IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 39

WCC No. 2002-0553

UNINSURED EMPLOYERS' FUND

Petitioner

vs.

BIG SKY PETROLEUM, INCORPORATED

Employer/Respondent

and

MONTANA STATE FUND

Respondent/Insurer

and

MELVIN J. STRONG

Employee/Claimant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Appeal Dismissed 05/09/05

Summary: The claimant injured his back in an industrial accident on either September 23 or 25, 1997. On September 23, 1997, his employer was uninsured; on September 25, 1997, its insurance was reinstated by the Montana State Fund. The employer reported the injury to the Montana State Fund and prepared and signed the First Report of Injury, declaring that the injury occurred on September 25, 1997. Later, while still working and while the Montana State Fund was paying medical benefits, the claimant notified the Montana State Fund that the accident had in fact occurred on September 23, 1997. After investigation, the Montana State Fund agreed and terminated benefits. The claimant thereafter pursued a claim with the Uninsured Employers' Fund which began paying benefits under a reservation of rights and then brought the present action for a determination as to the actual date of injury and the Montana State Fund's liability.

Held: After listening to the principals of the employer and the claimant, and judging their credibility, and sifting through all other evidence which affects my credibility judgment, the

Court finds the claimant the more credible witness and determines that he was injured on September 23, 1997, when the employer was uninsured. Since the State Fund's acceptance of liability for the claim was based on a misrepresentation of the date of injury, it is entitled to rescind its acceptance and is not liable for benefits. Instead, the UEF is liable for benefits and in turn is entitled to indemnification from the employer.

Topics:

Claims: Acceptance. Insurer may rescind acceptance of claim and deny further benefits for fraud or misrepresentation which vitiates the acceptance. Where insurer accepted claim based on an incorrect date of injury which was supplied by employer and did not insure the employer on the date when the injury in fact occurred, the insurer properly rescinded its acceptance and denied further benefits.

Claims: Acceptance. Where the claimant informs the insurer that his industrial accident occurred on a date different than the one set out in the accepted claim, and the insurer did not cover the employer on the actual date of injury, the action of the claimant in informing the insurer amounts to a withdrawal of his claim with respect to that insurer and effectively amends the claim to incorporate the correct date. Under such circumstances, the acceptance of the claim is mutually rescinded.

Fraud. Insurer may rescind acceptance of claim and deny further benefits for fraud or misrepresentation which vitiates the acceptance. Where insurer accepted claim based on an incorrect date of injury which was supplied by employer and did not insure the employer on the date when the injury in fact occurred, the insurer properly rescinded its acceptance and denied further benefits.

Proof: Burden of Proof: Fraud. Where insurer seeks to rescind its acceptance of claim on account of fraud or misrepresentation, it bears the burden of persuading the Court that fraud occurred and that the fraud was material to the acceptance.

Proof: Burden of Proof: Rescission of Acceptance. Where insurer seeks to rescind its acceptance of claim on account of fraud or misrepresentation, it bears the burden of persuading the Court that fraud occurred and that the fraud was material to the acceptance.

Uninsured Employers' Fund: Generally. Where an insurer accepts liability based on the employer's misrepresentation of the date of injury and the employer was uninsured on the actual date of injury, the insurer is entitled to rescind its acceptance, in which event the Uninsured Employers' Fund and the employer are liable for benefits.

¶1 The trial in this matter was held in Billings, Montana on May 12 and May 13, 2003. The Uninsured Employers' Fund was represented by Mr. Daniel B. McGregor. Big Sky Petroleum, Incorporated was represented by Mr. Jeffrey A. Simkovic. The Montana State Fund was represented by Mr. Greg E. Overturf. The claimant was present and represented by Mr. R. Russell Plath.

¶2 Exhibits: Exhibits 1 through 18, 20 through 47, 51 through 55, 58, 59, 61 through 64, 67, 68, 70, and 73 through 79 were admitted without objection. Exhibit 19 pages 18-23 was objected to as untimely disclosed and admitted. Exhibits 48, 49, 50, 56, 57, 60, 65, 66, 69, 71, and 72 were objected to as irrelevant and admitted.

¶3 Witnesses and Depositions: Melvin J. Strong (claimant), David Derhak, Keith Flygare, Bernadette Rice, Bill Visser, and Kelly Stanley testified at trial. The parties also submitted the depositions of Melvin J. Strong, Donna Hall, Ron Hall, David Derhak, Keith Flygare, Toni Reinhardt, Sandy Adams, Judith I. Fagan, and Vickie Hirschi for the Court's consideration.

¶4 Issues Presented: The Pre-trial Order sets out the following issues:

> ¶4a Was Strong [claimant] injured on September 23 or September 25, 1997?
>
> ¶4b If Strong was injured on September 23, 1997, is the State Fund still liable for all benefits paid to date on this claim as a result of its failure to issue a 14 day notice of termination as mandated by 39-71-609, MCA?
>
> ¶4c Alternatively, if Strong was injured on September 23, 1997, is the State Fund still liable for all benefits paid to date as a result of due process violations associated with the revocation of its acceptance of this claim?
>
> ¶4d Alternatively, if Strong was injured on September 23, 1997, and the State Fund not otherwise liable, is Big Sky an "uninsured employer" statutorily responsible for reimbursing the UEF for all benefits paid on Strong's claim?

(Pre-Trial Order at 2-3.)

OVERVIEW

¶5 This case arises because of a disagreement over the date of the claimant's industrial accident. The fact of the injury is not in dispute.

¶6 The original date reported on the First Report of Injury, which was submitted by the employer and not signed by the claimant, was September 25, 1997. On that date, the claimant's employer was insured by the Montana State Fund (State Fund).

¶7 Based on the First Report of Injury listing the date of injury as September 25, 1997, the State Fund accepted liability for the injury and began paying the claimant benefits. However, the claimant thereafter informed the State Fund that his actual date of injury was

September 23, 1997. On that date, the employer was uninsured, thus, based on the information, the State Fund terminated payment of benefits.

¶8 Thereafter, the claimant submitted a claim for compensation setting out an injury date of September 23, 1997. On that date, Big Sky Petroleum, Incorporated (Big Sky), was uninsured. Therefore, the claim was sent to the Uninsured Employers' Fund (UEF). The UEF commenced paying benefits but did so under a reservation of rights. It thereafter brought this action against the employer and the State Fund seeking indemnification for the benefits it has paid.

¶9 This case turns on the credibility of various witnesses, especially the credibility of the claimant and his employers, David Derhak and Keith Flygare, who are the principal shareholders in Big Sky Petroleum, Incorporated.

COMMENT CONCERNING EXHIBITS

¶10 In reviewing the exhibits, I note that there is yellow highlighting of portions of certain exhibits. The highlighting was present when the exhibits were submitted: I have not highlighted anything. The highlighting does not affect my decision in this case.

¶11 Having considered the Pre-trial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶12 Big Sky is a corporation engaged in the business of supplying propane to customers in the Billings, Montana area. Big Sky provides and installs propane tanks to its customers and delivers propane. It also does repair work on propane appliances.

¶13 At the time of the claimant's industrial accident, Big Sky serviced a large area which included Columbus, Melstone, Forsyth, and Ashland, Montana.

¶14 Big Sky's owners are Keith Flygare (Flygare) and David Derhak (Derhak), who are brothers-in-law. They characterize themselves as "partners." It was clear to me from the demeanor of the two during their trial testimony that Flygare is the domineering partner.

¶15 In August 1995 Big Sky hired the claimant as its service manager. The claimant's job was to supervise other employees, to obtain new customers, and to respond to customer problems involving furnaces, water heaters, and gas appliances. He also did repair and installation work.

¶16 In September 1997 Big Sky furnished the claimant with a 1997 Ford F-150 pickup to use in his work.

¶17 The claimant suffered an industrial accident while changing a tire on his employer's 1997 Ford pickup. He was returning from a job trenching a propane line in Shepherd, Montana. The trenching was on the property of Shad Lobdell.

¶18 The claimant testified that he picked up the ditch witch used for trenching from Big Sky's yard between 2:30 and 3:00 p.m. and drove to the Lobdell place, which was approximately three miles away. It took him approximately thirty minutes to dig the trench from the place where the propane tank was to be located to the house.

¶19 After reloading the ditch witch he noticed that the passenger side rear tire was flat. The spare tire on the truck was located underneath the truck towards the back. It had to be lowered from its place on the underside of the truck using a crank that threaded through the bumper. After using the crank to lower the spare tire, the claimant crawled under the truck to release and retrieve the tire. There was insufficient room for him to manipulate the tire from underneath the truck, so he got out from under the truck and jacked it up. He then got back underneath the truck to get the tire. While underneath the truck, the jack slipped and tilted or fell. The tire and/or truck struck him in the neck and back.

¶20 Prior to the accident the claimant had a history of back problems, including lumbar surgery with L4-S1 fusion. (Ex. 38 at 1.) Medical records subsequent to his September 1997 accident indicate he aggravated his preexisting back condition.

¶21 The fact of the accident is not in dispute. Indeed, in the First Report of Injury filed by the employer, the employer indicated it did not question the accident. (Ex. 1.) Although the report was signed by Derhak, it states that it was prepared by Flygare. (*Id*.) Thus, neither of the principals questioned the accident at the time of the report. The First Report of Injury was not signed by the claimant.

¶22 The First Report of Injury lists the date of claimant's injury as September 25, 1997. The claimant subsequently asserted the injury occurred on September 23, 1997. On September 23, 1997, Big Sky's workers' compensation had lapsed - it was uninsured. Its insurance was reinstated on September 25, 1997. The date of the accident is therefore critical. If the accident occurred on September 23rd, then the UEF and Big Sky are liable for benefits. If it occurred on September 25th, the State Fund is liable.

¶23 The evidence concerning the date of the accident is conflicting and hotly contested. In his first post-accident medical visit, the claimant reported that the accident had occurred on September 25, 1997. That visit was on October 6, 1997, with Dr. James T. Lovitt, an orthopedic physician who had seen the claimant previously. In his office note of October 6, 1997, Dr. Lovitt wrote:

> Mr. Strong is back with another injury. He is working for Big Sky Petroleum. On **September 25**, he had a flat tire on his truck. He jacked up the truck and was having trouble getting the spare tire down and then the truck came off the jack and hit him.

> H was leaning forward squatting on his knees. He was by himself. He said it "stunned me". He said he had a hot spot in his neck, headache on the top of his head and his back and right leg were painful with a burning discomfort in the right leg, in the buttock, posterior thigh, posterior calf and no left sided symptoms.
> He changed the tire himself and went on into town, had the flat fixed and went into the office.
> He has been working since, likes his work and wants to continue his work.

(Ex. 38 at 2, emphasis added.)

¶24 However, on April 27, 1998, Dr. Lovitt recorded the date of claimant's injury as September 23, 1997. (*Id*. at 9.)

¶25 Meanwhile, on October 6, 1997, Flygare called in a report of the accident to the State Fund. The State Fund prepared a typewritten report of the accident and forwarded it to Big Sky. The date of injury typed in on the original form was September 26, 1997, however, Derhak crossed out that date and inserted September 25, 1997. He signed the amended form on October 10, 1997, and returned it to the State Fund. (Ex. 1.)

¶26 As noted earlier, on September 23, 1997, Big Sky's workers' compensation insurance had lapsed. Judith Fagan (Fagan), Big Sky's bookkeeper at the time, testified she went on vacation on September 24th and that the day before - the 23rd - she discovered a State Fund premium invoice which had not been paid. She testified that Derhak opened the mail and had not provided the invoice to her. According to Fagan, she worked up the information necessary to pay the premium and left it for Flygare and Derhak to pay. She testified that neither Flygare nor Derhak were at work on September 23, 1997, rather they were in North Dakota.

¶27 Flygare and Derhak discovered the invoice on September 24, 1997, and claim that it was Fagan who overlooked the invoice. They fired Fagan when she returned from vacation. They also denied being absent from work on September 23rd. In his testimony Derhak said they had been in North Dakota earlier that month. He provided an itinerary of his work on September 23rd. That itinerary, however, was prepared two days before his deposition on January 16, 2003, and was obviously prepared for purposes of this litigation.

¶28 Flygare and Derhak FedEx'd the premium to the State Fund on September 24th, 1997, resulting in reinstatement of workers' compensation insurance as of September 25, 1997.

¶29 Derhak and Flygare testified that they did not learn of the claimant's industrial accident until October 6, 1997. However, the date recorded on the First Report of Injury as to when the claimant notified Big Sky of his injury was September 29th, not October 6th. Derhak, who signed the report on behalf of Big Sky, changed the reported injury date from September 26, 1997 to September 25, 1997. He could not explain the September 29th date. The discrepancy is significant in assessing Derhak's and Flygare's credibility.

¶30 When Big Sky reported the claimant's injury, both Derhak and Flygare were aware that their insurance had been reinstated effective September 25, 1997.

¶31 Derhak testified that the claimant did not initially report a date of injury and that he (Derhak) was the one who suggested that the claimant was injured on September 25, 1997. At the time of his suggestion, he was aware of the lapse in insurance and its reinstatement as of the 25th.

¶32 The State Fund accepted liability for the claim. While a November 10, 1997 note of the State Fund's field claims adjuster indicates she took a recorded statement from the claimant, the claimant did not recall any recorded statement ever being taken and the State Fund has been unable to find either a tape recording or transcript of any such statement. The existence of a statement is important only if the claimant specifically informed the adjuster that the date of his injury was September 25th rather than September 23rd. However, even if he did so, such statement would not be critical to my decision in this case in light of my finding of probable collusion between the employer and the claimant at the time the claim was initially filed.

¶33 On July 7, 1998, Vickie Hirschi, a field investigator for the State Fund, personally met with the claimant and took a recorded statement from him. In that statement, the claimant identified the date of his injury as September 23, 1997. At the time of the statement the claimant was continuing to work for Big Sky, although it appears that there was friction between him and Flygare, who believed he was malingering. Of some note, the interview was two and one-half months after Dr. Lovitt reported the claimant's date of injury as September 23, 1997. (See ¶ 24.)

¶34 In August 1998 the claimant was no longer able to work and the State Fund began paying temporary total disability benefits based on the September 1997 injury.

¶35 Thereafter, the State Fund conducted a fraud investigation and concluded the date of injury was in fact September 23, 1997. Based on that conclusion, on October 28, 1998, it decided to terminate further benefits with respect to the claim. In the meantime, the claimant had suffered a work-related shoulder injury, for which a separate claim had been filed and accepted. By October 1998 that injury was also disabling. On November 2, 1998, the State Fund wrote the claimant a letter notifying him that it had been determined his employer was uninsured at the time of his September 1997 back injury and suggesting he file a claim with the UEF. (Ex. 4.) However, in light of the claimant's disability from his shoulder, the letter also stated that the State Fund would "continue paying your wage loss benefits for the injury to your shoulder . . . until such time as you are released to return to work, do return to work or rehabilitation needs have been determined." (*Id*.)

¶36 Thereafter, the claimant submitted a claim for his September 1997 back injury, giving September 23, 1997, as the date of his accident. (Derhak Dep. Ex. 17.) The claim was

routed to the UEF since Big Sky was uninsured on September 23, 1997. The UEF agreed to pay benefits to the claimant under a reservation of rights. It thereafter brought this action to determine liability.

¶37 This case is essentially a swearing contest between the claimant, on the one hand, and Derhak and Flygare, on the other. My decision therefore rests on my ultimate assessment of the credibility of these witnesses. In assessing credibility, I have relied on my own perception of these witnesses' testimony at trial. As always, however, I have looked to exhibits and deposition testimony for confirmation, or lack thereof, of my credibility impressions.

¶38 Initially, I note that both sides have a motive to lie about the date of the injury. The motive of the employer, however, seems stronger, as it was uninsured on September 23, 1997, and the claimant could have continued to collect benefits from the State Fund simply by going along with the employer's assertion that the injury occurred on September 25, 1997. On the other hand, there was a falling out between the employer and the claimant after the injury, raising the possibility that the claimant is retaliating for what he perceives as mistreatment by his employer. If the September 23, 1997 date is accepted, the claimant could also benefit financially since he could receive benefits from the UEF and also have a tort action against the employer. However, there is no evidence that the employer has deep pockets, and indeed there is evidence suggesting to the contrary is true. In any event, I merely recognize that both parties have a motive to lie and do not decide this case on that basis.

¶39 In assessing the testimony at trial, I found the claimant the more credible of the three witnesses. I was especially unimpressed by Flygare's testimony, and am convinced he orchestrated the September 25th date of injury to avoid liability by Big Sky. I have previously noted that Flygare was the *domineering* partner in Big Sky, and I meant that comment in its literal sense. It was apparent to me that he calls the shots for Big Sky.

¶40 In looking for independent confirmation of my impressions, I looked to exhibits and the deposition testimony and statements of other witnesses. Initially, I note that Big Sky has tendered a slew of exhibits, including an itinerary of Derhak for September 23, 1997, and various purchase orders and receipts as support for its contention that the accident occurred on September 25, 1997. I was unimpressed by the tendered exhibits. Derhak's itinerary was prepared two days before his deposition on January 16, 2003. The various purchase orders and receipts were not conclusive. The time of their preparation was in dispute in some cases. In others, the claimant's involvement was in dispute. In yet others, the records were prepared in whole or in part by others.

¶41 The record of mileage driven by the claimant on September 23, 1997 (393 miles), is also inconclusive as it includes his mileage from his home, which is approximately an 80-

mile round trip from Big Sky's place of business.[1] It also does not take into consideration the fact that the Lobdell trenching job required only thirty minutes.

¶42 The most important and persuasive documentation was a Tire-Rama receipt for tire repair. (Ex. 17.) The receipt is dated September 23, 1997, and there is no evidence that the date was falsified. It was filled out by the manager of Tire-Rama. It states that the right-rear tire of a Ford pickup was repaired and replaced. The receipt specifically notes that the repaired tire was installed on the right rear of the pickup and torqued to one-hundred pounds. Ron Hall, the manager of Tire-Rama who wrote the receipt, testified that one-hundred pounds of torque is the proper torque for a 1997 Ford pickup, which is the model the claimant drove for Big Sky. The receipt is totally consistent with the claimant's report of a flat tire on the right rear of his truck.

¶43 The suggestions of Big Sky's attorney that the receipt was falsified to conceal a repair of a tire on the claimant's personal vehicle is utterly without merit and is scandalous. There is no indication of collusion between Ron Hall, the manager of Tire-Rama, or his wife, who was the bookkeeper for Tire-Rama, and the claimant. The receipt indicates the right-rear tire was in fact put back on the pickup, which contradicts Big Sky's suggestion that a tire from the claimant's personal vehicle was repaired and given back to him. Big Sky suggests that the "Che" originally written in by Ron Hall indicates that the repair was for a tire on a Chevy truck not a Ford truck. The claimant owned a GMC truck, not a Chevy, and the "Che" indicates that Ron Hall immediately recognized a mistake and corrected it. Moreover, a purchase order number was obtained by telephone from Fagan, Big Sky's bookkeeper. In his deposition examination of Fagan, Big Sky's attorney suggested that she conspired with claimant to enable him to steal from his employer by getting a tire for his personal pickup fixed at the expense of Big Sky. (Fagan Dep. at 41.) To credit the suggestions, I would have to conclude that the claimant, Fagan, Donna Hall, and Ron Hall all conspired to charge a personal, ten dollar tire repair by the claimant to Big Sky. Given the facts of this case, the suggestion is not only outrageous, it is beyond the bounds of legitimate advocacy.

¶44 The deposition testimony of both Fagan and Toni Reinhardt (Reinhardt) also supports my conclusion that the claimant is telling the truth as to the date of his injury. Fagan recalled that the claimant reported he was injured on her last day of work prior to her vacation. That last day of work was on September 23, 1997. Reinhardt testified as to her specific recollection of an incident at work on the morning of September 25, 1997, and recalled that the claimant had reported his injury prior to that time. (Reinhardt Dep. at 22-26.) She also testified that after the claimant's injury Flygare picked on the claimant. (*Id*. at 15.) Vickie Hirschi interviewed Reinhardt on July 23, 1998. At that time, Reinhardt was still working for Big Sky and specifically requested that her involvement be kept to a minimum. (Ex. 25 at 14.) Importantly, she told Hirschi that

> since Melvin's [claimant's] injury Keith [Flygare] has been after him. He is just obsessed with Melvin and this injury.

(*Id*.) My impression of Flygare is consistent with Reinhardt's testimony.

¶45 Flygare and Derhak testified that upon learning of the lapse of insurance on the morning of September 24th, they shut the business down. The mileage for the claimant on that day tells a different story, showing that he drove 417 miles that day. (Ex. 18.) Moreover, another exhibit shows numerous deliveries by another employee on the 24th. (Ex. 31 at 19 and *see also* Ex. 31 at 18 and 20.) While it is possible Flygare and Derhak shut the business down and that the deliveries were made before they were able to do so, I am unconvinced. They have produced no wage or time records for hourly employees that support their assertion. (Ex. 31 at 19.)

¶46 My biggest dilemma in deciding this case concerned a report filled out and signed by the claimant on July 17, 1998, in connection with a visit to Dr. Steven J. Rizzolo for his shoulder injury. (Ex. 60 at 7; Ex. 79.) For the date of the shoulder injury the claimant wrote "1st week June 89" but then corrected the year to 98. (*Id*.) I find no significance in the mistake and correction.

¶47 However, in the portion concerning his injury, the following information is handwritten:

> 9/25/97 - Hit by spare tire in neck. Herniated Disc.
> Working with a Trencher. Burning Pain on left shoulder. Down arm.

(*Id.,* capitalization in original.*)* The claimant testified that he did not write in the first line as quoted above. He did write the second line. He also testified that other portions, including a claim number, were not written by him. The writing which claimant testified was his is highlighted in yellow on Exhibit 79.

¶48 No handwriting expert was called, but in examining the handwriting I note discrepancies between the writing claimant admits doing and the writing he denies doing. There is a definite difference between the "D's." The "7's" and "S's" also appear distinctly different. The "T's" are especially different - The claimant used a capital "T" in his writing; the writing which he disavows uses lower case "T's." There are sufficient differences in the writing to convince me that some of the information on the form was recorded later by someone other than the claimant.

¶49 The information written in later - which is that information not highlighted in yellow in Exhibit 79 - included information concerning the employer, the workers' compensation insurer, and the claim number. It thus appears, and I infer, that the workers' compensation claim information was filled in later by the medical provider, based on information gleaned elsewhere. The September 25th date is consistent with the claim information then on file with the State Fund.

¶50 Moreover, it makes no sense that the claimant would report a September 25th injury date after giving a recorded interview on July 7, 1998, in which he insisted he was injured on September 23rd. I find it more likely that the medical provider contacted the State Fund for the information.

¶51 I therefore find that the industrial injury at issue in this case in fact occurred on September 23, 1997, when Big Sky was uninsured.

¶52 On the other hand, I find that the September 25th date set out in Dr. Lovitt's October 6, 1997 office note is more than coincidence. (Ex. 38 at 2.) It is unlikely that Dr. Lovitt conjured up the date. On October 6th the claimant was aware of the lapse of insurance and I find it likely that at that time he colluded with his employer in fixing an injury date to correspond with the date the insurance was reinstated.

CONCLUSIONS OF LAW

¶53 This case is governed by the 1997 version of the Montana Workers' Compensation Act since that was the law in effect at the time of the claimant's industrial accident. *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶54 The State Fund accepted liability for the claimant's September 1997 injury. It cannot escape liability for that claim unless there is a legal basis for doing so.

¶55 Fraud is a clear basis for relieving it of liability. Section 45-7-501, MCA, provides that an employer who knowingly or purposely fails to provide workers' compensation insurance coverage for its employees or misrepresents or falsifies employment records or information commits a criminal offense. Section 45-6-301(5), MCA, provides that an employee who fraudulently obtains workers' compensation is guilty of the crime of theft. As a matter of civil liability, a party who has been defrauded is entitled to rescind any agreement which was fraudulently induced. *Harrington v. Holiday Rambler Corp.,* 176 Mont. 37, 575 P.2d 578 (1978). Thus, the State Fund is entitled to rescind its acceptance for the claimant's September 1997 injury and seek reimbursement for what it has paid to the claimant.

¶56 In disavowing the claim, the State Fund bears the burden of persuading me that the claim was fraudulent. It has satisfied that burden. I have found by a preponderance of the evidence that the September 25, 1997 date tendered by Big Sky was fraudulent and that in fact the claimant's accident occurred on September 23, 1997.

¶57 The State Fund is not liable for any benefits. The fraud in this case vitiates the acceptance. Moreover, by apprizing the State Fund of his actual date of injury the claimant effectively withdrew his claim against the State Fund. He effectively agreed to the rescission of the acceptance. The UEF's argument that the State Fund should be liable for benefits paid or for further benefits on account of its failure to give a fourteen-day notice to the claimant is logically and legally unsound. The fourteen-day notice of termination of

further benefits was unnecessary since fraud vitiated the acceptance. Moreover, adoption of the UEF's argument would simply perpetuate the fraud. Such perpetuation is plainly against public policy.

¶58 Since Big Sky was uninsured at the time of the claimant's September 23, 1997 industrial accident, the UEF is liable to the claimant for all benefits paid or due claimant, including the benefits advanced by the State Fund. Section 39-71-508, MCA (1985-1997), provides in relevant part:

> **39-71-508. Coordination of remedies**. An employee who suffers an injury arising out of and in the course of employment while working for an uninsured employer as defined in 39-71-501 or an employee's beneficiaries in injuries resulting in death may pursue all remedies concurrently, including but not limited to:
>
> (1) a claim for benefits from the uninsured employers' fund;
>
> . . .

¶59 The UEF is entitled to indemnification from Big Sky for all benefits paid to or due the claimant. Section 39-71-504(1)(b), MCA (1997-2001), provides:

(b) The fund [UEF] shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to an injured employee of the uninsured employer.

From its recovery from Big Sky, the UEF shall reimburse the State Fund for benefits the State Fund paid the claimant, however, I do not determine here the extent of the reimbursement in the event the actual recovery from Big Sky is insufficient to cover all benefits paid claimant. The UEF is a "safety net." *Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund,* 2001 MT 72, 22, 305 Mont. 40, 23 P.3d 193 (2001) (citing *Thayer v. Uninsured Employers' Fund,* ¶ 24, 297 Mont. 179, 991 P.2d 447). That fact may or may not affect the State Fund's right to recovery in the event the UEF is unable to obtain full repayment from Big Sky. Since recovery may be complete, I need not address the issue at present and reserve ruling on the matter.

JUDGMENT

¶60 The claimant's industrial accident occurred on September 23, 1997. At that time the employer, Big Sky Petroleum, Incorporated, was uninsured. The UEF is therefore liable for benefits and shall pay all benefits related to that industrial accident. In turn, Big Sky Petroleum, Incorporated is liable to the UEF for all benefits, including the benefits originally advanced by the State Fund. I have not determined the amounts due. I reserve jurisdiction to do so in the event the parties are unable to do so.

¶61 Since the claim for benefits filed with the State Fund was fraudulent, it was entitled to rescind its acceptance. It is not liable for any benefits paid or due the claimant. As a general matter, it is also entitled to indemnification and reimbursement from the UEF and,

indirectly, from Big Sky. However, the Court makes no determination at present as to whether and when the UEF must repay the State Fund if it is unable to fully recover from Big Sky. The Court retains continuing jurisdiction to determine that matter in the event it becomes necessary to do so.

¶62 This JUDGMENT is certified as final for purposes of appeal.

¶63 Any party to this dispute may have twenty days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 29th day of April, 2004.

(SEAL)

\s\ MIKE McCARTER
JUDGE

c: Mr. Daniel B. McGregor
Mr. Kevin Braun
Mr. Jeffrey A. Simkovic
Mr. Greg E. Overturf
Mr. R. Russell Plath
Submitted: June 19, 2003

1. The claimant testified that he thought the distance was eighty miles one way but a quick review of highway maps indicates it is only about forty miles one way.