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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**INDUSTRIAL ACCIDENTS DIVISION,**

**Petitioner,**

**vs.**

**FERNANDO ARCE dba FERNANDO'S  
CUSTOM WHEELS & TIRES,**

**Respondent.**

**ORDER OF REMAND TO  
INDUSTRIAL ACCIDENTS  
DIVISION**

**Case No. 10682670629**

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The Industrial Accidents Division asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's decision regarding the amount of penalty to be assessed against Fernando Arce, dba Fernando's Custom Wheels & Tires pursuant to § 34A-2-211(2) of the Utah Workers' Compensation Act.

The Appeals Board exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers Compensation Act.

**BACKGROUND AND ISSUE PRESENTED**

The Industrial Accidents Division concluded that Mr. Arce did not maintain workers' compensation coverage for his tire and wheel shop from August 30, 2003, to August 14, 2006. The Division therefore assessed a penalty of \$23,319.80 against Mr. Arce pursuant to § 34A-2-211(2) of the Utah Workers' Compensation Act. In computing the amount of penalty, the Division assumed Mr. Arce had five employees during the period in question and then applied the other computational factors required by § 34A-2-211(2)(d) of the Act.

Mr. Arce appealed the Division's penalty assessment, and Judge La Jeunesse conducted an evidentiary hearing on the matter. At the hearing, Mr. Arce's testimony established that he had employed one person sporadically during the period in question. Judge La Jeunesse concluded that, because the employee's period of employment was uncertain and the Division had not submitted proof to support its computation of a higher penalty, Mr. Arce was subject only to the minimum penalty of \$1,000 established by § 34A-2-211(2)(d).

The Division has asked the Appeals Board to review Judge La Jeunesse's decision. In summary, the Division accepts Judge La Jeunesse's factual determination that Mr. Arce employed only one employee. However, the Division argues that the Division, rather than Judge La Jeunesse, should calculate the amount of penalty to be assessed against Mr. Arce under the now-established facts of this case.

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**DISCUSSION AND CONCLUSIONS OF LAW**

As already noted, the Utah Workers' Compensation Act requires that all employers maintain workers' compensation coverage. See § 34A-2-201 of the Act. This coverage requirement is enforced in several ways, including the penalty provision found in § 34A-2-211(2) of the Act. Section 34A-2-211(2)'s formula for computing the amount of penalty is somewhat complex and depends, among other factors, on the number of uninsured employees, the period of time when no coverage was provided, and the nature of the uninsured employer's business.

In this case, the Division's original penalty assessment of \$23,319.80 was based on an assumption that Mr. Arce employed five employees during the subject period. As found by Judge La Jeunesse, Mr. Arce actually employed no more than one employee. On that fact alone, it appears that the original penalty is five times too high and should be no more than \$4,663.96. It is also possible that other adjustments could be made to reduce the period for which a penalty is assessed. However, the Appeals Board finds no basis to support Judge La Jeunesse's assumption that the penalty should be reduced to \$1,000--the minimum allowed by § 34A-2-211(2).

Under these circumstances, the Appeals Board concludes that this matter should be remanded to the Industrial Accidents Division to recompute the penalty to be assessed against Mr. Arce, based on Judge Le Jeunesse's findings of fact and the requirements of § 34A-2-211(2). The Division will then issue a new penalty assessment which will be subject to Mr. Arce's right of appeal.

**ORDER**

The Appeals Board affirms Judge La Jeunesse's findings of fact but sets aside his determination that the penalty to be imposed against Mr. Arce should be reduced to \$1,000. The Appeals Board remands this matter to the Industrial Accidents Division for further proceedings consistent with this decision. It is so ordered.

Dated this 21<sup>st</sup> day of July, 2009.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch