

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

MIKE J. DUPERAULT)	CASE NO. 644-2016
D/B/A/ ROY'S HOLIDAY MOTEL)	
Petitioner,)	
)	FINDINGS OF FACTS;
vs.)	CONCLUSIONS OF LAW;
)	AND FINAL ORDER
DEPARTMENT OF LABOR AND,)	
INDUSTRY, UNINSURED)	
EMPLOYERS' FUND,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On September 21, 2015, Mike DuPerault, sole proprietor of Roy's - Holiday Motel, appealed a redetermination made by the Uninsured Employers' Fund that he failed to provide workers' compensation insurance coverage for his employees from November 17, 2014 through June 4, 2015, and assessed him \$2,414.10 in penalties (\$2,214.10 for failing to provide coverage and \$200.00 as a noncompliance fee).

On October 2, 2015, the Office of Administrative Hearings received a request to schedule DuPerault's appeal for an administrative hearing. With proper notice to the parties, a telephone scheduling conference was held before Hearing Officer Steven Wise. The parties agreed on deadlines for hearing preparation, which were set forth in a Scheduling Order issued on October 20, 2015. A telephone hearing was scheduled for January 4, 2016, with the agreement of the parties, but was postponed to January 5, 2016, at the request of Mike DuPerault.

On January 5, 2016, a telephone hearing was conducted. Mike DuPerault participated in the hearing and represented himself. Joe Nevin, Department of Labor and Industry, Office of Legal Services, represented the Uninsured Employers' Fund and had witnesses, Kathryn Simpson and Kathleen McElwain. DuPerault, Simpson, and McElwain presented sworn testimony.

Exhibits 1 through 47 were admitted into evidence without objection. At the close of the hearing, the parties made oral arguments to the Hearing Officer, and the case was submitted for a decision.

II. FINDINGS OF FACT

1. Mike DuPerault is the sole proprietor of Roy's - Holiday Motel, a business consisting of a convenience store and motel. He had six employees working in the convenience store and one employee working in the motel during the pertinent periods in this case.

2. Up until November 17, 2014, DuPerault had workers' compensation insurance coverage for his employees through the Montana State Fund (Policy 03-404723-3) and had been paying the required quarterly premium payments.

3. In November 2014, DuPerault was notified by the Montana State Fund that Policy 03-404723-3 was cancelled effective November 17, 2014. The cancellation was based on an audit by the Montana State Fund of DuPerault's policy starting in March 2013 and a determination that he had underpaid premiums and owed over \$4,500.00 in back premiums. DuPerault did not pay the amount owed because he did not have the funds to pay it, and Montana State Fund cancelled the policy.

4. On December 18, 2014, the Uninsured Employers' Fund (UEF) sent a notice to DuPerault stating that his insurance company had informed the UEF that his workers' compensation insurance was cancelled. He was informed that workers' compensation insurance was required, penalties could be assessed if workers' compensation coverage was not carried on his employees, and an additional noncompliance penalty of \$200.00 could be assessed if he failed to obtain the required workers' compensation coverage within 30 days. The notice also informed DuPerault that if he did not respond by January 2, 2015, a cease-and-desist order could be issued barring him from operating his business with employees (Document 33).

5. When DuPerault failed to respond to the notice, the UEF sent a second notice on January 5, 2015, which reiterated the information from the first notice and gave him until January 15, 2015, to obtain coverage or verify that he did not have persons working for him (Document 32).

6. When DuPerault did not respond to the notice, the UEF sent a letter on January 21, 2015, stating that a cease-and-desist order could be issued if he did not obtain workers' compensation coverage by January 26, 2015 (Document 31).

7. On January 28, 2015, the UEF auditor, Kathryn Simpson, contacted DuPerault by phone to find out the status of his workers' compensation coverage. DuPerault told her that he would look into it and get back to her. On February 3, 2015, DuPerault called Simpson back and said he was working with the Montana State Fund to get coverage and would contact her with the policy number (Document 11). DuPerault did not get back to Simpson because the Montana State Fund would not issue a policy without payment of the back premiums owed.

8. Simpson contacted DuPerault in person at the motel on March 12, 2015. DuPerault explained that he could not get a policy through the Montana State Fund because he could not afford to pay the back premiums. Simpson advised him that he was required to provide proof of coverage by March 16, 2015, or the UEF would issue a cease-and-desist order.

9. On March 13, 2015, DuPerault contacted Glacier Insurance of Libby to obtain a workers' compensation policy. He was informed that a workers' compensation policy could be issued to him, but the check for the premium payment would have to be made to the Montana State Fund. He gave a check to Glacier Insurance of Libby made to the order of the Montana State Fund for \$410.40 for the premium deposit (Document 44). Glacier Insurance of Libby provided DuPerault with a Certificate of Liability Insurance for workers' compensation coverage from March 14, 2015 to March 14, 2016, with the Montana State Fund listed as the insurer (Document 38).

10. DuPerault believed he had obtained the required workers' compensation coverage and faxed the Certificate of Liability Insurance to Simpson on March 6, 2015 (Document 38).

11. The Montana State Fund cashed the premium check (Document 44) but did not issue a policy to DuPerault. Instead, the \$410.40 was applied to the back premiums on the previously cancelled policy. DuPerault was not informed that he did not have workers' compensation coverage.

12. When Simpson discovered that DuPerault did not have an active workers' compensation policy in effect, she contacted Glacier Insurance of Libby on April 15, 2015. The agent at Glacier Insurance said that the premium had been paid, the

paperwork was submitted, and she is not sure why the workers' compensation policy was not in effect (Documents 11 and 38).

13. On May 17, 2015, a cease-and-desist order was served on DuPerault ordering him to stop operating his business using employees until he obtained proper coverage for all the employees as required by Montana law (Documents 27 and 28).

14. Effective June 5, 2015, DuPerault obtained proper workers' compensation coverage for all his employees through a private insurer, Travelers Insurance Company.

15. On June 12, 2015, Simpson sent a letter to DuPerault stating that due to the lapse in workers' compensation coverage from November 17, 2014, through June 4, 2015, a penalty of double the premium amount or \$200.00 (whichever was greater) was owed. She asked DuPerault to submit a UEF payroll report by June 27, 2015, for the period in question to avoid an estimated penalty or an onsite audit (Document 25 and 26). DuPerault did not submit the form.

16. On July 6, 2015, Simpson sent a letter to DuPerault stating that since he had not submitted a UEF payroll report, a penalty worksheet was prepared using an estimate of wages of \$22,096.85. This worksheet was based on Unemployment Insurance Division quarterly wage reports, a classification code of 9052 (hotel/motel workers), and a Tier 4 premium rate of 5.01 (.0501% of wages paid). Using these values, the premium due for November 17, 2014 through June 4, 2015, was \$1,107.05 (.0501% of \$22,096.85). The penalty of double the premium amount was \$2,214.10. An additional \$200.00 was assessed as a noncompliance fee, for a total penalty of \$2,414.10. DuPerault was again given the opportunity to complete the UEF payroll report before a penalty determination was issued (Documents 21-24), but DuPerault did not submit the report.

17. On July 21, 2015, Simpson issued a penalty determination informing DuPerault that he owed a total uninsured penalty of \$2,414.10, calculated as explained in Finding of Fact 16.

18. After DuPerault requested an administrative review on August 17, 2015, Kathleen McElwain, UEF compliance specialist, issued a penalty redetermination on August 25, 2015, that affirmed the penalty determination that DuPerault owed a total penalty of \$2,414.10. The redetermination offered DuPerault a compromise of paying 150% of the total penalty if the payment was received in full by September 24, 2015, or 175% of the total penalty if a payment plan was arranged

with McElwain by that date. DuPerault did not pay the total penalty or set up a payment plan by September 24, 2015.

19. Prior to the hearing, DuPerault completed and submitted the UEF payroll report detailing the wages paid to his six convenience store employees and one motel employee from November 17, 2014 through June 4, 2015. He properly assigned the classification code of 8006 for the convenience store employees and 9052 for the one motel employee (Document 41). The total wages were \$21,469.52 (Document 42). McElwain recalculated the premium due and penalty amount using the report's wages, classification codes, and Tier 4 premium rate of 4.94 that applies to convenience store employees. There are five tiers of premium rates (Tier 5 is the highest) and Tier 4 was chosen because it is the standard tier used in UEF cases. The premium due of \$1,061.46, when doubled and added to the \$200.00 noncompliance fee, yields a total penalty of \$2,322.92.

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. DuPerault has not argued that he is exempt from providing workers' compensation coverage to any of his 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). In addition to this penalty, Montana law also states that the department "shall collect a penalty of \$200 from an employer that fails to obtain Montana workers' compensation insurance within 30 days of notice of the requirement." Mont. Code Ann. § 39-71-504(1)(c).

While the statute states the penalty can be "up to double the premium amount," the department has adopted a rule restricting the department's discretion in assessing

penalties on uninsured employers. That rule states that “the department will assess a penalty on every uninsured employer of which it becomes aware, unless the department determines that the uninsured period is de minimis” and “the amount of the penalty assessed is \$200.00, or twice the amount of the premium that the uninsured employer should have paid,...whichever is greater.” Admin. R. Mont. 24.29.2831 (emphasis added).

That same rule states 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). Finally, the rule specifically states that the employer’s alleged “financial inability to pay the cost of workers’ compensation insurance premium during the uninsured period” or “to pay the penalty imposed” does not constitute “good cause” for the purposes of this rule. Admin. R. Mont. 24.29.2831(3)(i) & (ii).

Application of the Uninsured Penalty Provisions

DuPerault admits that he did not have workers’ compensation coverage from November 17, 2014, through June 4, 2015, but argues that he was unaware that he lacked coverage starting March 14, 2015, until he received the cease-and-desist order on May 17, 2015. He also argues that the cancellation of his workers’ compensation coverage by the Montana State Fund was improper and he could not afford to pay the back premium the Montana State Fund. In addition, he contends that he acted properly in securing what he believed was valid workers’ compensation with Glacier Insurance of Libby in March 2015.

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 is the pertinent and valid penalty.

Since DuPerault admits that he did not have workers’ compensation coverage from November 17, 2014 through June 4, 2015, he was an “uninsured employer” under Mont. Code Ann. § 39-71-501 and a penalty must be assessed since this

cannot be considered a “de minimis period” of time. Admin. R. Mont. 24.29.2831(1). In addition, the rules make it clear that the fact DuPerault could not afford to pay the back premium or the calculated penalty is not a defense to the assessment of a penalty in this case.

Throughout the proceedings, DuPerault has disputed the amount of the back premiums he owed to the Montana State Fund, its policy cancellation, and its actions in cashing his check instead of issuing him a policy when he had arranged what he believed was coverage through Glacier Insurance of Libby. The Montana Supreme Court, however, has considered and rejected nearly identical arguments and ruled that the Department of Labor and Industry has no legal authority to adjudicate the merits of contract disputes between an employer and an insurer in a UEF case. *Auto Parts of Bozeman v. Emp. Rel. Div. U.E.F.*, ¶ 39, 2001 MT 72, 305 Mont. 40, 23 P.3d 193. The court reasoned that DLI did not have the burden to prove the insured’s policy cancellation was legally proper and the DLI tribunal lacked jurisdiction to address the contract dispute between the State Fund and Auto Parts of Bozeman over the cancellation of its policy due to alleged nonpayment of the premium. *Auto Parts of Bozeman*, supra at ¶ 20. Finally, the court rejected Auto Parts of Bozeman’s argument (also made by DuPerault) that it should be assessed a penalty because it “thought or assumed it was insured, when it was not.” *Auto Parts of Bozeman*, supra at ¶ 24. The same reasoning applies in this case.

DuPerault submitted a letter he received on December 14, 2015, announcing his share of a dividend distribution of \$1,211.98, based on his paid premiums and claims history of \$0.00 losses during the policy year ending June 30, 2013 (Document 47). While DuPerault represented that this letter was evidence that his premiums should have been lower in 2013, the amount clearly is a dividend issued to numerous Montana State Fund customers. The document itself acknowledges he had an outstanding balance due the Montana State Fund and the dividend would be applied to the balance. This letter does affect the penalty in this case.

Calculation of the Uninsured Penalty

The evidence establishes McElwain’s recalculations of the premium due and penalty amount using the UEF payroll report’s wages, classification codes, and at Tier 4 premium rate of 4.94 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 the UEF to have used the highest Tier 5 premium rate for the convenience store classification code, but instead the

standard Tier 4 rate was used. The employer 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 recalculation, the premium due for the uninsured period was \$1,061.46. Doubling that premium amounts to \$2,122.92. Since DuPerault did not obtain coverage within 30 days of when he was notified that his workers' compensation coverage had lapsed, he owes a \$200.00 noncompliance fee. The total penalty amount owed is \$2,322.92.

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. Mike DuPerault was an uninsured employer between November 17, 2014, through June 4, 2015, in violation of Mont. Code Ann. § 39-71-401.

3. Mike DuPerault owes a total penalty of \$2,322.92. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.

V. ORDER

Mike J. Duperault, sole proprietor of Roy's - Holiday Motel, must pay the Uninsured Employers Fund penalties totaling \$2,322.92, for the period he was an uninsured employer.

DATED this 2nd day of March, 2016.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ STEVEN A. WISE
Steven A. Wise
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