

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

DEPARTMENT OF LABOR AND	)	Case No. 367-2011
INDUSTRY, UNINSURED	)	
EMPLOYERS' FUND,	)	
	)	<b>FINDINGS OF FACT,</b>
Petitioner,	)	<b>CONCLUSIONS OF LAW,</b>
	)	<b>AND ORDER</b>
vs.	)	
	)	
RUSSELL KILPATRICK,	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

Russell Kilpatrick appealed from a penalty billing notice issued by the Uninsured Employers' Fund (UEF) that found that Kilpatrick owes civil penalties in the amount of \$6,400.04 for failure to maintain workers' compensation insurance coverage for his employees from January 1, 2005 to December 31, 2007, pursuant to Mont. Code Ann. § 39-71-504. On September 8, 2010, the matter was transferred to the Hearings Bureau. The department did so because it believed that Kilpatrick's September 7, 2010 "Notice of Dishonor, Notice of Fault and Notice of Cure" was a request for appeal. The department appointed David Scrimm as Hearing Officer. Upon his review of Kilpatrick's document the hearing officer believed it to say that Kilpatrick did not wish to appeal the penalty notice. Because of the unclarity of the document's intent the hearing officer issued a Notice of Intent To Dismiss requiring Kilpatrick to file a "clear and plain written statement requesting an appeal no later than September 30, 2010." On September 29, 2010, Kilpatrick filed his written request for appeal.

On September 30, 2010, the Hearings Bureau issued a Notice of Telephone Conference for the purpose of setting a schedule for the proceedings in this matter. That conference was initially scheduled for October 12, 2010, but was reset to October, 5, 2010 at the request of the parties. At the October 5, 2010 conference the parties agreed to hold the hearing on January 25, 2011. On January 19, 2011,

Kilpatrick filed a Motion for Continuance requesting the hearing be continued until such time as his appeal of a Workers' Compensation Court decision could be decided by the Montana Supreme Court. The hearing officer granted the motion and required Kilpatrick to notify the hearing officer within seven days of the Court's opinion on his appeal. On March 22, 2011 the Court issued its opinion finding that the WCC's findings of fact were supported by substantial credible evidence and that its conclusions of law were correct.

Subsequent to the Court's opinion, a telephone scheduling conference was convened to reset the schedule of proceedings in this matter. At the conference, the parties agreed to a hearing date of June 14, 2011, a deadline of May 27, 2011 to file pre-hearing disclosures identifying their witness and exhibits, and a final pre-hearing conference date of June 7, 2011.

At the pre-hearing conference department's counsel identified a witness for the hearing that had not been listed in its pre-trial disclosures. Kilpatrick objected to the late disclosure and the hearing officer decided to require the department to submit a motion to allow it to supplement its witness list. The department filed this motion arguing that no prejudice would inure to Kilpatrick because he was well aware that the department was seeking penalties stemming from Wurster's employment with Kilpatrick. Wurster had also testified in the proceedings at the WCC. In response to the department's motion, Kilpatrick filed a Motion for Continuance requesting additional time to respond to the department's motion and to continue the hearing until June 20 or June 21, 2011. On June 13, 2011, the hearing officer granted Kilpatrick's motion and continued the hearing until 9:00 a.m. on June 20, 2011. The June 13, 2011 order also required Kilpatrick to respond to the department's motion to supplement no later than 5:00 p.m. on June 17, 2011. On June 15, 2011 Kilpatrick filed his Objection to the department's motion. Kilpatrick argued that Wurster testified at the WCC hearing and that he would have nothing to offer at the June 20 hearing. However, Kilpatrick also argued that Wurster's employment with Kilpatrick was not at issue in the WCC forum. Based on the arguments of the parties the hearing officer ruled at the subsequent hearing that Wurster could testify. Kilpatrick also indicated that he would not be appearing at the hearing.

The Hearing Officer convened the telephone hearing on June 20, 2011 in Helena, Montana. The UEF was represented by Patricia Bik, DLI Office of Legal Services. Kilpatrick did not appear. Steven LaVoie, Robert Scheid, and Scott Wurster testified under oath. The Hearing Officer admitted Exhibits 1-17 and A & B.

## II. ISSUE

Did the UEF properly assess civil penalties of \$6,400.04 against Kilpatrick because he employed workers at his bear park without providing and maintaining workers' compensation insurance coverage for them from January 1, 2005 to December 31, 2007? Mont. Code Ann. § 39-71-504.

## III. FINDINGS OF FACT

1. Between January 1, 2005 and December 31, 2007, Kilpatrick's employees Brock Hopkins and Scott Wurster were not covered by statutorily mandated workers' compensation insurance.

2. Between January 1, 2005 and December 31, 2007, Hopkins and Wurster earned \$43,173.00 as covered employees of Kilpatrick. The premium required in order to maintain statutorily mandated workers' compensation insurance for a payroll of that size during that time period was \$3,200.02.

3. 200% penalty due because of the uninsured status of Kilpatrick's employees between January 1, 2005 and December 31, 2007 amounts to \$6,400.04 ( $\$3,200.02 \times 2 = \$6,400.04$ ).

## 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 Sher. Off.*, 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).

Kilpatrick failed to appear at hearing and was therefore unable to dispute the department's evidence in this matter. Affidavits from his "woman" and his son are not substantial credible evidence that can be relied upon by the hearing officer. The determinations of the WCC and the Montana Supreme Court must be followed as well. The department proved that Kilpatrick had employees working for him between January 1, 2005 and December 31, 2007 who were not covered by workers' compensation insurance as required by state law and he was, therefore, an uninsured employer during that time period. The department proved that the amount of the premium that should have been paid for coverage during that time period was \$3,200.02. The imposition of a \$6,400.04 penalty by the UEF was correct under the facts, the applicable law, and the department's regulations.<sup>1</sup>

## 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. Russell Kilpatrick was an uninsured employer between January 1, 2005 and December 31, 2007 in violation of Mont. Code Ann. § 39-71-401.
3. The Uninsured Employers' Fund properly assessed a \$6,400.04 statutory penalty against Kilpatrick. Mont. Code Ann. § 39-71-504(1)(a) and Admin. R. Mont. 24.29.2831.

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<sup>1</sup> The department attempted to show that Kilpatrick owed more than the \$6,400.04. It contended in its pre-hearing filings that Kilpatrick owed \$6,706.05 and then at hearing argued that he owed \$7,036.26. The hearing officer finds that Kilpatrick had insufficient notice of these amounts (no penalty determinations issued to Kilpatrick and showing these amounts were going to be offered into evidence) and that given the changing numbers the testimony about them was not credible.

**VI. ORDER**

Due to his failure to cover workers with workers' compensation insurance between January 1, 2005 and December 31, 2007, Kilpatrick is **ORDERED** to pay to the Uninsured Employers' Fund a penalty of \$6,400.04.

DATED this 29th day of June, 2011.

DEPARTMENT OF LABOR & INDUSTRY HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM  
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 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