

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

DEPARTMENT OF LABOR AND) Case No. 1020-2008
INDUSTRY, UNINSURED)
EMPLOYERS' FUND,)
)
Petitioner,)
)
vs.)
)
DANA HENNEN, D/B/A)
PHOENIX GROUP,)
)
Respondent.)

**FINDING OF FACT;
CONCLUSIONS OF LAW;
AND FINAL ORDER**

* * * * *

I. INTRODUCTION

Dana Hennen, d/b/a Phoenix Group (Phoenix Group), appeals from an Uninsured Employer's Fund (UEF) notice imposing a penalty because of Phoenix Group's failure to provide worker's compensation insurance for its employees from July 1, 2007 to October 17, 2007. Hearing Examiner Gregory L. Hanchett convened a contested case hearing in this matter on March 6, 2008. Arthur Gorov, agency legal counsel, appeared on behalf of UEF. Dana Hennen appeared on his own behalf. Both Hennen and Windy Knutson, UEF auditor, testified under oath. The parties stipulated to the admission into evidence of the entirety of this tribunal's file. After considering the evidence and argument of the parties, the hearing examiner makes the following findings of fact, conclusions of law, and order.

II. ISSUE

Did UEF properly assess civil penalties of \$3,084.14 against Phoenix Group for its failure to provide worker's compensation insurance coverage for its covered employees between July 1, 2007 and October 17, 2007, pursuant to Mont. Code Ann. 39-71-504 (1) (a) and Admin. R. Mont. 24.29.2831?

III. FINDINGS OF FACT

1. As Hennen conceded at hearing, and the hearing examiner so finds, between July 1, 2007 and October 17, 2007, Phoenix Group's employees were not covered by statutorily

mandated worker's compensation insurance.

2. Between July 1, 2007 and October 17, 2007, Phoenix Group had payroll totaling \$17,895.08 for its employees covered by the Worker's Compensation Act. The premium required in order to maintain statutorily mandated worker's compensation insurance for a payroll of that size during that time period was \$2,390.22.

3. 200% penalty due because of the uninsured status of Phoenix Group's employees between July 1, 2007 and October 17, 2007 amounts to \$4,780.44 ($\$2,390.22 \times 2 = \$4,780.44$).

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 that 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** Admin. R. Mont. 24.29.2831 **with** Mont. Code Ann. §39-71-504(1)(a). In this contested case proceeding, the hearing officer must follow the department's regulation, by which the department has exercised the discretion accorded by statute in always requiring the 200% penalty. *Cf. Laudert v. Richland County Sheriff's Office*, 2000 MT 218, ¶¶ 40-41, 301 Mont. 114, ¶¶ 40-41, 7 P.3d 386, ¶¶ 40-41 (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).

Hennen admits that he had employees working for him between July 1, 2007 and October 17, 2007 who were not covered by worker's compensation insurance as required by state and regulation and he was, therefore, an uninsured employer during that time period. Hennen also admits that the amount of the premium that should have been paid for coverage during that time period was \$2,390.22. The imposition of a \$4,780.44 penalty by the UEF was correct under the facts, the applicable law and the department's regulations.

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. Phoenix Group was an uninsured employer between July 1, 2007 and October 17, 2007 in violation of Mont. Code Ann. §39-71-401.

3. The Uninsured Employers' Fund properly assessed a \$4,780.44 statutory penalty against Phoenix Group. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.

VI. ORDER

Due to its failure to cover workers with workers' compensation insurance between July 1, 2007 and October 17, 2007, Phoenix Group is **ORDERED** to pay to the Uninsured Employers' Fund a penalty of \$4,780.44.

DATED this 17th day of March, 2008.

DEPARTMENT OF LABOR & INDUSTRY HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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 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