STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

DEPARTMENT OF LABOR AND INDUSTRY, UNINSURED EMPLOYERS' FUND,	)	**Case No. 2172-2003**
Petitioner,	)	
vs.	)	**FINAL AGENCY DECISION SUMMARY JUDGEMENT**
MP LIVESTOCK TRUST/ PERRY POLZIN,	)	
Respondent.	)	

* * * * * * * * * *

Respondent MP Livestock Trust/Perry Polzin Trucking (MPLT) and petitioner Uninsured Employers Fund (the UEF) agreed that the professional employer's organization (PEO) with which MPLT contracted for leased employees failed to provide workers' compensation insurance for those employees from February 1, 2001, to August 3, 2001, and that MPLT did not provide such coverage during that time.[(1)] MPLT sought summary judgment that it was not liable for a statutory penalty based upon the applicable premium during that period on two bases:

> (1) MPLT was not an employer of the leased workers for purposes of the uninsured employer penalty statute; and
>
> (2) The department failed to exercise due diligence in ascertaining the PEO's failure to insure and requiring that MPLT timely receive notice from the PEO of that failure.

The parties agreed, on the record, that there were no questions of fact involved. Either MPLT is entitled to summary judgment that no penalty is applicable or the UEF is entitled to a summary judgment that the assessed penalty is applicable. Having considered the arguments and the written materials for and against the motion for summary judgment,[(2)] the hearing officer now rules that the UEF is entitled to a summary judgment that the assessed penalty is applicable for the following reasons.

MPLT and the PEO were both immediate employers of the involved workers during the pertinent time. Mont. Code Ann. § 39-8-207(3) provides:

> When a professional employer organization or group uses a professional employer arrangement with the client, both the professional employer organization or group and the client are the immediate employers of the workers subject to the arrangement for the purposes of the workers' compensation laws of this state.

The language of the statute is clear. The workers who are "subject to the arrangement" between MPLT and the PEO have both MPLT and the PEO as their immediate employers.

MPLT argued that the phrase "subject to the arrangement" in the statute modifies the phrase "both the professional employer organization or group and the client" rather than the word "workers." Under this reading, the arrangement between MPLT and the PEO would control who is an employer for purposes of liability for failure to provide compensation insurance coverage. However, the modifier comes immediately after "workers," and proper grammatical construction applies the modifier to the word immediately preceding it rather than a word or phrase earlier in the sentence. ***See,*** Richard Wydick, *Plain English for Lawyers*, Carolina Academic Press (4th Ed. 1998), pp. 49-51 ***and*** Roger Williams, *Style: Ten Lessons in Clarity and Grace* (Harper Collins College Publishers, 1994), p. 184. Since the modifier is not "dangling" (***i.e.***, equally likely to modify more than one word or phrase in the sentence), the meaning is clear.

Clearly, the legislature knew how to place modifiers. In another subprovision, Mont. Code Ann. § 39-8-207(8)(a) a modifier ("subject to any contrary provisions of the contract between the client and the professional employer organization") is located to apply to "contract" (*i.e.*, the professional employer agreement). This placement makes the statutory requirements of Mont. Code Ann. § 39-8-207(8)(b) subject to change by the terms of the agreement between MPLT and the PEO.[(3)]

Had the legislature intended to make MPLT's status as an immediate employer subject to its agreement with the PEO, Mont. Code Ann. § 39-8-207(3), could have been written in the same fashion as § 39-8-207(8)(a). It was not. The difference manifests the legislative intent.

There is an excellent public policy reason for not allowing the PEO and its clients to dictate who is responsible to the uninsured worker and the state if there is no coverage. If employers can absolutely avoid risks of uninsured employer claims by leasing employees, there is little reason for an employer to examine a PEO carefully before signing up or to monitor its compliance after signing up. By signing a PEO contract containing language that places sole liability on the PEO, the Montana employer would then be free and clear of all responsibility for assuring proper workers' compensation insurance coverage for the leased employees. Responsibility for the leased employees, typically part of the local workforce, would pass from the Montana employer to the PEO. The PEO, as in this case, is often far removed from Montana. The Montana employer would, with the stroke of a pen, defeat one of the fundamental purposes for the Workers' Compensation Actplacing the onus for workplace injuries upon the employer and the industry where those injuries occurred.

It is entirely consistent with the public policy of the State to make both the Montana employer (MPLT, in this case) and the PEO the immediate employers. If the workers are not properly covered under Plan 1, 2 or 3, both MPLT and the PEO are thereby uninsured employers pursuant to Mont. Code Ann. § 39-71-501, jointly and severally liable for the lack of workers' compensation insurance. MPLT in this case therefore employed the leased workers for purposes of the uninsured employer penalty statute.[(4)]

The department's regulation of the PEO does not provide a defense for MPLT. Mont. Code Ann. § 39-8-206(2) does not require the department to suspend the PEO's license as a prerequisite for treating MPLT as an uninsured employer. The statute simply mandates that if there is a suspension, the department then must require, under Mont. Code Ann. § 39-8-206(2)(b)(ii), that the PEO tell its Montana clients about their liability as uninsured employers. There is no legal or factual basis for barring the UEF from imposing and collecting the statutory penalty because the department's compliance bureau allegedly should have sooner suspended the license of this PEO and forced it to warn MPLT of the potential liability. It was MPLT who selected and contracted with the PEO. MPLT knew or should have known of the risk of being an uninsured employer if the PEO failed to perform its responsibilities. MPLT accepted that risk by leasing employees from the PEO and relying upon the PEO to insure them.[(5)]

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).

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 mandating denial any such recovery upon proof of "mixed motive," the department properly followed its own regulation and not the discretionary statutory language).

The failure of employers' trusted agents, both PEOs and outside professionals such as accountants and management consultants, to maintain proper workers' compensation insurance coverage for employees regularly results in imposition of liability upon unwitting employers. The employers then often contest the penalty because they had good intentions and no knowledge of the failures until after the fact. However, the Hearings Bureau has no power even to consider these defenses. As a matter of law, good intentions and ignorance of the violation do not protect an employer from the statutory penalty. If the employer was an uninsured employer, the penalty applies, under the statutes and regulations.

MPLT did not challenge either the amount of the penalty or its application if MPLT was an uninsured employer against whom the UEF was not estopped to apply the statutory penalty. Since MPLT was an uninsured employer against whom the UEF was not estopped, summary judgment is hereby entered in favor of the UEF. The assessed penalty of $26,331.53 applies and is hereby affirmed.

DATED this 7th day of July, 2004.

Department of Labor & Industry, Hearings Bureau

By: TERRY SPEAR
Hearing Officer

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 30 days after the date of mailing of this Order as provided in Mont. Code Ann. § 39-72-612(2) and Admin. R. Mont. 24.5.350. The Court's address is:

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

* * * * * * * * * *

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of this document was this date served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Mark Westveer, Attorney at Law
PO box 556
Stanford, MT 59479

The undersigned hereby certifies that a true and correct copy of this document was this date served upon the following parties or such parties' attorneys of record by means of the State of Montana's Interdepartmental mail service.

Kevin Braun, Department of Labor & Industry
PO Box 1728
Helena, MT 59624-1728

DATED this 7th day of July, 2004.
Natacha Bird

[1] The parties also agreed that MPLT sent payments to its PEO which were, in part, to pay for workers' compensation insurance coverage for leased employees during the time at issue.

[2] The hearing officer deferred ruling in this case until the completion of briefing and argument in *UEF v. Glacier Carriers, Inc.*, Case 2096-2003, and has considered the arguments and the written materials in that companion case as well.

[3] "Subject to any contrary provisions of the contract between the client and the professional employer organization or group, the professional employer arrangement that exists between the parties must be interpreted for purposes of insurance, bonding, and employer liability pursuant to subsection (8)(b)." Mont. Code Ann. 39-8-207(8)(a).

[4] The department has the statutory power to decide who is an uninsured employer. Mont. Code Ann. §§ 39-71-506(1) and 39-71-2401(2). Therefore, the department clearly has jurisdiction to decide who is the employer, even though it lacks jurisdiction to decide disputes between employers and insurers over coverage. *Auto Parts of Bozeman v. Uninsured Employers' Fund*, 2001 MT 72, 305 Mont. 40, 23 P.3d 193.

[5] MPLT agreed, in oral argument, that it had no authority to support its argument that alleged failure of the department to regulate adequately could estop the UEF from exercising its statutory power. A regulatory agency's failure immediately to identify a violation does not bar the agency from imposing statutory penalties for that violation. Application of such a doctrine would reward a statutorily culpable party for escaping earlier detection and penalize innocent injured workers.