

Case: *Titan Enterprises, LLC, Titan Topsoil, Inc., CCO Enterprises, LLC, and Todd Christianson vs. State of Alaska, Division of Workers' Compensation*, Alaska Workers' Comp. App. Comm'n Dec. No. 175 (January 8, 2013)

Facts: The board ordered Titan Enterprises, LLC (Titan), Titan Topsoil, Inc. (Titan Topsoil), CCO Enterprises, LLC (CCO), and Todd Christianson (Christianson), without distinguishing between them, to pay a civil penalty in the amount of \$6,392,601 for a failure to maintain workers' compensation insurance. The penalty was based on a rate of \$999 per uninsured employee workday. The board determined that the corporate veil should be pierced to hold Christianson personally liable for the penalty. The board set the amount by considering the aggravating factors in a regulation, 8 AAC 45.176, that was not in effect during the periods the businesses were uninsured. Christianson admitted that some or all of the businesses were uninsured during certain periods. But he claimed that the three businesses were insured through CCO's coverage for a period of 366 days (September 25, 2006 to September 25, 2007) while the division asserted the businesses were uninsured during that same period. The board concluded the businesses were uninsured for those 366 days as well as the other periods. Christianson and the businesses appeal.

Applicable law: AS 23.30.075(a) provides that "An employer under this chapter, unless exempted, shall . . . insure and keep insured for the employer's liability under this chapter in an insurance company or association duly authorized to transact the business of workers' compensation insurance in this state[.]"

AS 23.30.080(f) provides that "If an employer fails to insure or provide security as required by AS 23.30.075, the division may petition the board to assess a civil penalty of up to \$1,000 for each employee for each day an employee is employed while the employer failed to insure or provide the security required by AS 23.30.075. . . ."

If certain factors are present, the board has the authority to pierce the corporate veil and impose personal liability on the shareholder. The factors are whether:

- (a) the shareholder sought to be charged owns all or most of the stock of the corporation;
- (b) the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation;
- (c) the corporation has grossly inadequate capital;
- (d) the shareholder uses the property of the corporation as his own;
- (e) the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest; and
- (f) the formal legal requirements of the corporation are observed. *L.D.G., Inc. v. Brown*, 211 P.3d 1110, 1126 (Alaska 2009).

Issues: Did the board have substantial evidence to hold Christianson personally liable? Did the board have substantial evidence to conclude that Titan and Titan Topsoil were uninsured for the disputed 366-day period? Could the board properly hold each entity liable for the entire civil penalty? Did the board improperly apply 8 AAC 45.176 retroactively? Did the board have substantial evidence on which to find each of the

aggravating factors? Does the amount of the civil penalty constitute an abuse of the board's discretion?

Holding/analysis: Substantial evidence supported four out of the six factors for piercing, (a)-(b) and (d)-(e). Thus, the commission upheld the board's decision to pierce the corporate veil and hold Christianson personally liable for the three businesses' civil penalty.

The commission concluded that as a matter of law, Titan and Titan Topsoil were covered by CCO's policy for the disputed 366-day period. AS 21.36.220 requires an insurer to notify the policyholder before cancelling an insurance policy. Because the insurer did not do so in this case, Titan and Titan Topsoil were insured. The commission concluded the board erred in admitting an e-mail from an individual who worked for CCO's worker's compensation carrier because the e-mail was hearsay.

The commission remanded to the board to discuss the factual findings on which it based its implicit conclusion to hold each entity liable for the entire civil penalty, using criteria similar to those used to consider whether to pierce the corporate veil. The commission required the board to calculate the number of uninsured employee workdays separately for each corporate entity and to separately determine the aggravating factors applicable to each entity and then to determine each entity's penalty amount. Then the board could consider the factors applicable to hold each entity jointly and severally liable for the entire penalty amount.

The board appeared to have applied 8 AAC 45.176 retroactively. The commission concluded that it was appropriate for the board to use the same aggravating factors as the regulation as guides for calculating the amount of the civil penalty because those aggravating factors had been developed and recognized in earlier board decisions. But the board may have been unduly influenced by the regulation's provision that required a penalty of no less than \$500 and no more than \$999 per uninsured employee workday based on the nine aggravating factors it found in this case.

Some of the nine aggravating factors may not have been supported by substantial evidence. The division conceded that two of them were not, and Christianson and the businesses disputed whether another three of the factors were supported by substantial evidence. Christianson also asserted that there was a mitigating factor. The commission required the board to hear evidence on the disputed factors on remand.

The commission concluded that the board abused its discretion in considering the businesses a "worst offender" by imposing the maximum penalty. Although the uninsured period was very long, there was no violation of any stop-work order and none of the businesses had previously been *before the board* for failure to insure. Moreover, the Division conceded that two of the nine aggravating factors were not present, others might be eliminated on further hearing, and the mitigating factor might be found applicable. The commission advised the board to review the matter differently on remand.