

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Department of Labor and Industry,) Case No. 52-2004
Uninsured Employers' Fund,)
Petitioner,) **FINDINGS OF FACT,**
vs.) **CONCLUSIONS OF LAW**
Martin Construction,) **AND ORDER**
Respondent.)

I. INTRODUCTION

Martin Construction, through its principal, Alex Martin, appealed from an penalty billing notice issued by the Uninsured Employers' Fund (the UEF) that found the company ("Alex J. Martin, Martin Construction") failed to provide workers' compensation coverage for employees from July 1, 1999 to June 30, 2002, and assessed \$11,825.78 in penalties. The company contended that its failure to provide coverage for its workers resulted from the failure of the Certified Public Accountant it had retained to maintain the coverage during that time. The company contended that it did not discover until 2003 that it lacked the coverage, and acted to remedy the lack as soon as it ascertained it. The company contended that an assessment of the maximum statutory penalty of 200% of the premium that the State Fund would have charged for the uncovered period was excessive and unreasonable.

The department appointed Terry Spear as hearing officer. The parties participated in a telephone scheduling conference and agreed that a contested case hearing could convene and proceed by telephone. The hearing officer convened the hearing on July 30, 2003. Brenda Wahler, DOLI Legal, appeared and participated on behalf of the UEF. Alex J. Martin participated on behalf of the company. Charles A. Miller, UEF Field Auditor, and Martin testified. The hearing officer admitted Exhibits 1-6 and 8-11. The parties made closing arguments and submitted the case.

II. ISSUE

1. Did the department properly assess civil penalties of \$11,825.78 against Martin Construction for its failure to provide Montana workers' compensation insurance coverage for employees from July 1, 1999 through June 30, 2002, pursuant to Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24. 24.29.2831?

III. FINDINGS OF FACT

1. Martin Construction (the company) does construction work in Montana.
2. Prior to July 1, 1999, the company maintained workers' compensation insurance for its employees in accord with the law.

3. The company hired a Certified Public Accountant to perform various functions, including maintaining its workers' compensation insurance. The CPA failed to maintain the workers' compensation insurance from July 1, 1999 through June 30, 2002. Alex Martin did not become aware of the failure until after a computer cross-reference performed by the UEF between Montana Department of Revenue records and Department of Labor and Industry workers' compensation insurance records indicated no evidence that Martin Construction had workers' compensation insurance during that time.

4. From July 1, 1999 through June 30, 2002, the company had a payroll for persons entitled to coverage under the Montana Workers' Compensation Act as employees of \$31,513.50. The premium the State Fund would have charged for that payroll, with a construction classification code, would have been \$5,912.89.

5. UEF Field Auditor, Charles A. Miller, verified the payroll and the premium, and calculated the 200% penalty as \$11,825.78.^[1] The UEF issued the penalty notice and made its standard offers to compromise. The company requested a hearing.

IV. DISCUSSION

Applicability of the Penalty

The definition of uninsured employer means 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. § 39-71-501, **requiring compliance with the provisions of** Mont. Code Ann. § 39-71-401. The penalty provision authorizes the UEF to require a penalty of up to double the premium the State Fund would have charged during the period that the employer lacked insurance, or \$200.00, whichever is greater. Mont. Code Ann. §39-71-504(1)(a).

Amount of the Penalty

Although the statute allows a discretionary penalty of "up to" double the premium, the UEF always imposes a penalty of double the premium, by regulation, unless the uninsured period was *de minimis*. **Compare** 24.29.2831 A.R.M. **with**

Mont. Code Ann. §39-71-504(1)(a). In this contested case proceeding, the hearing officer must follow the department's regulation, which requires the 200% penalty. *Laudert v. Richland County Sheriff's Office*, 2000 MT 218, ¶¶ 40-41, 301 Mont. 114, 7 P.3d 386 (when the statute authorized discretionary monetary recovery against the respondent, and a properly adopted regulation exercised the agency's discretion by denying any such recovery upon proof of "mixed motive," the department properly followed its own regulation rather than the discretionary language of the statute and denied the recovery upon proof of mixed motive).

The company did not present any evidence that the penalty calculation was faulty. There is no evidence that a lower classification rate was proper and would have resulted in a lower

premium. The penalty amount was correct under the facts, the applicable law and the department's regulations.

Compromise of the Penalty

The department can settle a penalty assessment with an uninsured employer. Mont. Code Ann. §§ 39-71-506(2) and 519. The UEF can, in its sole discretion, compromise a penalty assessment. Admin. Code Mont. 24.29.2839. The UEF had the discretion to offer an appropriate settlement of the mandatory penalty.

The purpose of the UEF is to pay benefits to injured workers of uninsured employers. Mont. Code Ann. §§ 39-71-503 and 504. The UEF, in the exercise of its sole discretion, can presumably take into account any factors it deems pertinent. Those factors could conceivably include the status of any pending UEF fund claims by employees of the company (none appear in the record), the financial status of the fund, the degree of fault (if any) of the company, the financial status of the company, the strength of the evidence of uninsured status and any other pertinent matters.

The company in this case relied upon a CPA who apparently failed to do his job. The company had previously been in compliance with the law. Nevertheless, the hearing officer cannot, on this record, conclude that the UEF abused its sole discretion in making the settlement proposals, much less that the UEF had a duty to make greater concessions in its settlement proposals. The record does not contain adequate information about the basis of the settlement proposals, which appear to be the standard offers the UEF makes after a penalty assessment.

Even if the record fully illustrated the basis for the UEF's settlement offers, there is no authority for the Hearings Bureau to review a UEF settlement offer for its adequacy, fairness or propriety. The statutes authorizing settlement with an uninsured employer (Mont. Code Ann. §§39-71-506(2) and 519) may not require department approval of such settlements under Mont. Code Ann. §39-71-741. The applicability of that approval statute to this kind of settlement is unclear.^[2] Even if it does apply, a meeting of the minds of the UEF and the company, so that a settlement existed to review, would be necessary before any review for approval would be proper.

The Hearings Bureau has no authority to decide an appeal or other request for review of a settlement offer by the UEF. Such an offer is not a final agency decision. It is not binding on any party, and does not result in any change of status for any party. Therefore, the Hearings Bureau cannot review the compromise proposals to decide whether there was any abuse of the UEF's sole discretion.

V. 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. Martin Construction was an uninsured employer from July 1, 1999 through June 30, 2002, in violation of Mont. Code Ann. §39-71-401.

3. The Uninsured Employers' Fund properly assessed a statutory penalty against Martin Construction of \$11,825.78. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831

4. The department does not have jurisdiction over appeal about compromise proposals tendered to Martin Construction by the Uninsured Employer's Fund.

VI. ORDER

1. Martin Construction is **ORDERED** to pay to the Uninsured Employers' Fund as a penalty for failure to cover workers with workers' compensation insurance from July 1, 1999 through June 30, 2002, the amount of \$11,825.78.

DATED this 31st day of July, 2003.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ TERRY SPEAR
Terry Spear, Hearing Officer
Hearings Bureau

Notice: This Order is signed by the 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 thirty (30) days after the date of mailing of this Order as provided in §39-72-612(2) and ARM 24.5.350. The Court's address is:

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

^[1] Miller had previously included the wages earned by Martin's wife, whose payroll should have been excluded, and erroneously calculated a higher premium and penalty. Martin pointed out the error and Miller corrected it.

^[2] The approval statute addresses approval of benefit settlements, and provides for review by the Compensation Court of department disapproval of a benefits settlement or a dispute between claimant and insurer over lump sum conversions. *See* Mont. Code Ann. § 39-71-741. Settlement of a UEF penalty assessment against an employer is not a benefit settlement.