

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

DEPARTMENT OF LABOR AND )	Case No. 128-2008	
INDUSTRY, UNINSURED )		
EMPLOYERS' FUND, )		
		)
Petitioner, )	<b>FINAL AGENCY DECISION</b>	
		)
vs. )		
		)
TIMBER EDGE PRODUCTS LLC, )		
		)
Respondent. )		

\* \* \* \* \*

**I. INTRODUCTION**

Timber Edge Products, LLC, through its counsel, Steven W. Jennings, appealed from a penalty billing notice issued by the Uninsured Employers' Fund (the UEF) that found that Timber Edge Products, LLC (“Timber Edge”) failed to provide workers' compensation coverage for employees from January 1, 2005 to August 17, 2006. and assessed \$26,938.32 in penalties. The company contended that it had three employees who last worked for the company in Montana on July 15, 2005 when it closed its Montana retail location. It further contended that it was not required to have coverage for Clayton Rockwell because as a member of a limited liability company he did not meet the statutory definition of an “employee.”

The department appointed David Scrimm as hearing officer. At the scheduling conference in this matter, Joseph Nevin, DOLI Legal counsel, appeared and participated on behalf of the UEF, Steven W. Jennings, attorney at law, represented Timber Edge. The parties agreed to a schedule for the proceedings. Subsequently, the parties submitted a joint motion to vacate the hearing and to set a schedule for summary judgment motions and briefing. The Hearing Officer issued an order granting the motion on October 3, 2007. The last filing was November 19, 2007, at which time the case was deemed submitted for decision.

## II. ISSUE

Did the department properly assess civil penalties of \$26,938.72 against Timber Edge for its failure to provide Montana workers' compensation insurance coverage for its four Montana employees from January 1, 2005 to August 17, 2006, pursuant to Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.<sup>1</sup>

## III. STIPULATED FACTS

1. Timber Edge was founded on November 16, 2004, when it filed its Articles of Organization with the Nevada Secretary of State. Articles of Organization, 11/16/04.

2. Upon its founding, Timber Edge became a member-managed limited liability company ("LLC"). Articles of Organization, 11/16/04.

3. On November 30, 2005, Timber Edge filed with the Nevada Secretary its Annual List of Manager or Members and Resident Agent of Timber Edge Products LLC which did not list Mr. Rockwell as a member. Annual List of Manager or Members and Resident Agent of Timber Edge Products LLC, 11/30/05.

4. On November 29, 2006, Timber Edge filed with the Nevada Secretary its Annual List of Manager or Members and Resident Agent of Timber Edge Products LLC which did list Mr. Rockwell as a member. Annual List of Manager or Members and Resident Agent of Timber Edge Products LLC, 11/29/06.

5. Timber Edge has and continues to recognize Mr. Rockwell's membership and ownership interest in the LLC. Notice of Annual Meeting; Domestic Return Receipt, 1/21/07 (signed by Pamela C. Rockwell); Minutes of the Annual Members Meeting, Timber Edge Products LLC, 2/20/07.

6. At no time since its founding has Timber Edge elected to provide workers compensation coverage for Mr. Rockwell by providing written notice to an insurer of such election. Letter K. Dizney to Timber Edge Products LLC, 8/17/06.

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<sup>1</sup> This matter involves only the penalty associated with one of the four employees, Clayton Rockwell. Timber Edge did not dispute that it owes penalties with respect to its other three Montana employees Stan Baker, Skyler Kolberg and Charity Jensen.

7. In addition to his membership interest in Timber Edge Mr. Rockwell also worked for Timber Edge devoting full-time to its business. First Report, 8/9/06.

8. In July of 2005, while traveling in Canada, Mr. Rockwell suffered a stroke. First Report, 8/9/06.

9. On August 9, 2006, Mr. Rockwell filed a claim with the Montana Department of Labor & Industry seeking workers' compensation benefits for his stroke. First Report, 8/9/06; Letter B. Rice to C. Rockwell, 8/17/06.

10. Incidental to Mr. Rockwell's claim for workers' compensation benefits, the Uninsured Employers Fund ("UEF") began investigating Timber Edge Products to determine if it had provided workers compensation insurance coverage for its Montana employees. Letter K. Dizney to Timber Edge Products LLC, 8/17/06.

11. Pursuant to its investigation, the UEF requested that Timber Edge provide proof of workers' compensation coverage for its Montana employees. Letter K. Dizney to Timber Edge Products, LLC, 8/17/06.

12. In response to the UEF's request, Timber Edge advised the UEF that pursuant to Mont. Code Ann. § 39-71-118(5)(a), it was not required to provide workers' compensation coverage for Mr. Rockwell because he was a member and 20% owner of the LLC. Letter S. Jennings to K. Dizney, 9/19/06.

13. As proof of Mr. Rockwell's membership and ownership, Timber Edge provided the UEF with the Equity, Compensation, and Incentive Program for Clayton Rockwell. Letter S. Jennings to K. Dizney, 9/19/06.

14. On September 12, 2006, the UEF denied Mr. Rockwell's claim for workers' compensation benefits. Letter B. Rice to C. Rockwell, 9/12/07.

15. As a result of its investigation, the UEF rejected the Equity, Compensation, and Incentive Program for Clayton Rockwell as proof of Mr. Rockwell's membership and determined that Mr. Rockwell was an employee of Timber Edge during the period of the audit and, on October 6, 2006, assessed a penalty against Timber Edge for failing to carry workers' compensation insurance on it Montana employees. Penalty Notice, 10/6/06.

16. The UEF imposed a penalty in the amount of \$26,938.72, the major portion of which was based upon Mr. Rockwell's earnings at Timber Edge. Penalty Computation, 10/6/06.

17. On December 7, 2006, Mr. Rockwell filed a petition with the Department of Labor & Industry seeking mediation of his claim for workers' compensation benefits, asserting that he was not a member of or owner of Timber Edge and thus, that he was an employee. Petition for Mediation, 12/7/06.

18. On May 10, 2007, Mr. Rockwell's claim for workers' compensation benefits was mediated before Department Mediator Carol Morris. Mediation Report and Recommendation, 6/4/07.

19. Following the mediation, Mr. Rockwell advised Timber Edge, through his attorney, that he would not pursue his claim for workers compensation benefits but would pursue a breach of contract action based upon the Equity, Compensation, and Incentive Program for Clayton Rockwell. Letter P. Fox to S. Jennings, 6/22/07.

20. On June 18, 2007, Mr. Rockwell filed a complaint in the First Judicial District Court, Broadwater County, alleging that Timber Edge breached the Equity, Compensation, and Incentive Program for Clayton Rockwell by failing to provide Mr. Rockwell with health insurance coverage. Complaint and Demand for Jury Trial, 6/18/07.

21. The complaint contradicted Mr. Rockwell's earlier assertion that he was not a member of Timber Edge and stated as follows:

Plaintiff became a member and 20% equity holder of TEP on January 1, 2005, pursuant to the terms laid out in Equity, Compensation, and Incentive Program for Clayton Rockwell (the Rockwell Program) attached as Exhibit 1.

Complaint and Demand for Jury Trial, 6/18/07, ¶ 3.

Under the Rockwell Program, Plaintiff was entitled to the following:

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...a pro rata share of any distributions made by TEP, if any, during that time in which Plaintiff was a member.

Complaint and Demand for Jury Trial, 6/18/07, ¶ 3.

22. The penalty amount is \$6,284.92 if the Hearings Officer determines that Clayton Rockwell was not an employee of Timber Edge for purposes of the Workers' Compensation Act.

#### IV. DISCUSSION<sup>2</sup>

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<sup>2</sup>Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

### A. Summary Judgment Standard

The legal standard for granting summary judgment is set out in *Andrews v. Plum Creek Manufacturing, L.P.*, 2001 MT 94, 305 Mont. 194, 27 P.3d 426:

The movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist. Having determined that genuine issues of fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law.

*Andrews*, ¶ 5 (citing *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901, 903).

The legal arguments, affidavits, exhibits and stipulations of the parties reduce this matter down to two essential legal questions: (1) was Clayton Rockwell an employee of Timber Edge Products, LLC and; (2) was he a member of that LLC. The affidavits, exhibits and stipulations of the parties result in there being no outstanding genuine issue of material fact.

### B. Workers' Compensation Analysis

An uninsured employer is an employer who has not properly complied with the requirement to have workers' compensation insurance coverage for its workers in this state under one of the three statutory plans authorized by the Montana Act. Mont. Code Ann. §§ 39-71-401 and 39-71-501.

Montana law requires employers to provide workers compensation coverage for its employees. Mont. Code Ann. § 39-71-401(1). Montana law defines an employer to include limited liability companies. Mont. Code Ann. § 39-71-117.

Under Montana law the term "employee" or "worker" means:

- (a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations, except those officers identified in 39-71-401(2), while rendering actual service for the corporations for pay. Casual employees, as defined by 39-71-116, are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic employment is excluded. . . .

Mont. Code Ann. § 39-71-118(1).

A simple application of these two standards to the facts of this case would appear to result in Timber Edge being an employer that must provide workers' compensation coverage for its employees, including Rockwell. However, in construing a statute, this tribunal is required to give effect to all parts of the statute. Mont. Code Ann. § 1-2-101. In giving effect to the whole of the Workers' Compensation Act the hearing officer must consider the effect of both Rockwell's employment with and membership in Timber Edge Products, LLC.

Mont. Code Ann. § 39-71-118(5) provides that:

(a) If the employer is a partnership, limited liability partnership, sole proprietor, or a *member-managed limited liability company*, the employer may elect to include as an employee within the provisions of this chapter any member of the partnership or limited liability partnership, the owner of the sole proprietorship, or *any member of the limited liability company devoting full time to the partnership, limited liability partnership, proprietorship, or limited liability company business.*

(b) In the event of an election, the employer shall serve upon the employer's insurer written notice naming the partners, sole proprietor, or members to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). *A partner, sole proprietor, or member is not considered an employee within this chapter until notice has been given.*

. . . (emphasis added).

This provision allows LLC's like Timber Edge to elect coverage for its members who work full time for the LLC. Rockwell was a member of Timber Edge and worked full time for the business. While the department disputes Rockwell's membership in Timber Edge primarily on the basis that the document entitled "Equity, Compensation, and Incentive Program for Clayton Rockwell" was not signed by the parties. Nonetheless, the document is a contract under Montana law.

There is no doubt that there was consent to the contract based on Rockwell's work according to the contract and based on Timber Edge's payment for his services. While some parts of the contract may be considered ambiguous, (and this hearing officer makes no judgment regarding those parts) the critical elements of this contract with respect to the dispute in this matter - Rockwell's employment status and membership in the LLC - are unambiguous, obviating any need to review extrinsic evidence to determine whether a contract exists or the intent of the parties. See Mont. Code Ann. §§28-3- 303, 401.<sup>3</sup>

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<sup>3</sup> Evidence that Goolsbee reported himself as 100% owner on his 2005 income taxes and that Timber Edge reported Rockwell's wages for Unemployment Insurance purposes is irrelevant when the language of the agreement regarding employment and membership in the LLC is unambiguous.

Under the terms of the “Equity, Compensation, and Incentive Program for Clayton Rockwell,” Rockwell was both an employee and a member of the LLC which could elect to provide him with worker’s compensation coverage. The LLC was not required to and did not make such an election. Thus, while Rockwell was employed by the LLC he was not an “employee” for purposes of the Workers’ Compensation Act.

A review of the legislative history of Mont. Code Ann. § 39-71-118(5) further shows that the legislature intended to exempt members who work full time for member-managed LLCs from the requirements of the Act unless they elected to be covered. When originally enacted, this provision pertained to managers of manager-managed LLCs. See HB 200, 54<sup>th</sup> Leg., (Jan. 19, 1995). Testimony given by the director of the Department of Labor at the hearing of the Bill in front of the House Business and Labor committee states “Section 3 adds persons who are managers in manager-managed limited liability companies and corporate officers of quasi-public and private corporations as employers *who may elect to include themselves as employees* within the provisions of the Workers’ Compensation Act.” Test. Chuck Hunter, Mont. H. Bus. & Labor Comm., Hearing on HB 200, 54<sup>th</sup> Leg. Reg. Sess. (January 19, 1995). (emphasis added).

While subsequent legislation moved managers of manager-managed limited liability companies to other parts of the Act and replaced it with working members of member-managed LLCs, the intent is still clear - the provision allows LLCs to elect to provide workers’ compensation coverage to its members who devote full time to the LLC. Without such an election, LLCs are not required to cover its full-time employees who are also members of the LLC.

Another provision of the Workers’ Compensation Act, Mont. Code Ann. § 39-71-401(5), provides further evidence that working members of an LLC are exempt from coverage because under this provision making an employee a member of the LLC with the intent of evading coverage would not entitle that person to the exemption. Stated otherwise, members of an LLC who are also full-time employees of the LLC are exempt from coverage unless they were made members solely for the purposes of evading workers’ compensation coverage requirements. In sum, Timber Edge was not obligated to provide workers’ compensation coverage for Rockwell.

The UEF relies on Mont. Code Ann. §39-71-401(3) to argue that Timber Edge had to provide Rockwell with workers’ compensation coverage. The relevant statute provides:

Employments covered and employments exempted. (1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers and to all employees. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments:

...

(d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3).

...

(3)(a)(i) A person who regularly and customarily performs services at locations other than the person's own fixed business location shall elect to be bound *personally and individually* by the provisions of compensation plan No. 1, 2, or 3 unless the person has waived the rights and benefits of the Workers' Compensation Act by obtaining an independent contractor exemption certificate from the department pursuant to 39-71-417.

...

Mont Code Ann. §39-71-401(1)-(3)(emphasis added).

This argument fails for several reasons; first, Rockwell was not an employee under the Act because Timber Edge did not elect to make him one. Secondly, the exclusion identified in section 401(2)(d) does not apply to Rockwell because he was not hired by a third party employer. This provision is clearly meant to apply to employment of working members of member-managed LLCs who are hired by third parties and not to the employment of the working member by the LLC itself. Thus the UEF cannot even get to the exception to the exclusion found in section 39-71-401(d)(2). However, and thirdly, even if this exception to the exception did apply, it would be Rockwell's responsibility, and not Timber Edge's, to obtain coverage or an independent contractor exemption certificate. Rockwell worked out of Timber Edge's store and warehouse in Belgrade until it closed that location in July 2005 and then he worked out of his home in Toston. Those are fixed business locations. Section 39-71-401(3) makes clear that section 39-71-401(2)(d) is meant to apply to those who work for third parties as independent contractors at locations other than the person's own fixed business location. Otherwise they would not be able to obtain an exemption.

## V. PENALTIES

Based upon the determination that Clayton Rockwell was not an employee of Timber Edge for purposes of the Workers' Compensation Act, the penalty amount owed by Timber Edge is \$6,284.92. This amount relates to the wages of three other employees for which Timber Edge failed to provide workers' compensation coverage.

## VI. 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. Clayton Rockwell was not an employee of Timber Edge Products, LLC for purposes of the Workers' Compensation Act.

3. With respect to its other Montana employees, Timber Edge Products, LLC was an uninsured employer from January 1, 2005 to July 15, 2005, in violation of Mont. Code Ann. § 39-71-401.

4. Timber Edge Products, LLC, must pay to the Uninsured Employers' Fund a penalty in the amount of \$6,284.92. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.

## VII. ORDER

1. Timber Edge Products, LLC motion for summary judgment is granted and is therefore **ORDERED** to pay a penalty in the amount of \$6,284.92 to the Uninsured Employers' Fund for its failure to provide workers' compensation insurance from January 1, 2005 through July 15, 2005.

2. UEF's motion for summary judgment is denied

DATED this 27th day of May, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM  
David A. Scrimm, Chief  
Hearings Bureau