

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 33

WCC No. 2002-0717

JONNI PEKUS

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

MIKE AND SUSAN YACOS

Uninsured Employer.

Distinguished by, [Dostal v. Uninsured Employers' Fund, 2012 MTWCC 42](#)

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary: In her petition, the claimant requests attorney fees, a penalty, and costs. The UEF moves to dismiss the requests.

Held: The UEF is not an "insurer" for purposes of attorney fee and penalty provisions of the Workers' Compensation Act, therefore, as a matter of law claimant is not entitled to either attorney fees or a penalty. Under Court rules, however, she may be entitled to costs.

Topics:

Uninsured Employers' Fund: Penalty. The UEF is not an insurer under section 39-71-2907, MCA (2001), and is not subject to a penalty.

Penalty: Uninsured Employers' Fund. The UEF is not an insurer under section 39-71-2907, MCA (2001), and is not subject to a penalty.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-2907 (2001). The UEF is not an insurer under section 39-71-2907, MCA (2001), and is not subject to a penalty

Uninsured Employers' Fund: Attorney Fees. The UEF is not an insurer under section 39-71-611 or 39-71-612, MCA (2001), and is not subject to an award of attorney fees.

Attorney Fees: Insurers. The UEF is not an insurer under section 39-71-611 or 39-71-612, MCA (2001), and is not subject to an award of attorney fees.

Attorney Fees: Uninsured Employers' Fund. The UEF is not an insurer under section 39-71-611 or 39-71-612, MCA (2001), and is not subject to an award of attorney fees.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-611 (2001). The UEF is not an insurer under section 39-71-611 or 39-71-612, MCA (2001), and is not subject to an award of attorney fees.

Constitutions, Statutes, Rules and Regulations: Montana Code Annotated: 39-71-612 (2001). The UEF is not an insurer under section 39-71-611 or 39-71-612, MCA (2001), and is not subject to an award of attorney fees.

Uninsured Employers' Fund: Costs. Under the Rules of the Workers' Compensation Court, the UEF is subject to an award of costs.

Costs: Uninsured Employers' Fund. Under the Rules of the Workers' Compensation Court, the UEF is subject to an award of costs.

¶1 This case is brought against the Uninsured Employers' Fund (UEF) and the allegedly uninsured employer for occupational disease benefits. Claimant's claim arose in 2002, and is governed by the 2001 version of the Occupational Disease Act.

¶2 In addition to compensation benefits, claimant seeks a penalty, attorneys fees, and costs. The UEF moves to dismiss those requests. While I agree with the UEF regarding penalty and attorneys fees, I find that costs may be awarded against the UEF should claimant prevail at trial.

¶3 The UEF relies on *Thayer v. Uninsured Employers' Fund*, 1999 MT 304. In *Thayer* the Supreme Court explained that "the Uninsured Employers' Fund is not an insurer and was statutorily created to provide a substitute source of benefits to the employee of an impecunious employer." (*Id.* ¶ 32.) *Thayer* held that the UEF, in contrast to insurers, may terminate survivors' benefits under the setoff provision of section 39-71-511, MCA, to the extent the survivors obtain compensation from a third party, even if the survivors have not been made whole for their entire loss and any costs of recovery. The Court observed:

The Fund is a legislatively provided source from which to minimize the hardships imposed when an injured worker is unable to get workers' compensation benefits as a result of the employer's failure to provide coverage....Moreover, the statutory scheme of the Uninsured Employers' Fund requires that we treat the Fund differently than an insurer. Payments from the Fund are dependent upon the Fund's ability to pay claims. The legislature has directed the Fund to pay claims to the best of its ability and to make proportional reductions to all Fund claimants when the present funds are inadequate to pay all claims....Because the Fund is merely a safety net and stands in the place of the employer, we conclude that it is

reasonable to condition the Fund's obligations on the extent to which the employer fails to provide compensation.

(*Id.* at ¶¶s 21, 22, 24.)

¶4 Sections 39-71-611 and -612, MCA (2001), allow for an award of attorney fees against an "insurer" for unreasonable conduct. Section 39-71-2907, MCA (2001), similarly permits the award of a penalty for unreasonable delay or denial of benefits. Consistent with *Thayer*, I find these provisions inapplicable to the UEF. This conclusion follows both from the Supreme Court's holding that the UEF is not an "insurer" within meaning of the Act and from the underlying premise of *Thayer*, that the Fund is a safety net.

¶5 I reach a different conclusion, however, with regard to costs. As claimant points out, this Court has previously assessed costs against the UEF when a claimant has prevailed in an action to obtain benefits from the Fund. *See, e.g., Fliehler v. UEF*, 2001 MTWCC 29. While I have found the UEF is *not* an insurer within the meaning of sections 39-71-611 and -612, MCA, -- which authorizes an award of costs against an insurer in workers' compensation proceedings -- the practice of awarding litigation costs to claimants prevailing against the UEF has developed in this Court and falls within the Court's inherent power to adopt rules of practice not inconsistent with statutory provisions. *See*, ARM 24.5.342, regarding taxation of costs, and section 2-4-201, MCA (2001), (authorizing statutory agencies to adopt rules of practice). In this regard, I note that while sections 39-71-611 and -612, MCA, do not authorize costs against the UEF where the UEF is not an insurer, nothing in those provisions or in the Workers' Compensation Act prohibit an award of costs.

ORDER

¶6 Claimant may not recover attorney's fees or penalty against the UEF. To the extent the petition alleges a right to such recovery, those allegations are dismissed.

¶7 If claimant prevails on her action against the UEF, she will be entitled to costs in accordance with rules and practices of the Workers' Compensation Court.

Dated in Helena, Montana, this 25th day of April, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Ms. Brenda Wahler
Ms. Shelly F. Brander
Submitted: April 7, 2003