

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

LIVING THE DREAM	)	CASE NO. 1629-2016
OUTDOORS, LLC,	)	
Petitioner,	)	
	)	FINDINGS OF FACTS;
vs.	)	CONCLUSIONS OF LAW;
	)	AND FINAL ORDER
DEPARTMENT OF LABOR AND	)	
INDUSTRY, UNINSURED	)	
EMPLOYERS' FUND,	)	
	)	
Respondent.	)	

\* \* \* \* \*

I. INTRODUCTION

On or about March 11, 2016, Eric Wilund, a member of Living the Dream Outdoors, LLC (Living the Dream) appealed a redetermination made by the Uninsured Employers' Fund (UEF) that Living the Dream failed to provide workers' compensation insurance coverage for its employees from July 1, 2015 through December 14, 2015, and assessed a penalty of \$4,760.44 for failing to provide coverage.

On March 17, 2016, the Office of Administrative Hearings (OAH) received a request to schedule Living the Dream's appeal for an administrative hearing. On March, 23, 2016, OAH mailed the Notice of Hearing to both parties at the addresses of record. Neither mailing was returned as undeliverable. The Notice of Hearing provided in part, that a limited liability company must be represented by an attorney, The Notice of Hearing also included the date and time set for a telephone scheduling conference.

On April 5, 2016, the Hearing Officer convened a telephone scheduling conference in this matter. No one representing Living the Dream appeared at the scheduling conference. Joe Nevin, Attorney at Law, appeared on behalf of UEF. A schedule of prehearing deadlines and hearing date were set and a Scheduling Order was subsequently issued on April 5, 2016. The Scheduling Order set hearing for July 27, 2016.

On July 27, 2016, a telephone hearing was conducted. The Hearing Officer attempted to call Eric Wilund, principal member of Living the Dream but the Hearing Officer's phone call went to voicemail. The Hearing Officer left a message for Wilund to call should he wish to participate in the hearing. No one representing Living the Dream participated in the hearing. Exhibits 1 through 65 were admitted into evidence without objection. Nevin argued the burden to show an error in UEF's calculation of the penalty rested upon Living the Dream and moved the Hearing Officer to rely upon the administrative record and affirm UEF's redetermination.

## II. FINDINGS OF FACT

1. Living the Dream Outdoors, LLC, (Living the Dream) is a business that provides outfitting services. It's principal offices are in Prentice, Wisconsin. Living the Dream had two employees working during the pertinent periods in this case.

2. In October 2015, UEF Auditor Debra Smith discovered that Byrne Ranch, Inc., doing business as J&J Guide Service, had sold its business to Living the Dream. Smith could not locate a workers' compensation policy for Living the Dream and made inquiry to Eric Wilund and Rich Schneider, both of whom were listed as members of Living the Dream on the Montana Secretary of State's website.

3. Smith began communicating with Wilund about obtaining workers' compensation insurance coverage for Living the Dream. On December 9, 2015, Wilund emailed Smith documentation of payment to the Montana State Fund to obtain coverage for Living the Dream.

4. On December 15, 2015, a workers' compensation insurance policy became effective for Living the Dream.

5. On December 22, 2015, Smith emailed and mailed Wilund requesting payroll information for the time period between July 1, 2015 and December 14, 2015, the period in which Living the Dream was operating without workers' compensation insurance coverage.

6. On December 30, 2015, Wilund emailed Smith payroll information for the time period between July 1, 2015 and December 14, 2015.

7. On January 4, 2016, Smith emailed and mailed Wilund a letter with an enclosed penalty calculation worksheet for the time period of July 1, 2015 and December 14, 2015. Smith used the same rating information that the Montana

State Fund used for the business before it was purchased by Living the Dream. Based on the payroll information provided by Wilund and the rating information, Smith calculated that Living the Dream's premium for the above time period would have been \$2,380.22. Smith doubled the premium as allowed by Mont. Code Ann. § 39-71-504(1)(a), which resulted in a penalty amount of \$4,760.44. Smith's letter allowed for Wilund to review and dispute the calculation.

8. On January 21, 2016, after hearing nothing from Wilund, Smith emailed and mailed Wilund a Penalty Determination stating a penalty amount of \$4,760.44. The Penalty Determination also explained how to appeal the decision. Wilund timely appealed the Penalty Determination.

9. On February 17, 2016, UEF issued a Penalty Redetermination, which upheld the penalty amount of \$4,760.44, but included an offer to compromise the penalty amount to resolve the matter. One compromise offered by the UEF was to accept \$3,570.33 (150% of the premium) if payment was received in full by March 18, 2016.

10. Wilund timely paid the compromise penalty amount of \$3,570.33, and also requested an appeal of the Penalty Redetermination.

### III. DISCUSSION

#### Uninsured Penalty Provisions under Montana Statutes and Rules

Under Mont. Code Ann. § 39-71-401, an employer who has employees in Montana is required to have workers' compensation coverage for its employees under compensation plan No. 1 (self-insurance plan), No. 2 (private insurance plan), or No. 3 (Montana State Fund) unless an exception found in Mont. Code Ann. § 39-71-401(2) applies. Living the Dream has not argued that it is exempt from providing workers' compensation coverage to any of its employees under an exception found in Mont. Code Ann. § 39-71-401(2).

Mont. Code Ann. § 39-71-501 defines an "uninsured employer" as "an employer who has not properly complied with the provisions of 39-71-401." Montana law requires uninsured employers pay a penalty of "up to double the premium amount the employer would have paid on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 or \$200, whichever is greater." Mont. Code Ann. § 39-71-504(1)(a).

Admin. R. Mont. 24.29.2831 provides that, if the Montana State Fund used a tier-pricing structure for determining premiums during the uninsured period, the penalty may be calculated using premium rate for the highest tier that could have been charged by the state fund during that period, or if the employer shows good cause, the rate the state fund would have actually charged the employer during the uninsured period. The burden is on the employer to show the rate that the state fund would have charged. Admin. R. Mont. 24.29.2831(3).

### Application of the Uninsured Penalty Provisions

Living the Dream did not dispute that it did not have workers' compensation coverage from July 1, 2015 through December 14, 2015. Further, Living the Dream did not dispute the classification used by UEF in calculating its penalty for the uninsured period. It was reasonable for UEF to use the same classification used by the Montana State Fund for the predecessor business.

As an initial matter, the department has adopted a valid rule, Admin. R. Mont. 24.29.2831, requiring a penalty of the greater of \$200.00 or double the premium due on the wages paid to employees during the uninsured period based on the applicable Montana State Fund rates. The discretion found in the statute has been restricted by rule, and this properly adopted rule must be applied in this case. In this case, double the premium due, \$4,760.33, is the pertinent and valid penalty. Living the Dream timely accepted UEF's compromise offer and paid \$3,570.33, which UEF accepted as payment in full for the penalty.

### Calculation of the Uninsured Penalty

The evidence establishes Smith's calculations of the premium due and penalty amount using UEF payroll report's wages, classification codes, and premium rate of 10.78 were accurate and proper. See Montana State Fund Underwriting Manual, p. R/M-7 (July 1, 2014 Edition) <https://www.montanastatefund.com/web/common/underwritingmanual/UnderwritingManualPY15.pdf>.

The rule would have allowed UEF to use a higher premium rate for the classification code, but, instead, UEF used the same rate used by the Montana State Fund for employees performing the same work as the predecessor business. Living the Dream has not provided evidence that the Montana State Fund would have calculated the premium using a lower tier as required by Admin. R. Mont. 24.29.2831(3).

Based on the above calculation, the premium due for the uninsured period was \$2,380.22. Doubling that premium amounts to \$4,760.44. UEF subsequent offered a compromise of 150% of the premium due for the uninsured period in the amount of \$3,570.33, which Living the Dream accepted and paid on March 18, 2016. UEF is allowed to compromise penalty amounts upon such terms and conditions that UEF deems expedient and appropriate. Admin. R. Mont. 24.29.2839.

#### IV. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction to review the penalty determination in this matter. Mont. Code Ann. §§ 39-71-504 and 2401(2).

2. Living the Dream Outdoors, LLC, was an uninsured employer between July 1, 2015 through December 14, 2015, in violation of Mont. Code Ann. § 39-71-401.

3. Living the Dream Outdoors, LLC, is liable for a total penalty of \$4,760.44. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.

4. The UEF's compromise offer to Living the Dream is appropriate. Admin. R. Mont. 24.29.2831.

#### V. ORDER

The UEF Penalty Redetermination, dated February 17, 2016 is AFFIRMED. However, Living the Dream Outdoors, LLC, has satisfied its obligation for the uninsured period between July 1, 2015 through December 14, 2015, by timely paying the compromise amount offered by the UEF.

DATED this 28th day of July, 2016.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID W. EVANS  
David W. Evans  
Hearing Officer

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NOTICE OF APPEAL RIGHTS

Notice: This Order is issued by the undersigned Hearing Officer of the Department of Labor and Industry under authority delegated by the Commissioner. Any party in interest may appeal this Order to the Workers' Compensation Court within 30 days after the date of issuance of this Order, pursuant to Mont. Code Ann. § 39-71-2401(3) and Admin. R. Mont. 24.29.215(3) and (4). The Court's address is:

Workers Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537  
(406) 444-7794

Living.FOF.dev