 2014, returning jurisdiction to the Workers' Compensation Appeals Commission effective December 16, 2014; Supplemental Briefs filed by parties on January 30, 2015.

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

By: Laurence Keyes, Chair.

### *1. Introduction.*

As indicated in the Proceedings section above, the State of Alaska, Division of Workers' Compensation (Division), petitioned the Alaska Supreme Court (supreme court) for review of a ruling by the Workers' Compensation Appeals Commission

(commission) in an Order on Motion for Attorney Fees (attorney fees order), following the commission's final decision in this matter.<sup>1</sup> The attorney fees order was in response to a motion by appellants, Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson (collectively Titan), for an award of fees at the conclusion of the appeal to the commission, which the Division opposed. We awarded Titan full attorney fees in the amount of \$50,925 and costs. The supreme court granted the Division's petition and reversed and remanded the attorney fees issue to the commission "[b]ecause the [c]ommission failed to consider the Division's partial success in the appeal[.]"<sup>2</sup>

2. *Factual background and proceedings.*<sup>3</sup>

Leading up to a hearing before the Alaska Workers' Compensation Board (board), the Division asserted that Titan was operating without workers' compensation insurance from March 5, 2006, through October 18, 2007, and January 3, 2008, through January 16, 2008. The Division prepared a Petition for Finding of Employer's Failure to Insure Workers' Compensation Liability pursuant to AS 23.30.075<sup>4</sup> (Petition) and for Assessment

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<sup>1</sup> See *Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson v. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 175 (Jan. 8, 2013) (*Titan I*).

<sup>2</sup> *State, Division of Workers' Compensation v. Titan Enterprises, LLC*, 338 P.3d 316, 317 (Alaska 2014) (*Division v. Titan*).

<sup>3</sup> The factual background is an abbreviated version of the factual background provided by the commission in *Titan I* at 3-10.

<sup>4</sup> **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

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of Civil Penalty under AS 23.30.080(f).<sup>5</sup> The Petition indicated that Titan was an employer, using employee labor, and did not have workers' compensation insurance in the timeframes indicated. The board held a hearing on the Petition on April 1, 2009.

At hearing, evidence was presented that Titan had some workplace injuries, one occurring while it was uninsured.<sup>6</sup> Todd Christianson (Christianson), Titan's owner, 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. 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 had difficulty obtaining workers' compensation insurance.

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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[.]

<sup>5</sup> **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.

. . . .

<sup>6</sup> *See generally 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, and Todd Christianson, Alaska Workers' Comp. Bd. Dec. No. 11-0095 (June 30, 2011).*

The Division maintained that the entities that were the subject of its Petition, Titan Enterprises, LLC, Titan Topsoil, Inc., and CCO Enterprises, LLC, were instrumentalities of Christianson, and, therefore, under the principle of piercing the corporate veil, the various forms of business they were operating under should be ignored and Christianson should also be personally liable, together with the various entities, for violating AS 23.30.075. Christianson asserted the entities were separate. The board ordered the Division to file separate petitions with respect to each entity whose business the Division asserted was commingled and that these petitions might 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 was held on July 17, 2009, at which time the petitions filed by the Division against the entities Christianson allegedly controlled were consolidated under AWCB case number 700002789M.

After another hearing, in its decision, the board referred to these entities and Christianson collectively as "Employer." The board found that Christianson was the person actively in charge of the entities during the periods they were uninsured, and that Employer had a history of workers' compensation claims with thirteen injuries, including a leg amputation, upper and lower extremity injuries, and back injuries. It found that Employer had previous violations of AS 23.30.075. The board also found that Employer was using employee labor, and had neither workers' compensation insurance, nor approval to self-insure. Employer was uninsured for 563 calendar days and 6,399 uninsured employee workdays after November 7, 2005. Employer obtained workers' compensation insurance on January 16, 2008. The Employment Security Division tax records indicate Employer paid taxes for ten to forty-seven employees in 2006 and 2007.

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,<sup>7</sup> a board regulation that went

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<sup>7</sup> 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:

.....

(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[.]

.....

(d) For the purposes of this section, "aggravating factors" include

(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;

.....

(10) a history of injuries or deaths sustained by one or more employees while employer was in violation of AS 23.30.075;

(11) A history of injuries or deaths while the employer was insured under AS 23.30.075;

.....

(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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into effect on February 28, 2010, subsequent to the uninsured periods at issue here. It found that Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, 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 civil penalty of \$6,392,601.00 (\$999 per uninsured employee workday).

In its decision, the commission stated “The civil penalty . . . is a shocking amount, appears to be purely punitive, and does not serve the purposes of AS 23.30.080(f).”<sup>8</sup> The commission reversed the board, vacated its order on the civil penalty, and remanded the matter to the board.<sup>9</sup> Titan moved for an award of fees from the commission, seeking \$50,925 in fees calculated on an hourly rate of \$250.<sup>10</sup> The Division filed an opposition to the motion, arguing that both parties were partially successful in the appeal, the Division having prevailed on the issue whether to pierce the corporate veil, which Titan had vigorously opposed in the appeal.<sup>11</sup>

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(14) lapses in business practice that would be used by a reasonably diligent business person, including  
(A) ignoring certified mail;  
(B) failure to properly supervise employees; and  
(C) failure to gain a familiarity with laws affecting the use of employee labor[.]

<sup>8</sup> *Titan I*, App. Comm’n Dec. No. 175 at 20.

<sup>9</sup> *See id.* at 22.

<sup>10</sup> *See Titan’s Motion for Attorney Fees* at 4.

<sup>11</sup> *See Division’s Opposition to Motion for Attorney Fees* at 2-3.

In the commission's attorney fees order, we concluded Titan was entitled to an award of fees under AS 23.30.008(d)<sup>12</sup> as the successful party in the appeal, having prevailed on two significant issues:<sup>13</sup> "1) the [Division] had not proven that the various entities should be liable for each other's misconduct in failing to maintain workers' compensation insurance; and 2) the board erred when it imposed a \$6M penalty[.]"<sup>14</sup>

The Division petitioned the supreme court for review of the attorney fees order. The court granted the petition and reversed and remanded the attorney fees issue to the commission. On December 18, 2014, the commission ordered the parties to file supplemental briefs regarding their respective positions on the supreme court's remand of the commission's attorney fees order. The parties filed their supplemental briefs on January 30, 2015. In its brief, the Division included an itemization of the attorney fees it incurred in representing the Division's interests, calculated on an hourly rate of \$200, for a total was \$12,997.<sup>15</sup>

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<sup>12</sup> **AS 23.30.0080. Powers and duties of the commission.**

. . . .

(d) In an appeal, the commission shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the commission determines to be fully compensatory and reasonable. However, the commission may not make an award of attorney fees against an injured worker unless the commission finds that the worker's position on appeal was frivolous or unreasonable or the appeal was taken in bad faith.

. . . .

<sup>13</sup> See *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1068 (Alaska 2011).

<sup>14</sup> Attorney fees order at 3-4.

<sup>15</sup> The Attorney General calculates an hourly "market rate" at which it bills state agencies for the services of assistant attorneys general. In this matter, the hourly rate used was \$200. See Supplemental Brief of Appellee, Exhibit E, Affidavit of Aesha Pallesen Regarding Attorney's Fees at 2 and Exhibit 1 thereto.

### 3. *Standard of review.*

We exercise our independent judgment when reviewing questions of law and procedure.<sup>16</sup> Interpretation of a statute is a question of law; statutes are interpreted according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose.<sup>17</sup>

### 4. *Discussion.*

On remand, in accordance with the supreme court's decision, the commission must construe and apply AS 23.30.008(d), the attorney fees subsection that applies in appeals to the commission. As we mentioned, the supreme court reversed and remanded this matter to the commission because we failed to take into account that the Division also prevailed on a significant issue before the commission, that of piercing the corporate veil. The court instructed:

If two non-claimants both succeed on significant issues in an appeal, the [c]ommission must weigh the success of both parties when it considers a motion for attorney's fees. The [c]ommission may take one of two approaches in evaluating this type of fee request. The [c]ommission may decide that neither party can truly be deemed a successful party[.] In such a case, the [c]ommission can opt not to award fees. Alternatively, the [c]ommission can consider the amount of fees incurred by both parties, as well as the parties' relative success in the appeal, and offset the competing fee awards to the parties to arrive at the final award of attorney's fees in the case.<sup>18</sup>

In the commission's view, it would not be appropriate to utilize the first alternative and not award either party any fees. The reason is, we conclude that both parties were successful on significant issues in the appeal and the attorneys involved provided valuable legal services to their respective clients. On the other hand, if we were to utilize the offset alternative, it would, at least to some extent, recognize the value of the services of the attorneys representing both parties, Titan and the Division.

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<sup>16</sup> See AS 23.30.128(b).

<sup>17</sup> See *Monzulla v. Voorhees concrete Cutting*, 254 P.3d 341, 345 (Alaska 2011).

<sup>18</sup> *Division v. Titan*, 338 P.3d 316 at 322.

Roughly offsetting Titan's attorney fees in the amount of \$50,925 by the Division's attorney fees in the amount of \$12,997, the commission concludes that an attorney fees award to Titan's counsel in the amount of \$38,000 is appropriate.

*5. Conclusion and order.*

In accordance with the foregoing analysis, the commission awards attorney fees to Titan's counsel in the amount of \$38,000. It is so ORDERED.

Date: 18 February 2015 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



*Signed*

James N. Rhodes, Appeals Commissioner

*Signed*

Philip E. Ulmer, Appeals Commissioner

*Signed*

Laurence Keyes, Chair

I certify that this is a full and correct copy of Memorandum Decision and Order on Remand No. 210, issued in the matter of *Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson vs. 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 February 18, 2015.

Date: February 23, 2015



*Signed*

K. Morrison, Appeals Commission Clerk