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.	Final Decision Decision No. 227 July 11, 2016 AWCAC Appeal No. 14-025 AWCB Decision No. 14-0131 AWCB Case No. 700002789

Final Decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0131, issued at Anchorage, Alaska, on October 1, 2014, by southcentral panel members Ronald P. Ringel, Chair, Patricia Vollendorf, Member for Labor, and Amy Steele, Member for Industry.

Appearances: Daniel I. Pace, Pace Law Offices, for appellants, Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson; James E. Cantor, Acting Attorney General, and Kimberly D. Rodgers, Assistant Attorney General, for appellee, State of Alaska, Division of Workers' Compensation.

Commission proceedings: Appeal filed October 30, 2014; briefing completed February 3, 2016; oral argument held on March 17, 2016.

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

By: Andrew M. Hemenway, Chair *pro tempore*.

1. Introduction.

The Alaska Workers' Compensation Board (hereinafter, Board) imposed a penalty on several business entities, pierced the corporate veil of each, and found Todd Christianson liable for the full amount of the penalty. On appeal, we reversed the Board's decision, vacated the penalty, and remanded the case to the Board to recalculate the penalty.

On remand, the Board concluded that none of the business entities should be treated as a separate entity. It imposed a penalty of $2,541,456. Mr. Christianson and the entities appeal, arguing that (1) the Board erroneously applied certain aggravating factors;[1] (2) the Board erroneously concluded that the business entities are not separate;[2] (3) the Board erroneously failed to consider certain mitigating factors;[3] and (4) the Board erroneously failed to consider the business entities' and Mr. Christianson's ability to pay.[4]

We conclude that (1) the Board erroneously applied two aggravating factors to the entities; (2) substantial evidence supports the Board's decision to treat the entities as not separate; (3) the Board did not erroneously fail to consider mitigating factors; and (4) the Board failed to consider an important factor in determining the appropriate penalty, and improperly disregarded Titan Enterprises' and Mr. Christianson's ability to pay. We reverse the Board's decision and remand for imposition of a penalty in accordance with our decision.

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[1] Appellants' Brief, pp. 13, 15-17

[2] Appellants' Brief, pp. 14-15.

[3] Appellants' Brief, pp. 17-19

[4] Appellants' Brief, pp. 19-22. The appellants' Notice of Appeal identified three additional grounds for appeal: (5) the Board erred in holding that Mr. Christianson may be held personally liable for the penalty; (6) the Board proceedings failed to provide due process of law; and (7) the penalty is unconstitutional in that it is criminal in nature. The appellants did not argue these points in their brief, reserving them for appeal to the Alaska Supreme Court. *See* Appellants' Brief, pp. 22-23. Because these points were not argued to us, we consider them waived for purposes of the appeal to the Commission. *See*, *e.g.*, *Cameron v. TAB Electric*, Alaska Workers' Comp. App. Comm'n Dec. No. 089, p. 15 (Sept. 23, 2008).

2. Factual background and proceedings.

a. Factual background.[5]

i. Mr. Christianson's relationship with Titan Topsoil and Titan Enterprises.

During the time period at issue in this case, Mr. Christianson was engaged in a landscaping business operating as Titan Enterprises, LLC (hereinafter, Titan Enterprises).[6] He also operated a seasonal business, Titan Topsoil, Inc. (hereinafter, Titan Topsoil), whose sole function was to provide topsoil to Titan Enterprises.[7] Mr. Christianson was the sole member of Titan Enterprises,[8] and the sole shareholder of Titan Topsoil.[9] He was the person in charge of both entities during the times at issue in this case.[10] He commingled the assets and interests of Titan Enterprises and Titan Topsoil, treating both as his alter egos.[11]

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[5] We make no factual findings. We set forth the material facts relating to the Board's decision to impose a penalty, based on the factual findings made by the Board in *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, Todd Christianson,* Alaska Workers' Comp. Bd. Dec. No. 09-0114 (June 16, 2009)(*Titan I*); *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, Todd Christianson,* Alaska Workers' Comp. Bd. Dec. No. 11-0095 (June 30, 2011)(*Titan II*); and *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, Todd Christianson,* Alaska Workers' Comp. Bd. Dec. No. 14-0131 (Oct. 1, 2014)(*Titan IV*). We add context and detail by reference to the record with respect to matters that do not appear to be in substantial dispute.

[6] *Titan II*, pp. 3 (No. 11), 9 (No. 48); *Titan IV*, p. 9 (No. 50).

[7] *Titan II*, p. 6 (No. 30); *Titan IV*, p. 8 (No. 42).

[8] *Titan IV*, p. 2 (No. 3).

[9] *Titan II*, p. 3 (No. 4).

[10] *Titan II*, p. 9 (No. 44); *Titan IV*, p. 8 (No. 41).

[11] *Titan II*, p. 8 (Nos. 41, 42); *Titan IV*, p. 9 (Nos. 47, 48).

ii. Titan Topsoil's and Titan Enterprises' uninsured status.

Titan Topsoil and Titan Enterprises were uninsured employers for 162 calendar days (March 5 - July 30, September 11-24) in 2006, and Titan Enterprises was an uninsured employer for an additional 22 calendar days (September 26 - October 17) in 2007 and 13 calendar days (January 3-15) in 2008.[12]

The 2006 lapse occurred after the firms' workers' compensation policy, issued by Commerce and Industry Insurance Company (hereinafter, Commerce and Industry), was cancelled for non-payment of premiums,[13] during a time period in which Mr. Christianson was unable to obtain workers' compensation insurance for Titan Topsoil or Titan Enterprises, due to an ongoing premium dispute with their prior insurer, Alaska National Insurance Company (hereinafter, Alaska National).[14] From March 5 - July 30, 2006 (148 calendar days), Titan Topsoil and Titan Enterprises operated using their own employees, despite being uninsured. During that time, Titan Topsoil had 324 uninsured employee workdays and Titan Enterprises had 1,899 uninsured employee workdays.[15] Also during that period of time, on June 8, 2006, an employee of Titan Enterprises incurred an employment injury; Titan Enterprises fully compensated the employee in October 2007, after failing to pay in accordance with its stipulation to pay at an earlier time.[16] From July 31 – September 10, 2006, Titan Topsoil and Titan Enterprises operated utilizing the services of employees of a professional employee organization, NANA Management Services.[17] Mr. Christianson terminated that arrangement effective September 11, 2006, and the firms operated

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[12] *Titan II*, pp. 2-3 (No. 1); *Titan IV*, p. 7 (Nos. 31, 35).

[13] *Titan IV*, p. 3 (No. 6).

[14] *Titan IV*, p. 3 (No. 8). As a result of that dispute, Alaska National had filed an action for unpaid premiums in 2004 that resulted in a judgment in 2007 in the principal amount of $15,000 against Titan Topsoil, Inc. *Titan II*, p. 4 (No. 19). *See Titan IV*, p. 6 (No. 27); R. 3990-3991; 4123-4130.

[15] *Titan IV*, p. 4 (No. 15).

[16] *Titan II*, p. 3 (No. 8); *Titan IV*, pp. 3-4 (Nos. 11-12). *See Aubert v. Titan Enterprises, LLC*, Alaska Workers' Comp. Bd. Dec. No. 07-0015 (Jan. 31, 2007).

[17] *Titan IV*, p. 4 (Nos. 13-15).

again without coverage from September 11-24, without accumulating any uninsured employee workdays,[18] after which they began using employees of another professional employee organization, CCO Enterprises.[19]

The 2007 lapse (September 26 - October 17) occurred after CCO Enterprises' policy expired on September 25, 2007.[20] Titan Enterprises accumulated 157 uninsured employee workdays during that time.[21] Titan Topsoil and Titan Enterprises obtained insurance through Alaska National effective October 18, 2007.[22] The 2008 lapse (January 3-15) occurred after that policy was cancelled for nonpayment of the premium, effective January 3, 2008.[23] Titan Enterprises accumulated 164 uninsured employee workdays during that time.[24] Titan Enterprises obtained insurance through Umialik Insurance, effective January 16, 2008.[25]

iii. Proportionality considerations.

A. Financial Gain.

The combined daily premium cost for Titan Topsoil and Titan Enterprises was approximately $205.37 in 2006,[26] for a combined financial gain of $33,269.94 as a result of their uninsured status for 162 days in 2006. Titan Enterprises' daily premium cost in 2007 was $191.22,[27] for a financial gain of $4,206.84 as a result of its uninsured status for 22 days in 2007. Titan Enterprises' daily premium cost in 2008 was

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18 *Titan IV*, p. 5 (No. 20).

19 *Titan II*, p. 5 (No. 22); *Titan IV*, p. 5 (No. 19).

20 *See Titan II*, p. 5 (No. 24).

21 *Titan IV*, p. 7 (No. 31).

22 *Titan IV*, p. 7 (No. 30).

23 *Titan IV*, p. 7 (No. 32).

24 *Titan IV*, p. 7 (No. 35).

25 *Titan IV*, p. 7 (No. 34).

26 *Titan IV*, p. 3 (No. 5). Titan Enterprises and Titan Topsoil were both insured in the same policy in 2005-2006, until it was cancelled. *See Titan II*, p. 4 (No. 18).

27 *Titan IV*, p. 7 (No. 30).

$139.53,[28] for a financial gain of $1,813.89 as a result of its uninsured status for 13 days in 2008.

Pro-rating their financial gain based on each entity's number of uninsured employee workdays,[29] in 2006 the gain to Titan Enterprises was approximately $28,279.45 and the gain to Titan Topsoil was approximately $4,990.49. Titan Enterprises' 2007 financial gain was $4,206.84, and in 2008 it was $1,813.89. Thus, the total financial gain to Titan Enterprises was approximately $34,300.18, and the total financial gain to Titan Topsoil was approximately $4,990.49. Their combined total financial gain was $39,290.67.

B. Financial Resources.

In 2005, Titan Enterprises and Titan Topsoil owned equipment valued at $706,000.[30] In 2006, Titan Topsoil had gross receipts of $279,606, a tax loss of $2,554, and total assets of $526,328.[31] In 2007, Titan Topsoil had gross receipts of $240,206, taxable income of $65,404, and owned assets valued at $548,105,[32] and Titan Enterprises had gross receipts of $1,680,969 and net income of $138,182.[33] Titan Enterprises had net income of $161,149 in 2012 and a net loss of $49,569 in 2013.[34] Mr. Christianson testified the combined annual net income of these enterprises was in the range of $200,000 in a normal year.[35]

Mr. Christianson's individual tax return showed adjusted gross income of $181,974 (including the $138,182 attributable to Titan Enterprises) and taxable income

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28 *Titan IV*, p. 7 (No. 34).

29 In 2006 Titan Enterprises had 1,899 uninsured employee workdays and Titan Topsoil had 324. Thus, Titan Enterprises had approximately 85% of the uninsured employee workdays, and Titan Topsoil had approximately 15%.

30 *See Titan IV*, p. 8 (No. 45).

31 *Titan II*, p. 7 (No. 36).

32 *Id.*

33 *Titan II*, p. 8 (No. 37).

34 *Titan IV*, p. 12 (No. 58).

35 Hr'g Tr. at 91:12-20, Apr. 1, 2009.

of $89,437 in 2007.[36] Mr. Christianson was receiving a monthly salary of $5,000 from Titan Enterprises in 2009.[37] Mr. Christianson testified that at the time of the 2009 hearing, Titan Enterprises and Titan Topsoil were not generating a positive cash flow.[38] Mr. Christianson asserts that he is subject, in his personal capacity, to a civil judgment of nearly $800,000 and to an Internal Revenue Service lien in excess of $400,000.[39]

b. Prior proceedings.

The State of Alaska, Division of Workers' Compensation (hereinafter, Division) initiated this case on June 10, 2008, by filing a petition requesting the imposition of a civil penalty.[40] The Board conducted hearings on April 1, 2009, and April 27, 2010, and issued its decision in 2011, finding Titan Enterprises, Titan Topsoil, and CCO Enterprises liable for a total penalty of $6,392,601, and finding Mr. Christianson personally liable for the entire amount as the alter ego of all three corporate entities.[41] On appeal, we held that: (1) substantial evidence supported the Board's finding that Titan Enterprises, Titan Topsoil, and CCO Enterprises were "mere instrumentalities" of Mr. Christianson, and thus its decision to pierce the corporate veil as to each (parent-subsidiary

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[36] *Titan II*, p. 8 (No. 37).

[37] *Titan II*, p. 7 (No. 34). *See* Hr'g Tr. at 93:2-3, Apr. 1, 2009 ("I think I pay myself 5,000 a month.").

[38] Hr'g Tr. at 91:25 – 92:17, Apr. 1, 2009.

[39] *Titan IV*, p. 12 (No. 57). There is ample evidence to support these assertions. *See*, *e.g.*, R. 5001 (Writ of Execution, dated March 13, 2013, showing a balance due of $987,627.28). *See generally*, *Christianson v. First National Bank*, 2012 WL 6062124 (Memorandum Opinion, Alaska Supreme Court, Dec. 5, 2012); *Jones v. Bowie Industries, Inc., Todd Christianson, Great Alaska Lawn and Landscaping, Inc., and AIG*, 282 P.2d 316 (Alaska 2012); *Christianson v. Conrad-Houston Insurance*, 318 P.3d 390 (Alaska 2014).

[40] *See Titan II*, p. 1.

[41] *Titan II*.

liability);[42] (2) the Board erred in concluding that CCO Enterprises, Titan Enterprises, and Titan Topsoil were uninsured from September 25, 2006 – September 25, 2007;[43] (3) the Board's decision did not adequately explain the basis for its determination that each of the corporate entities was liable for the other corporate entities' penalty (brother-sister liability);[44] (4) the Board could consider the aggravating factors listed in 8 AAC 45.176 in determining the appropriate penalty, but not as a mandatory directive;[45] and (5) the total amount of the penalty imposed, $6,392,601, was excessive.[46]

We reversed the Board's decision, vacated the penalty, and remanded to the Board to make factual findings "whether, as to each other, [Titan Enterprises, Titan Topsoil, and CCO Enterprises] merit treatment as separate entities" and, if they were found not to be separate entities, to make findings as to the aggravating and mitigating factors applicable to each individual entity or combination of non-separate entities and to reconsider the penalty it had imposed.[47]

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[42] *Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 175, pp. 11-13 (Jan. 8, 2013) (hereinafter, *Titan III*). While we refer to "parent-subsidiary" liability, this case actually concerns the liability of an individual sole owner, rather than of a parent corporation. The analysis is similar. *See Uchitel Company v. Telephone Company*, 646 P.2d 229, 234-235 (Alaska 1982).

[43] *Titan III*, pp. 14-15. We made this ruling based on two separate grounds: first, that the Board had erred by relying on hearsay evidence as the basis for its finding; and second, that as a matter of law CCO Enterprises' policy could not be considered void absent notice to the insured. *Id.* The Board, in its decision, invites us to elaborate on the first ground, in light of 8 AAC 45.120(e) and AS 44.62.460(d). *See Titan IV*, p. 11, note 2. Given the alternative ground for our ruling, and the Division's failure to request reconsideration with respect to the hearsay issue, we decline the Board's invitation.

[44] *Titan III*, pp. 15-16.

[45] *Titan III*, pp. 16-17.

[46] *Titan III*, pp. 18-21.

[47] Order on Motion for Clarification (Mar. 11, 2013). *See Titan III*, p. 21.

The Board, in its decision on remand, concluded that because it had found that each of the corporate entities was a mere instrumentality of Mr. Christianson, "[t]here are no separate entities to which aggravating factors can be applied or against which a penalty can be assessed."[48] Nonetheless, the Board specifically found seven aggravating factors applicable to Titan Enterprises, and five applicable to Titan Topsoil.[49] The Board imposed a penalty at the same rate it had previously, $999 per uninsured employee workday, for a total fine of $2,541,456, applicable to Mr. Christianson personally, as well as to each of the corporate entities.

3. Standard of review.

In this case, the Board had discretion to determine the amount of a civil penalty under AS 23.30.080(f).[50] 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."[51] 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.[52]

With regard to the last consideration, we have held that in the absence of a governing regulation, an unsuspended penalty greater than four times the financial gain will be

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[48] *Titan IV*, p. 29.

[49] *Titan IV*, pp. 12-13 (Nos. 60-62).

[50] *See Moore v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 092 at 13 (Nov. 17, 2008) (*Moore*). The Board's discretion with respect to conduct occurring after February 28, 2010, is limited by 8 AAC 45.176.

[51] *Alaska R & C Communications, LLC v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 at 22 (Sept. 16, 2008) (*Alaska R & C*).

[52] *Id.*

considered excessive for an employer without a prior violation and with no aggravating factors.[53] In addition, we have stated:

> AS 23.30.080(f) was designed to be proportionate to the duration and scope of the employees' exposure to work-related injury caused by the failure to insure [*i.e.*, the number of uninsured employee workdays]. However, the board's exercise of its discretion should not result in penalties that ignore proportionality in all other respects.[54]

In determining whether a penalty is proportionate in other respects, we have looked to the total amount of the penalty in relation to (1) the financial gain to the employer and (2) the employer's resources as measured by income, payroll, and assets.[55]

Because the conduct at issue in this case predates the promulgation of 8 AAC 45.176, we exercise our independent judgment in examining the Board's choice to consider (or disregard) particular aggravating or mitigating factors.[56] In cases not governed by 8 AAC 45.176, we have approved consideration of the aggravating factors listed in the regulation.[57] We review the Board's findings relating to the existence of aggravating or mitigating factors for substantial evidence.

For conduct occurring prior to the promulgation of 8 AAC 45.176, in determining whether the penalty rate is appropriate we have looked to the penalty rate imposed in similar cases as a guide.[58] We have cautioned that for conduct occurring prior to the promulgation of 8 AAC 45.176, it would be an abuse of discretion to impose a penalty rate that is consistent with the regulation, but that is grossly disproportionate to the penalty rate imposed in the absence of the regulation.[59]

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[53] *Moore*, p. 21.

[54] *Moore*, p. 21.

[55] *See Moore*, pp. 19, 21.

[56] *See Alaska R & C*, p. 20.

[57] *Titan III*, pp. 16-17.

[58] *See Anchorage Midtown Motel, Inc. v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 159 at 13-14, notes 49-50 (Feb. 14, 2012) (*Anchorage Midtown*).

[59] *See Anchorage Midtown*, p. 18, note 69.

4. Discussion.

a. Aggravating factors.

Because the conduct at issue in this case occurred prior to the promulgation of 8 AAC 45.176, that regulation did not govern the Board's consideration of aggravating factors. Nonetheless, as we stated in our earlier decision in this case, the aggravating factors listed in the regulation are derived from prior Board and Commission decisions, and it was appropriate for the Board to consider them.[60]

On remand the Board found five aggravating factors listed in the regulation to be applicable to both Titan Topsoil and Titan Enterprises: (1) failure to maintain insurance after notification from the Division; (2) previous violations; (3) history of injuries while insured; (4) history of injuries while uninsured; and (5) cancellation of a policy for failure to comply with the carrier's requests or procedures.[61] The Board found two additional aggravating factors applicable to Titan Enterprises only: (6) lapse of more than 180 days; and (7) failure to provide compensation to an injured uninsured employee.[62] The Board found that another aggravating factor, (8) lapses in reasonably diligent business practices, had been established, but did not specify which entities had engaged in that conduct.[63]

The appellants object that the Board erred in considering three aggravating factors (5, 6, and 7) and that substantial evidence does not support considering another (8).

i. Provision of benefits to injured employee.

Under 8 AAC 45.176(d)(9), it is an aggravating factor that an employer:

> Fail[ed] to provide compensation or benefits payable under the Act to an uninsured injured employee.

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60 *Titan III*, p. 16.

61 *Titan IV*, pp. 12-13 (Nos. 60, 62). *See* 8 AAC 45.176(d)(1), (4), (10), (11), (14).

62 *Titan IV*, p. 12 (Nos. 60, 61). *See* 8 AAC 45.176(d)(3), (9).

63 *Titan IV*, p. 36. *See* 8 AAC 45.176(d)(14).

The facts relevant to this aggravating factor are undisputed: on June 8, 2006, while Titan Enterprises was uninsured, an employee of Titan Enterprises reported a compensable injury. The injured worker filed a claim on October 3, 2006. On January 17, 2007, Titan Enterprises accepted liability and on January 30, 2007, it filed a stipulation in which it agreed to pay benefits. Benefits were not paid as stipulated and the employee filed a petition for an order of default. Titan Enterprises paid the requested benefits on October 2, 2007.[64]

The Board, in light of the delay in payment, considered this to be an aggravating factor, treating the delay as a failure to pay.[65] The appellants argue that (1) the Board erred in considering this factor because the Division did not argue that it should apply, and (2) because Titan Enterprises eventually paid the benefits, it did not "fail" to pay the benefits.[66]

With respect to the first point, the Division does not dispute that it did not ask the Board to consider Titan Enterprises' conduct in this regard to be an aggravating factor in determining an appropriate penalty. It argues, however, that the Board may consider any evidence in the record in exercising its discretion with respect to the appropriate penalty.[67] The Division's response conflates two separate issues: (1) whether the Board may consider particular conduct as an aggravating factor when that conduct was not specified by the Division prior to the hearing; and (2) if the conduct can be considered, what evidence may the Board consider in determining whether the conduct occurred. The appellants' objection goes to the first issue, not the second; the Division's response goes to the second, not the first.

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64 *See supra*, note 16.

65 *See Titan IV*, p. 32.

66 Appellants' Brief, p. 13.

67 Brief of Appellee, State of Alaska, Division of Workers' Compensation, p. 32, citing 8 AAC 45.120(f) (hereinafter, Appellee's Brief).

As to the first issue, the Board's regulations require that a hearing be limited to the issues identified in the prehearing summary.[68] The prehearing summary in this case identified two disputed aggravating factors as at issue: "cancellation due to failure to comply with carrier's policies" and "lapse in business practice."[69] In this particular case, moreover, we clarified our initial decision by stating that the Board needed to make findings with respect to the seven aggravating factors identified in its first decision, without suggesting that additional aggravating factors could also be considered.[70] Nonetheless, in the absence of any claim by the appellants that there was a factual dispute regarding this particular aggravating factor,[71] in our independent judgment we conclude that the Board did not err in considering it. And, because 8 AAC 45.176(d)(9) applies to a failure to pay compensation of benefits payable to an employee, and a delayed payment is a failure to make a payment when it is payable (*i.e.*, by the date due), we conclude that the Board properly found this aggravating factor to be applicable.

ii. Uninsured in excess of 180 days.

Under 8 AAC 45.176(d)(3), an aggravating factor is established when there is "a violation of AS 23.30.075 that exceeds 180 days." Titan Enterprises was uninsured for a total of 197 days in four periods of 148, 14, 22, and 13 days from March 2006, through October 2008. The Board found that the aggravating factor was established based on the combined total number of 197 uninsured days.

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[68] 8 AAC 45.065(c); 8 AAC 45.070(g). *See*, *e.g.*, *Lynden Transport, Inc. v. Mauget*, Alaska Workers' Comp. App. Comm'n Dec. No. 154 at 9-10 (June 17, 2011); *Alcan Electrical and Engineering, Inc. v. Redi Electric, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 112 at 11-13, (July 1, 2009); *Schouten v. Alaska Industrial Hardware*, Alaska Workers' Comp. App. Comm'n Dec. No. 094 at 6-11, (Dec. 5, 2008).

[69] R. 5058, 5070.

[70] Order on Motion for Clarification, p. 2.

[71] 8 AAC 45.065(c) states that the prehearing summary "will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing."

The appellants argue that because Titan Enterprises was not uninsured for at least 180 consecutive days, the aggravating factor stated in 8 AAC 45.176(d)(3) does not apply.[72] They assert that the reference in the regulation to "a violation . . . that exceeds 180 days" should be construed to mean a single, continuing violation, rather than a combined total of different violations.[73]

The Division responds that the reference to "a violation" includes multiple violations totaling in excess of 180 days, because, pursuant to AS 01.10.050(b), the singular includes the plural.[74] It adds that we have recognized that the length of a violation is an important consideration in assessing a penalty, and observes that in considering the period of time employees are uninsured it makes no difference whether the dates are consecutive or not.[75]

Under AS 23.30.080(f), the penalty amount is set based on the number of uninsured employee workdays; thus, the combined length of time that an employer is uninsured is an inherent factor in the determination of the applicable penalty. Given that the combined length of time is a factor in the penalty in every case, to consider the combined length of time as an aggravating factor is duplicative. Moreover, given the Division's discretion to combine multiple violations in a single petition, the Division would have the ability to enhance a penalty based on its enforcement decisions. Lastly, we have previously ruled that 8 AAC 45.176(d) should be strictly construed,[76] and 8 AAC 45.176(d)(3) remains ambiguous even when read in accordance with AS 01.10.50(b).[77] For these reasons, exercising our independent judgment, we

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[72] Appellants' Brief, pp. 15-16.

[73] *Id.*

[74] Appellee's Brief, pp. 27-28.

[75] Appellee's Brief, p. 28.

[76] *See Anchorage Midtown Motel*, p. 17.

[77] The question of statutory construction is not whether "a violation" means "a violation or more than one violation", but is rather whether at least one violation must be in excess of 180 days. AS 01.10.050(b) does not answer to that question.

conclude that the Board erred in considering the combined length of multiple violations as an aggravating factor under 8 AAC 45.176(d)(3).

iii. Cancellation for failure to comply.

Under 8 AAC 45.176(d)(13), an aggravating factor is established by:

> cancellation of a workers' compensation insurance policy due to the employer's failure to comply with the carrier's requests or procedures.

The Board found that CCO Enterprises had failed to comply with an insurer's year-end policy audit.[78] This finding relates to the failure of CCO Enterprises to provide information requested by American Interstate Insurance Company in 2007 regarding a policy covering Titan Topsoil and Titan Enterprises, in connection with an end of year audit.[79] The Board also found that two of the appellants' other policies, one issued by Commerce and Industry and the other by Alaska National, were cancelled for nonpayment of premiums.[80]

The appellants argue that while it is true that an Alaska National policy was cancelled for failure to pay the premium,[81] it was not cancelled for failure to respond to the carrier's audit request, and that we ruled in *Anchorage Midtown* that this aggravating factor does not apply to a cancellation for failure to pay the premium.[82]

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[78] *Titan IV*, p. 6 (No. 29) (Policy No. RAWCAK1543982006). *See* Hr'g Tr. at 110:10-15, Apr. 27, 2010.

[79] *See Titan IV*, p. 33; R. 4, 4238-4239.

[80] *Titan IV*, pp. 3 (No. 6) (Commerce and Industry Policy No. WC1513758, named insureds including Titan Enterprises and Titan Topsoil, cancelled effective March 5, 2006), 7 (No. 32) (Alaska National Policy No. 07JWW06259, cancelled effective January 3, 2008). We have previously ruled that the Board's prior determination that the latter policy was void or cancelled effective March 30, 2007, for failure to notify the insurer of a change in ownership was incorrect. *See Titan II*, p. 5 (No. 25); *Titan III*, p. 15, citing AS 21.36.220(b).

[81] Appellants' Brief, pp. 16-17. Here, the appellants refer to the Alaska National policy that was the subject of Alaska National's 2004 lawsuit, which terminated in 2007. *See supra*, note 14. However, the Board's finding regarding nonpayment concerns a subsequent Alaska National Policy (No. 07JWW062590, cancelled effective January 3, 2008).

[82] Appellants' Brief, pp. 16-17. *See Anchorage Midtown* at 16-17.

The Division responds that the failure to comply with an insurer's request for payment is sufficient to establish this aggravating factor.[83]

In *Anchorage Midtown* a policy was cancelled for nonpayment. It appears that the insured did not fail to comply with the audit, but that rather no audit occurred because the insured failed to pay for one. On those facts, we ruled that the cancellation for nonpayment was not sufficient to establish this aggravating factor. We think that ruling effectively governs here: we can safely presume that, in *Anchorage Midtown*, the insurer had requested payment, and since refusing that request was insufficient to establish this aggravating factor in that case it follows that refusing the same request in this case is insufficient. To treat a refusal to comply with a request for payment as sufficient to establish this aggravating factor would effectively overrule *Anchorage Midtown*. It would effectively treat nonpayment as a ground for aggravating a penalty. In the absence of a finding by the Board that any policy was cancelled for failure to comply with the carrier's requests or procedures, rather than for nonpayment, we do not see that this aggravating factor has been established.[84]

iv. Business practices.

Under 8 AAC 45.176(d)(14), an aggravating factor is established by a showing of:

> 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[.]

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[83] Appellee's Brief, p. 29 ("Titan provides no legal support . . . for the proposition that 'carrier's requests or procedures' excludes a carrier's request for payment.").

[84] The Division offered into evidence a document relating to this issue, but the Board declined to admit it into evidence. *See* Hr'g Tr. 110:22 – 111:21, Apr. 27, 2010; R. 3918.

In its decision on remand the Board found this aggravating factor had been established, without specifying the entity that had engaged in the conduct or the specific conduct it considered to fall within the scope of the regulation. In its initial decision, the Board referred to Mr. Christianson's failure to ascertain the impact that his premium dispute with Alaska National would have on his ability to obtain coverage.[85] It also referred to a course of conduct reflecting what it perceived to be Mr. Christianson's effort to fraudulently obtain insurance at less than market rates by utilizing CCO Enterprises as a source of labor without accurately disclosing its anticipated payroll costs.[86] On remand, the Board described Mr. Christianson as "an experienced businessman" whose "knowledge and understanding of workers' compensation insurance is well above average."[87] It characterized the 22-day and 13-day lapses in insurance as due to "his own failures", specifically the failure to renew the CCO Enterprises policy and the failure to pay the Alaska National premium, stating, "No one is to blame for those lapses other than Mr. Christianson himself."[88] More egregiously, the Board characterized the 148-day lapse as the result not of inadvertence or negligence or any other "lapse" in ordinary business practices, but rather as the result of knowing and deliberate conduct.[89]

The appellants point out that the Board did not find that any of the three specific types of conduct identified in 8 AAC 45.176(d)(14) had occurred. They argue that notwithstanding the general rule that "including" means, "including but not limited to", 8 AAC 45.176(d)(14) should be strictly construed to the contrary, and that in the absence of any findings to support one of the three specific items the Board ought not to have considered this factor as applicable.[90]

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85 *Titan II*, p. 24.

86 *Id.*

87 *Titan IV*, p. 30.

88 *Titan IV*, p. 31.

89 *Titan IV*, p. 32.

90 Appellants' Reply Brief, p. 12.

We do not need to resort to the rules of statutory construction to interpret 8 AAC 45.176(d)(14). A strict construction would be required if 8 AAC 45.176(d)(14) were ambiguous, but in light of AS 01.10.040 the regulation is not ambiguous.[91] As a matter of law, the Board did not need to find that one of the three specific examples was established.

The appellants also argue that the evidence does not support a finding that Mr. Christianson failed to act with reasonable business diligence. We conclude, to the contrary, that there is ample substantial circumstantial evidence to support the Board's finding that Mr. Christianson failed to employ reasonable business practices to avoid lapses in insurance.[92] The appellants assert that the lapses occurred due to administrative staff oversight, but have not identified evidence in the record to support that assertion as to each lapse that occurred.[93]

b. The Board adequately explained brother-sister liability.

We directed the Board on remand "to first make factual findings whether, as to each other, [Titan Enterprises, Titan Topsoil, and CCO Enterprises] merit treatment as separate entities."[94] We did so because in our view the Board's decision "lack[ed] a . . . discussion of the factual findings on which the board based its implicit conclusion that

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[91] By contrast, we applied the rule of strict construction to 8 AAC 45.176(d)(3), because even in light of AS 01.10.050(b), that provision remains ambiguous. *See supra*, note 77.

[92] That multiple lapses in coverage occurred is in itself circumstantial evidence of a lapse in reasonably diligent business practices, absent evidence to support a finding of reasonable care with respect to each lapse. *See generally*, *supra*, notes 85-89.

[93] Mr. Christianson testified that at one point, his insurance was cancelled when his office manager failed to pay a bill. Hr'g Tr. at 37:8-10, Apr. 1, 2009. He accepted responsibility for her mistake. *Id.* Mr. Christianson's concession is, in effect, a concession that the aggravating factor applies, as a failure to properly supervise staff.

[94] Order on Motion for Clarification, p. 2. *See also*, *Titan III*, p. 21 (the Board "should make . . . findings that would support making each entity jointly and severally liable for any part of the civil penalty separately imposed on the other two entities.").

each entity was liable for the entire civil penalty."[95] Absent a discussion by the Board linking its factual findings to its legal conclusion that the entities' separate existence should be disregarded for purposes of brother-sister liability, we were "unable to identify the factual underpinning for the board's holding in this regard."[96]

On remand, the Board made no new findings pertinent to this issue.[97] The appellants argue that by not making any new findings to support its decision to impose brother-sister liability, the Board failed to comply with our instructions on remand.[98] But on remand the Board, in explaining its decision to pierce the corporate veil with respect to brother-sister liability, pointed us to the discussion, in its initial decision, of this issue.[99] Turning to the Board's initial decision, we now discern the basis for the Board's decision to pierce the corporate veil for purposes of brother-sister liability. In its initial decision, the Board explained, "Based upon the administrative record, [Titan Enterprises, Titan Topsoil, and CCO Enterprises] are so closely intertwined that they do not merit treatment as separate entities."[100] The Board went on to cite specific facts regarding the relationship between CCO Enterprises and Titan Topsoil and Titan Enterprises, and between Titan Topsoil and Titan Enterprises, as supporting its decision to impose brother-sister liability on all three.[101] As between CCO Enterprises and the other two entities, the Board cited these facts:

(1) Employees of CCO Enterprises were employees of Titan Enterprises;

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95 *Titan III*, p. 16.

96 *Id.*

97 *See* Appellants' Reply Brief, pp. 3-5.

98 Appellants' Brief, pp. 14-15.

99 *Titan IV*, p. 29 ("For the reasons set out in *Titan II*, and for the reasons set out above, [Titan Enterprises, Titan Topsoil, and CCO Enterprises] will again be disregarded as separate entities.").

100 *Titan II*, p. 19.

101 *Titan II*, p. 20.

(2) CCO Enterprises' only clients were Titan Enterprises and Titan Topsoil;[102] and

(3) Mr. Christianson operated and controlled CCO Enterprises to fraudulently obtain workers' compensation coverage for Titan Topsoil and Titan Enterprises.

As between Titan Topsoil and Titan Enterprises, the Board cited these facts:

(1) They share a common sole owner (Mr. Christianson);[103]

(2) They share employees;

(3) Titan Topsoil's sole function is to provide topsoil to Titan Enterprises;[104]

(4) Titan Topsoil and Titan Enterprises do not deal at arm's length;

(5) Neither Titan Topsoil nor Titan Enterprises maintains corporate formalities;

(6) Assets of Titan Topsoil and Titan Enterprises are freely transferred between them;[105]

(7) Mr. Christianson has failed to distinguish Titan Topsoil from Titan Enterprises.

With respect to piercing the corporate veil to hold CCO Enterprises liable for the penalties imposed on Titan Topsoil and Titan Enterprises, the Board's factual finding that CCO Enterprises was a vehicle by which Mr. Christianson fraudulently obtained workers' compensation insurance coverage for Titan Topsoil and Titan Enterprises is

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[102] *See Husky Oil N.P.R. Operations, Inc. v. Sea Airmotive, Inc.*, 724 P.2d 531, 534 (Alaska 1986) ("To the extent that Gay Airways acted at all, it acted on behalf of Seair.") (*Husky Oil*).

[103] *See id.* (brother-sister corporations are "corporations sharing a common nucleus of shareholders.").

[104] *See supra*, note 102.

[105] The Board placed particular emphasis, in its initial decision, on the fact that Titan Enterprises' assets were transferred at less than market value to Titan Topsoil as collateral for a loan to Titan Topsoil. *See Titan II*, pp. 6-7 (No. 33), 20.

sufficient to pierce the corporate veil between those entities,[106] and Mr. Christianson's role in the acquisition of coverage through CCO Enterprises for a premium far below the premium paid previously for direct coverage is substantial evidence to support the Board's finding that Mr. Christianson's conduct was fraudulent. As for piercing the corporate veil to find Titan Topsoil and Titan Enterprises liable for each other's penalty, the appellants do not contest any of the facts the Board cited in its initial decision, nor do they argue that, taken together, those facts are insufficient to impose brother-sister liability as between those two entities: the appellants simply point out that the findings were made in the initial decision.[107] But our stated reason for remanding the case was that we were unable "to identify the factual underpinning for the board's holding in this

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[106] The Alaska Supreme Court has stated:

> The corporate veil may not be pierced merely because [an individual] controls the activities of the corporation. Rather, the veil may be pierced only if the corporate form is used 'to defeat public convenience, justify wrong, commit fraud, or defend crime.'

Uchitel, 646 P.2d at 234, quoting *Elliott v. Brown*, 569 P.2d 1323, 1326 (Alaska 1977), quoting *Jackson v. General Electric Co.*, 514 P.2d 1170, 1172-1173 (Alaska 1973). Where the veil is pierced on the ground that one corporate entity is a mere instrumentality of the other (as the Board found in this case as between Titan Topsoil and Titan Enterprises) this restriction does not apply. *See id.*, citing *Jackson*, *General Construction Co. v. Tyonek Timber, Inc.*, 629 P.2d 981, 983 (Alaska 1981); *Volkswagenwerk, A.G. v. Klippan, GmBH*, 611 P.2d 498, 505 (Alaska), cert. denied, 449 U.S. 974, 101 S.Ct. 385, 66 L.Ed.2d 236 (1980).

[107] Appellants' Reply Brief, pp. 3-5.

regard."[108] Because we are now able to identify the facts the Board relied on, the failure to make additional findings of fact on remand is harmless error.[109]

c. Mitigating factors.

The appellants argue that the Board failed to consider the following mitigating factors: (1) cooperation with the Division's investigation;[110] (2) diligence in remedying lapses in coverage;[111] (3) except for one, the lapses were short term and inadvertent;[112] (4) lack of culpability (*i.e.*, lapses were due to excusable error or omission);[113] (5) absence of stop work order;[114] and (6) no prior Board proceeding for failure to insure.[115]

We agree with the Division that the employers' cooperation with the Division's investigation was unexceptional, and thus did not constitute a mitigating factor.[116] As for diligence in remedying lapses in coverage, this mitigating factor does not apply when an employer simply complies with the law and promptly obtains insurance after being notified of a lapse, nor does it apply when, as the appellants assert occurred in

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[108] *Titan III*, p. 16.

[109] Even if the Board had failed to explain its reasoning, the appellants would not necessarily have been prejudiced. The Board on remand made specific findings relating to the aggravating factors applicable to Titan Topsoil and Titan Enterprises separately, which was what we asked it to do if it did not find them to be subject to brother-sister liability. Moreover, on remand the Board determined a penalty rate by reference to prior similar cases. *See Titan IV*, pp. 20-23. The Board referred to the penalty rate that would be applied under 8 AAC 45.176(a)(5) for purposes of comparison only. *See Titan IV*, pp. 35-36. Because the Board erred in its consideration of two of the aggravating factors listed in 8 AAC 45.176(d), however, the applicable comparison on remand from this decision is to the penalty rate established in 8 AAC 45.176(a)(4) ($51-$499 per uninsured employee workday).

[110] Appellants' Brief, pp. 17-18.

[111] Appellants' Brief, pp. 18-19.

[112] Appellants' Brief, p. 18.

[113] Appellants' Brief, pp. 18-19.

[114] Appellants' Brief, p. 19.

[115] Appellants' Brief, p. 19.

[116] *See* Appellee's Brief, p. 35, citing *Alaska R & C,* p. 25.

this case, an employer diligently attempts to obtain replacement insurance but is unsuccessful in doing so and yet continues to operate as an uninsured employer.[117] We agree with the Division that the Board did not err in determining that the lapses were not the inadvertent result of excusable neglect.[118] Regarding the non-existence of a stop work order, we think it apparent that while the existence of a stop work order may be an aggravating factor, the non-existence of a stop work order is not a mitigating factor: the absence of such an order is a neutral factor. Similarly, that an employer has not previously been before the Board is a neutral factor, not a mitigating one. In sum, there is no merit to the appellants' contentions regarding mitigating factors.

c. The Board disregarded an important consideration.

The appellants argue that the Board improperly failed to consider their ability to pay and therefore erred by imposing a penalty beyond their ability to pay.[119] But the Board did not completely fail to consider the appellants' ability to pay. Rather, the Board concluded that because Titan Topsoil is no longer in business, and Titan Enterprises has no employees or assets, their ability to pay is immaterial.[120] In the Board's view, ability to pay is a consideration only insofar as the penalty might cause the employer to go out of business, place employees' jobs at risk, or otherwise adversely affect the community.[121]

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[117] *See Alaska R & C*, p. 25 ("[A]n employer who sends workers home rather than operate uncovered and also promptly remedies the lack of coverage has demonstrated exceptional diligence. Exceptional diligence should be regarded as a 'mitigating' factor.").

[118] *See e.g., supra*, notes 85-89. We observe that under 8 AAC 45.176(a)(1), the Board considers a lapse of less than 30 days inadvertent in specified circumstances, none of which was shown to exist in this case.

[119] Appellants' Brief, pp. 20-22.

[120] *See Titan IV*, p. 34 ("[Titan Topsoil and CCO Enterprises] are no longer in business, and [Titan Enterprises] sold all its assets and has no employees. A sizeable penalty will not jeopardize their existence, place employee jobs at risk, or adversely affect the community.").

[121] *Id.* ("The ability to pay . . . was considered above. Apart from those factors, the ability to pay has no relationship to an employer's culpability. . . .").

We discussed an employer's ability to pay as a consideration in *Alaska R & C*.[122]

> The penalty is not intended to cause businesses to fail or employees to become unemployed. Such an outcome does not restore the employer to compliance, provide security for injured workers or continued employment, or deter future lapses, and it goes beyond the community's interest in condemnation of the offense. There are employers so grossly incompetent in business or so exploitive of their employees that there is little public interest in their continued viability; however, there is a strong public interest in preserving employment opportunities when possible.

We also stated:[123]

> The purpose of bringing employers into compliance includes the avoidance of closure of businesses and resultant unemployment unless the danger to the community presented by the continued operation of the business outweighs the public interest in preserving it.

In this case, the Board concluded that Mr. Christianson's attempts to obtain workers' compensation insurance by what it considered to be fraudulent means were so reprehensible as to warrant the imposition of a total penalty far beyond the capacity of the employers to pay, reasoning that his conduct was equivalent to, if not more egregious than, disregarding a stop work order.[124] But the legislature has otherwise limited the financial liability of an employer for fraudulent conduct to three times the damages incurred, and the maximum penalty for violation of a stop work order is $1,000 per day.[125] Moreover, in disregarding the employers' capacity to pay, the Board also failed to consider that the total penalty must be proportionate to the employer's financial gain and resources as measured by income, assets and payroll.[126] In this

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122 *Alaska R & C*, p. 28.

123 *Id.*, p. 27.

124 *See*, *e.g.*, *Titan II*, p. 24; *Titan IV*, p. 33.

125 AS 23.30.080(d); AS 23.30.250(c).

126 *See Moore*, pp. 19, 21.

case, the findings and the evidence clearly point to the conclusion that the total penalty imposed is disproportionate in all of those respects.[127]

The total penalty imposed is approximately 65 times the combined total financial gain ($39,290.67) to Titan Topsoil and Titan Enterprises. Their conduct clearly warrants a total penalty greater than four times their combined financial gain ($157,162.68).[128] In light of the multiple aggravating factors applicable to them, an amount double, triple, or even quadruple that amount ($628,650.72) could be viewed as reasonably proportionate to the combined financial gain. But even in light of the aggravating factors found to exist, the total penalty imposed ($2,541,456) is grossly disproportionate to the financial gain.[129]

Similarly, the total penalty imposed appears to be grossly disproportionate to the resources of Titan Topsoil and Titan Enterprises, as measured by their income, assets and payroll during the period of lapse. The combined total penalty imposed was eight to ten times the normal annual earnings of the combined enterprises.[130] The total penalty appears to be about five times the entities' combined total assets at the time of

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[127] We have previously cautioned the Board that "the goal of deterrence is not served by imposition of excessive penalties, as they are more likely to encourage more egregious conduct instead of prompt compliance." *Alaska R&C*, pp. 27-28.

[128] *See supra*, note 53.

[129] In considering whether a penalty imposed under AS 23.30.080(f) is proportional to the offense, we recognize that proportionality is not a strictly mathematical exercise, just as it is not a strictly mathematical exercise when considering whether an award of punitive damages is excessive. However, the mathematical relationship is an important factor to consider. *See generally*, *Central Bering Sea Fishermen's Association v. Anderson*, 54 P.3d 271 (Alaska 2002).

[130] For an employer with 1,907 uninsured employee workdays over periods of two weeks and one year, on a record establishing the four aggravating factors listed in 8 AAC 45.176(d)(1), (3), (4) and (7), we disapproved a penalty equal to approximately one-half the firm's annual income. *See Moore*, p. 18. In another case, involving 8,567 uninsured employee workdays over a period of more than five years, on a record establishing the four aggravating factors listed in 8 AAC 45.176(d)(2), (3), (4), and (10), we approved a penalty (one-half of which was suspended) equal to one and one-half times the firm's annual income. *See Miller v. State, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 161 (May 14, 2012).

the lapses.[131] The total penalty appears to be about five times the average annual payroll of the entities' combined payroll at the time of the lapses.[132]

A total penalty that is proportionate to the employer's financial gain and resources at the time of lapse may nonetheless be beyond the employer's ability to pay at the time the penalty is imposed. If so, a payment schedule or conditional suspension of a portion of the penalty are generally appropriate mechanisms for alleviating the impact on the employer, employees, and community, while still respecting the goals of AS 23.30.080(f). But regardless of whether a payment schedule or conditional suspension of a portion of a penalty would be appropriate, the Board's first task is to set the total penalty at an amount proportionate to the employer's financial gain and resources at the time of the lapses. The failure to consider proportionality in this case was an abuse of discretion, in that it resulted in the imposition of a total penalty that is punitive rather than restorative, and disregarded an important factor in determining the appropriate penalty.[133]

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[131] *See Titan II*, p. 7 (No. 36).

[132] R. 3948. For an employer with 1,478 uninsured employee workdays over a period of one year, on a record establishing the four aggravating factors listed in 8 AAC 45.176(d)(3), (4), (7), and (12), we disapproved a penalty equal to 80% of the annual payroll. *See Alaska R & C*, p. 29. In another case, involving 1,907 uninsured employee workdays, on a record establishing the four aggravating factors listed in 8 AAC 45.176(d)(1), (3), (4) and (7), we disapproved a penalty that exceeded the quarterly payroll. *See Moore*, p. 19.

[133] Because we have concluded that the Board erred in this regard, we need not consider whether the total penalty imposed is excessive. In *Titan III*, we concluded that the total penalty amount was excessive. We did not conclude that the penalty rate of $999 was excessive. Accordingly, the Board's decision on remand is not on its face contrary to our decision in *Titan III*, even though the penalty rate imposed on remand is exactly the same as the penalty rate the Board imposed previously: $999 per uninsured employee workday. That the total penalty amount was reduced from $6,392,601 to $2,541,456 is a function of our reversal of the Board's finding that Titan Topsoil and Titan Enterprises were uninsured from September 25, 2006, through September 24, 2007.

d. Ability to pay was not fully and adequately considered.

In concluding that the employers' ability to pay was immaterial, the Board disregarded Titan Enterprises' continued existence as an ongoing business, as well as Mr. Christianson's personal liability.[134] If the Board had found that the danger posed by the continued operation of Titan Enterprises outweighs the public interest in preserving it, the Board might have been justified in disregarding Titan Enterprises' ability to pay.[135] But the Board made no such finding, and in any event similar reasoning does not apply to Mr. Christianson's personal liability: Mr. Christianson is not a corporate entity. There is no public interest in imposing a penalty on him that is beyond his capacity to pay, except with respect to his conduct as an employer. To impose a penalty on Mr. Christianson in his personal capacity that is beyond his ability to pay, without regard to his future conduct as an employer, would be entirely punitive.[136] The Board may, in imposing a penalty on an individual, impose conditions that reflect the Board's findings with respect to culpability and the public interest in ensuring future compliance with the Alaska Workers' Compensation Act, but it is inconsistent with the restorative purposes of AS 23.30.080(f) to impose on an individual an unconditional and unsuspended penalty that is beyond the individual's ability to pay, and that is unconnected to that individual's future conduct as an employer.[137]

5. Conclusion.

The Board failed to consider whether the total penalty imposed was proportionate to the employers' financial gain and resources at the time of the lapse,

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[134] *See supra*, notes 120, 121.

[135] *See Alaska R & C*, p. 27 ("The purpose of bringing employers into compliance includes the avoidance of closure of businesses and resultant unemployment unless the danger to the community presented by the continued operation of the business outweighs the public interest in preserving it.").

[136] If such a penalty could be discharged by bankruptcy, its punitive effect would be to that extent limited. However, the Division has not established that the penalty is dischargeable. *See In Re Wiebe*, 485 B.R. 667 (D. Kansas 2013) (civil penalty for failure to maintain workers' compensation insurance is not dischargeable).

[137] *See Moore,* pp. 22-23.

and it disregarded the ability of Titan Enterprises and Mr. Christianson to pay the penalty imposed on them. The Board's decision is therefore REVERSED, and this case is REMANDED for imposition of a revised penalty in accordance with this decision.

The Board may reopen the record in order to make findings regarding the appellants' finances at the time of the lapses and their current and anticipated future ability to pay the penalty imposed, but shall not otherwise reopen the record or make additional findings. We do not retain jurisdiction.

Date: ____*July 11, 2016*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Michael J. Notar, Appeals Commissioner

Signed
Phillip E. Ulmer, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair *pro tempore*

This is a non-final order of the Commission remanding the Board's award of a penalty for imposition of a revised penalty in accordance with this decision.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started). For the date of distribution, see the box below.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this order's distribution.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review 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 not a final decision issued under AS 23.30.128(e). It is not an appealable decision, so reconsideration is not available.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Decision No. 227 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. 14-025, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 11, 2016.

Date: *July 12, 2016*

Signed
K. Morrison, Appeals Commission Clerk