

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

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| BETH SOBBA PT MMT, |) | Case No. 352-2016 |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | FINDINGS OF FACT; |
| |) | CONCLUSIONS OF LAW; |
| DEPARTMENT OF LABOR AND |) | AND FINAL ORDER |
| INDUSTRY, UNINSURED |) | |
| EMPLOYERS' FUND, |) | |
| |) | |
| Respondent. |) | |

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I. INTRODUCTION

On August 17, 2015, Elizabeth R. Sobba, sole proprietor of “Beth Sobba PT MMT,” appealed a Redetermination by the Uninsured Employers’ Fund (“UEF”) affirming and reiterating a Determination that she failed to provide workers’ compensation insurance coverage of her employee from October 1, 2014 through June 30, 2015, and assessed \$400.00 in penalties (\$200.00 for failure to provide coverage and \$200.00 as a non-compliance fee). On August 20, 2015, the Office of Administrative Hearings (“OAH”) received a request to schedule Sobba’s appeal for an administrative hearing. On August 27, 2015, the OAH issued its notice of hearing and of telephone scheduling conference, by U.S. Mail, postage prepaid, on Sobba and by State of Montana Interdepartmental mail service on counsel for UEF. After said telephone scheduling conference, Hearing Officer Terry Spear, assigned to preside in this proceeding, convened a telephonic contested case hearing, to which both participants had agreed, on September 16, 2015. Sobba represented herself. Joe Nevin, DLI Office of Legal Services, represented UEF.

Kathryn Simpson and Elizabeth R. Sobba testified under oath by telephone. Exhibits 1-29 were admitted into evidence without objection. At the close of the hearing, the parties made oral arguments to the Hearing Officer, and the case was deemed submitted for decision.

II. FINDINGS OF FACT

1. Elizabeth R. Sobba is the sole proprietor of “Beth Sobba PT MMT.” She is a physical therapist, qualified and licensed to practice in Montana. She has been

practicing in Montana since 2005. In the second half of 2014, she felt her business had developed to the point that she needed an assistant. She and another sole proprietor in the same building each hired the same part-time employee, scheduling the new employee each had hired for different hours in each business. This was a cooperative arrangement between two businesses, which remained two separate and unrelated endeavors.

2. This was the first time that Sobba had been an employer – before, she had always worked either as an employee or as a sole proprietor. She consulted an accountant about the requisite record keeping, reporting and withholding involved in employing a part-time worker. She did not recall the accountant saying anything about workers’ compensation insurance coverage. She testified that the first time she was told that she was required to have workers’ compensation insurance coverage for her new employee was when she received the first notification from UEF, dated March 19, 2015 (Ex. 29), that there was such a requirement.

3. That initial notice also advised her that “Penalties will be assessed on an employer who does not carry workers’ compensation coverage on employees who are not exempt from the coverage requirements.” Ex. 29, 2nd paragraph. It also advised her that “Section 39-71-504, MCA, specifies that an additional non-compliance penalty of \$200.00 shall be assessed if an employer fails to obtain the required workers’ compensation insurance within ‘30 days of notice of the requirement.’” Ex. 29, 4th paragraph.

4. Sobba did not obtain any workers’ compensation insurance coverage for her employee within the first three weeks after she received the March 19, 2015, notice (Ex. 29). UEF sent Sobba a second letter, dated April 13, 2015, which reiterated the information in the first letter and added an additional notice that a cease and desist order might be served upon Sobba’s business unless she obtained coverage for her employee, verified in writing that she no longer had any employees, or provided a certification of workers’ compensation coverage to UEF. Ex. 28.

5. At the end of April, Sobba still had not obtained any workers’ compensation insurance coverage for her employee. She had received, from the Montana State Fund, some forms for applying for coverage and a quote of approximately \$320.00, which she recalled as being the cost of coverage of her one employee for a year. With its quote, the Montana State Fund specified that the quote would be honored if Sobba purchased the coverage by June 19, 2015.

6. Sobba also had contacted the other sole proprietor about obtaining a single policy covering their common employee on both jobs. She was advised (perhaps by the Montana State Fund – her testimony was unclear about who advised her) that

each employer had to provide its own workers' compensation insurance coverage for its employee(s), and that two unrelated employers of the same part-time employee (at different times) in their two businesses could not obtain a policy covering that employee at both jobs. She also made inquiry about the costs of workers' compensation insurance coverage from private insurers, and verified that the cost would not be less than that quoted to her by the Montana State Fund.

7. UEF sent Sobba a third letter, dated May 1, 2015, noting that UEF still did not find any record that Sobba had workers' compensation insurance coverage for her employee. Ex. 27. That third letter stated that if no such coverage was obtained by May 6, 2015 (48 days after the first letter was mailed to Sobba notifying her that she was required to provide workers' compensation insurance coverage for her employee), a cease and desist order might be issued, and that failure to comply with a cease and desist order constituted a criminal misdemeanor. Ex. 27. That letter asked Sobba, "Please call me at (406) 459-6894 to advise me of your new workers' compensation policy and effective date." Ex. 27.

8. Sobba did not understand the separation between the Montana State Fund and UEF. The Montana State Fund sells workers' compensation insurance coverage to Montana employers, for their Montana employees, as the "Plan Three" insurer under Montana law. It is an entirely separate entity from the UEF, which is operated within the Workers' Compensation Regulations Bureau of the Employer Relations Division of the Montana Department of Labor and Industry.

9. As an apparent result of her lack of understanding, Sobba came to believe that the deadline of June 19, 2015, for purchasing workers' compensation insurance coverage for her one part-time employee from the Montana State Fund at the quoted price, also applied to both the penalty for not having coverage for employees and the penalty ("non-compliance fee") for failure to obtain the required workers' compensation insurance within 30 days of notice of that requirement. Nothing in the correspondence Sobba received from the UEF could reasonably have led Sobba to form this belief.

10. Sobba purchased workers' compensation insurance coverage for her one part-time employee, effective June 19, 2015. Ex. 25. On June 24, 2015, UEF sent Sobba a letter indicating that her business "had a lapse in coverage" for its one part-time employee from October 1, 2014 through June 18, 2015, and requesting that Sobba complete an enclosed payroll reporting form (Ex. 26) and return it by July 9, 2015. Sobba did, dating her signature on the completed form June 29, 2015. Ex. 24.

11. The evidence of record indicates that there were also some telephone contacts between UEF employees and Sobba. Based upon the testimony and

contents of the exhibits, Sobba may have been noticeably angry about the situation and may sometimes have used a hostile tone towards the UEF employees who were enforcing the workers' compensation insurance coverage requirements. The written evidence also suggests her anger. For example, she characterized the letters to her from UEF as containing "threats." The statements in the UEF's letters to which this characterization applied were accurate statements about what the applicable law dictated regarding the employer's obligation to provide workers' compensation insurance coverage for (in this case) her one employee, and the consequences of failure to do so. Her characterization of the penalty information as "threatening" is understandable. Nonetheless, it is common practice in and out of state government to give notice of the consequences of action or inaction in light of applicable rules to a person engaged in the action or inaction, even though that person is expected to know those rules and their consequences.

12. Ex. 24 confirmed the wages that Sobba paid her employee, from which UEF calculated the premium that would have been charged as \$81.10. Ex. 23, 17, 12, and 5. From that premium, UEF calculated the penalty as \$200.00 and the "non-compliance penalty" as an additional \$200.00. *Id.* Sobba has agreed that she does not challenge the accuracy of the penalty calculations and does not challenge the correctness of the procedures used. The penalties were accurate and required by law.

13. UEF issued a penalty determination (Sobba's official bill) for \$400.00 on August 5, 2015. On August 10, 2015, UEF issued a redetermination (requested by Sobba) affirming the penalty determination. UEF offered to accept \$321.65 in full satisfaction of the total uninsured penalty if Sobba paid by September 9, 2015 or to accept \$341.92 if Sobba contacted UEF and arranged a payment plan by that same date. UEF routinely extends such offers, as incentives for prompt payment, which reduces the cost to UEF for collections. Sobba did not timely pay and therefore was no longer entitled to the offered reductions.

III. DISCUSSION

The Hearing Officer is constrained by the directives of the applicable statute, and has no authority to act, in any contested case hearing, except as specifically provided by statute or rule. *Auto Parts of Bozeman v. Emp. Rel. Div. U.E.F.*, ¶ 38, 2001 MT 72, 305 Mont. 40, 23 P.3d 193.

The rules of statutory construction require that the language of a statute be construed according to its plain meaning. *Lovell v. St. Comp. Mut. Ins. Fund*, (1993), 260 Mont. 279, 860 P.2d 95. Statutes must be read in their entirety and legislative intent may not be gained from the wording of one particular section or

sentence but only from consideration of the whole. A court's duty is to interpret individual sections of the act in such a manner as to insure coordination with the other sections of the act, *State v. Meador*, (1979), 185 Mont. 32, 601 P.2d 386, and the same duty applies for a quasi-judicial officer.

The law states that UEF "may require that the uninsured employer pay to the fund a penalty of either up to double the premium amount the employer would have paid on the payroll of the employer's workers in this state if the employer had been enrolled with compensation plan No. 3 [the Montana State Fund] or \$200, whichever is greater." Mont. Code Ann. §39-71-504(1)(a). That same subsection requires that UEF determine the premium amount based upon periods within the last 3 years when the employer's employees were uncovered. Since the statute says "may," it gives UEF the discretion to require the penalty or not. If the penalty is required, then the amount is required to be the greater of \$200.00 or twice the premium. UEF has adopted a rule addressing the collection of this penalty. Admin. R. Mont. 24.29.2831 provides, in pertinent parts:

(1) The department collects penalties from uninsured employers in the manner specified by 39-71-504, MCA. The department will assess a penalty on every uninsured employer of which it becomes aware, unless the department determines that the uninsured period is de minimis.

(2) The amount of the penalty assessed is \$200.00, or twice the amount of the premium that the uninsured employer should have paid on the past three-year payroll while the employer was uninsured, whichever is greater.

When a statute authorizes discretionary monetary awards, 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, which defined its discretion under the statute, and denied recovery when defendant presented mixed motive proof. *Laudert v. Richland County Sheriff's Off.*, ¶¶39-40, 218 MT 2000, 301 Mont. 114, 7 P.3d 386. UEF exercised its discretion by adopting the rule and deciding to collect the maximum penalty in every case, unless the uninsured period is "de minimis." From the information in the report Sobba completed (Ex. 24) the uninsured period was 260 days long, not a "de minimis" time.

In addition, the rule goes on to state that, in the context of the amount of this penalty for being uninsured for more than a de minimis period of time, the employer's alleged financial inability to pay the costs of workers' compensation insurance coverage during the uninsured period and the employer's alleged financial inability to pay the penalty imposed by the rule are irrelevant to the penalty

assessment. Mont. Code Ann. §39-71-504(1)(a) and Admin. R. Mont. 24.29.2831(1) and (2). Thus, for this penalty, there is no discretion left to exercise in light of the rule. That \$200.00 penalty was proper, appropriate and required by law.

With regard to the second penalty, the statute leaves no discretion: “In addition to any amounts recovered under subsections (1)(a) and (1)(b), the fund shall collect a penalty of \$200 from an employer that fails to obtain Montana workers’ compensation insurance within 30 days of notice of the requirement.” Mont. Code Ann. §39-71-504(1)(c).

With regard to the amounts levied against Sobba, they were correct, legal and required. They were not excessive, unfair or inappropriate – the fines were exactly as required by law. Sobba has raised several arguments against the amounts levied that do not apply. Her intentions are irrelevant to whether she, as an employer, failed to provide required workers’ compensation insurance coverage, as are her financial situations at any time during the periods of lack of insurance or of levying and collecting penalties.

It is troubling that UID’s auditor in this case wrote a note to the reviewer stating, in her email appearing as Ex. 16:

Something to keep in mind when you review this case – the employer has been very difficult and uncooperative (see my case notes). She indicated that she would get a policy “when she gets to it,” so in my opinion the \$200.00 noncompliance fine is deserving.

Since the non-compliance penalty under §39-71-504(1)(c) is mandatory rather than discretionary, “deserving” the penalty arises out of not obtaining the policy within 30 days, and is unrelated to the attitude or level of cooperation of the employer, which are irrelevant.

Nonetheless, enforcing the law against Sobba was not “just plain wrong.” The Hearing Officer has no reason to believe that Sobba was acting in bad faith or trying to get away with something. She genuinely did not know that she was required to have the insurance coverage for her employee. But being unaware of the law is generally not a legitimate justification for breaking it.

Well over a century ago, Montana endorsed the general maxim that ignorance of the law is no excuse.

That ignorance of the law is no excuse is a postulate of law, but, unless the maxim is upheld, there would be innumerable

problems presented to courts, and he who knew the least might fare the best; or, as is said by the supreme court of California (People v. O'Brien, 96 Cal. 171, 31 P. 45) "the denser the ignorance the greater would be the exemption from liability."

Leggatt v. Prideaux (1895), 16 Mont. 205, 207. 40 P. 377, 377.

Discussing the "the common-law maxim that ignorance of the law excuses no one," the Montana Supreme Court stated, 42 years later and still 78 years ago, "This rule is one of necessity, for if ignorance of the law be permitted to be pleaded, then there could be no security in legal rights, no certainty in judicial investigations, and no finality in litigations. (2 Pomeroy's Equity Jurisprudence, 4th ed., sec. 842, p. 1716.)" Rieckhoff v. Woodhull (1937), 106 Mont. 22, 30, 75 P.2d 56, 59.

Just four years ago, the maxim was again cited, approved and applied. "Ignorance of the law [is] no excuse for its violation." Cr. Serv. Co. v. Crasco, ¶25, 2011 MT 211, 361 Mont. 487, 264 P.3d 1061, citing Wiard v. Liberty N.W.Ins.Co., ¶32, 2003 MT 295, 318 Mont. 132, 79 P.3d 281.

There is no intent here to hold up the employer to ridicule or derision. She did not know about the workers' compensation insurance coverage requirement. She made an honest mistake. However, there is no basis in this record for relieving her from the obligation of paying the penalties properly levied against her for that honest mistake. There is no requirement that an evil motive be proved to trigger the penalties. Failure to obtain the insurance coverage as required by law triggers them.

It is disconcerting that there is no explanation in UEF's correspondence explaining what "premium" it is of which \$321.65 is "150 per cent" and \$341.92 is "175 per cent" (see Ex. 12). \$321.65 divided by 1.5 equals \$214.43, but \$341.92 divided by 1.75 equals \$195.38, so there is no single premium amount that will yield the two numbers cited by UEF. UEF either misstated how the two numbers were generated or made a mistake in the calculations. Either way, it does not alter the reality here, which is that UEF imposed precisely the penalties properly levied upon this employer under these circumstances, Sobba did not take advantage of the offers to accept smaller amounts, and the entirety of the two penalties are due and owing.

IV. CONCLUSIONS OF LAW

1. The department's Office of Administrative Hearings has jurisdiction to review the penalty determinations and levies against "Beth Sobba PT MMT," by the department's Uninsured Employers' Fund ("UEF").

2. Elizabeth R. Sobba, sole proprietor of Beth Sobba PT MMT, was an uninsured employer from October 1, 2014 through June 18, 2015 in violation of

Montana law, for which UEF properly assessed against her a \$200.00 statutory penalty. Mont. Code Ann. § 39-71-504(1)(a), Admin. R. Mont. 24.29.2831(1) and (2).

3. Elizabeth R. Sobba, sole proprietor of Beth Sobba PT MMT, was an uninsured employer from March 19, 2015, the date of the first notice sent to her of her obligation to provide coverage for her one employee, through June 18, 2015, more than thirty days after receipt of that first notice, in violation of Montana law, for which UEF properly assessed against her a \$200.00 statutory non-compliance penalty. Mont. Code Ann. §39-71-504(1)(c).

4. All potential due dates for timely payment have passed. Payments of the amounts due are now subject to a \$50.00 late payment fee on each such payment. Mont. Code Ann. §39-71-504(2)(a). Interest has accrued and accrues at 12% per annum or 1% per month or partial month, from the official (initial) billing date. Mont. Code Ann. §39-71-504(2)(b).

5. UEF still has the power to offer to accept a reduced payment in full satisfaction of what Sobba owes, again as incentive for prompt payment at this level of the proceedings, although UEF is under no obligation to make such an offer.

V. ORDER

Elizabeth R. Sobba, sole proprietor of Beth Sobba PT MMT, owes UEF penalties totaling \$400.00, for times she has been an uninsured employer. Late payment fees and interest accrue by law.

DATED this 25th day of September, 2015.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ TERRY SPEAR
Hearing Officer

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NOTICE OF APPEAL RIGHTS

Notice: This Order is issued by the undersigned 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 issuance of this Order, pursuant to Mont. Code Ann. § 39-71-2401(3) and Admin. R. Mont. 24.29.215(3) and (4). The Court's address is:

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