Case: *Ivan Moore d/b/a Ivan Moore Research vs. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 092 (November 17, 2008)

Facts: Ivan Moore Research (Moore) was found to have been an uninsured employer for about two weeks in August 2005 and from April 7, 2006, to April 6, 2007. The board assessed a penalty under AS 23.30.080(f) of $66,745.00, with $38,140.00 suspended and the remaining $28,605.00 due in seven days. Moore requested reconsideration and the board modified its order with a payment plan.

Moore employed part-time telephone interviewers, a phone center manager, and a research analyst. In December 2005, the person who handled insurance for the business, his research analyst, left. Moore, who did not handle the payroll and associated tasks of managing his business personally, did not renew his workers' compensation insurance in April 2006 and did not respond to the division's first discovery request and petition in January 2007. Moore explained that neither the lapse in coverage nor the failure to respond to the first discovery demand was willful, but was due to his delegation to an employee who did not understand that coverage was not in place. Moore finally responded to the discovery request and petition in early May 2007. During the time he was uninsured, he had one year-round, full-time employee, the phone center manager; another employee worked as a weekend phone center manager plus two weekdays of substitute time. The rest of his employees were part-time, called in for surveys.

Moore appealed, arguing "the penalty, based on a rate of $35 per employee per uninsured day, is inconsistent with the median established by board panels of $14.67 per employee per uninsured day." He argued "it is unfair because the hearing officer who presided at his hearing 'hands down penalties significantly higher than average' and the language of the decision reflects hostility toward him, notably a characterization of him as an 'atrocious businessman.'" He argued "that the penalty order is arbitrary because, unlike the penalties in the cases cited by the board as similar cases, the penalty in his case is 55 times the financial gain he had by not paying his insurance premium, but in the cases cited the penalties were 7, 3, and about 8 times the avoided premium." Finally, he argued "that the board erred as a matter of fact in comparing his practice of leaving mail for employees to open to the act of willfully refusing certified mail." Dec. No. 092 at 2.

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

> If an employer fails to insure . . . 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 . . . .

The commission stated that it is an abuse of the board's discretion to impose a penalty under AS 23.30.080(f) 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." *Alaska R & C Commc'ns v. State of Alaska, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088, 22 (Sept. 16, 2008).

Moreover, a penalty "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." *Id*. The commission synthesized prior board decisions into four groups of factors that the board ought to consider in assessing a penalty. Included in those factors were the (1) duration, scope and severity of the risk associated with the offending employer's conduct, (2) the culpability of the employer's conduct, (3) the impact on the community and employees, and (4) the employer's ability to pay. *Id*. at 23-29.

Issues: Is a pattern of disparity in penalty decisions, based on the assigned hearing officer, evidence of arbitrary or capricious decision-making? Should unsuspended penalties assessed under AS 23.30.080(f) be subject to a presumptive cap based on the uninsured employer's financial gain as represented by the unpaid insurance premium? Did the board have substantial evidence to support its findings on aggravating factors? Was the assessed penalty not so excessive that it shocks the conscience?

Holding/analysis: The commission concluded that the argument that a disparity among hearing officers is indicative of board bias in assessing penalties is flawed. The flaws included failing to consider the role of the board members assigned to each case, the failure to establish that the cases are randomly assigned, and the fact that the interested party, Moore, gathered and interpreted the data. Lastly, the commission decided the data constitutes "new or additional evidence" that the commission cannot consider on appeal under AS 23.30.128(a) because of Moore's expert statistical interpretation of prior board decisions. Thus, the commission did not consider this evidence.

Nonetheless, the commission was concerned that the lack of penalty guidelines leads to a lack of consistency and fairness in assessing penalties. "The process used by the board to develop the information for penalty assessment in this case placed the accused employer at an unfair disadvantage because the employer did not understand the range of penalty he was facing" and the conduct that would subject him to increased penalties. Dec. No. 092 at 17. The commission looked at other statutes to determine a reasonable cap. The commission noted that "in cases involving personal injury or death, in which punitive damages are awarded based on clear and convincing evidence of outrageous conduct, malice, greed, and knowledge of harm to another four times the financial gain received is considered an appropriate penalty by the legislature." *Id*. at 21 (citation omitted). Thus, the commission held that:

> in the absence of department regulation otherwise, the unsuspended penalty imposed on an employer, who has not previously been found by the board to fail to insure, is presumed excessive if it exceeds the greater of four times the offending employer's financial gain as a result of the failure to insure or the audited premium owed for the period of violation, *provided* that the board finds no aggravating factors present, or *minor*

> aggravating factors are outweighed by mitigating factors. For example, it will not apply in cases where the uninsured employees have suffered compensable injury or death, or the employer's conduct is motivated by greed, or exploitation of employees, or the employment is historically hazardous. These concern three factors . . . the duration, scope and severity of the risk associated with the offending employer's conduct, the culpability of the employer's conduct, and the impact on the community and employees. The presumptive first violation cap on the unsuspended portion of the penalty addresses the employer's ability to pay without requiring extensive discovery of the employer's finances. *Id*. at 21.

In Moore's case, the commission rejected his argument that the entire harm caused by a failure to insure is measured by the value of the premium he did not pay, citing the other factors discussed above. The commission, however, concluded that the penalty in Moore's case was excessive because:

> In this case, where no injury occurred, the conduct was not shown to be outrageous, greedy, or malicious, and the harm was unknown to the appellant when it occurred and until notified by the division, and the appellant has not previously been found to be in violation of the requirement to provide insurance for workers' compensation liability, the board chose to order a penalty that is 37 times the financial gain received from the conduct, one-half the business's taxable income for a year, and more than the business's quarterly payroll for the first quarter of 2007. The suspended penalty became immediately due and payable if he did not fully comply with the act for ten years and no provision was made for the appellant to discharge his liability for the unsuspended penalty at the end of the ten year period. The commission concludes that this penalty is excessive. *Id*. at 19.

The commission concluded that the board does not have authority to impose a lifetime suspended penalty without a final discharge date. "The effect of the board's failure to provide for discharge is that the business must carry the liability on its books until the business is wound up, affecting its ability to obtain loans, to be sold or transferred, and reducing the value of the business." *Id*. at 22-23. The commission modified the board's order to provide for a discharge after timely payment of the unsuspended portion of the penalty and compliance with the insurance requirement for two years.

The commission reversed some findings and affirmed others as follows:

> 1. The commission reversed the board's finding that Moore testified that he was an "atrocious businessman" because the finding misread his testimony. Nothing in Moore's testimony regarding his qualities as a businessman contained a synonym for "atrocious" and so this finding was unsupported by the record. The commission left undisturbed the board's finding that Moore was credible. *See* Dec. No. 092 at 24.

2. The commission reversed the board's finding that Moore willfully ignored his obligation to insure and behaved irresponsibly. Because a business owner may lawfully delegate obligations to employees, the business owner only willfully ignores his obligation to insure when the delegated worker willfully disregards the delegated responsibility. In this case, there was no evidence of willful disregard, only evidence that Moore delegated opening certified mail and paying premiums for workers' compensation insurance. *See Id.* at 25.

3. Because the record contains no evidence that a subpoena was issued against Moore, the board's finding that Moore "did not respond to discovery demands 'until after the third request in the form of a Board ordered subpoena' is without substantial evidence to support it in the record." Dec. No. 092 at 26.

4. Substantial evidence supports the board's finding that Moore did not promptly respond to the discovery requests. Taking out the time between the first discovery request and the deadline to respond to that request, the record supports the board's finding that the Moore did not respond in a timely fashion. His responses were due in February 2007 and he responded in early May 2007. *See* Dec. No. 092 at 4, 26.

5. The evidence that Moore did not secure insurance promptly on receiving notice that he lacked it is also supported by substantial evidence. "Insurance was not secured until April 6, 2007; more than 30 days after the second discovery demand was served on March 2, 2007. No evidence was presented to support a legal excuse for the delay or to excuse the requirement that insurance be obtained for the period." Dec. No. 092 at 26-27.

Thus, applying these rules and not considering the reversed findings, the commission modified the board's order:

> Based on the evidence of the amount of the appellant's annual . . . insurance premium for the period the appellant was not insured, the "first violation" presumptively reasonable unsuspended penalty to pay would be $7,436.
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> However, the commission has upheld the board's findings of two aggravating factors. . . . The board found the business presented a low risk of injury, had no reports of injury, and was uninsured for a period of 364 days. The board found no evidence of intent to defraud or mislead, or motivation by greed at the expense of employee safety. The board noted the evidence of correction of the internal business process that led to the lapse in insurance. *Id.* at 27.

The commission reduced the penalty to $12 a day for 1,907 days of uninsured employee labor, for a total penalty of $22,884. The commission suspended part of the penalty, and provided for a payment plan and for discharge of a suspended portion.