

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 39

WCC No. 9901-8140

EMPLOYMENT RELATIONS DIVISION,
UNINSURED EMPLOYERS' FUND

Appellant

vs.

TOTAL MECHANICAL HEATING & AIR CONDITIONING, et al.

Respondents/Cross Appellants

and

HUMAN DYNAMICS CORPORATION

and

HRC/HRC ARMCO, INC.

Respondents.

DECISION AND ORDER ON APPEAL

AFFIRMED 3/26/02 [2002 MT 55](#)

Summary: DLI Hearing Officer ruled that several companies "leasing" employees from "lessor" entity were insured by policies obtained by "lessor" and therefore UEF could not properly assess penalties for failure to carry workers' compensation insurance. UEF appealed.

Held: WCC reversed the hearing officer's determination, concluding the record does not contain substantial evidence that putative policies existed or evidence that the lessor retained control over employment as required by section 39-71-117 for "lessee" companies to rely on WCC policies obtained by "lessor." Leasing companies given opportunity to produce accurate records of employment to permit re-computation of penalty by UEF. WCC decision affirmed in [Total Mechanical Heating & Air Condition, et al. v. ERD/UEF](#), 2002 MT 55.

Topics:

Constitutions, Statutes, Regulations and Rules: 39-71-117, MCA (1993). DOL Hearing Officer's determination that companies "leasing" employees were insured by putative policies arranged by "lessor" entity reversed where record does not contain substantial evidence of existence of policies nor that lessor retained control over employment as required by section 39-71-117 if "lessee" were to rely on "lessor's" WC policy. WCC Decision affirmed in [*Total Mechanical Heating & Air Condition, et al. v. ERD/UEF*](#), 2002 MT 55.

Employment: Leased Employees. DOL Hearing Officer's determination that companies "leasing" employees were insured by putative policies arranged by "lessor" entity reversed where record does not contain substantial evidence of existence of policies nor that lessor retained control over employment as required by section 39-71-117 if "lessee" were to rely on "lessor's" WC policy. WCC Decision affirmed in [*Total Mechanical Heating & Air Condition, et al. v. ERD/UEF*](#), 2002 MT 55.

Penalties: Uninsured Employers. DOL Hearing Officer's determination that companies "leasing" employees were insured by putative policies arranged by "lessor" entity reversed where record does not contain substantial evidence of existence of policies nor that lessor retained control over employment as required by section 39-71-117 if "lessee" were to rely on "lessor's" WC policy. WCC Decision affirmed in [*Total Mechanical Heating & Air Condition, et al. v. ERD/UEF*](#), 2002 MT 55.

¶1 This is an appeal and cross-appeal involving the Uninsured Employers' Fund (UEF), two employee leasing companies (Human Dynamics Corporation and Human Resources Company), and twelve Montana businesses which were clients of the leasing companies. The leasing companies will be referred to by their initials - "HDC" and "HRC." The clients will be referred to collectively as the "client companies."

THE PROCEEDINGS BELOW

¶2 In 1996, the UEF determined that the client companies were uninsured employers at various times during 1994, and assessed penalties against them pursuant to section 39-71-504(1)(a), MCA. The client companies disputed the assessments and requested contested case hearings. Thereafter, on June 2 and 8, 1998, a consolidated hearing was held before a hearing officer of the Department of Labor and Industry (the Department). The hearing involved all client companies except Enviroheat, which was involved in a separate proceeding. HDC represented most of the client companies at the administrative level, and continues to represent most of the companies in this Court. (See UEF Ex. L at 8.)

¶3 In both the consolidated case and the Enviroheat matter, the hearing officer found in favor of the client companies. (Findings of Fact; Conclusions of Law; and Order dated January 8, 1999, hereafter "Findings," and Order dated April 13, 1999.) He ruled that the UEF's attempted assessment was not barred by the statute of limitations (Findings at 10-

11), but imposed the burden of proof on the UEF to prove the client companies were in fact uninsured (Findings at 10). Based on documents presented by HDC and the testimony of G. Douglas Anderton, president and chief executive officer of HDC (Tr. at 13-14), he found that the client companies were insured during the disputed period. Although he found for the client companies, he also addressed the amounts of the penalties assessed by the UEF, concluding, "The UEF did not act in an arbitrary, capricious or unreasonable manner under the circumstances in this case when it assessed premiums against Petitioners." (Findings at 16.) Finally, he declined to rule on constitutional challenges, concluding he lacked jurisdiction over those issues.

¶4 For the reasons set forth below, the hearing officer's finding that the client companies were insured is reversed and this matter is remanded for entry of an order sustaining the penalty assessments.

Record on Appeal

¶5 The record on appeal consists of the transcript of the hearing in the consolidated case, the Department files, and the exhibits admitted at the consolidated hearing. No hearing was actually conducted in the Enviroheat matter since the parties entered into a Stipulation and Order for decision based upon the proceedings in the consolidated cases. The Department files in the Enviroheat case are included as part of the record.

Issues on Appeal

¶6 The issues raised by the UEF, as set forth in its initial brief on appeal,⁽¹⁾ are as follows:

1. Did the Hearing Officer misapply the burden of proof during the contested case hearings?
2. Were the Hearing Officer's findings of fact supported by the substantial credible evidence of record?
3. Were the Hearing Officer's conclusions of law correct?

(UEF's Initial Brief in Support of Notice of Appeal at 4.) In their cross-appeal, HDC and the client companies raise the following, additional issues:

[4.] Whether the assessments made against the cross-appellants are inaccurate and inflated; and whether the Department of Labor has acted arbitrarily, capriciously, and unreasonably in making such assessments with the knowledge that the assessments are inaccurate and inflated.

[5.] Whether the statute of limitations has run on any action or portions of any action by the Department of Labor to assess Uninsured Employers' Fund penalties against the cross-appellants.

[6.] [Whether] the Uninsured Employers' Fund statutes, in particular § 39-71-506, MCA, are in violation of the due process clause of the Constitution of the State of Montana and the due process clause of the Constitution of the United States.

[7.] [Whether] the procedures utilized by the Montana Department of Labor in this proceeding have deprived the Cross Appellants of due process of law, in violation of the due process clause of the Constitution of the State of Montana and the due process clause of the Constitution of the United States.

[8.] [Whether] the actions of the Uninsured Employers Fund and the Montana Department of Labor in the pursuit of this matter, and in particular in filing its appeal in this matter, are frivolous or taken in bad faith, thereby subjecting the UEF and/or the Montana Department of Labor to liability for Cross Appellant's costs and attorneys fees pursuant to Section 25-10-711, MCA.

(Notice of Cross Appeal at 2.)

STANDARD OF REVIEW

¶7 Judicial review of the Department's decisions is governed by section 2-4-704, MCA. *Dahl v. Uninsured Employer's Fund*, 1999 MT 168, 983 P.2d 363. As applicable to this appeal, the section provides:

2-4-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

....

¶8 When reviewing a hearing officer's decision under the "clearly erroneous" standard of subsection (2)(a)(v), a three-part test is applied. *State Compensation Mutual Insurance Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85 (1992). Under the three-part test, I must first determine whether the hearing officer's findings of fact are supported by substantial evidence. If they are, then I must determine if the hearing officer misapprehended the effect of the evidence. If he did not, then, and finally, I must determine whether "a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." *Id.*

¶9 The other grounds for review involve matters of law, which are subject to plenary review. *Montana Rail Link v. Byard*, 260 Mont. 331, 337, 860 P.2d 121, 125 (1993); *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). This is because "no discretion is involved when a tribunal arrives at a conclusion of law - the tribunal either correctly or incorrectly applies the law." *Steer, Inc.*, 245 Mont. at 474, 803 P.2d at 603.

Factual Background

¶10 At the risk of contravening the Court's own mandate of brevity, ARM 24.5.306(1), what follows is a detailed history of this case. Without specific and detailed examination of that history the danger exists of repeating the hearing officer's error of accepting misleading evidence tendered by HDC.

HDC and the Leasing Arrangement

¶11 HDC provides "administrative services and other services including payroll, financial services, insurance services, risk management services and other services to small businesses throughout the country." (Tr. at 14.) Around the beginning of 1994, Bob Rock, a Montana native and then President of HDC, contacted friends and acquaintances in the Montana small business community to sell HDC's services. (*Id.*) As a result of his contacts, the client companies entered into contracts with HDC around the first quarter of 1994. (*Id.* at 14, 24.) HDC did not provide workers to the client companies. It simply assumed payroll, withholding, reporting, and insurance tasks previously performed by the individual companies. (See, e.g., testimony of G. Douglas Anderton describing HDC (Tr. at 14); HDC's "Agreement For Services" (UEF Ex. D); and Terry Wilson's testimony regarding his comparison of pre-HDC unemployment insurance reports with HDC reports to associate HDC "employees" with the appropriate company, which demonstrates continuity in the workforces pre- and post-HDC (Tr. at 123-24).)

¶12 Anderton testified that HDC used written agreements with all client companies, although the record contains executed contracts for only some of them. (Tr. at 24; Exhibits of Johnson Brothers Contracting, Incorporated, and Eureka Pellet Mill, Incorporated; UEF Ex. D.) The written agreements in evidence are titled "Agreement For Services." They

purport to establish "co-employer" status between HDC and client companies, providing in relevant part:

5. ADMINISTRATION. *The parties understand the relationship between us and Client is one of a co-employer status.* We are, however, responsible for completion of such administrative employment matters as issuance of employee payroll checks, withholding and/or payment of federal, state, and local employment taxes, as well as providing non-obligatory employee benefit programs for the Client's employees. Human Dynamics Corporation and the Client shall make all determinations regarding hiring, firing, job function, pay rates, hours worked, and benefit contribution. Employees should be compensated at overtime rates to the extent they work more than (8) hours in a daily pay period. You may override this federal requirement, but be advised this issue could be lost under audit and you would be liable for all penalties and payments. Clients shall be solely responsible for compliance with all federal, state and local laws and regulations pertaining to the health, safety, welfare, and any other employer responsibilities not specifically assumed by or delegated to Human Dynamics Corporation under the terms of this agreement.

(*Id.*, italics added.)

¶13 Under a paragraph regarding insurance, HDC was required to "provide Workers Compensation Coverage or it's [sic] equivalent." (*Id.* ¶ 8 at 2; Tr. at 24.) Notwithstanding the requirement, when HDC began operating in Montana it did not provide workers' compensation insurance for leased employees. Anderton testified: "At the time both in Montana and elsewhere in the other states . . . we were operating under the federal program authorized under the ARISA [sic] statutes and it was a workers occupational and injury benefit as authorized under ARISA [sic] that provided the coverages initially for all employees in the state of Montana as well as many other states." (Tr. at 16.) The transcript's reference to "ARISA" is a typographical error. It should be to ERISA, which is a federal program governing employee benefits. ERISA is not a workers' compensation program. Anderton's further testimony shows that HDC took the position that ERISA provisions preempted Montana workers' compensation laws. (*Id.*; Ex. I at 25-26.)

¶14 Around June of 1994, the UEF wrote to HDC telling it that it was required to provide workers' compensation insurance coverage for employees working in Montana. (Tr. at 16.) On July 12, 1994, attorney Andrew J. Utick contacted the UEF on behalf of HDC. An inter-office memorandum of the Department records the conversation with Mr. Utick:

Andrew Utick phoned he knows Human Dynamics doesn't have WC. He said they are under the ERISA act but is aware Montana does not recognize this. He said Human Dynamics is working getting legit MT W.C. He will call & get an up-date & call me back. Advised if they do secure a policy we must receive a filing for each client.

(UEF Ex. A at 2.) At this point, it is indisputable that HDC and its client companies did not have Montana workers' compensation insurance covering employees of the client companies.

¶15 Anderton testified that after learning the UEF would not accept an "ERISA plan," he tried to obtain standard workers' compensation coverage but was "discriminated against in the market place in terms of pricing . . . which in effect would drive us out of business and so we explained this to the authorities who did not seem to be sympathetic" (Tr. at 17.) He continued:

[W]hat I was able to do was find another leasing company . . . desiring to be in that [Montana] market, it was a company out of Texas whose name coincidentally was an acronym that was very close to our own and I think that created some confusion later on, but at any rate, I was able to negotiate with this company. It was called HRC out of Dallas, Texas.

(*Id.*) According to Anderton, negotiations with HRC led to HDC procuring retroactive policies from Credit General Insurance Company (Credit General) which insures HRC and its subsidiaries. (*Id.* at 19-20.)

Credit General Policy No. SWC 100-060-00 (3/23/93 to 4/1/94)

¶16 During August 1994, Mr. Utick tendered Credit General policy number SWC 100-060-00 to the Department (HDC Ex. 1), indicating that the policy provided coverage for HDC's leased employees. The policy was for the period March 23, 1993 to April 1, 1994. (*Id.* at 8.) The named insured on the policy was Allied Resource Management Corporation of Dallas, Texas (*id.* at 1, 8), a subsidiary of HRC Armco, which in turn is a wholly owned subsidiary of HRC. (Ex. F at 1.) An endorsement to the policy listed "HDC, Inc." as an additional insured. (HDC Ex. 1 at 27.) Mr. Anderton testified that "HDC, Inc." was really Human Dynamics Corporation. (Tr. at 21.) However, his testimony was contradicted by Jarrell B. Ormand (Ormand), a Texas attorney and General Counsel for HRC. Ormand testified that he did not believe "HDC, Inc." referred to Human Dynamics Corporation, but conceded on cross-examination that he was not sure. (Tr. at 169-70.) He further testified that in August 1994, there was no relationship between HRC and HDC, although HRC later took an assignment of HDC's Montana business. (*Id.* at 81-84; *and see* discussion ¶ 20-22.)

¶17 There were multiple problems with the proffered policy. Those problems were outlined in an August 19, 1994 letter by Keith Messmer, Regulation Section Supervisor for the Department, to Mr. Utick. The most significant problems were:

1. The policy was written by Credit General Insurance Company to Allied Resource Management Corporation. In an endorsement to the policy the named insured was expanded to cover five other corporations, last of which was HDC, Inc. The Secretary of State has no record of Human Dynamics Corporation operating as HDC

Inc. We need additional proof that Human Dynamics Corporation is the named insured in the policy.

....

3. Montana is not specifically identified in the coverage portion of the policy at paragraph 3A of the policy's information page. Subsection 3c, however, applies the policy coverage to all other states unless specifically exempted. While Montana is not listed as being exempted (and thus subject to the "Other States Insurance" terms of the policy) two problems exist:

The other states insurance provision only applies if you begin work in any one of the covered states and are not insured or self-insured, and then begin working in another state not specifically listed. The insurer requires the leasing company to notify it "at once" if work begins in a state covered by the "other states insurance". We need proof that Human Dynamics Corporation notified the insurance company that it had begun working in Montana. Otherwise, the insurance company might seek to avoid liability based on the insurer's failure to comply with the contract.

Also, the "other states" coverage will only reimburse the insured for benefits required by the worker's compensation law of the covered state. This coverage certainly implies that the standard WC coverage protection of defense of claim and the costs associated with a claim might not be covered under such an arrangement.

....

(UEF Ex. A at 6-7.)

¶18 On September 12, 1994, Mr. Messmer again wrote to Mr. Utick because the UEF had received information that HDC was paying workers' compensation "benefits directly to an injured worker" of Eureka Pellet Mills.⁽²⁾ (UEF Ex. A at 8.) Mr. Messmer warned:

If Human Dynamics Corporation is not able to furnish proof of valid workers' compensation coverage by Monday, September 19, 1994, we feel we must proceed with our normal procedures. In the case of Eureka Pellets, where the above referenced injury occurred, **it may be necessary to issue a cease and desist order to prevent this firm from continuing to employ workers without proper coverage.**

(*Id.*, emphasis added.)

¶19 On September 28, 1994, UEF checked with NCCI, which provides a nationwide database of insurance policies. "[N]o coverage [was] found for Eureka Pellet or Human Dynamics." (UEF Ex. A at 9.)

The Sale of Client Assets from HDC to HRC

¶20 HDC thereafter entered into a "Client Assignment Agreement" with HRC wherein HDC sold and assigned to HRC its "right, title and interest" in and to the employee leasing customers described on an attachment to the agreement. The attachment (HRC Ex. 2) included HDC's Montana client companies.

¶21 The agreement with HRC is dated October 1, 1994 (UEF Ex. B. at 3; HRC Ex. 2) and provides for an "[e]ffective [d]ate" of October 1, 1994 (UEF Ex. B at 4). However, Ormand testified:

I would say that the conveyance was effective as of that date. I don't think the transfer actually took place on that date. . . . As I said, I didn't attend the finalization of the closing of the document of the matter, but it was not on October the first, I know that.

(Tr. at 84.) Ormand explained that he was sure the agreement was not executed until later, "because I participated in drafting the documents and I was still working on the documents later in the month of October." (*Id.*)

¶22 Paragraph 4.4 of the "Client Assignment Agreement" related to insurance, and represented that HDC had workers' compensation coverage for its client companies:

Seller [HDC] maintains in effect . . . (c) worker's compensation insurance (or its equivalent through standard and non-standard markets) on the Leased Employees as set forth on Exhibit 4.4(b) attached hereto; all of such insurance coverage shall be maintained by Seller through the Effective Date or such other dates as shall be agreed to by the parties hereto.

(UEF Ex. B at 5, emphasis added.) Exhibit 4.4(b) to the agreement (HRC Ex. 2) lists HDC's Montana client companies, along with other client companies. The Exhibit states that clients listed in bold face type have their own workers' compensation coverage. None of the Montana client companies are bolded, therefore their insurance coverage was supposed to be provided by HDC.

Policy No. SWC 100-060-01 (4/1/94 to 4/1/95)

¶23 On October 4, 1994, Mr. Utick forwarded additional documents to the UEF, including "a copy of the information page from the Credit General Insurance Company workers' compensation policy No. SWC 100-060-01." (UEF Ex. A at 11-14; HDC Ex. 3 at 1.) According to the information page, that policy renewed policy number SWC 100-60-00. The renewal

policy covered "4/1/94 to 4/1/95." (*Id.*) The named insured was: "Human Resources Corporation 2351 W. Northwest Hwy, Suite #3100 Dallas Texas 75220-4400." (*Id.* at 12.) Neither "Human Dynamics Corporation," nor "HDC, Inc." are listed as additional insureds. No other variant of the name "Human Dynamics Corporation" is listed on that page. (*Id.* at 13; HDC Ex. 3 at 1.) Moreover, as initially presented to Mr. Daniel B. McGregor, an attorney for UEF, the documents were "unsigned, undated, did not specifically apply to Montana and [had] no evidence of compliance with the 'other states' policy provision requiring notification of doing business in an unlisted state." (UEF Ex. K at 32.)

¶24 Mr. Utick also enclosed a "Certificate of Insurance," with an issue date of 10/04/94, listing the insured as "HRC Armco, Inc. Allied Resource Management of Florida, Inc." (UEF Ex A at 14.) The certificate is designated an "ACORD Certificate of Insurance" with the term ACORD evidently describing a type of certificate used in the insurance industry to supply information about an existing policy without intending to amend or alter coverage. See *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 884 (10th Cir. 1991). In a section entitled "Workers Compensation and Employer's Liability," the policy was listed as "SWC 10006000/10008800" with an "effective date" of "04/01/94 to 04/01/95." Elsewhere on the document, under the heading, "DESCRIPTION OF OPERATIONS/ LOCATIONS/ VEHICLES/ SPECIAL ITEMS," the following was printed: "REF: HUMAN DYNAMICS CORPORATION COVERING ANY AND ALL OPERATIONS IN MONTANA." (*Id.*, capitalization in original.) The "certificate holder" was listed as "HUMAN DYNAMICS CORPORATION." The information set out in the certificate was qualified by the following statement:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

(*Id.*, capitalization in the original.)

¶25 Ormand testified that HRC acquired Credit General policy SWC 100-0-01, with effective dates of 4/1/94 through 4/1/95, prior to even considering the purchase of HDC's leasing assets. (Tr. at 85). He provided no information about acquisition by HRC of retroactive coverage through Credit General for HDC or its client companies.

¶26 Anderton testified that he believed the ACORD certificate showed coverage for Montana employees beginning April 1, 1994. (*Id.* at 22-23.) It was his "understanding" that the additional coverage for HDC was "paid for by my friend and partner at the time, Human Resources Corp." (*Id.* at 39.)

¶27 On October 12, 1994, Dennis A. Zeiler (Zeiler), then Chief of the Workers' Compensation Regulation Bureau, wrote to the Credit General in Fort Worth, Texas. (UEF Ex. A at 15-16.) The letter stated:

It has been represented to us that Montana workers who are leased to the employer clients of a Montana company, Human Dynamics Corporation, are the employees of Human Resources Corporation, who is Credit General Insurance Company's insured. Currently, we are awaiting information in the form of an agreement or contract between the above referenced firms to confirm this information. In an effort to obtain the policy filing information as soon as possible, I am writing to you to inform you of the Montana requirements.

(*Id.* at 15.) Zeiler noted that insurers typically list only the leasing company on policies covering leased employees, making it difficult for the regulatory authority to verify that particular workers are covered. He continued:

Therefore, we have been asking insurers who provide coverage for leasing companies to continue to utilize the policy filing cards and the policy cancellation cards to provide the level of detail we need. Normally we receive a policy filing card for each separate employer client covered under the policy, however we will also accept a written and signed notification from you which contains all of the information required on the policy filing card for each employer client covered under the leasing company's policy.

(*Id.* at 15-16.) Zeiler enclosed "a supply of the policy filing cards and the policy cancellation cards." (*Id.* at 16.)

¶28 On December 16, 1994, Nancy Pugh (Pugh), an assistant underwriter for Credit General of Texas, faxed the Department of Labor and Industry a "Human Resource Montana Client List." (UEF Ex. A at 17-18.) The document faxed by Pugh lists each client company involved in this matter⁽³⁾, and provides a "contract date." The "contract dates" for the Montana client companies are all between November 10 and November 15, 1994. (*Id.* at 18.) Rhonda Halstead, a UEF employee, called Pugh to inquire about the significance of the "contract date." As recorded in an internal memorandum, she was informed that the contract date is the date they became liable for the client company. Pugh said "it is also the date the client company signed a contract with Human Resources Company." (*Id.* at 19.)⁽⁴⁾

¶29 Pugh later prepared and forwarded the policy filing cards to HRC. The cards are found at UEF Ex. I at 5-31. Each card lists Human Resources Corporation as the "ASSURED" and the name of one of the Montana client companies. Each card also lists the policy number, the effective date of the policy (April 1, 1994 to April 1, 1995), and the "[c]ontract [d]ate" for each Montana client company. All contract dates are between November 10 and November 15, 1994. The contract date information is on the same line as the policy number and the effective dates of the policy.

¶130 No further proof of insurance was forthcoming. On February 9, 1995, following a meeting between Mr. McGregor and Mr. Utick, Mr. McGregor wrote Mr. Utick about the continuing coverage issue:

During our meeting I explained that though the policy filing cards showed a 4/1/94 effective date for your client Human Resources Corporation, further contact with your clients' insurer reflected that the coverage for employees leased by your clients would only commence on the "contract date" indicated on the card. At that time I provided you with copies of representative policy filing cards prepared by your client's insurer, phone conversation summaries and a list of the Montana clientele of Human Dynamics/Human Resources with notations as to lapses in coverage. I extended your clients the opportunity to provide proof of proper coverage for the apparent lapses. You responded that your clients could probably get the information to you in the near future - unfortunately, that proved not to be the case.

Consequently, on January 26, 1995, I wrote you and set a deadline of February 3, 1995, for your clients to provide any supplemental data. **On the day of the deadline you telephoned and informed me that no additional proof of insurance was being forwarded by your client.**

As we discussed last Friday, with the failure of your clients to provide additional proof of proper workers' compensation coverage, the department must now assume that such coverage did not exist prior to the "contract date" indicated on Credit General's policy filing cards. While your clients presently appear to have coverage for their leased workers, the matter of the earlier uninsured periods for Human Dynamics/Human Resources client companies has not been resolved. Initially when your clients began entering leasing agreements with Montana employers, there was either no coverage or there was improper coverage. In light of the fact that Human Dynamics/Human Resources represented that it provided workers' compensation coverage for its leased employees, a number of client companies dropped their individual workers' compensation policies. As a result, these employers became uninsured.

(UEF Ex. J at 2-3, emphasis added.)

¶131 In the same letter, Mr. McGregor pointed out that an uninsured employer was liable for a penalty. He offered to compromise the penalty if HDC and HRC met certain conditions. (*Id.*) On March 7, 1995, Mr. Utick responded that he intended to file a declaratory judgment action asking for a declaration that ERISA provisions preempt Montana worker's compensation requirements. (UEF Ex. J at 5 and see also *Id.* at 1, 3-4.)

Subsequent Negotiations Between the Parties

¶132 On March 13, 1995, Zeiler notified the client companies of UEF's intention to assess a penalty against them for failure to provide workers' compensation coverage for their employees. (UEF Exs. N at 1-2, O at 2-3, P at 3-4, Q at 8-9, R at 1-2, S at 1-2, T at 11-12, U at 1-2, V at 1-2, W at 1-2, X at 1-2, and Y at 24-25.) Following the letter, discussions continued between counsel for HDC and the UEF, resulting in a meeting on May 10, 1995. (UEF Ex. J at 24-25.) The substance of the meeting is described in notes taken by Mr. McGregor. (*Id.*; Tr. at 63.)

¶133 Present on behalf of Human Dynamics were Mr. Chester Brown (an attorney from Santa Monica, California), Anderton, and Mr. Utick, who stated they were "not here to argue" over whether ERISA preempted Montana's statutory requirements of workers' compensation coverage.⁽⁵⁾ (Ex. J at 24.) They presented three alternatives for resolving the matter, which were recorded as follows in Mr. McGregor's notes:

- - HDC fully responsible & secure surety bond to guarantee the continued payments [of benefits to injured workers.]
- Self-Insured

HRC -- Policy lapsed in mid April

* (1) Retro policy

(2) dual employer endorsement

(3) confirm w/ Ins. COMMS

(*Id.* at 24-25.)

¶134 Mr. McGregor testified that the Department rejected the first two suggestions. As to the offer to post a bond, he noted there are no provisions under Montana law authorizing a bond in lieu of compliance with statutory coverage requirements. With regard to HDC's acting as a self-insured employer, he explained that HDC had not satisfied statutory criteria for self-insured status. (Tr. at 63-65.)

¶135 After consideration and further discussion, the Department wrote to Mr. Utick telling him it would accept HDC's offer to secure a retroactive policy of insurance provided certain conditions were met. On October 2, 1995, Mr. McGregor wrote:

Dear Mr. Utick:

The Department regrets the substantial delay in responding to your clients' settlement offer regarding their lack of Montana approved workers' compensation coverage while operating in this state. As you recall, that offer was premised upon your clients' [sic] securing a retroactive policy, with a dual-employer endorsement (for both the applicable employee leasing entity and its Montana client companies) from a Montana licensed/admitted workers' compensation insurance carrier.

Extensive and careful consideration of the legal, practical, moral and political consequences was required. Based upon the unique circumstances of this case, the Department has decided to accept your client's [sic] offer.

Such acceptance of your client's [sic] settlement offer to secure a retroactive policy for the period in question, however, is contingent upon the following conditions:

1. A full and complete copy of the retroactive policy (with all Montana client companies listed as named insureds) must be provided the Department for its review and approval;
2. All known workers' compensation claimants (against either HDC, HRC, HRC ARMCO, Inc. or any of their client companies in Montana) filed or arising during the uninsured period, must be identified to the Department;
3. Complete and accurate copies of the claim files of such claimants (including, but not limited to, records of initial coverage decisions, benefits paid, dates of such payments, settlements and their terms) must be provided to the Department for its review to determine compliance with Montana law; and
4. The named insurer must utilize a Montana adjuster in accordance with the in-state adjuster rule embodied at 24.29.804, ARM.

During our earlier meeting with your client's [sic], they indicated that six weeks would be a sufficient time frame in which to secure the coverage in question and comply with additional Department requirements. In light of that representation, you are hereby extended until close of business on Friday, November 16, 1995, in which meet the requirements outlined above.

(UEF Ex. J at 27-28.)

¶136 On November 15, 1995, Mr. Utick wrote to Mr. McGregor, stating as follows:

Dear Dan:

Thank you for your letter of October 2, 1995.

I have had a chance to discuss the conditions set forth in your letter with my clients and they are agreeable to such conditions.

However, there is one problem, and that has to do with the proposed time frame for meeting your requirements. When we had our meeting on May 10, 1995, my clients **indicated that six weeks would be sufficient time to provide a retroactive policy.** That estimate, however, was premised on the assumption that we would receive a prompt response from the Department with respect to the offer. **There**

were commitments [sic] in place at that time concerning the retroactive policy that have since expired and will have to be renegotiated. My clients are using their best efforts to get this accomplished, and are confident that it will be accomplished, but will not be able to meet the November 16, 1995 deadline you have set, particularly since your letter arrived in my office while I was out of town and, consequently, there was a delay in getting it forwarded to my clients.

(*Id.* at 29, emphasis added.) The Department gave HDC an extension through December 15, 1995. (*Id.* at 30.)

¶137 On December 15, 1995, Mr. Brown notified the Department that HDC was pursuing retroactive coverage but needed an additional 30 days to secure the coverage. (*Id.* at 31.) Mr. McGregor responded on December 28, 1995, extending the deadline to January 16, 1996. (*Id.* at 34-35.)

¶138 The Department did not receive evidence of compliance by the January deadline and began discussions regarding an enforcement action. (UEF Ex. K-1.) However, settlement communications between the parties continued. On May 9, 1996, attorney Brown and Anderton called Mr. McGregor, indicated HDC was having difficulty securing a retroactive policy and asked if it could post a bond in the interim or become a Plan I self-insurer. (*Id.* at 2.) On May 23, 1996, attorney Brown wrote to Mr. McGregor, renewing the request. (*Id.* at 4-5.) The Department rejected the request (*id.* at 7), and on May 29, 1996, Zeiler wrote the client companies notifying them of the Department's intent to audit the companies so it could determine the amount of penalties due. (UEF Exs. N at 5-6, O at 6-7, P at 8-9, Q at 14-15, R at 5-6, S at 9-10, T at 19-20, U at 8-9, V at 5-6, W at 5-6, X at 8-9, and Y at 33-34.)

¶139 In a clear attempt to evade the audits, on June 10, 1996, Anderton wrote the client companies, telling them that coverage was in effect "through an E.R.I.S.A. plan which has paid all claims,⁽⁶⁾ and continues to do so" (UEF Ex. U at 10) and providing them with the following instructions:

As you know all wages, taxes, impounds, withholdings, etc. were processed by HDC on behalf of the leased employees. Therefore, all accounting records are in our possession. Your response to Mr. Zeiler and/or his representatives should, we believe, indicate that we are the employer and that the records for the leased employees are in the possession of HDC.

(*Id.* at 11.) When field auditors visited the client companies, the companies informed the auditors "they didn't have the documentation to show what wages were being paid, that those (inaudible) Human Dynamics Corporation." (Tr. at 68 (McGregor testimony).) Several client companies sent letters to the Department advising they did not have the records. (*E.g.* UEF Ex. N at 7; see *also* UEF Ex. O at 8.)

¶40 The Department then attempted to obtain records from HDC. On June 19, 1996, Zeiler wrote to Anderton, stating, "[I]f it is your company and not your Montana clients that have the payroll records for the periods in question, the Department hereby makes formal demand that you, as agent for your Montana clients, supply us with true and accurate copies of the payroll and classification information submitted to you by these Montana businesses." (UEF Ex. K at 9.) On July 23, 1996, Mr. Utick responded on behalf of HDC, writing that while "HDC is not, at this time, refusing to open its books and records for inspection," there was no authority for the Department to demand inspection of HDC's records since the Department took the position that HDC was not the employer. (*Id.* at 12.) Mr. McGregor responded on August 27th that HDC was an agent for the employer, thus obligated it to provide the records. He further indicated, "Failure to provide these records to the department will likely result in a higher premium calculation and ultimately in higher penalty assessments against your Montana clients." (*Id.* at 14.)

¶41 The war of letters continued. On September 24, 1996, Mr. Utick wrote to Mr. McGregor, informing him that the records were open for inspection but only at HDC's offices in Mesa, Arizona. (*Id.* at 18-19.) Mr. McGregor responded on September 27, 1996, that the Department would not travel to Mesa, Arizona, to inspect records and was currently calculating penalties based upon available unemployment insurance records. (*Id.* at 20-21.)

¶42 On October 9, 1996, Mr. Utick again wrote to Mr. McGregor, protesting the impending penalties. His letter effectively concedes that HDC and the client companies were uninsured for a period of time in 1994:

When the Department made its position on the [ERISA] issue known to HDC, rather than litigate the ERISA issue at that point, HDC, in an attempt to work with the Montana authorities, first attempted to secure workers' compensation coverage on its own that would meet with Department approval. The only carriers that HDC could secure a reasonable premium from were unacceptable to the Department of Labor because they were not licensed to do business in Montana, even though HDC is an Arizona employer, doing business in Arizona, as well as 22 other states, and these carriers were licensed and admitted insurers in Arizona.

When it became apparent that HDC was not going to be able to satisfy the Department with coverage of its own, HDC made arrangements to secure workers' compensation coverage that was approved by the Montana Department of Labor by selling its entire Montana operation, at a substantial financial loss, to another company, HRC, which provided approved Montana coverage. Thus, HDC did, in fact, take steps to provide valid, Department-approved workers' compensation coverage even though it believed then, and still believes now, that with an ERISA-based plan, such coverage is not necessary.

With respect to all claims that occurred during the time period the Department claims there was no valid Montana workers' compensation coverage, HDC has paid or defended each and every one of those claims. It has paid benefits on such claims, where liability exists, pursuant to the terms of the Montana Workers' Compensation Act. . . .

Nevertheless, even though HDC did, in fact, bring its Montana operations into compliance with the Department's directives by selling the entire operation over two years ago, the Department is still not satisfied. Even though no one, either state agency or employee, has sustained one dime in loss except HDC, the Department claims substantial penalties and assessments for the time periods that it claims there was no valid Montana workers' compensation coverage in effect.

HDC had hoped to address these concerns of the Department by placing a retroactive policy in effect that would cover the time period in question. This has not proved to be possible at a reasonable premium. The only retroactive policy that HDC has been able to negotiate would carry the same premium that would have been charged had coverage been in place during the entire time period in question, but the insurer will not assume any of the liabilities that have been paid or will be paid for injuries during that period. This is not reasonable, and, regrettably, in spite of the best efforts of HDC, **it appears that a retro policy by a carrier admitted in Montana cannot be found at an economically reasonable premium.**

(*Id.* at 22-23, emphasis added.) Payment of claims by HDC is patently inconsistent with its being insured.

¶43 On October 22, 1996, Mr. Utick again wrote to Mr. McGregor, providing, evidently for the first time, a copy of the Client Assignment Agreement between HDC and HRC. (*Id.* at 26.) Mr. Utick stated in part:

Please note that the effective date of this agreement is set forth in paragraph 3 on page 2. That date was October 1, 1994. Thus, HDC's responsibility for the Montana employee leasing operation ran through midnight September 30, 1994, a date over two years ago.

(*Id.*) Mr. Utick also raised the specter of the statute of limitations but noted, nevertheless, "HDC remains anxious" to resolve the matter. He also resurrected HDC's desire "for retroactive approval to operate during the period in question as a Plan I self-insured employer." (*Id.*) There were also discussions in October and November concerning postponing enforcement actions while HDC pursued a declaratory judgment in district court, but the parties never reached an agreement to do so. (*Id.* at 39-40.)

Adjustment and Payment of Claims by HDC and HRC

¶44 The record below is replete with evidence showing that between January and October 1994, HDC adjusted and paid workers' compensation claims of injured employees of its client companies, including a claim of Ron Beaulieu (Beaulieu), an employee of Eureka Pellet Mills. On August 25, 1994, Beaulieu's attorney wrote UEF a letter advising it that his client, Beaulieu, had been "receiving partial disability payments from Human Dynamics Corp. in Mesa, Arizona," but that the payments, and medical reimbursement were not correct under Montana law. (UEF Ex. Q at 4.) The lawyer reported that Tom Lindsey, an HDC employee,

informed me that **because it was private insurance**, Human Dynamics did not have to submit anything to State Fund or Workers Compensation and that the amount reimbursed to Mr. Beaulieu was correct and they were not going to change it. [Emphasis added.]

(*Id.*) The record contains a copy of a check dated June 13, 1994, in the amount of \$351.10 payable to Beaulieu and drawn on an account of International Risk Management, Incorporated, of Mesa, Arizona. (*Id.* at 7.) At the hearing, Anderton testified he was president of International Risk Management, which appears to be the claims adjusting adjunct to HDC. (Tr. at 37.) A printed "memo" on the check indicates: "Payment; 94MT0002 TD 5/28/94 to 6/10/94." (UEF Ex. Q at 7.)

¶45 Later on, Beaulieu filed a petition with this Court requesting an increase in his temporary total disability benefits and payment of certain medical expenses. He named the UEF and HDC as respondents. (See *Id.* at 11-13.) HDC appeared, **affirmatively alleged that it (HDC) insured Eureka Pellet Mills**, and moved to dismiss the UEF as a party. I denied the motion, holding that since the claimant alleged in the alternative that Eureka Pellet was uninsured the Court had jurisdiction to determine whether the UEF was liable for benefits, which in turn required a determination as to whether Eureka Pellet in fact was insured or not. (*Beaulieu v. Uninsured Employers' Fund and Human Dynamics, Incorporated*, ⁷² 1998 MTWCC 16 at ¶ 5; UEF Ex. Q at 47.)

¶46 At least three workers for Johnson Brothers Contracting were injured at work during 1994: Mark Batt suffered an injury to his right thumb on August 1, 1994; Randall Clark injured his triceps tendon on August 16, 1994; and Curtis Fitzgerald suffered a head injury on August 23, 1994. (UEF Ex. T at 3, 4, and 40.) On May 6, 1997, Mark Batt entered into a Petition for Compromise and Release Settlement with Human Dynamics Corporation, which was listed as the insurer. Mr. Utick signed the petition as the "[a]uthorized [i]nsurance [r]epresentative." (*Id.* at 42.) The Settlement Recap Sheet indicates a settlement amount of \$10,000.00. (*Id.* at 41.) The settlement was never approved by the Department because the UEF was not a party to it. (Tr. at 136 (Test. of Bernadette Rice).)

¶47 Elroy Shackle, an employee of Total Mechanical Heating and Air Conditioning, was injured November 8, 1994. (UEF Ex. W at 22.) A settlement agreement was executed

December 6, 1995, listing "HUMAN RESOURCES, INC." as the employer. (*Id.* at 27.) The agreement provided for payment of \$53,235. The special provisions section stated that the employer (Human Resources) would pay outstanding medical bills and receive credit for \$11,235 it had paid to date. (*Id.*)

¶48 Duane B. Hjelt, who worked for Rainflow Services, Incorporated, filed a claim for a September 8, 1994 back injury. (UEF Ex. Y at 13.) On December 7, 1994, Mr. Utick wrote to Hjelt's counsel, informing him as follows:

Please be advised that this claim has been referred to me for handling by Human Dynamics Corporation, Mr. Hjelt's employer at the time of his alleged industrial injury of September 8, 1994.

My client has undertaken a complete investigation into the circumstances surrounding Mr. Hjelt's alleged injury and has concluded that Mr. Hjelt did not sustain a compensable industrial injury on September 8, 1994. Therefore, I must inform you that my client denies Mr. Hjelt's claim.

(*Id.* at 11.) On February 9, 1995, Mr. Utick wrote to Bernadette Rice at UEF informing her that Human Dynamics Corporation, as the employer, had admitted coverage for the claim. He wrote, in part, "**The employee leasing company which is the employer has admitted coverage for Mr. Hjelt's compensation claim**, but has denied that he sustained a compensable injury on the date alleged." (*Id.* at 17, emphasis added.)

¶49 The actions of HDC in these claims show, without a doubt, that it was acting both as employer and its own insurer. The record nowhere reflects any participation by Credit General in either the adjustment or payment of any of these claims.

Calculation and Assessment of Penalties Against Client Companies

¶50 Meanwhile, Terry Wilson (Wilson), a Compliance Specialist with the UEF, calculated penalties against the individual client companies using unemployment insurance reports to ascertain wages paid to employees during the relevant periods. (Tr. at 123; UEF Ex. M at 1.) Because the reports were filed by HDC, he had to determine which employees went with which client company. (Tr. at 123.) He testified that he was able to match employees with client companies because HDC had filed its unemployment insurance reports with employees listed alphabetically in separate blocks. He compared the employee blocks with names listed on filings made by the individual companies prior to contracting with HDC. He was able to calculate total wages of each company with the exception of Enviroheat. (*Id.*) As the Department discovered later, Enviroheat workers were listed within the block associated with another employer, Johnson Brothers Contracting. (UEF Ex. P at 16-17.)

¶51 To calculate the premiums that would have been paid by each company, and thereby determine the penalty, Wilson also used the database of the State Fund Compensation Insurance Company (State Fund), which had previously insured most of the companies, to ascertain appropriate classifications for their employees. (Tr. at 124-25.) He was forced to do so because HDC refused to make employee records for the client companies available in Montana. Where State Fund information was inadequate, Wilson "used the most common class code . . . the one that reported the most payroll." (*Id.*)

¶52 In early October 1996, Wilson wrote letters to eight of the twelve client companies advising them of the amount of the penalty and the periods to which the penalty applied, as follows:

AAA Construction of Missoula	\$ 6,571.22	10/01/94 to 11/09/94
Dee Mortensen (d/b/a Dee's Draperies)	\$ 1,004.98	7/01/94 to 11/13/94
Tri-Star Pizza Enterprises	\$15,626.57	8/01/94 to 11/12/94
Rainglow Services, Inc.	\$23,211.85	8/01/94 to 11/11/94
Flathead Janitorial	\$16,839.84	7/01/94 to 11/14/94
Hi Country Mini Motors	\$ 2,851.72	7/29/94 to 11/11/94
Riverside Construction/ABC Seamless	\$40,019.18	4/29/94 to 11/12/94
Total Mechanical Heating & Air Cond.	\$12,492.90	7/01/94 to 11/12/94

(UEF Exs. K at 51, N at 17-18, O at 15, R at 14-15, S at 22-23, V at 21-22, W at 36-37, X at 13-14, and Y at 44-45.)

¶53 Wilson was unable to calculate penalties for the remaining companies. He wrote to them on October 11, 1996, informing each company "that your business has been declared an 'uninsured employer'" for a period specified in the respective letters, as follows:

Montana Glass Inc.	4/01/94 through 11/12/94
Eureka Pellet Mills	1/01/94 through 11/11/94
Johnson Brothers Contracting	1/01/94 through 11/14/94

(UEF Exs. P at 10, Q at 16, T at 21, and U at 12,) Each letter then noted:

At the present time, this Department lacks the payroll information to determine the exact amount of the penalty that will be assessed against your business. Consequently, please consider this a formal request for that information. You can comply with this request by completing the enclosed payroll report, which will identify the gross wages paid and classification code for each of your employees during the uninsured period.

(/d.) The letters closed by asking that the information be provided by October 31, 1996, and warning that failure to respond would result in issuance of an administrative subpoena.

(/d.)

¶54 Around the end of December 1996,⁽⁸⁾ Wilson wrote to Montana Glass, Eureka Pellet Mills, and Johnson Brothers Contracting to assess specific penalties, as follows:

Montana Glass Inc.	\$ 46,186.90	4/01/94 through 9/30/94
Eureka Pellet Mills	\$179,390.74	1/01/94 through 12/31/94
Johnson Bros. Contracting Inc.	\$849,978.23	2/01/94 through 12/31/94

(UEF Exs. Q at 32, T at 31, and U at 22.) In April 1998, the penalty against Johnson Brothers Contracting was recalculated at \$805,598.86 and a penalty for Enviroheat issued for \$13,031.93. (UEF Exs. P at 16 and T at 38.)

Discussion

I. The Penalties Are Not Barred by the Statute of Limitations

¶55 I will address the statute of limitations issue first since discussion of other issues is unnecessary if the penalties are barred.

¶56 The penalties sought by the UEF are provided in section 39-71-504, MCA, (1997-1999), which sets out the manner of funding the UEF. The section provides in relevant part:

39-71-504. Funding of fund -- option for agreement between department and injured employee. The fund is funded in the following manner:

(1)(a) The department 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 or \$200, whichever is greater. In determining the premium amount for the calculation of the penalty under this subsection, the department shall make an assessment based on how much premium would have

been paid on the employer's past 3-year payroll for periods within the 3 years when the employer was uninsured.

¶157 The parties agree that the applicable limitations period is the two-year statute set forth in section 27-2-211(1), MCA (1993-1999). The section provides:

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability. (1)

Within 2 years is the period prescribed for the commencement of an action upon:

(a) a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state, except when the statute imposing it prescribes a different limitation;

(b) a statute or an undertaking in a criminal action for a forfeiture or penalty to the state;

(c) a liability created by statute other than:

(i) a penalty or forfeiture; or

(ii) a statutory debt created by the payment of public assistance.

¶158 In his decision in the consolidated case, the hearing officer identified subsection (1)(c)(i), which concerns action on a statutory liability **other than** a penalty or forfeiture, as the applicable provision. The hearing examiner was wrong. The UEF is seeking a penalty under section 39-71-504(1), MCA; the section on its face provides for a penalty. Thus, the subsection the hearing examiner relied upon is inapplicable.

¶159 Subsection (1)(a) of section 27-2-211, MCA, also does not apply since it applies only to penalties due an individual or "an individual and the state." The latter is in the conjunctive and is inapplicable since only the state is entitled to the penalties assessed in this case.

¶160 However, subsection (1)(b) is applicable. The subsection is properly read as governing "an action . . . upon a statute . . . for a forfeiture or penalty to the state," which is of course what this proceeding involves. This reading is supported by "a rule of law as old as the law itself, that a relative clause shall be construed to relate to the nearest antecedent that will make sense." *State v. Centennial Brewing Co.*, 55 Mont. 500, 179 P.2d 296, 298 (1919). Under this principle, the phrase "in a criminal action" modifies only the term "undertaking." The phrase does not modify or apply to the word "statute."

¶161 This reading of the provision is confirmed by the legislative history of the provision. In 1947, the Revised Montana Code contained section 93-2606, the predecessor to what became subsection (b). Section 93-2606, RCM, provided as follows:

93-2606. Within two years. Within two years:

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.

3. An action for libel, slander, assault, battery, false imprisonment, or seduction.
[Emphasis added.]

The commas in subsection (2) of 93-2606 leave no doubt that the subsection covered an action "upon a statute . . . for a forfeiture or a penalty to the state" **or** "upon an undertaking in a criminal action . . . for a forfeiture or penalty to the state." The commas were removed by the Code Commissioner when editing the Code for uniform punctuation usage, not through any legislative decision to alter the meaning of the subsection. The first appearance of the subsection *without* commas followed re-codification in 1978. During that year, subsection (2) of 93-2606, RCM, was re-enacted as subsection (1)(b) of section 27-2-211, MCA, without any suggestion of legislative intent to change the substance of the provision. The Official Report of the Montana Code Commissioner - 1979 (which is reported in the 1978 Montana Code Annotated), confirms that "[a] uniform system of punctuation was adopted and punctuation changed accordingly whenever necessary."

¶162 HDC and the client companies argue that the UEF penalties are barred by the two-year limitations since the UEF did not commence an enforcement action until December of 1996, more than 2 years after the last month the UEF alleges the client companies were uninsured. (Respondent/Cross-Appellant's Brief on Appeal at 35.) Initially, it is unclear where they arrive at the December 1996 date. Penalty assessment letters were sent to eight of the client companies in October 1994. The other client companies were also notified in October 1994, that a penalty would be assessed against them but could not be calculated because payroll information had not been furnished to the UEF. HDC and the client companies also state that September 30, 1994, was the last date to argue liability since "the effective date of HDC's sale of its Montana employee leasing business to HRC was October 1, 1994." (*Id.*) However, as discussed in paragraphs 28-30, the evidence does not support a finding that insurance took effect on October 1, 1994; the first dates of insurance which the evidence supports are the November dates on Credit General's policy cards. (See ¶ 29.)

¶163 Even if the Court were to adopt the dates proposed by HDC and the client companies, the hearing officer correctly applied *Intermountain Deaconess Home v. State*, 191 Mont. 309, 623 P.2d 1384 (1981), in concluding that the May 29, 1996 letter from Zeiler to the client companies (¶ 38) commenced an action for the penalties. That was within 2 years of the continuous periods in 1994 during which HDC and its client companies were uninsured. "The statute of limitations in any given case generally begins to run upon the

occurrence of the last wrongful act relevant to the cause of action." *Wisher v. Higgs*, 257 Mont. 132, 140, 849 P.2d 152, 157 (1993). Since HDC's and its client companies' lack of insurance was continuous until November 1994, the last wrongful act was the last day they were uninsured.

¶164 In *Intermountain Deaconess Home* the Department of Labor and Industry sought overtime wages on behalf of several employees. In 1977, it audited the employer and sent "a letter to plaintiff demanding over \$40,000, for back wages." *Id.*, 191 Mont. at 311, 623 P.2d at 1386. However, no action was filed in district court to enforce the demand for more than five years after the date the wages had accrued. Five years was the applicable limitations period. The district court held that the action was barred because the Department failed to commence an action within the limitations period which could result in a judgment by a court. 191 Mont. at 313, 623 P.2d at 1386. Agreeing the appropriate limitations period was five years, the Supreme Court nonetheless reversed, holding:

The statute of limitations was tolled in this case when plaintiff received the Department's demand letter notifying plaintiff of each claimant's minimum wage claims. The court erred by concluding that only court action tolls the running of this statute of limitations. The statute of limitations for wage claims may be tolled by an active, timely administrative pursuit of the unpaid wages that gives notice to the employer. We recently decided this issue in *State, Dep. of Labor v. Wilson* (1980), Mont., 614 P.2d 1066, 37 St.Rep. 1393:

"The question remains: (in wage claim enforcement cases) Is the statute of limitations tolled by the commencement of formal administrative proceedings, or must an action be commenced by the Department's filing a complaint with the District Court?

"...

"In an administrative setting, where the agency acts to enforce the (Minimum Wage) law on its own initiative this action is the equivalent of the filing of a civil complaint. The Department's ... (demand letter to the employer) fulfilled the purposes of a complaint by giving ... notice of the claim being made against them."

191 Mont. at 314, 623 P.2d at 1387. *Accord State v. Wilson*, 189 Mont. 52, 58-59, 614 P.2d 1066, 1070 (1980) (Department letter notifying appellants of overtime claim against them was the administrative equivalent to filing a civil complaint).

¶165 HDC and the client companies argue that an action is not commenced unless a demand letter specifies a particular dollar amount of penalty. The Court does not read *Intermountain* and *Wilson* so narrowly. The May 29, 1996 letters from Mr. Zeiler to the client companies unequivocally informed the client companies that the Department had

determined they "lacked any workers' compensation coverage during the above time frame" and "are deemed an 'uninsured employer' for that period pursuant to section 39-71-501, MCA." (UEF Exs. N at 5-6, O at 6-7, P at 8-9, Q at 14-15, R at 5-6, S at 9-10, T at 19-20, U at 8-9, V at 5-6, W at 5-6, X at 8-9, and Y at 33-34.) The letters also stated that an audit would be conducted in the near future to determine the penalty amount due. The letter was sufficient to initiate the administrative enforcement process.

¶66 Moreover, even if the May 29th letters were not sufficient, the Court finds the running of the statute of limitations was tolled by HDC's and the client companies' refusal in the summer of 1996 of HDC to produce their payroll records in the State of Montana. HDC, if the employer, or the client companies, if they were the employers, were statutorily required to produce payroll records. Section 39-71-304(1), MCA, requires that the books, records and payrolls of every employer "**must always be open to inspection by the department or any duly authorized employee**" and goes on to provide,

Refusal on the part of an employer **to submit the books, records, and payrolls for such inspection** will subject the offending employer to a penalty not exceeding \$500 for each offense, to be collected through a workers' compensation action in the name of the state and paid into the state treasury. [Emphasis added.]

The word "submit" means just that. It means submit them in Montana, not some other state or foreign country. The cat and mouse game played by HDC and the client companies in the summer of 1996 was dilatory, obstructive, and contrary to section 39-71-304(1), MCA. They cannot benefit from their own wrong by now arguing that the May 29, 1996 letter was insufficient because it failed to specify the amounts the Department was claiming in penalties.

¶67 Tolling of the statute of limitations was found by a federal district court in analogous circumstances. *Reich v. Southern New England Telecommunications Corp.*, 892 F.Supp. 389 (D.Conn. 1995), *aff'd* 121 F.2d 58 (1997), was a wage case filed by the federal Department of Labor. The defendants had failed to timely respond to a request for production of documents served July 30, 1993, by the Department. At trial, the defendants argued the statute of limitations provided a defense. The Court disagreed:

In light of SNET's failure to comply with section 11 of the FLSA and to respond timely to the plaintiff's request for production, and as SNET should not be allowed to benefit from its delayed compliance, see *Anderson v. Mt. Clemens Pottery Co.* [328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946)]^[9], equitable considerations dictate that the statute of limitations be **tolled** as of August 30, 1993 [the date the employer's response was due] for the outside craft employees currently listed in Plaintiff's Exhibit 9.

II. Merits

¶168 The penalties sought by the UEF are governed by section 39-71-504(1), MCA (1993), which provides:

The department 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 or \$200, whichever is greater. [Emphasis added.]

An uninsured employer is defined by section 39-71-501, MCA (1993), as "an employer who has not properly complied with the provisions of 39-71-401." In turn, section 39-71-401, MCA, requires that any employer subject to the Act be insured through one of the following three plans: Plan 1, an approved self-insurance plan (§ 39-71-2101, et seq.); Plan 2, a private carrier authorized to transact business in Montana (§ 39-71-2201); or Plan 3, the State Fund (§ 39-71-2311, et seq.)

¶169 In *Dahl v. Uninsured Employers Fund*, the Montana Supreme Court held that section 39-71-401, MCA (1993), requires the "employer" *itself* to procure workers' compensation insurance." The Court stated:

Section 39-71-401(1), MCA (1993), clearly and unambiguously requires the "employer" to elect to be bound by "compensation plan No. 1, 2, or 3." Thus, contrary to the Workers' Compensation Court's interpretation, **§ 39-71-401(1), MCA (1993), precludes a separate entity from providing workers' compensation insurance for an employer's employees**; it simply provides that the *employer* must procure workers' compensation insurance (by either "compensation Plan No. 1, 2, or 3") for its employees.

1999 MT 168, ¶ 16, 983 P.2d at 366 (emphasis added).

¶170 In the present case, the client companies do not contend that they had workers' compensation coverage for their employees, rather they contend that they are exempt from coverage because the leasing company from which they leased their employees (HDC) provided the required coverage. Their argument involves an exception to the coverage requirement not present in *Dahl*, specifically section 39-71-117(3), MCA.

¶171 Section 39-71-117(1)(a), MCA (1993), states the general rule that "every firm . . . and private corporation" which "has any person in service under any appointment or contract of hire, expressed or implied, oral or written" is an "employer" for workers' compensation purposes. Subsection (3) of the statute creates an exception, providing:

An employer defined in subsection (1) **who utilizes the services of a worker furnished by another person, association, contractor, firm, 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, 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, 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.** [Emphasis added.]

The section is clear on its face. As applied to the present case, the client companies were relieved from the requirement that they secure their own workers' compensation insurance **if, and only if**, the requirements of both subsection (a) and (b) are satisfied.

¶72 Subsection (a) requires only brief discussion. HDC's own evidence was that it furnished payroll, withholding, and reporting services, along with employee benefits, including insurance. It did not retain "control over all aspects of the work performed by the worker[s]" employed at the client companies. Indeed, the workers furnished by HDC were already working for the client companies and there is not a scintilla of evidence that HDC or HRC in fact ever exercised *any* control over those workers. Indeed, HDC was based in Mesa, Arizona, while HRC was based in Texas far, far from the workplaces of their Montana clients. Subsection (a) is not satisfied. Since both (a) and (b) must be satisfied, the client companies are not exempt from the requirement that they secure their own workers' compensation insurance coverage.

¶73 While the Department suggests this Court *would* have authority to render a decision under subsection (a) (UEF's Initial Brief at 16), in the proceedings below the UEF did not argue non-compliance with subsection (a) as a ground or finding uninsured status. Instead it made a policy decision not to pursue arguments it might have had under the subsection:

This action [not to pursue the control issue] was the result of a policy decision by the Department in 1992. At that time, the Department concluded that employee leasing was authorized by recently enacted MCA section 39-71-117(3), but that the requirement that the leasing company control "all aspects" of the work performed by the worker effectively invalidated any such leasing arrangement. The Department therefore found subsection (3) (a) to be inherently inconsistent in that it both authorized and then effectively precluded employee leasing. Consequently, so long

as the leasing company retained a substantial portion of the traditional employer responsibilities, the Department deemed this subsection satisfied.

(UEF's Initial Brief at 16, n.3.) Where the terms of a law are plain on their face, the agency enforcing it is required to follow and apply the law as written; it cannot reinterpret it as did the UEF in this case. See *Safeway, Inc. v. Montana Petroleum Release Compensation Bd.*, 281 Mont. 189, 194, 931 P.2d 1327, 1330 (1997) ("an agency's rules are valid only if they are 'consistent and not in conflict with the statute'", quoting section 2-4-305(6)(a), MCA). Nevertheless, since the argument was not raised below, the Court will not reverse on the basis of subsection (a). *Entriiken v. Motor Coach Federal Credit Union*, 256 Mont. 85, 90, 845 P.2d 93, 96 (1992) (argument raised for the first time on appeal will not be considered).

¶74 The question then is whether, under subsection (b), the hearing officer erred in finding that HDC and HRC had insurance coverage for their client companies. When HDC came into Montana, it did not have workers' compensation insurance covering "leased" employees. This fact was found by the hearing officer as follows:

5. When it first started doing business in Montana in January of 1994, HDC did not provide workers' compensation coverage. It had a disability benefit program and took the position that the federal Employee Retirement Income Security Act (ERISA) preempted the state workers' compensation laws requiring coverage.

(Findings of Fact; Conclusions of Law; and Order at 5.) Under subsection (b), the obligation of the client companies to obtain workers' compensation insurance *themselves* is excused only if HDC had "obtained workers' compensation for the worker[s] in Montana both **at the inception of employment and during all phases of the work performed.**" The hearing officer's finding of no insurance at the inception of employment under the "leasing" contracts is unassailable. Under subsection (b) and *Dahl*, this finding is conclusive as to uninsured status until the time workers became prospectively insured. See also, *Buerkley v. Aspen Meadows Limited Partnership*, 1999 MT 97, ¶ 5, 16-18, 980 P.2d 1046, 1047, 1049 (holding that workers' compensation obligations were **not** satisfied through "back-dated" coverage).

¶75 The UEF notified HDC that it would not pursue penalties if HDC obtained retroactive coverage satisfactory to the UEF. The purported retroactive policies tendered by HDC and HRC were never satisfactory to the UEF, for good reasons, and it never accepted them. Thus, no settlement agreement was ever struck. Lacking an enforceable settlement agreement regarding penalties for the period in question, the hearing officer erred. Thus the client companies are subject to penalties until such time as they became prospectively insured.

¶76 Moreover, the contention by HDC, HRC, and the client companies that they were retroactively insured is unsupported by the evidence, the hearing officer's findings

notwithstanding. The finding of retroactive coverage was clearly erroneous under the standard of review provided in section 2-4-704(2)(v), MCA. His finding is unsupported by substantial evidence. Even if the evidence were viewed as sufficient, the hearing officer misapprehended the effect of the evidence. Finally, a review of the record leaves me "with a definite and firm conviction that a mistake has been committed."

¶77 There were two attempts by HDC to provide retroactive coverage for the client companies. The first involved policy SWC 100-060-00 tendered to the Department by Mr. Utick in August, 1994. On its face the policy provided coverage after April 1, 1994, thus it did not cover that portion of the uninsured period after April 1st. Second, proof that the policy covered Human Dynamics Corporation Incorporated was lacking. HDC, Inc., which was listed as an additional insured, is not the legal name of Human Dynamics Corporation and no evidence from Credit General was ever tendered to show that in listing HDC, Inc., it extended coverage to Human Dynamics. Anderton's testimony was incompetent to establish coverage under the policy. He was not party to the negotiations with the insurer and there was no relationship between the insured under the policy and Human Dynamics. Anderton cannot alter or interpret the list of additional insureds. Third, as discussed at paragraph 17, the policy conditions which might have provided coverage in Montana were not shown to have ever been met.

¶78 The second policy was SWC 100-060-01. Initially, that policy was effective on and after April 1, 1994. On its face it does not cover the January 1, 1994 to March 31, 1994 part of the uninsured period. Proof of coverage for HDC was offered through an informational certificate issued by a third party, and is insufficient to establish the dates of coverage as to additional insureds who were added later on. The fact of insurance coverage for HDC's client companies was established through subsequent communications with Credit General but those communications indicate that the coverage became effective only when Credit General received client cards for the Montana clients, which did not occur until the latter part of November 1994. Anderton's "belief", based on the informational certificate, that coverage was retroactive to April 1, 1994, was incompetent to contradict the other evidence. He did not participate in securing the additional coverage and had no personal knowledge of the transaction.

¶79 Moreover, HDC's own actions belie its argument that coverage was retroactive to April 1, 1994. As discussed at paragraph 30, Mr. McGregor told Mr. Utick that Credit General had informed the Department that coverage for the client companies did not begin until the November contract dates listed on Credit General's client cards, and offered him an opportunity to present additional evidence showing earlier coverage. No additional evidence was ever offered.

¶80 More significantly, HDC's own conduct in adjusting and paying claims made prior to late November is irreconcilable with its claim that retroactive coverage existed under either

of the policies. Its actions in adjusting and paying claims made for the period were those of a Plan I self-insurer, despite its failure to qualify as a self-insurer. Lacking is even a scintilla of evidence that Credit General adjusted or paid any claim made during the uninsured periods, or that it reimbursed HDC or HRC for expenditures made for those claims. In light of the payment of claims by HDC, its arguments regarding retroactive coverage are disingenuous and farcical.

¶81 I note that around November of 1996, HDC filed a lawsuit against Credit General to compel coverage. In his brief on appeal, Mr. Utick equivocates on the propriety of the Court taking notice of the existence, content, and status of that separate lawsuit.

(See Respondent/Cross-Appellant's Brief on Appeal at 18.) However, evidence admitted at hearing without objection indicates that a default judgment was taken against HRC establishing, as recited in a letter from Mr. Utick to the UEF, that Credit General Policy No. SWC100-060-00 provided coverage to the leased employees during the period January 1, 1994 through September 30, 1994. (UEF Ex. K at 55.) Correspondence in the record indicates Credit General has been served through the Commissioner of Insurance and that when Credit General finally learned of the lawsuit it took steps to have the default judgment set aside. (UEF Ex. L at 3.) The default judgment was in fact set aside and HDC appealed to the Montana Supreme Court. (Respondent/Cross-Appellant's Brief on Appeal at 18.) The only relevance given to these facts by the Court is in drawing the inference that Credit General denied retroactive coverage, otherwise there would have been no reason for it to seek to set aside the default judgment.

¶82 Finally, I note that from around February 9, 1995, until the filing of the lawsuit against Credit General in November of 1996, HDC ceased arguing that HRC had in fact already purchased retroactive policies. Rather, HDC dropped this angle of defense and began proposing other means to satisfy the UEF's investigation. This included the proposal that HDC be deemed self-insured, that it post a bond to cover any claims, and, amazingly enough, **that HDC purchase a retroactive insurance policy to cover the period at issue.** (UEF Ex. J at 24-25; Tr. at 63.) As the UEF aptly asks in its brief on appeal:

[I]f HDC already had bona-fide coverage under Credit General Policy No. SWC100-060-00 why didn't it stress this position during the meeting with the Department on May 10, 1995? Why would HDC offer to post a security bond if it was already insured? Why would HDC request that it be deemed self-insured if it already had plan No. 2 coverage? Why would HDC incur the expense of securing a retroactive policy if coverage already existed? Why is the record of hearing devoid of any HDC exhibit from Credit General confirming that HDC was a named insured under the policy? Why didn't HDC simply secure a representation from Credit General (its purported insurer) that it was a named insured?

(UEF's Initial Brief at 12.)

¶83 The result in this case is unfortunate and disquieting. The client companies relied on HDC to provide them with workers' compensation insurance coverage. HDC took an untenable position concerning its duty to comply with Montana workers' compensation statutes. Unfortunately, the statutes governing uninsured employers do not make provision for imposing penalties on HDC. The statutes are written such that HDC's failure to provide insurance renders the client companies uninsured and subjects them to penalties. The client companies have not only been misled by HDC but victimized by its actions. However, whatever remedies they may have against HDC for the harm they have suffered are beyond the issues presented in this case.

III. Burden of Proof

¶84 In light of the forgoing discussion, it is unnecessary for the Court to consider the burden of proof issue raised by the Department.

IV. Reasonableness of Penalties

¶85 Since the decision below is reversed, the Court must consider the client companies' argument that the UEF's assessments were arbitrary and inaccurate. They argue the UEF did not have accurate job classifications for all employees when it computed penalties. UEF's lack of records, however, was due to the actions of HDC and the client companies, which refused to produce the records in Montana where Department employees work. The UEF did the best it could reconstructing employee wages using unemployment insurance records of wages and, in some cases, State Fund records of employee classifications. The client companies had notice that the UEF was calculating penalties. At any point during the calculation process, or during the administrative review process, they could have presented information regarding more appropriate job classifications. They chose not to do so. Even during the litigation of this matter they failed to produce the necessary records.

¶86 However, the Court recognizes that the client companies have been misled and victimized by HDC, which even on appeal speaks for them. More precise calculation of the penalties is a simple matter of producing wage records and classification information for UEF to review, then doing some arithmetic. Unless the UEF objects, I will grant the client companies 30 days in which to provide the UEF with the information necessary for more accurate calculations. If that information is satisfactory, then I will order that the penalties be recalculated based on the information.

¶87 I also note that for all but two of the client companies, the last day of the penalty period was the day *before* the "contract date" reported by Credit General. (See ¶¶ 29, 52, 53; UEF Ex. A at 18.) But in the case of Johnson Brothers Contracting and Eureka Pellet Mills, the penalty period appears to extend to December 31, 1994, which is beyond the November 11, 1994, "contract date" shown by Credit General's information. The discrepancy is not raised by HDC, Johnson Brothers Contracting or Eureka Pellet Mills, but

in light of my comments above, any review of the penalties should examine the periods applicable to both Johnson Brothers Contracting and Eureka Pellet Mills.

V. Due Process

¶188 Substantive due process bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action. *Newville v. Department of Family Services*, 267 Mont. 237, 249, 883 P.2d 793, 800 (1994). The statutes applicable in this case need only meet the "rational relationship test." See, *Cottrill v. Cottrill Sodding Service*, 229 Mont. 40, 43, 744 P.2d 895, 897 (1987). That test requires only that the contested classification be rationally related to a legitimate governmental end. *Id.* The legislature's decision to create procedures for assessing penalties against uninsured employers meets a legitimate governmental goal of discouraging the operation of businesses without workers' compensation insurance. It is also rationally related to funding the UEF so that injured workers employed by uninsured employers may receive workers' compensation benefits.

¶189 HDC complains in particular about the lien and levy provisions of section 39-71-506, MCA, however, that section is not the basis of the proceeding below and is not at issue.

¶190 HDC also argues that it is not "fair" to penalize the "blameless" client companies. The uninsured employer statutes, however, provided the client companies with fair warning that if HDC did not provide workers' compensation insurance coverage for their workers then they would be deemed uninsured employers. Their beef is with HDC, not the statute.

¶191 For the reasons set forth in the above discussion, I HEREBY ORDER AND ADJUDGE AS FOLLOWS:

¶192 1. The January 8, 1999, and April 13, 1999 Department findings that HDC and the client companies were retroactively insured are **reversed** and this matter is **remanded** to the Department for entry of a finding that each of the client companies listed in the caption of this appeal were uninsured employers for the periods set forth in paragraphs 52 and 53 of this decision, and that they are subject to the statutory penalties assessed by the Department.

¶193 2. If the UEF objects to this Court's provision giving the client companies leave to submit employee records which will enable the Department to more accurately calculate the penalties due from the companies, then it shall file its written objections within 10 days of this Decision. If no objection is filed, then the client companies have 30 days in which to submit employee records to the UEF and the UEF shall have 30 days thereafter to prepare and submit recalculated penalties. The client companies shall then have 20 days in which to file objections to the manner or amounts of those calculations. If the UEF objects to recalculation of the penalties or the client companies fail to avail themselves of the

opportunity provided herein, then the penalty amounts set forth in paragraphs 52 and 54 of this decision shall become final.

¶194 3. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this decision.

¶195 4. This decision is certified as final for purposes of appeal.

DATED in Helena, Montana, this 26th day of June, 2000.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Daniel B. McGregor

Mr. Peter J. Stokstad

Mr. Andrew J. Utick

Mr. Jon G. Beal

Mr. Dennis E. Lind (Courtesy Copy)

Date Submitted: November 8, 1999

1. In its Notice of Appeal, the UEF also asserted that "findings of fact, upon issues essential to the decision were not made although requested." (UEF's Notice of Appeal at 2.) It has not pursued that issue in its briefing and it is not considered.

2. UEF Exhibit Q at 5 is an August 25, 1994 Claim For Compensation filed by a Eureka Pellet Mill employee.

3. Montana Glass is listed as Glacier Lite Form.

4. None of the parties presented testimony from any representative of Credit General regarding whether HRC had purchased coverage for the client companies beginning before the contract dates. In written argument to this Court, HRC correctly asserts that the note made by Rhonda Halstead of her conversation with Nancy Pugh contains multiple levels of hearsay. (See Respondent HRC/HRC Armco, Inc. Response Brief at 4-5.) The note was nonetheless received into evidence without objection, thus indicating the conversations were not disputed. In any event, no affirmative evidence was presented to show retroactive coverage.

5. While HDC indicated it would not "argue" over whether ERISA preempted Montana workers' compensation laws, it never actually conceded the lack of merit of its initial "position." Although not an issue on this appeal, it bears noting that the Ninth Circuit Court of Appeals has held that the Federal Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1001 et seq. does not allow employers to avoid state workers' compensation obligations. See, e.g., *Employee Staffing Services, Inc. v. Aubrey*, 20 F.3d 1038 (9th Cir.

1994); *Contract Services Network, Inc. v. Aubrey*, 62 F.3d 294 (9th Cir. 1995). In *Employee Staffing Services, Inc.*, the Ninth Circuit bluntly stated:

The premise of the complaint in this case is that ERISA opened a loophole so that employers could avoid buying workers' compensation insurance. It does not. The obligations of California workers' compensation insurance cannot be avoided by substituting an ERISA plan's coverage for work-related injuries.

Id. at 1039. Although no cases on this issue have arisen in Montana, the issues are identical.

6. While no ERISA plan was put into evidence, evidence of direct payments by HDC to workers' compensation claimants suggests that the plan was for HDC to, in essence, self-insure.

7. While the caption of the case named "Human Dynamics, Incorporated" as respondent, the exhibits in this case show that the Human Dynamics Corporation was the correct name of the respondent.

8. These letters are undated, but dates on attachments suggest the letters went out near the end of December 1996.

9. *Anderson v. Mt. Clemens Pottery, supra*, did not involve tolling the statute of limitations, but held that an employer cannot rely upon its own failure to maintain records as required by law to argue wage claims were not sufficiently proven.