

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

DEPARTMENT OF LABOR AND)	Case No. 1179-2007	
INDUSTRY, UNINSURED)		
EMPLOYERS' FUND,)		
)	
Petitioner,)	FINAL AGENCY DECISION	
)	
vs.)		
)	
RULE CONSTRUCTION, LLC,)		
)	
Respondent.)		

* * * * *

I. INTRODUCTION

Rule Construction, LLC, through its principal, Robert V. Rule, appealed from a penalty billing notice issued by the Uninsured Employers' Fund (the UEF) that found that Rule Construction, LLC failed to provide workers' compensation coverage for employees from April 3, 2006 to May 31, 2006. and assessed \$4,444.02 in penalties. The company contended that its workers were covered by a partner's Workers Compensation Policy.

The department appointed David Scrimm as hearing officer. The hearing officer convened the hearing on April 18, 2007. Brian Hopkins, DOLI Legal, appeared and participated on behalf of the UEF. Robert V. Rule participated on behalf of the company. Windy Knutson, UEF Field Auditor, Barbara Hoff, Tony Jacques, Ian Cassidy, Jason Lineaweaver, Jacob Taylor, Robert Rule, John Rule and Richard Lamar testified. The hearing officer admitted Exhibits 1-7n and Exhibit A. The parties made closing arguments and submitted the case.

II. ISSUE

Did the department properly assess civil penalties of \$4,444.02 against Rule Construction, LLC for its failure to provide Montana workers' compensation insurance coverage for employees from April 3, 2006 to May 31, 2006, pursuant to Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24. 24.29.2831.

III. STIPULATED FACTS

1. On or about January 5, 2006, Robert Rule entered into a contract with Barbara Hoff on behalf of Rule Construction, for construction of a residence at Lot 14 of the Warm Springs Ranch Subdivision on Mountain Meadow Drive, Clancy, Montana (hereinafter “the construction project”).

2. On or about February 13, 2006, Rule Construction changed its business name to Rule Construction, LLC (Rule LLC). The change in business structure from Rule Construction to Rule LLC, did not change the company’s status as an employer under Mont. Code Ann. § 39-71-117(a).

3. During April and May 2006, Rule LLC, had at least four employees who worked on the Hoff construction project. They included Ian Cassidy, Tony Jacques and Jason Lineaweaver.

4. On or about June 1, 2006, Windy Knutson, a Field Auditor for the UEF, conducted an audit of the database of the Workers’ Compensation Automation Project (WCAP). WCAP is the official Montana workers’ compensation database, established pursuant to Mont. Code Ann. § 39-71-225. Insurers report workers’ compensation coverage to the National Council on Compensation Insurance and this information is transferred to WCAP.

5. Upon reviewing the WCAP database, Knutson could not locate workers’ compensation insurance coverage for Rule LLC.

6. As part of her official duties, Knutson conducted a routine audit of Rule LLC. During the course of this audit, Knutson learned about the contract referenced in paragraph one above. Upon further investigation she learned that Rule LLC employed at least four workers between April 3, 2006 and May 31, 2006.

7. Under Mont. Code Ann. § 39-71-504(1), the UEF is authorized to collect from an uninsured employer a penalty of either up to double the premium amount the employer would have paid on the payroll of the employers’ workers if the employer had been enrolled with compensation plan No. 3 or \$200, whichever is greater.

8. Based upon information obtained in her audit, Knutson determined that the four workers earned or should have earned \$12,844 for eight weeks plus one day of work between April 3, 2006 and May 31, 2006. Using the statutory standard referenced in paragraph 7 above, she determined that the premium amount Rule LLC would have paid on this payroll had it been enrolled with compensation plan No. 3 was \$2,222.01. Because the statutory provision allows for a penalty of double the amount of the premium, Knutson arrived at and assessed a penalty of \$4,444.02 for the period in question against Rule LLC.

9. Pursuant to Mont. Code Ann. § 39-71-504(2), on or about December 19, 2006, the UEF assessed an interest charge in the amount of \$83.28 and a late fee of \$50.00 against Rule LLC.

10. During March 2006, Rule Construction and Castle Rock Construction formed Luxury Homes, LLC. Rule LLC believed that Luxury Homes, LLC, rather than Rule LLC, was responsible for providing workers' compensation insurance for the four workers Rule LLC employed during April and May 2006.

IV. FINDINGS OF FACT

1. The contract between Barbara Hoff and Rule Construction was not amended to indicate that either Eli Burnum or Luxury Homes, LLC would be the general contractor for the construction project.

2. Ian Cassidy was hired to work on the construction project by Robert Rule who also supplied the tools for the project. Rule also paid Cassidy's wages at the rate of \$13.00 per hour. Cassidy did not work for Eli Burnum or Luxury Homes, LLC. Cassidy left work when he was not paid for work he performed for Rule. Rule paid some or all of the wages he owed Cassidy the night before the hearing in this matter.

3. Jacob Taylor was not sure who he worked for, but was paid by Rule. Rule supplied the tools that Taylor used on the construction project. Taylor was paid \$12.00 per hour and worked an average of 30 hours per week. Taylor did not know who was to provide workers' compensation coverage. Taylor quit working when he did not get paid for his work. Rule later paid some of the wages he was owed and Taylor "called it even."

4. Tony Jacques was hired by and worked for Rule on the construction project. Rule directed Jacques' work, supplied his tools and paid him. Jacques wages were \$13.00 per hour. Jacques left work when he was not paid. Rule offered to pay Jacques what he was owed the night before the hearing.

5. Windy Knutson based her calculation of the covered wages on a 30-hour week for each employee.

6. Luxury Homes, LLC was formed by Castle Rock, LLC and Rule LLC to construct homes in the Majestic Heights Subdivision. The partnership contemplated that Hoff's house would be a model home for the subdivision. The contract between Hoff and Rule Construction (now named Rule LLC) was never modified to identify a new general contractor or the model home nature of Hoff's house.

7. Rule believed Burnum had workers' compensation insurance that would cover the construction project but never asked to see a copy of the policy.

8. Rule alleged that Burnum stole a number of important business records from him and that he filed a report with the police regarding the alleged theft. Rule did not try to obtain a copy of the police report.

9. An excerpt from the purported minutes of Luxury Homes, LLC managing member meeting indicates that "Insurance for all jobs be blanketed under Castle Rock Construction," Eli Burnum's company.

10. Rich Lamar was hired by Rule on January 18, 2006. As of March 3, 2006, Lamar and Tony Jacques were Rule's only employees.

11. Jason Lineaweaver was hired by Rule to work for Luxury Homes, LLC. He was paid \$11.50 -12.50 per hour by Rule Construction, and averaged \$12.00 per hour. He left the construction project when he wasn't paid for his work.

12. The wages earned and applicable penalty during the time at issue are:

Name	Hourly Rate	Amount	Rate	Premium
Jason Lineaweaver	12.00	\$ 2,964.00		
Ian Cassidy	13.00	\$ 3,211.00		
Jacob Taylor	12.00	\$ 2,964.00		
Tony Jacques	13.00	\$ 3,211.00		
		\$ 12,350.00	.173	\$ 2,136.55
Penalty				\$ 4,273.10

V. DISCUSSION

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.

Rule's entire defense was based on the idea that another person, Levi Burnum, or entity, Luxury Homes' LLC, was responsible for providing coverage for the employees on the Hoff project. Montana law provides for such situations where an employer uses the services of a worker provided by another person or entity:

39-71-117. Employer defined. (1) "Employer" means:

...

(3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. The presumption may be rebutted by substantial credible evidence of the following:

(a) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and

(b) the person, association, contractor, firm, limited liability company, limited liability partnership, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed.

Under this statute, Rule LLC is presumed to be the employer responsible for providing workers compensation coverage for the four workers unless it can show, first, that Burnum or Luxury Homes actually employed the workers (i.e., that Rule was not acting for Rule LLC in hiring, directing and paying them) or at least: (a) that Burnum or Luxury Homes controlled the four employees; and (b) that Burnum or Luxury Homes had workers' compensation insurance for the workers at the construction project. Rule LLC failed to prove any of these facts.

The evidence produced at hearing and as stipulated by Rule LLC indicates that Rule LLC had four employees during the time frame at issue. Cassidy, Taylor and Jacques all testified that they were hired by, paid by and provided tools by Rule. Moreover, their work was directed by Rule. Jason Lineaweaver's testimony was equivocal with respect to the identity of his employer. Since Rule failed to show that Burnum or Luxury Homes had workers' compensation insurance for the four workers at the construction project, they are still Rule LLC employees.

Rule LLC's assertions that Burnum either had or would obtain workers' compensation insurance coverage are insufficient to overcome the presumption that it was the employer of the four employees at the construction project and thus liable for providing such coverage. Rule LLC did not have such coverage, and therefore was an uninsured employer.

An uninsured employer is subject to a penalty of up to double the premium the State Fund (the Plan 3 insurer) would have charged during the uninsured period, 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, by regulation the UEF always imposes a

penalty of double the premium unless the uninsured period was *de minimis*. Admin. R. Mont. 24.29.2831. The hearing officer must follow the department's regulation and impose the maximum 200% penalty. *Laudert v. Richland County Sheriff's Off.*, 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).

Evidence adduced at hearing shows that the penalty calculation was incorrect as to the hourly rates of the involved employees. The table in Finding of Fact 12 shows the proper payroll amount subject to the penalty. There is no evidence that a lower classification rate was proper and would have resulted in a lower premium. The penalty shown in Finding of Fact 12 is correct under the facts, the applicable law and the department's regulations.

"An uninsured employer that fails to make timely penalty or claim reimbursement payments required under this part must be assessed a late fee of \$50 for each late payment." Mont. Code. Ann § 39-71-504 (2)(a). Pursuant to this part the department assessed Rule with a \$50 penalty for failure to timely pay the assessed penalty. Such assessment was in accord with the statutory provision.

Montana law further provides that "any unpaid balance owed to the fund under this part must accrue interest at 12% a year or 1% a month or fraction of a month. Interest on unpaid balances accrues from the date of the original billing." Mont. Code. Ann § 39-71-504 (2)(b). The department properly assessed interest in the amount of \$83.28 on Rule's outstanding balance owed to the fund.

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. Rule Construction, LLC was an uninsured employer from April 3, 2006 through May 31, 2006, in violation of Mont. Code Ann. §39-71-401.
3. Rule Construction, LLC, must be assessed a statutory penalty of \$4,273.10, due to the Uninsured Employers' Fund. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.
4. Rule Construction LLC also owes a late fee of \$ 50.00 and interest in the amount of \$83.28.

VII. ORDER

1. Rule Construction, LLC is **ORDERED** to pay to the Uninsured Employers' Fund a statutory penalty for failure to provide workers' compensation insurance from April 3, 2006 through May 31, 2006, together with a late fee and interest, in a total amount of \$4,406.38, as itemized in the conclusions of law herein.

DATED this 11th day of July, 2007.

DEPARTMENT OF LABOR AND INDUSTRY

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

Notice: Pursuant to Mont. Code Ann. 39-71-504(2)(b) any unpaid balance owed to the fund under this part must accrue interest at 12% a year or 1% a month or fraction of a month. Interest on unpaid balances accrues from the date of the original billing.

This final agency decision is signed by the Hearing Officer under authority delegated by the Commissioner of Labor and Industry. Any party in interest may appeal this decision to the Workers' Compensation Court within 30 days after the date of mailing of this Order as provided in Mont. Code Ann. § 39-71-2401(3) and Admin. R. Mont. 24.29.215(3). The Court's address is:

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