Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation, Appellant, vs. Lawn Ranger of Alaska, LLC, Appellee.	Final Decision Decision No. 224 March 7, 2016 AWCAC Appeal No. 15-016 AWCB Decision Nos. 15-0059 and 15-0076 AWCB Case No. 700004714

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 15-0059, issued at Anchorage, Alaska, on June 11, 2015, by southcentral panel members Matthew Slodowy, Chair, and Linda Hutchings, Member for Industry; and, Final Decision and Order on Reconsideration and Modification No. 15-0076, issued at Anchorage, Alaska, on July 7, 2015, by southcentral panel members Matthew Slodowy, Chair, and Linda Hutchings, Member for Industry.

Appearances: Craig W. Richards, Attorney General, and Kimberly D. Rodgers, Assistant Attorney General, for appellant, State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation; Kenneth M. Wasche, Kenneth M. Wasche, PC, for appellee, Lawn Ranger of Alaska, LLC.

Commission proceedings: Appeal filed July 28, 2015; briefing completed November 30, 2015; oral argument was not requested.

Commissioners: Michael J. Notar, Philip E. Ulmer, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction.

Lawn Ranger of Alaska, LLC, (Lawn Ranger) failed to maintain workers' compensation insurance for a period of time. The Division of Workers' Compensation (Division) proposed to impose a civil penalty equal to twice the amount of the insurance premiums that would have been due for that time. The Alaska Workers' Compensation

Board (Board) imposed the penalty and suspended the entire amount. The Division appeals.

We conclude that suspension of the entire amount of the civil penalty, in the absence of a showing that the employer lacks the ability to make payment, does not serve the purposes of AS 23.30.080. We reverse the Board's order suspending the penalty, vacate the penalty, and remand for imposition of a penalty in accordance with this decision.

2. Factual background and proceedings.[1]

Lawn Ranger is a small business owned by Stephen Spikes. The firm performs lawn care, landscaping maintenance, and snow plowing services.[2] The firm hires employees to provide these services as needed, typically full-time during the summer season and temporarily, depending on the vagaries of snowfall, during the winter.[3] At some times, Mr. Spikes is the firm's sole employee.[4]

Lawn Ranger first obtained workers' compensation insurance in 2008. The policy lapsed for 33 days in 2009, 21 days in 2010, 31 days in 2011, and 358 days beginning September 22, 2012, and ending September 15, 2013.[5] In November 2014, the Division of Workers' Compensation demanded the production by Lawn Ranger of employee wage and hour records, in order to determine the number of employee workdays for which Lawn Ranger was uninsured during the period in which its

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[1] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[2] *In the Matter of the Petition for a Finding of the Failure to Insure Workers' Compensation Liability and Assessment of a Civil Penalty Against Lawn Ranger of Alaska, LLC,* Alaska Workers' Comp. Bd. Dec. No. 15-0059 (*Lawn Ranger*) at 2 (No. 1).

[3] *See Lawn Ranger*, Bd. Dec. No. 15-0059 at 3 (No. 13); Hr'g Tr. at 62:8-12, May 12, 2015.

[4] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 3 (No. 13).

[5] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 2-3 (Nos. 2-8).

insurance coverage lapsed.[6] Lawn Ranger did not have employee records from 2009.[7] It provided employee time sheets for one full-time employee during the uninsured periods in 2010 and 2011.[8] For 2012-2013, Lawn Ranger provided no timesheets, but Mr. Spikes stated that during the summer of 2013 the firm had one full-time employee and one part-time employee.[9]

At the hearing, the Division introduced into evidence records maintained by the Department of Labor, Division of Employment Security, that include the amounts reported by Lawn Ranger as its total quarterly payroll from the third quarter of 2010 through the third quarter of 2013, together with the total number of employees reported each month by Lawn Ranger.[10] According to those records, Lawn Ranger's average annual payroll during that time was $79,512, with an average of 2.42 employees per month.[11]

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[6] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 3 (Nos. 10, 11). *See* R. 75-85.

[7] *See* R. 14.

[8] *See Lawn Ranger*, Bd. Dec. No. 15-0059 at 3 (No. 12); R. 16-21. The timesheets show employee work hours in the uninsured periods equal to 11.625 employee workdays (93.0 hours) in 2010, and 13.3625 employee workdays (106.9 hours) in 2011. *Id.*

[9] *See* R. 22, 24; *Lawn Ranger*, Bd. Dec. No. 15-0059 at 3 (No. 13). Mr. Spikes' statement indicates that the full-time employee was paid $15 per hour and worked about 40 hours per week for 18 weeks (about 90 employee workdays), and the part-time employee was paid $10-12 per hour and worked "most" of that time (perhaps about 60 employee workdays).

[10] *See Lawn Ranger*, Bd. Dec. No. 15-0059 at 3 (No. 14); R. 32; Hr'g Tr. at 12:16 – 13:12, 32:13 – 33:16.

[11] R. 32. Average quarterly payrolls during ranged from a low of $6,255 in the first quarter (January through March) to a high of $39,003 in the third quarter (July through September). *Id.* It is important to keep in mind that the number of employees reported is the number of different individuals who worked for the employer at any time during the reporting month. An employee may have worked as little as one day, or the entire month. Nonetheless, based on Lawn Ranger's stated hourly wage of $10-$15 per hour, an estimate of quarterly employee workdays could have been derived from the payroll totals shown in the records of the Employment Security Division.

At the hearing, the Division did not ask the Board to impose a penalty for the uninsured periods of time in 2009, prior to promulgation of 8 AAC 45.176.[12] For the uninsured periods of time in 2010-2013, after that regulation went into effect, the Division asked the Board to impose the minimum civil penalty allowed for a non-inadvertent lapse of coverage with three aggravating factors, as provided in 8 AAC 45.176(a)(3): two times the premium the employer would have paid had the employer provided the required insurance. The Division calculated the premiums for 2010 and 2011 based on the actual amounts paid by Lawn Ranger as premiums in those two years.[13] It calculated the premiums for 2012 and 2013 based on estimated premiums derived from a premium calculator provided by the National Council on Compensation Insurance.[14] The unpaid premiums, according to the Division's calculations, totaled $6,934.47.[15] The Board adopted the Division's calculations and imposed a penalty of $13,868.94, twice the unpaid premiums.[16] It suspended the entire amount because of "the Division's failure to meet its burden to produce facts necessary to support a higher penalty."[17]

The Division appeals, asking that we reverse that portion of the Board's order suspending the entire civil penalty.

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[12] 8 AAC 45.176 went into effect February 28, 2010. Prior to the effective date of the regulation, civil penalties were determined on a case by case basis. *See generally*, *Alaska R & C Communications, LLC v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (September 16, 2008) (*Alaska R & C*).

[13] *See Lawn Ranger*, Bd. Dec. No. 15-0059 at 3-4 (No. 16). The Board's decision states that all of the premiums were derived from the calculator. In fact, however, the premiums for 2010 and 2011 reflect Lawn Rangers' actual premiums for those years. Reply Brief at 7-8. *See* Hr'g Tr. 27:4 – 29:18; R. 51-54.

[14] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 3-4 (No. 16).

[15] R. 59.

[16] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 4 (No. 16).

[17] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 10.

3. Standard of review.

The Board has discretion, subject to 8 AAC 45.176, to determine the amount of a civil penalty under AS 23.30.080(f).[18] We have stated 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."[19] Regarding the first of these considerations, we have stated:

> [T]he 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.[20]

4. Discussion.

The Board imposes a civil penalty in accordance with 8 AAC 45.176. For an inadvertent lapse in coverage, the regulation provides for imposition of a penalty no greater than the unpaid premiums.[21] Otherwise, the regulation provides for imposition of a penalty no less than twice the unpaid premiums[22] or, for more aggravated offenses, four times the unpaid premiums,[23] and for the worst offenses, the maximum allowable fine of $1,000 per employee per uninsured day.[24]

The Division did not seek a penalty for the periods of time that Lawn Ranger was uninsured in 2009, because the Division had no information regarding the number of uninsured employee workdays during that time. For the periods of time after promulgation of 8 AAC 45.176, the Division lacked sufficient information to precisely

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[18] *See Moore v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 092 at 13 (Nov. 17, 2008) (*Moore*).

[19] *Alaska R & C*, App. Comm'n Dec. No. 088 at 22.

[20] *Id.*

[21] 8 AAC 45.176(a)(1).

[22] 8 AAC 45.176(a)(2)-(4).

[23] 8 AAC 45.176(a)(5).

[24] 8 AAC 45.176(a)(6). *See* AS 23.30.080(f).

determine the number of uninsured employee workdays, but believed it had sufficient information to support the imposition of the minimum penalty authorized by the regulation, that is, twice the unpaid premiums, for the entire uninsured periods in 2010-2013. Accordingly, the Division asked the Board to impose the minimum penalty for those periods of time.[25]

The Board imposed the minimum penalty for the entire time Lawn Ranger was uninsured in 2010-2013. However, the Board observed, "The Division did not produce reliable evidence [Lawn Ranger] used employee labor during all the periods it was not carrying workers' compensation liability insurance."[26] Therefore, the Board suspended the entire amount.

On appeal the Division argues that the Board's decision to suspend the entire civil penalty was an abuse of discretion because (in the Division's view) the suspension was based on the absence of evidence of the number of employee workdays, but the penalty (*i.e.*, the unpaid premium) was based on the number of uninsured calendar days: "Because the penalty calculation was not based on employee workdays, the Board cannot rely on a lack of evidence on the actual hours worked to suspend the penalty."[27] The Division contends that a Board finding that an employer was uninsured in violation of AS 23.30.075 for the entire period that its insurance lapsed would preclude suspending the civil penalty based on the lack of evidence as to the specific dates worked.[28] Furthermore, the Division contends that suspending the entire amount is contrary to the purposes of AS 23.30.080(f).[29]

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[25] The Division elected not to seek a penalty based on the number of employee workdays based on the evidence that it did have, which, as explained above, might have supported a finding of at least 175 uninsured employee workdays, for a penalty under 8 AAC 45.176(a)(3) of $1,750-$8,750. *See supra*, notes 8, 9, 11.

[26] *Lawn Ranger*, Bd. Dec. No. 15-0059 at 10.

[27] Appellant's Brief at 11.

[28] Appellant's Brief at 14-16.

[29] Appellant's Brief at 17.

a. The board's decision is not logically inconsistent.

Under AS 23.30.080(f) the Board has authority to impose a penalty for every day on which a firm is uninsured in violation of AS 23.30.075. In this case, the Board imposed a penalty for 410 calendar days. The Board suspended the civil penalty, however, because the Division did not provide evidence from which the Board could identify the specific dates on which Lawn Ranger had employees. The Division's argument is that since the Board found the evidence was sufficient to impose a civil penalty for 410 days, it ought also to have found the evidence sufficient to not suspend that penalty. In making that argument, the Division asserts that it is logically impossible to conclude that the evidence was sufficient to impose the penalty, but not sufficient to require that it be paid.[30] That assertion conflates the Board's factual finding (that Lawn Ranger was uninsured in violation of AS 23.30.075 for 410 days) with its exercise of discretion (that the civil penalty should be suspended). It is not logically inconsistent to find the evidence sufficient to make a factual finding supporting the imposition of a civil penalty, while at the same time insufficient to warrant immediate imposition of the full amount. We reject the Division's argument that the Board's decision to suspend the civil penalty is inconsistent with a factual finding that there are grounds to impose the penalty in the first place.

b. Partial suspension was within the Board's discretion.

We agree that, as the Division concedes, it may in some cases be appropriate to suspend a penalty based on inaccurate or incomplete payroll records[31] or inability to

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[30] Appellant's Brief at 16 ("Logically, the Board cannot on the one hand conclude an employer has employees and therefore was uninsured in violation of AS 23.30.075, while, on the other hand, decide that a properly calculated penalty should be suspended because the employer might not have used employees.").

[31] *See* Appellant's Brief at 13, citing *In Re Delta Sanitation, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 14-0150 (Nov. 18, 2014) ("The Division. . . agreed that the estimated annual premium . . . was determined by relying on inaccurate payroll information.") (*In Re Delta Sanitation*).

pay.[32] While a deficiency in payroll records resulting from the employer's unexcused failure to maintain or provide those records ordinarily might not warrant suspension,[33] it is not beyond the discretion of the Board to suspend a penalty even in that situation, based on all of the circumstances. Moreover, there is some evidence that Lawn Ranger lacked the ability to pay the civil penalty in full.[34] Under the circumstances of this particular case, we cannot conclude that the Board abused its discretion in choosing to suspend a portion of the penalty.

c. Suspension of the entire penalty was error.

Suspending the entire civil penalty, the Division contends, is contrary to the purposes of AS 23.30.080(f) because the absence of a financial sanction "encourages other businesses to go without workers' compensation insurance at least until they get caught."[35] In light of the risk of injury in this line of work, the presence of three aggravating factors, and Lawn Ranger's failure to maintain and provide adequate payroll records, suspension of the entire penalty is unjustifiable, the Division concludes.[36]

Lawn Ranger argues that entirely suspending the civil penalty "will likely gain compliance with the statute by this employer."[37] But obtaining compliance by Lawn Ranger satisfies only the first of the goals of AS 23.30.080(f). The other goals of the statutory penalty include deterring future lapses (by the sanctioned employer and

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[32] *See* Appellant's Brief at 13, citing *Miller v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 161 (May 14, 2012) ("the Commission upheld the Board's decision to suspend a portion of a penalty to avoid jeopardizing the continued viability of the business.").

[33] By contrast, where the lack of evidence is due to criminal conduct by an employee, the employer's failure to produce that evidence might warrant suspension. *See In Re Delta Sanitation*, n. 32, *supra*.

[34] *See* Hr'g Tr. at 61:23, 70:21-25.

[35] Appellant's Brief at 17.

[36] Appellant's Brief at 17-19.

[37] Brief of Appellee at 4.

others), providing for the continued safe employment of employees, and satisfying the community's interest in punishing the offender without vengeance.[38]

To entirely suspend a civil penalty on an employer who fails to insure not only permits that employer to flout the law without punishment, it creates a financial incentive to do so. In the absence of a finding that suspension is necessary in order to provide for continued safe employment, such an outcome is incompatible with the deterrent and punitive purposes of AS 23.30.080(f). We conclude that the Board's decision to suspend the entire civil penalty was an abuse of its discretion under the facts of this case.

d. No penalty is due absent employment.

The Division's argument that suspending a penalty based on a deficiency in the evidence of employee workdays is inconsistent with the imposition of the penalty in the first place highlights a more fundamental issue which, because the Division's argument implicates it, we are constrained to address.

The Board's decision indicates that it agreed with Lawn Ranger's contention at the hearing that Lawn Ranger did not have employees on every calendar day it was uninsured: the evidence (and common sense) is to the effect that Lawn Ranger hired employees as needed during the winter months, depending on the vagaries of snowfall.[39] And, although it was not logically inconsistent to find the evidence sufficient for purposes of imposing a penalty, while at the same time insufficient to warrant the immediate imposition of the full amount, the Board may not impose a civil penalty for periods of time when Lawn Ranger was not required to maintain workers' compensation insurance. The question the Division's argument raises, in effect, is whether there is substantial evidence to support the Board's decision to impose a penalty for all 410 days for which Lawn Ranger was uninsured.

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[38] *Alaska R & C*, App. Comm'n Dec. No. 088 at 22.

[39] *See Lawn Ranger*, Bd. Dec. No. 15-0059 at 10 ("Employer's business is seasonal and very dependent on the weather. It is logical to conclude Employer did not use employee labor during periods when the season for landscaping had ended, but there was not yet snow on the ground to plow.").

The Division argues that Lawn Ranger would have had to maintain insurance coverage for periods of time when it had no employees, because it could not be certain whether or when it would need coverage.[40] But, assuming that is true as a matter of business practice, it nonetheless remains true that a penalty may only be imposed for periods of time during which a firm was an employer. Moreover, proving that there are grounds for imposing a penalty during any particular period of time is part of the Division's initial burden of proof, before the amount of the penalty becomes an issue.

We turn, then, to whether there is substantial evidence that Lawn Ranger was an employer throughout the time it was uninsured. In that regard, Lawn Ranger did not dispute that it operates as a year-round business, with employment occurring throughout the year.[41] This was sufficient to establish, on behalf of the Division, a *prima facie* case that the firm was required to maintain insurance under AS 23.30.075 throughout the year. To rebut that *prima facie* case, Lawn Ranger could have provided specific information regarding its employment needs and practices during the periods at issue. It failed to provide any specific information in that regard, although Mr. Spikes did testify that in general hiring in the winter months depends on snowfall. However, notwithstanding the lack of specificity in Mr. Spikes' testimony, there is direct evidence rebutting in part the Division's *prima facie* case. According to the employment counts shown in the records of the Employment Security Division, Lawn Ranger had no employees in February or March, 2013.[42] In light of the record as a whole, there is not substantial evidence to support the imposition of a penalty for those two months.

5. Conclusion.

Suspension of the entire penalty is contrary to the purposes of AS 23.30.080 under the facts of this case. The Board's order imposing a penalty for the months of February and March, 2013, is REVERSED. The remainder of the Board's order is VACATED. This matter is REMANDED to the Board to impose the minimum civil

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40 Appellant's Brief at 14.

41 *See* R. 32; Hr'g Tr. at 59:23 – 62:12.

42 *See* R. 32.

penalty, suspended in such part on such conditions as the Board orders in its discretion, with the unsuspended portion payable in a lump sum or installments as the Board may order in its discretion, and with the remainder discharged upon successful completion of the conditions imposed.[43] We do not retain jurisdiction.

Date: ____*March 7, 2016*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

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

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below). 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

[43] *See Moore,* App. Comm'n Dec. No. 092 at 22-23.

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 Final Decision No. 224 issued in the matter of *State of Alaska, Department of Labor and Workforce Development, Division of Workers' Compensation vs. Lawn Ranger of Alaska, LLC,* AWCAC Appeal No. 15-016, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 7, 2016.

Date: *March 8, 2016*

Signed

K. Morrison, Appeals Commission Clerk