

Case: *Alaska R & C Communications, LLC vs. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 102 (March 18, 2009)

Facts: The parties sought reconsideration of Alaska Workers' Comp. App. Comm'n Dec. No. 088. In Dec. No. 088, the commission remanded to the board with instructions to re-determine the penalty under AS 23.30.080(f) against R & C Communications, LLC (R & C) for its failure to maintain workers' compensation insurance. The commission provided a framework of mitigating and aggravating factors to determine penalty amounts, relying on factors that individual board panels had applied in different cases. The State's arguments on reconsideration were that the commission exceeded its statutory authority and its function as a quasi-adjudicatory body in imposing new requirements that will apply in all cases, that the decision imposed onerous new administrative burdens and went too far in requiring notice and an opportunity to be heard for uninsured employers.

Applicable law: AS 23.30.128(b) states the commission "*shall* exercise its independent judgment" in reviewing matters of law and procedure.

Issues: Did the commission have the power to review factors for setting penalties for uninsured employers? Does Dec. No. 088 impose onerous new administrative burdens on the State? Are uninsured employers not entitled to notice and a meaningful opportunity to be heard?

Holding/analysis: The commission concluded that it had the authority to review the factors used to assess penalties. "The reasonableness of factors considered by the board in assessing penalties generally, when no guidance is provided by regulation or statute, is a matter of law the commission may review, because those factors are the basis of the board's application of the statute." Dec. No. 102 at 5. "To suggest, as the State does, that individual board panels may develop and apply factors *arbitrarily* but the commission, directed by the legislature to apply its independent judgment to questions of law, may not *systematize* those factors, turns the relationship between the reviewing body and the hearing body on its head." *Id.* at 4 n.11. Although the State urged the commission to uphold the board's decision on other grounds, the commission concluded that the board's failure to allow the unrepresented employer an opportunity to appear and testify required remand.

Dec. No. 088 did not impose onerous new administrative burdens. The commission rejected the State's argument that the checklist of factors was a burden in part because only relevant, not all, factors needed to be considered in a given case. "[T]he commission provided systematic guidance which should make it easier for the investigative arm of the division to present a report in support of penalty imposition, for the accused employer to know what the board may consider in setting a penalty, and for the board panel to analyze the evidence presented by the division and the accused employer." Dec. No. 102 at 7. The commission believed that "its decision will better advance the prompt investigation and efficient resolution of penalties than leaving the board – and the division – without guidance." *Id.* at 8. Moreover, the decision only required the division investigator to disclose any exculpatory or mitigating evidence that

it has to the employer, but need not assist an uninsured employer to develop evidence. Rather it was up to the employer to produce exculpatory or mitigating evidence.

Lastly, Dec. No. 088 did not require the board to go to unusual lengths to assure notice to the parties and a meaningful opportunity to be heard. The commission rejected the State's arguments that it was important to impose the penalty quickly, even at the risk of denying notice and a hearing, to curb the illegal conduct. The commission concluded the argument was illogical because the hearing only addresses the penalty amount while the illegal conduct (the lack of insurance) has already occurred. Moreover, the board may still issue stop-work orders without a hearing to prevent the use of employee labor while an employer is uninsured. Even though the employer's interest is solely economic, the State must still provide an opportunity to be heard before imposing a penalty. "The board developed a practice of relying on specific factors in calculating penalties in some cases, but provided no notice of those factors to accused employers before assessing penalties, and, *in this case*, denied the employer a meaningful opportunity to present evidence and argument regarding factors pertinent to the penalty assessed against him." Dec. No. 102 at 15.

In the end, the commission clarified that Dec. No. 088 does not impose an affirmative duty on the division to obtain evidence favorable to the employer and, other than that clarification, denied the motion for reconsideration of Dec. No. 088.

Note: Comm'n Dec. No. 088 was the original decision laying out aggravating and mitigating factors in setting penalties for uninsured employers.