

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

DEPARTMENT OF LABOR AND) Case No. 989-2009
INDUSTRY, UNINSURED)
EMPLOYERS' FUND,)

Petitioner,)

vs.)

JOHN ZULKOWSKI D/B/A)
BEARTOOTH MOUNTAIN LOG)
HOMES/NORTHWESTERN)
HOMES IMPROVEMENT,)

Respondent.)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
FINAL ORDER AND
NOTICE OF APPEAL RIGHTS**

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I. INTRODUCTION

John Zulkowski appealed from a penalty billing notice issued by the Uninsured Employers' Fund (UEF) that found that Zulkowski owes civil penalties in the amount of \$8,118.76 for failure to maintain workers' compensation insurance coverage for his employees from January 8, 2007 to January 28, 2008, pursuant to Mont. Code Ann. § 39-71-504. Zulkowski contended that he was not the employer of the workers building the new home of Kim Dalton and (until their divorce) her husband on their land near Red Lodge, Montana, but that he, rather than being Dalton's general contractor on the project, was Dalton's foreman and that she employed all of the workers on the project.

The department appointed Terry Spear as Hearing Officer. The Hearing Officer convened the hearing on May 19 and 20, 2009 in Red Lodge, Montana. The UEF was represented by Joseph Nevin, DLI Office of Legal Services. Zulkowski attended with counsel Steven L. Thuesen. John Zulkowski, Kim Dalton, Jim Tandy, Jeff Schmalz, Michelle Carlson, Sam Coolimore, Lee St. Clair, Calder Stradtman, Todd Planichek, J.C. Graham, and Karen Zulkowski testified under oath. The Hearing Officer admitted Exhibits 1-12 (Bates' numbers), and 16-18 (Bates' numbers 45-101) and selected pages of Exhibit 19 (Bates' numbers 106, 111, 114-16, 119, 125-28, 130, 132-34, and 141), as well as Exhibits 103-06 (handwritten page numbers 4 and 7-47) and 114 (handwritten page number 5).

After some initial post hearing postponements, the UEF filed its proposed decision. The case was then further delayed when Zulkowski's attorney moved and was permitted to withdraw. Over the UEF's objections, the Hearing Officer allowed Zulkowski additional time, after which he filed his proposed decision. The UEF filed its reply brief on November 13, 2009, and the matter was submitted for decision.

II. ISSUE

Did the UEF properly assess civil penalties of \$8,118.76 against Zulkowski because he employed workers on the construction of the Dalton home without providing and maintaining workers' compensation insurance coverage for them, from January 8, 2007 to January 28, 2008? Mont. Code Ann. § 39-71-504.

III. FINDINGS OF FACT

1. In Spring 2006, John Zulkowski (Zulkowski) and Kim Dalton (Dalton) had an informal meeting. Dalton and her husband were inspecting the land they bought near Red Lodge when Zulkowski, who owned land close to theirs, came over and greeted them. He invited them over to his home for a beer, and asked them what they planned to do with their land. They told Zulkowski they wanted to build a home on the property. Zulkowski told them he built homes and offered to build their home. He showed them some of the building work he had done in the local area.

2. Dalton and her husband subsequently divorced during the work on what ultimately became her separate property near Red Lodge, where the home was built. Thus, her ex-husband became and is irrelevant to this dispute.

3. Initially, Zulkowski undertook some "dirt work" on the property in preparation for the home construction. Dalton told Zulkowski generally where and how she wanted the home situated on the property and then deferred to Zulkowski both regarding what dirt work needed to be done and how to structure the agreement between them for him to do the work. Zulkowski billed Dalton \$6,000.00 on the letterhead of a corporation in which he owned an interest, for the "dirt work" phase of construction of her home. He performed that work as an independent contractor. Upon what appeared to be satisfactory completion of the dirt work, Dalton decided that she could rely upon Zulkowski to do the job of building her home.

4. Zulkowski prepared documents that showed an estimate of costs of construction for the Dalton home, on the letterhead of one of his businesses, Northwestern Homes, Inc. Zulkowski's estimate stated a total expense to complete Dalton's home, including "labor costs."

5. Dalton also obtained a bid from another individual, Don Wolf, which was approximately \$100,000.00 more than Zulkowski's estimate. She equated the

“estimate” from Zulkowski with Wolf’s “bid.” She chose Zulkowski to build the home. Dalton and Zulkowski entered into an agreement that Zulkowski would supervise the construction of Dalton’s home. Dalton reasonably believed that her agreement with Zulkowski made him her general contractor for the project.

6. The arrangement under which Zulkowski had done the dirt work in preparation for construction of Dalton’s home became the functional model for how Zulkowski and Dalton interacted as the work on the home began and progressed. Dalton would tell Zulkowski what she wanted, Zulkowski would tell her how he and the workers would accomplish what Dalton wanted and Dalton would ask questions. Once the parties agreed, she would rely upon Zulkowski to accomplish the result she sought. She had to rely upon him, because she did not have the knowledge and experience necessary to direct how the result would be accomplished. However, they did not document their agreement in the same fashion as they had documented the dirt work. Zulkowski structured their agreement on the actual construction project so that he would not look like an independent contractor, would not look like Dalton’s primary contractor or general contractor, and would not look like the employer of any of the workers he hired with Dalton’s money.

7. Zulkowski, in submitting his estimate, told Dalton that he did not want the hassle of handling a payroll, and asked that Dalton pay the workers (including Zulkowski) on the project as well as pay (or reimburse him if he should pay) for materials and supplies and for the work and materials provided by subcontractors. Zulkowski had equipment and owned or had ready access to building materials and supplies. In providing his estimate to Dalton, he expected, over the course of the project, that he would sell Dalton the use of his equipment or that of others and obtain, at her expense, various material and supplies from independent vendors as well as vendors with whom he had business relations.

8. Zulkowski’s estimate was substantially lower than Wolf’s bid because he would be charging for his time by the hour, renting his equipment to Dalton, and using Dalton’s money to buy materials and supplies that he either already had or that he could purchase with Dalton’s money. His estimate contemplated that she and not he would pay the workers he hired and supervised on the project. He also planned not to provide those workers with workers’ compensation insurance coverage. He would not be keeping payroll records or making payroll deductions. He would not be paying employer’s contributions for taxes, or unemployment insurance contributions. His plan to build Dalton’s house without discharging the responsibilities a builder normally undertook allowed him to provide the substantially lower estimate.

9. In every aspect of the project where Zulkowski, as general contractor, would incur expenses or liabilities that were part of Wolf's bid, Zulkowski's lower estimate was based upon his intention to act as the general contractor in fact, but structure the transaction if he were just another employee who was working for Dalton, thereby avoiding those expenses or liabilities.

10. The department had twice previously assessed penalties against Zulkowski for not having workers' compensation insurance coverage for workers on construction projects. Dalton had a business in Arizona, Dalton Interiors, that had employees. Neither party was particularly naive or ignorant of the need to provide workers' compensation for employees. However, there is no credible evidence that Zulkowski explained to Dalton why, in detail, his estimate was cheaper than Wolf's.

11. Zulkowski placed ads for workers in the Carbon County News. Zulkowski interviewed and hired workers through these ads. Zulkowski tolerated Dalton's input on hiring and included her on decisions about subcontractors, without surrendering to her his control over those aspects of the project. As the project progressed, he humored Dalton by running errands for her and having his crew do extra work for her (such as putting gravel in front of her camper when she was living in it on the premises). Her effective input was limited to trying to control expenses and trying to make sure that she got the house she visualized. Dalton may have been led to believe that she supervised the workers on her home, but Zulkowski actually did - she lacked the capacity to do it.

12. Zulkowski billed Dalton for the hours he and his crew worked on the home. Dalton paid for the hours reported. At some point she asked for time cards rather than time sheets, to document the hours. It does not appear that Zulkowski ever provided actual time cards, but Dalton still paid for the hours reported. No taxes were deducted from these payments, nor did Zulkowski ever request any withholding be taken from his checks or the checks of his crew. Zulkowski did not declare income from these payments on his tax returns.

13. Dalton did deal directly with many of the subcontractors, relying upon their knowledge and expertise in the same way that she relied upon Zulkowski's knowledge and expertise as the general contractor. Either she paid every one of the subcontractors, directly or through Zulkowski, or they were not paid at all, but Zulkowski still retained control and direction of the project.

14. During the course of the construction of the Dalton home, Zulkowski made purchases for the Dalton project and Dalton paid the invoices for those purchases, whether the purchases were from third party vendors and suppliers or from entities in which Zulkowski had ownership interests. Zulkowski also used vehicles and other equipment owned by Dalton at the site during the building.

There were various methods used for billing and payment over the course of the project. Ultimately, Dalton paid for all of the equipment, material and supplies used, on the project, either through cash advances to Zulkowski or directly to the vendors. In some instances, Dalton paid for material and supplies that Zulkowski used at least in part for purposes other than building Dalton's home. Zulkowski, because he retained actual control and direction of the project, was able to avoid advancing very much of his own money, if any.

15. Dalton wanted certain parts of the construction work done first or next. For examples, Dalton wanted the side of the house facing the road to be completed first, and wanted the bathroom finished first so that she could use it right away. Zulkowski appeared to comply with Dalton's preferences, while still controlling and directing the construction project. During part of the time when Zulkowski was in control of the project, Dalton lived on her property. When she was present, Dalton and Zulkowski would discuss the work to be done that day, after which Zulkowski would give his crew their directions for the day. Although Zulkowski testified that Dalton, through their morning meetings, directed and controlled the work being done, she did not have the experience or expertise to direct and to supervise the construction of her home. When Zulkowski told his workers what to do, he also told them that "she" wanted these things done next. This superficial deferral to her wishes was intended both to keep his customer happy and to maintain the facade that he was simply one of her employees on the project. In fact, Zulkowski decided what to do next, how to do it, and who would do it. At all times during his tenure as her contractor retained control and direction of the work.

16. Dalton wanted and expected her home to be habitable by the summer of 2007, but it was not. Dalton lived on her property, beginning in mid-May 2007, in her camper until the home appeared partially habitable, and then she stayed for a time in the home. While she was living on the property, she noticed that some of Zulkowski's crew did not show up regularly. Zulkowski told her that they were on drinking binges, but that was better than having nobody working on her home. She directed him to hire more workers. It is unclear whether he did so. If he did, he retained control and direction of the workers, including hiring them.

17. Dalton requested that Zulkowski fire certain crew members and an electrician who seldom showed up. Zulkowski elected to do so, but since he still retained actual control and direction over the construction of the house, including the power to fire workers, he could instead have given Dalton an explanation of why that would not be in her best interests. She would have been unhappy about it, but she would have deferred to the man she believed to be her general contractor. The evidence does not show whether firing these people was in her best interests or not, but she had no means of ascertaining which was, in fact, the truth.

18. At some time after she was residing on the premises, Dalton asked Zulkowski about workers' compensation insurance coverage for his crew. Zulkowski told Dalton that a letter from Helena was coming confirming that if she paid the workers, workers' compensation coverage would not be needed. Dalton never received such a letter, and Zulkowski did not explain the meaning of his statement. Dalton became increasingly concerned about how the home building was progressing.

19. Dalton did not require Zulkowski to work at certain established times. Dalton did not have the necessary knowledge and experience to require Zulkowski to perform services in a certain manner, order, or sequence.

20. Dalton relied on Zulkowski to acquire the proper tools and other equipment, as well as the proper supplies and materials for the job, whether the vendor accounts were in Dalton's name, Zulkowski's name, or the name of one of Zulkowski's businesses.

21. Dalton provided no training to Zulkowski.

22. Zulkowski was often responsible for obtaining and always responsible (sometimes after a sham consultation with Dalton, when she was present) for providing general directions to subcontractors who worked on Dalton's home. Dalton paid for all of the subcontractors, many directly, but Zulkowski retained actual control and direction of the project.

23. Some of the subcontractors told Dalton that she was being exploited by Zulkowski. They pointed out that there were already cracks in the foundation, that the stairway was unstable, and that the framing of the house also looked unstable.

24. Dalton grew increasingly dissatisfied with Zulkowski's handling of the construction of her house. Jim Tandy, a local resident with experience in various kinds of building and contracting, became someone she confided in about how the project was going. He expressed concerns to her about Zulkowski's handling of the business, including the apparent absence of workers' compensation coverage.

25. Dalton approached Tandy about being her general contractor. He initially refused. After repeated requests by Dalton, he agreed to be present when Dalton told Zulkowski she was putting the house building project on hold, because of financial stress.

26. At that meeting, Dalton initially did the talking. Zulkowski became argumentative. Tandy intervened and asked Zulkowski to stay professional and refrain from swearing. Zulkowski retorted that Tandy should shut up, because Zulkowski was the general contractor and this was between Dalton and him. At that point, Tandy told Zulkowski he was now the general contractor on Dalton's home,

and that Zulkowski was to be “out of there” within a week, returning all of Dalton’s equipment, material, and supplies to the work site.

27. The total payroll Dalton paid during the time Zulkowski controlled and directed the building of her home (from January 8, 2007 through January 28, 2008) was \$26,653.00, for which the Plan 3 premium for workers’ compensation insurance coverage would have been \$4,059.38. The statutory penalty for the failure to provide such coverage 200% of the premium, which is \$8,118.76.

28. Zulkowski initially asserted that Dalton owed him additional money at the time she ended his work as general contractor. If, as it appears, he did not pursue this claim, it was because he belatedly recognized its inconsistency with his pretense of being nothing more than the lead worker in a crew of her employees.

IV. DISCUSSION¹

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 the provisions of one of the three statutory plans authorized by law. Mont. Code Ann. §§ 39-71-401 and 39-71-501. An “employer” is defined as “each person, . . . each prime contractor, . . . including an independent contractor who has a person in service under an appointment or contract of hire, expressed or implied, oral or written.” Mont. Code Ann. c 39-71-117(1)(a).

Zulkowski’s defense against UEF’s imposition of the statutory penalty for failing to insure the workers on the Dalton building project rests entirely upon his contention that he and all of the workers he directed were employed by Dalton. This case is far off the usual beaten path in which this issue arises, because the one thing clear in all of the evidence is that Zulkowski, in his dealings with Dalton, attempted from the onset to structure his role in building her house so that he did not look like her general contractor. Thus, it is necessary to examine the evidence with care, to parse the appearance of the relationship from the factual and legal reality of it.

Ordinarily, the issue of whether someone is an independent contractor or an employee arises when tort liability or entitlement to workers’ compensation benefits for a work-related injury is at issue. But despite the unique circumstances of this case, the basic test still applies. To be an independent contractor, the worker must be free from control over his performance of services and the worker must be

¹ Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

customarily engaged in an independent trade, occupation, profession, and business. *Sharp v. Hoerner Waldorf Corp.*, (1978), 178 Mont. 419, 584 P.2d 1298.

There is a four-part test to determine whether a worker is free from control of his work and is therefore an independent contractor: (1) right or exercise of control over the work; (2) method of payment; (3) furnishing of equipment; and (4) the right to fire. *Mathews v. BJS Const., Inc.*, ¶27, 2003 MT 116, 315 Mont. 441, 68 P.3d 865, *Sharp at* 1302

Despite his best efforts to conceal it, Zulkowski did not cede to Dalton either the right or the exercise of control over the project and over the workers he directed. The first part of the test did not establish that he was an employee.

Although he succeeded in dividing his payments between payments for hours he reported working and his shares in various payments made to companies in which he had ownership interests and through which he sold or rented equipment, materials and supplies to the project, the total payments Zulkowski received for contributions to the project went beyond mere wages. The second part of the test did not establish that he was an employee.

Zulkowski both facilitated and furnished equipment (through other businesses in which he had interests) for the project, which was not equipment useful to Dalton for any purpose after construction of her home was finished. The third part of the test did not establish that he was an employee.

Finally, in his role as “stealth” prime contractor for Dalton, Zulkowski was subject to termination at Dalton’s discretion, just as he was free to quit at his own discretion, not because he was an hourly employee, but because there was no written contract specifying his rights and obligations to complete the work, even though he was the general contractor. He began to assert such rights after Dalton ended their agreement, forgetting for the moment that he was trying not to be a contractor, and should not be asserting rights employees ordinarily did not have. The fourth part of the test did not establish that Zulkowski was an employee.

The *Sharp* Court specifically held “that the consideration to be given these factors is not a balancing process, rather . . . independent contractorship . . . is established usually only by a convincing accumulation of these and other tests, while employment . . . can if necessary often be solidly proved on the strength of one of the four items [above].” *Id.* In this case, Zulkowski did not solidly prove that he was an employee on any of the four items. Indeed, Zulkowski’s calculated efforts to appear a worker rather than a contractor are clear. He was never an employee of Dalton’s, who was not competent to be her own general contractor.

The second aspect of determining independent contractor status is whether the worker is engaged in an independently established, trade, occupation, profession, or business. Unless both parts of the test are proved, the worker is an employee and not an independent contractor. *Northwest Publishing v. Montana Dept. of Labor & Ind.* (1993), 256 Mont. 360, 846 P.2d 1030, 1032; *Sharp at* 1301. Zulkowski was involved in several independent businesses, and did other work as a contractor. He was not simply a worker for Dalton. He was an independent contractor, and her general, or prime, contractor.

In support of his defense, Zulkowski presented evidence that, at the conclusion of their business relationship, Dalton said, "I'm gonna have to let them [all the workers] go," and said, "Everybody outta [sic] here," and that she then did let the whole crew go. None of this evidence conclusively determined the relative status of Dalton and Zulkowski, it simply evidenced the confusion surrounding the status of the workers, as Zulkowski had arranged it.

Zulkowski's efforts were directed toward structuring his work on the house so that he appeared to be an employee. He did not undertake many of the normal obligations of a general contractor, because he had bid the job of building Dalton's house (by his disingenuous "estimate") based upon omission of those obligations. Thus, Dalton's confusing statements about what she would do, as well as her subsequent actions, all occurred in the context of Zulkowski's subterfuges to avoid looking like Dalton's general contractor while still controlling and directing the actual building of her house.

In setting out to build Dalton's house without assuming the responsibility of being her general contractor, Zulkowski did not enlighten Dalton about what his plan meant to her. Taking his bid (estimate) instead of Wolf's bid and apparently saving approximately \$100,000.00 in the cost of construction was certainly attractive to her, but of more importance here is what she did not know.

There is no credible evidence that Dalton knew that the workers constructing her house would be without workers' compensation insurance coverage. There is likewise no credible evidence that she understood that she, had she actually employed the workers, could go without workers' compensation coverage for them since she was not in the home building business. Mont. Code Ann. c 39-71-116(6) (defining casual employment); *Colmore v. U.E.F.*, cc17-33, 2005 MT 239, 328 Mont. 441, 121 P.3d 1007 (setting forth requirements for "casual employment," which, compared to the facts of this case, demonstrate that employees of Dalton, had she had any, would have been in casual employment). Zulkowski testified that he did tell her these things, but his testimony and supporting evidence to this effect were not credible.

The laundry list of responsibilities Dalton would have undertaken by being her own general contractor is daunting. Indeed, a home owner can even be liable for injuries suffered by a contractor's employee during construction work on the home "if the owner retains sufficient control over the property on which the work is performed." *Cunnington v. Gaub*, c19, 2007 MT 12, 335 Mont. 296, 153 P.3d 1. It is not credible that Dalton agreed to assume or even was aware of the obligations involved, and it is wildly improbably and not all credible that Zulkowski explained them to her. Unlike the home owner in *Cunnington* (c25), Dalton had never been the general contractor on a house building job. She had neither the knowledge nor the experience to be her own general contractor in terms of controlling and directing the actual construction of her home.

Since Dalton lacked the qualifications to be her own general contractor, she relied upon Zulkowski to do that job. A construction contractor, for contractor registration purposes under Montana law, is defined as "a person . . . that . . . in the pursuit of an independent business, offers to undertake, undertakes, or submits a bid to construct . . . for another a building." Mont. Code Ann. c 39-9-102(1)(a). That is precisely what Zulkowski offered to do for Dalton. Even his equivocal testimony, which was not believable, about what he did tell Dalton did not establish that she knowingly agreed to be her own contractor. He clearly did not tell her that although he would control and direct the work, she would appear to be her own contractor and he would not be responsible for the work done under his direction in fact.

Dalton did not intend, nor did she agree, to control all aspects of the work performed by the workers on her house, both at the inception of their employment and during all phases of the work. She was happy to give Zulkowski as much detail as she could about what she wanted the house to look like, what she wanted it to contain and when she wanted it finished. Zulkowski deferred to her during their conferences, but then he went ahead and made the decisions regarding the actual construction work, and directed the workers in accomplishing that work. He was clever in structuring their arrangement to create the appearance that he was just the lead worker, but Dalton had no chance of having her house built without somebody qualified to be her prime or general contractor in charge. Until she ended their arrangement, once Jim Tandy had agreed to take Zulkowski's place, she believed that "somebody" was Zulkowski, based upon what he did tell her and what he did not tell her. Zulkowski, in the heat of the moment, even admitted in Tandy's presence that he was Dalton's general contractor.

The workers Zulkowski hired and directed were not casual workers in his employ. He was in the pursuit of an independent business (construction work) and in furtherance of that business he undertook to construct her home. *Colmore, op cit.* Thus, had Zulkowski been honest with Dalton about what he was going to do, he

would have told her that he would necessarily function as her contractor, but that he intended to avoid being responsible for the work done under his direction, the payment of workers' compensation insurance premiums and the withholding and payment of taxes. It is beyond incredible that Dalton would have agreed to any such arrangement.

Zulkowski also contended that the workers he hired were furnished by him to Dalton, so that she, by controlling and directing those workers, was their employer. His argument relied upon Mont. Code Ann. c 39-71-117(3), which states, in pertinent part:

[A]n employer defined in subsection (1) who uses the services of a worker furnished by another person . . . 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 . . . 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 . . . 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.

Zulkowski argued that he had not retained control over all aspects of the work throughout his tenure on the project and that he never had obtained workers' compensation insurance for the workers on the project. Therefore, he argued, not only was he an employee of Dalton, rather than an independent contractor, she was the statutory employer of all of his workers.

This argument is a brazen reversal of the public policy purpose of the statute. Beyond cavil, the plain meaning of the statute is that a statutory employer cannot escape responsibility for employees' workers' compensation premiums and payment of any benefits due for work-related injuries unless the provider of the workers retains control of them and provides such coverage throughout the work they perform. The purpose and point of the statute is to assure that someone has to provide workers' compensation coverage for the workers involved. It applies when the furnishing person is not a temporary service contractor (i.e., in the business of providing "temp" workers). It keeps the statutory employer "on the hook" for workers' compensation

coverage unless the furnishing person provides such coverage and retains control of the workers. Using the statute to relieve both the alleged statutory employer, Dalton, (as to whom the workers would be in casual employment) and the alleged furnishing person, Zulkowski, of responsibility to provide workers' compensation coverage defeats the purpose of the statute. If such a scheme were legal, contractors across the state would begin fashioning similar arrangements for all their home construction contracts with gullible property owners.

However, Dalton did not actually "use the services" of the workers Zulkowski hired and directed, within the meaning of the statutory employer law. She did not discharge even the most rudimentary duties of an employer regarding withholding, about which she was certainly aware from operating her business in Arizona. She did not actually hire, control, or direct the workers. Zulkowski maintained his control and direction over the workers, authorizing them to follow Dalton's directions when they actually did do so (for example, Zulkowski's directed members of his crew to spread gravel beside her camper and she then showed them where she wanted it). Thus, the statute does not apply. It is not available to defeat its very purpose by protecting Zulkowski, who was at all times the employer of the workers he controlled and directed on the Dalton construction project. His attempt to be Dalton's prime contractor, while avoiding the responsibilities of that role by appearing not to be, failed.

UEF also argued that Zulkowski was estopped to deny that he was Dalton's general contractor, because he led her (and perhaps others), by his conduct, to rely detrimentally upon him as such. The facts may support such a legal conclusion, but it is unnecessary.

As already reiterated, Zulkowski retained control and direction over the workers. The Hearing Officer need not embark upon a further lengthy analysis to determine whether UEF can stand in Dalton's shoes and estop Zulkowski from defending against the statutory penalty because he led Dalton, who does not face the penalty, to believe he was her general contractor. Since Zulkowski was Dalton's general, or prime, contractor, further discussion of potential estoppel is beyond the scope of the decision.

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).

The UEF did not seek late fees or prejudgment interest, so neither is included in the award herein. Mont. Code Ann. §§ 39-71-504(2)(a) and (b).

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. Zulkowski was an uninsured employer from January 8, 2007 through January 28, 2008, in violation of Mont. Code Ann. § 39-71-401.

3. Zulkowski is subject to the statutory penalty, in the amount dictated by the applicable rule, which must be due and payable to the Uninsured Employer's Fund, of \$8,118.76. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.

VII. FINAL ORDER

John Zulkowski is **ORDERED** to pay to the Uninsured Employers' Fund a statutory penalty for failure to provide workers' compensation insurance from January 8, 2007 through January 28, 2008, in a total amount of \$8,118.76.

DATED this 11th day of December, 2009.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR

Terry Spear
Hearing Officer

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NOTICE OF APPEAL RIGHTS

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