



valid coverage, or was not required to carry workers' compensation coverage.

Section 39-71-2401(2), MCA, provides that a dispute that does not concern benefits, or which arises under a specific provision of the chapter that gives the department jurisdiction, must be brought before the department. Cases such as this one, which does not concern benefits, are heard by the department's Hearings Bureau as a contested case hearing. The hearing is de novo. Thus, even though the UEF determined that Frontier Town owed a penalty for failure to carry workers' compensation coverage on its employees during the applicable time period, the UEF must still carry the initial burden of proof at the fact finding hearing. It is petitioning the department for payment of a penalty by an alleged uninsured employer. Frontier Town may be the party appealing the UEF's determination, but the UEF is, in fact, the petitioner at the fact finding hearing, and carries the initial burden of proof.

## II. ISSUE

Whether Frontier Town, Inc. owes civil penalties for failure to maintain workers' compensation coverage for employees from April 1, 1999 to September 30, 2000 pursuant to § 39-71-504, MCA.

## III. FINDINGS OF FACT

1. Frontier Town, Inc. sold its assets to Eric Little, d/b/a Big Sky Export/Fair Trading Post, in the mid-1990's. On April 1, 1999, Richard Pegg, president of Frontier Town, Inc. repossessed the assets and once again began operating the business known as "Frontier Town."
2. Pegg formerly owned and operated a large business corporation that employed several hundred employees in several states. Pegg was familiar with state workers' compensation coverage requirements. Pegg, however, employed bookkeepers and accountants to handle the accounting and administrative aspects of his businesses, while he concentrated on procuring jobs and a customer base. When Pegg reacquired the Frontier Town business in 1999, he hired a bookkeeper to handle, in part, state and federal income tax withholdings and reporting, unemployment insurance reporting, and workers' compensation premium payments. The bookkeeper managed the accounts payables of Frontier Town, and gave Pegg checks to sign. Pegg did not track the payments or oversee the bookkeeper's work. He assumed she was paying all taxes and insurance premiums as required by Montana law.
3. The bookkeeper set up Frontier Town accounts on a computer program. She did not purchase workers' compensation insurance on Frontier Town's behalf to cover employees. Thus, an account for workers' compensation expenses and accounts payable was never set up on the computer. Pegg was unaware of this circumstance.
4. After a time, Pegg fired the bookkeeper, and turned the computer and books over to a CPA. The CPA continued paying state and federal tax withholdings, unemployment insurance taxes, and meeting all necessary state and federal reporting requirements. Because the computer program contained no accounts payable for workers' compensation insurance, the CPA did not pay for or purchase workers' compensation coverage, assuming that Frontier Town made payment for workers' compensation insurance in some other fashion. Pegg continued signing any checks submitted by the CPA, but remained unaware that Frontier Town carried no workers' compensation insurance on its employees.

5. The UEF receives copies of wage claim determinations, independent contractor determinations, workers' compensation insurance cancellation lists, and other information from the Montana Department of Labor and other state and federal entities. The UEF uses the determinations, cancellation lists and other information obtained to determine if the businesses involved are carrying proper workers' compensation coverage on employees.
6. In September 2000, Frieda Huberty, compliance specialist with the UEF, received two wage claim determinations involving employees of Frontier Town. Huberty checked several state and federal databases and could not find that Frontier Town had a valid workers' compensation policy on its employees. She requested that Charles Miller, a UEF field auditor, conduct an audit of Frontier Town and determine if the company had workers' compensation coverage, if required.
7. On October 11, 2000, Miller mailed a letter addressed to Pegg at Frontier Town requesting information regarding its workers' compensation insurance coverage. Miller asked that Pegg advise him of coverage status no later than October 17, 2000, and informed Pegg that penalties would be assessed on employers who failed to carry coverage. Pegg did not respond to the letter.
8. On October 17, 2000, Miller mailed Pegg a letter requesting that Pegg contact him within five days of the date of the letter and advise Miller of the status of his workers' compensation coverage.
9. Pegg telephoned Miller a day or two later. Miller told Pegg to immediately procure workers' compensation coverage, and that Miller would conduct an audit to determine what time period Frontier Town had failed to carry workers' compensation coverage on its employees. Miller provided Pegg with a list of business records he would need to determine what amount of coverage had been required over the past months. Pegg did not provide the records.
10. When he did not receive the requested records, Miller began researching other State of Montana databases in an attempt to determine Frontier Town payroll amounts and employee status. He learned that Frontier Town had filed quarterly tax reports for state withholding and unemployment insurance taxes with the Montana Department of Revenue. Miller obtained copies of the quarterly reports for the second, third and fourth quarters of 1999, and the first, second and third quarters of 2000. Using the payroll information contained on the quarterly reports, Miller determined that Frontier Town would have paid \$3,998.55 in workers' compensation premiums over that time period had it covered its employees properly.
11. Miller sent the audit information back to the UEF in December 2000. He also mailed a letter to Pegg on December 1, 2000 advising that Frontier Town had operated without workers' compensation coverage from April 1, 1999 through the date of the letter, and that, in accordance with state law, the penalty for operating without proper coverage was twice what the premium would have been had the business carried proper coverage. In the case of Frontier Town, it would have paid \$3,998.55 in premiums from April 1, 1999 through September 30, 2000 had it obtained a valid worker's compensation insurance policy. Thus, the penalty for failure to maintain workers' compensation coverage was calculated to be \$7,997.10, twice the premium the company would have paid.

12. On December 21, 2000, Huberty mailed Frontier Town an accounts receivable notice advising that it owed \$7,997.10 in penalties which had to be paid within 30 days. The notice offered Frontier Town the opportunity to arrange a payment plan if requested.
13. On January 19, 2001, Pegg mailed a letter to the UEF advising that Frontier Town had obtained workers' compensation coverage effective October 24, 2000, and requesting leniency regarding the penalty amount.
14. Huberty sent Pegg's request for leniency to the UEF Administrative Review Panel. This body has the ability to compromise penalty amounts based on certain criteria. One of the criteria the Panel reviews is the entity's prior history with workers' compensation insurance.
15. Before Frontier Town sold its assets to Eric Little, it had been penalized for failure to maintain workers' compensation coverage on its employees. Based upon this history, the Administrative Review Panel declined to fully remove the 200% UEF penalty premium. Instead, it offered Pegg the option of paying 150% of the premium amount Frontier Town would have paid had it properly carried workers' compensation coverage, or \$5,997.82, if it made a full payment. If Frontier Town was unable to pay that amount in full, and required a payment plan, the Panel agreed to decrease the penalty amount to \$6,997.46, 175% of the premium amount it would have paid had it properly carried coverage.
16. Pegg did not respond to the Panel's compromise offers. On April 27, 2001, Huberty mailed Frontier Town a demand letter, advising that if the full amount of penalty was not paid by May 11, 2001, the UEF would file a lien against Frontier Town.
17. On May 9, 2001, Pegg sent Huberty a letter requesting "forbearance", and offering to pay the amount of premium Frontier Town would have paid had it properly carried workers' compensation coverage. Pegg declined to pay any additional penalty amount on the basis that the "Fund" failed to meet its responsibilities of alerting him that Frontier Town was not carrying workers' compensation coverage.

#### IV. DISCUSSION

Frontier Town contends that the State of Montana had the responsibility of promptly alerting the company of its failure to carry workers' compensation coverage on its employees. Since the State should have known that the business had employees, by way of the quarterly tax reports filed beginning the second quarter 1999, Frontier Town contends that the State should not have waited some 20 months to inform it of the failure.

Montana law, § 39-71-401(1), MCA, requires all employers who have employees be bound by the provisions of compensation plan No. 1, 2, or 3, unless the employee(s) are specifically exempted. This an employer responsibility. Nothing in the law requires the State of Montana to contact each employer within the state and remind it of its obligations or determine if the entity is in compliance with all state laws. Instead, the statutes place distinct liability for compliance upon each employer. Those employers who fail to comply, for whatever reason, are assessed a strong penalty. Accordingly, Frontier Town's attempt to shift the burden of responsibility to the state fails.

The facts show that Frontier Town failed to maintain workers' compensation coverage on its employees from April 1, 1999 through September 30, 2000. As outlined in § 39-71-501, MCA, Frontier Town was an uninsured employer where it failed to comply with the provisions of § 39-71-401, MCA. The law requires an uninsured employer to pay penalties for failure to carry workers' compensation coverage on its employees.

The purpose of the UEF is to pay benefits to injured workers of uninsured employers. § 39-71-502, MCA. "A claimant's benefits may be reduced if the UEF fails to collect penalties from uninsured employers, thereby defeating the purpose of the fund. Further, the legislature's decision to create procedures for assessing penalties against uninsured employers meets a legitimate governmental goal of discouraging the operation of businesses without workers' compensation insurance." UEF v. Total Mechanical Heating & Air Conditioning, et al, and Human Dynamics Corporation and HRC/HRC ARMCO, Inc., 2000 MTWCC 39, WCC No. 9901-8140 (June 2000). If the UEF allowed Frontier Town to simply pay the amount of premium it would have owed had it carried workers' compensation insurance on its employees, there would be no discouragement for operating a business without proper insurance coverage.

Although § 39-71-504(1), MCA, states that the department may assess a penalty, the administrative rules further define when the department will collect a penalty and when it may suspend the assessment. Under 24.29.2831, ARM, the department will assess a penalty of twice the amount of premium the employer should have paid, unless the uninsured period is de minimis. Here, the uninsured period encompassed 17 months, hardly a trivial period of time. The rule does not allow waiver of the penalty under these circumstances.

Under ARM 24.29.2839, the UEF, in its sole discretion, can enter into a compromise settlement. The UEF sets the terms and conditions of compromise. The rules offer no compromise amount based upon the degree of fault assessed. Thus, Frontier Town's argument that it trusted its bookkeeper and CPA to ensure proper coverage, that they betrayed that trust, and that, as a result, the company was not at fault in the failure to carry proper coverage, is without merit.

## V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction in this matter pursuant to §§ 39-71-506 and 39-71-2401(2), MCA.
2. Frontier Town, Inc. failed to maintain workers' compensation insurance on its employees, in violation of § 39-71-401, MCA, from April 1, 1999 through September 30, 2000, and was an uninsured employer.
3. The Uninsured Employers' Fund assessed an appropriate penalty equaling twice the premium amount Frontier Town, Inc. would have paid had it carried workers' compensation insurance on its employees.
4. Frontier Town had the responsibility to ensure proper coverage of its employees. The State of Montana was not required to contact it for purposes of notification of workers' compensation coverage requirements.

## VI. ORDER

Frontier Town is hereby ordered to pay the UEF \$7,997.10 in penalties for failure to maintain workers' compensation coverage on its employees from April 1, 1999 to September 30, 2000.

DATED this 20th day of March, 2002.

DEPARTMENT OF LABOR & INDUSTRY

HEARINGS BUREAU

By: /s/Bernadine E. Warren

Bernadine E. Warren

Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.