IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2000 MTWCC 16

WCC No. 9906-8248

**AUTO PARTS OF BOZEMAN, INCORPORATED,
A MONTANA CORPORATION,**

Appellant,

vs.

EMPLOYMENT RELATIONS DIVISION, UNINSURED EMPLOYERS' FUND,

Respondent.

DECISION AND ORDER ON APPEAL

APPEALED

Summary: Employer appealed from Department of Labors determination that it lacked insurance and assessment of penalty.

Held: Workers Compensation Court reversed Departments determination where Department relied on records of State Compensation Insurance Fund regarding existence of insurance without separate inquiry into whether policy was in effect. **Note:** this decision was reversed by the Montana Supreme Court in *Auto Parts of Bozeman v. ERD*, 2001 MT 72, 305 Mont. 40, 23 P.3d 193.

1 This is an appeal by Auto Parts of Bozeman, Incorporated (Auto Parts) from findings of fact; conclusions of law; and final order of the Department of Labor and Industry (Department) determining that Auto Parts was an uninsured employer during the period February 1, 1996 to April 22, 1996, and assessing a penalty of $2,675.96. For the reasons set out below, the Department's decision is **reversed**.

Record on Appeal

2 The record on appeal consists of the transcript of the hearing and the Department file, including the exhibits admitted at the hearing.

Factual Background

3 Beginning March 8, 1993, Auto Parts maintained workers' compensation insurance with the State Compensation Insurance Fund (State Fund). (Uninsured Employers' Fund Exhibits, hereafter "UEF Exs.", 2-3.)

4 On January 8, 1996, State Fund issued a "Cancellation Notice" of the policy for failure to pay an advance premium of $879.34. (Auto Parts Exhibit, hereafter "AP Ex.", 1.) The Notice referenced a "due date" of January 1, 1996, and a "pending cancellation date" of February 1, 1996. (*Id.*) Printed language on the Notice stated:

> We will cancel your policy at 12:01 a.m. on the pending cancellation date(s) shown below unless each item is received by its respective pending cancellation date. We will not accept claims occurring on or after the pending cancellation date(s) unless we receive each item by its pending cancellation date.
>
> . . . .
>
> Once your coverage is cancelled, we must reveive [sic] all delinquent reports, amounts due, a new application, and sufficient advance premium or deposit to initiate new coverage. THERE WILL BE A LAPSE OF COVERAGE FROM THE CANCELLATION DATE TO THE NEW POLICY EFFECTIVE DATE.
>
> The Department of Labor and Industry's Uninsured Employer's Fund receives information concerning all cancellations of coverage. You are subject to fines, penalties and court action if you have not complied with coverage requirements under the Workers' Compensation Act.

(*Id.*)

5 On February 5,1996, State Fund issued and apparently sent out a "Premium Report" for Auto Parts. The report, as completed by Auto Parts later on, is found at UEF Exhibit 3. The following language appears at the top left of the report just above the insured's name and address: "IMPORTANT NOTICE. Your policy will be cancelled if this report and payment are not received in our office within 30 days of the DUE DATE." Next to the phrase, "DUE DATE," the word "IMMEDIATELY" is printed. However, further down on the form, after the words "POLICY STATUS," the word "CANCELLED" is typed in. Finally, approximately two-thirds of the way down the legal-size page, the following language is printed:

> IMPORTANT NOTICE: YOUR POLICY WAS CANCELLED ON 02/01/96. ONCE COVERAGE IS CANCELLED, ALL REPORTS, PREMIUMS AND OTHER AMOUNTS DUE MUST BE SUBMITTED TO CLOSE YOUR ACCOUNT. A NEW APPLICATION MUST BE SUBMITTED TO RE-ENROLL.

(UEF Ex. 3 at 1.)

6 Included with the report was a payroll form for the insured to provide information concerning actual wages paid to employees for the period July 1, 1995, through January 31, 1996. (*Id*.) A handwritten "authorized signature" indicates the payroll report was completed by Florine Thorson, a bookkeeper for Auto Parts, on April 19, 1996. (*Id*.) Based on the payroll information, premium calculations were written in on the report form. (*Id*. at 2.)

7 Meanwhile, Auto Parts' President, Richard Lewis (Lewis), wrote a check dated January 31, 1996, to State Fund for the $879.34 advance premium as set out in the January 8 Notice.[(1)] (UEF Ex. 2; Tr. 43.) Lewis testified the check was not mailed until "a later date." (Tr. 43). The State Fund recorded the check as received on February 21, 1996. (AP Ex. 15.) The State Fund cashed the check. (*See* AP Ex. 18.) Lewis testified that since the check was cashed he believed Auto Parts' workers' compensation coverage continued. (Tr. 43.)

8 Contrary to Lewis' belief, the State Fund credited the payment to additional premiums which were due for pre-January 1, 1996 periods, and took the position that the policy was canceled. In September 1996, Kristy Gilbert, an underwriting services supervisor for State Fund, wrote: "We received the advance premium for January 1, 1996 through March 31, 1996, 51 days late. Since the canceled policy was not yet fully reconciled, we credited the payment to the canceled policy." (AP Ex. 15.) But, as far as the Court can ascertain from the record on appeal, the State Fund did not give notice of its application of the check to the prior policy period. (*See* UEF Ex. 4 and AP Ex. 15.)

9 Ultimately, the policy was reinstated effective April 23, 1996. Gilbert, in her September letter, provided the following history of the account:

> 12/11/95 We billed your client for their advance premium in the amount of $879.34 for the January 1, 1996 through March 31, 1996 quarter. This payment was due on January 1, 1996.
>
> 1/8/96 We mailed a cancellation notice stating this payment had to be received in our office by February 1, 1996, in order to prevent cancellation of the policy.
>
> 2/1/96 The policy was canceled due to non-receipt of the advance premium.
>
> 2/9/96 We mailed out a cancellation letter informing the policyholder their policy was canceled and that if they submitted all reports and premiums for the policy period and they desired coverage again, they should contact our office. We enclosed their payroll report form to report actual wages for the coverage period of July 1, 1995 through January 31, 1996.
>
> 2/21/96 We received the advance premium for January 1, 1996 through March 31, 1996, 51 days late. Since the canceled policy was not yet fully reconciled, we credited the payment to the canceled policy.

4/10/96 In order to fully reconcile and finally close the account, State Fund estimated payroll for the period of July 1, 1995 through January 31, 1996, since the report was never received. This resulted in a premium billing on April 18, 1996, for $3465.52.

4/17/96 We received a call from Florine Dorsin [sic] of Auto Parts of Bozeman requesting a duplicate report for July 1, 1995 through January 31, 1996. She stated she never received the other report.

4/18/96 We received a call from Dick Lewis of Auto Parts of Bozeman regarding the re-enrollment. He stated that during January he was in the process of firing one bookkeeper and hiring another one. He also stated the old bookkeeper didn't mail the old workers' compensation check and they found it in the middle of February, 1996, and mailed it. Although the policy had already been canceled, he thought the policy was still in force because we accepted the check. He stated he would call in the actual wages for July 1, 1995 through January 31, 1996. He also stated there had been an injury and that is when he found out he was canceled.

4/22/96 We mailed the policyholder a new application to re-enroll with a cover letter stating that we had established a pending effective for the date their prior policy was brought up-to-date [sic]. On this day, we also received their actual wages over the phone, however, there was still additional premium due.

4/23/96 We received the additional premium, therefore, April 23, 1996, became the pending effective date for their re-enrollment.

5/2/96 We received the application for re-enrollment.

5/16/96 We billed for the initial advance premium. This payment was due on or before June 6, 1996, in order to establish the April 23, 1996 pending effective date.

5/31/96 We received the initial advance premium, therefore, April 23, 1996 was the effective date of the re-enrollment.

(AP Ex. 5 at 1-2; UEF Ex. 7at 1-2.)

10 Meanwhile, on April 8, 1996, Newman Hoff, an employee of Auto Parts, was injured while working for Auto Parts. (UEF Ex. 1.) Auto Parts completed an "EMPLOYER'S FIRST REPORT OF Notice of Occupational Injury or Disease" and forwarded it to the State Fund, which received the report on April 15, 1996. (*Id.*)

11 The Employer's First Report of Injury was forwarded to the UEF, which began investigating insurance coverage. (Tr. 8.) Lacey Culver (Culver), an auditor for the UEF, checked both a national workers' compensation insurance database (NCCI) and a State

Fund database: Both reflected cancellation of Auto Parts' policy on February 1, 1996, and reinstatement on April 23, 1996. (Tr. 10-11; UEF Ex. 3.)

12 UEF determined that Auto Parts was uninsured from February 1 through April 22, 1996. In doing so, it relied on the information provided by the State Fund to the two databases. Culver testified that she was not aware of the information upon which State Fund relied in deciding the policy was canceled. (Tr. at 19-20, 24.) UEF records also contain a short note dated May 6, 1996, stating, "Spoke to Dick Lewis (owner); says uninsured." (AP Ex. 7.) Lewis recalled a conversation around May 6 with someone at the UEF. He testified: "The question was posed, do you have other insurance than the state work comp? And told her that we did not. So [they] interpreted to say that I was not insured, or that I had said that I was uninsured. We felt we were insured by work comp, State Fund." (Tr. at 48.)

13 Culver testified that the UEF would not have issued a penalty if State Fund had decided "that the policy will be back dated." (*Id.* at 37.) She testified:

> [T]hey never back dated the policy so that there was not a lapse in coverage and sometimes that will happen not only with State Fund but with other insurance companies that through a review that it would be discovered that there were extenuating circumstances or there was an error on the part of the insurance company and the policy will be backdated without a lapse in coverage. When that happens, obviously, the UEF would no longer be involved because the only time that UEF is involved is when there is an uninsured period.

(*Id*. at 12.) Culver further testified that had the State Fund determined it had made an error and there was no uninsured period, no penalty would have been assessed:

> Had they changed their position and said there was an error we are going to backdate this policy, then UEF would not have assessed a penalty, or the penalty would have gone away because there wouldn't have been a period of time that they were uninsured and because they didn't do that it just reaffirms that they, that there was an uninsured period.

(Tr. at 14-15.) However, Culver did not consider Auto Parts' position, asserted below and in this appeal, that the State Fund's acceptance of its $879.34 check reinstated coverage effective February 1, 1996. She testified she did not know if the premium was timely "because I don't know State Fund's procedures so I can't answer that question." (*Id*. at 31.) She testified that she was unable to determine whether the policy had been properly canceled, going on to say, "**The insurance company is the one that has to make that determination**." (*Id.* at 38; emphasis added.)

The February 4, 1998 Department Order

14 Faced with a penalty and a claim for indemnification for medical bills paid by the UEF for Newman Hoff, Auto Parts requested a contested case hearing before the Department to contest the State Fund's "action of cancelling Petitioner's workers' compensation insurance policy." (AP Ex. 18.) The request was dismissed for lack of jurisdiction. The Department's hearing officer wrote:

> On February 1, 1996, Respondent cancelled Petitioner's workers' compensation insurance policy when Petitioner failed to pay premium when due. Procedures governing payments from the insured and cancellation are set forth in the contract of insurance between the parties. The contract specified that the District Court, Lewis and Clark County, has jurisdiction to hear any suits brought under the policy. This matter is one in which Petitioner seeks a remedy or enforcement of a right founded in the contract or insurance law.

(February 4, 1998 Order at 2.) The hearing officer concluded the dispute did not fall under the Department's contested case function and dismissed the appeal "for lack of subject matter jurisdiction." (*Id*. at 3.) Auto Parts did not appeal the Order.

The May 26, 1999 Department Decision

15 In a second proceeding, Auto Parts appealed a "penalty assessment issued on August 12, 1996 by the Uninsured Employers' Fund (UEF)." (Findings of Fact; Conclusions of Law; and Final Order dated May 26, 1999 at 1.) The appeal went to hearing on October 29, 1998.

16 The issues, as stated by the hearing officer, were as follows:

> 1. Did the UEF correctly exercise its regulatory functions by assessing a penalty against Appellant [Auto Parts of Bozeman, Inc.] for failure to carry workers' compensation coverage during the period of February 1, 1996 until April 22, 1996?
>
> 2. Is the UEF entitled to recover the amounts it has expended, and may continue to expend, for the medical bills of Mr. Newman (Joseph) Hoff, who was employed by Appellant and who incurred a work-related injury during the uninsured period referenced above?

(*Id*. at 2.) After stating the issues, the hearing officer found that the UEF had carried its burden of proof by checking the two insurance reporting databases and ascertaining that the State Fund denied coverage and refused to backdate its policy. He concluded that Auto Parts was liable for the penalty and must reimburse the UEF for benefits it paid to Hoff.

17 The hearing officer refused to consider Auto Parts' contention, based on the State Fund's notices and its cashing of the $879.34 check, that it was in fact insured by the State Fund between February 1 and April 22, 1996. The hearing officer's refusal to consider the contention was in part based on his view that the contention was barred by the Department's February 4, 1998 Order. He noted:

> Auto Parts maintains that State Fund improperly cancelled its policy and that the UEF improperly relied on a customer service review conducted by the State Fund which concluded the State Fund followed the proper procedures concerning cancellation and re-enrollment.
>
> Auto Parts attempted to challenge the State Fund's cancellation of its workers' compensation policy in a collateral proceeding. On February 4, 1998, Department Hearing Officer Stan Gerke determined that the Department lacked subject matter jurisdiction over the contractual dispute between the State Fund and Auto Parts. Auto Parts did not appeal that decision to the Workers' Compensation Court.

(*Id*. at 6-7.) The hearing officer then characterized the contention as a collateral attack on the earlier Order:

> Auto Parts continued to engage in collateral attacks on the State Fund. Auto Parts' proposed findings numbers 1 through 16 expound its complaints against the State Fund. Auto Parts' proposed conclusion of law number 66 attempts to argue what the State Fund may or may not lawfully do. Auto Parts' proposed conclusion number 77, that it was insured at all times, flies in the face of unrefuted evidence.
>
> These arguments and the lack of subject matter jurisdiction over Auto Parts' dispute with the State Fund were earlier concluded to be beyond the purview of the Department. Likewise, Culver had no authority to speak for, or interpret any policies or actions of the State Fund. The attempts by Auto Parts to blur the distinction between the Department and the State Fund were not persuasive. The failure by Auto Parts to pursue an appeal of the Department's February 4, 1998 order to the Workers' Compensation Court is fatal to its claims here.

(*Id*. at 8-9.)

18 The hearing officer also viewed the company's contention as asserting that the State Fund had "improperly influenced" the UEF determination. He answered:

> The UEF made its determination that Auto Parts was uninsured on August 12, 1996, before the State Fund conducted its customer service review. There is no evidence the State Fund improperly influenced the UEF determination. Even if it did, it is irrelevant to the question of whether Auto Parts was uninsured.

(*Id*. at 7.)

Issues on Appeal

19 The notice of appeal filed in this Court states the following issues:

> 1. Whether the Department erred in its adoption of the issues to be determined, to wit; whether the UEF had the burden to establish that Auto Parts was uninsured and

that the State Fund's practice of accepting advance premium payments without binding coverage is legal before it may proceed to assess a penalty [or] collect for moneys they have expended;

2. Whether Auto Parts had valid Workers' Compensation insurance in effect at all times in question;

3. Whether Auto Parts was properly insured because the State Fund received and accepted their advance premium payment and therefore is prohibited from canceling the policy of insurance;

4. Whether the damages claimed by the UEF are supported by evidence in the record;

5. Whether the procedures utilized by the UEF/State Fund/Montana Department of Labor in this proceeding have deprived Auto Parts of due process of law in violation of Montana Constitution and the United States Constitution.

6. Auto Parts further asserts that the UEF/State Fund and/or the Montana Department of Labor has brought or defended this action frivolously or in bad faith thereby subjecting them to liability for Auto Part's costs and attorney's fees pursuant to MCA 25-10-711.

(Notice of Appeal at 1-2.)

Standard of Review

20 Section 39-71-204 (3), MCA, provides that "[i]f a party is aggrieved by a department order, the party may appeal the dispute to the workers' compensation judge."

21 The Workers' Compensation Court reviews the Department's decisions under the standards of review set forth in the Montana Administrative Procedure Act, 2-4-101, et seq., MCA. *Dahl v. Uninsured Employer's Fund,* 1999 MT 168, 983 P.2d 363. The scope of judicial review is governed by section 2-4-704, MCA, which 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;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(b) because findings of fact, upon issues essential to the decision, were not made although requested.

22 Although an agency's findings of fact are reviewed under a "clearly erroneous" standard, the agency's conclusions of law are subject to plenary review to determine whether they are correct. *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). "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.

Discussion

23 Although Auto Parts sets forth several issues, two of the issues are dispositive, those being the allegations that the burden of proof was improperly shifted to Auto Parts and that the proceedings below denied Auto Parts its right to due process of law. In light of Auto Parts' success on those issues, its request for attorney fees and costs is also addressed.

I. Burden of Proof and Due Process

24 Both the penalty and the UEF's claim for reimbursement are governed by section 39-71-504(1), MCA (1995), which provides:

> (1) 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 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. [Emphasis added.]

An uninsured employer is defined as "an employer who has not properly complied with the provisions of 39-71-401." 39-71-501, MCA (1995). In turn, the "provisions of 39-71-401" simply require that any employer subject to the Act be insured under plan 1, 2, or 3 of the Act, plan 3 being the State Fund.

25 One of the issues below concerned the burden of proof. The hearing officer determined:

> The UEF bore the burden of proof to go forward and make a prima facie showing that Auto Parts was an uninsured employer for the time in question, that it properly calculated the penalty assessed, and that it had expended medical payments of [sic] behalf of Auto Parts' employee Newman Hoff, who sustained an injury while Auto Parts was uninsured. (39-71-501, MCA; Loney v. Uninsured Employers' Fund, WCC No. 9305-6788, December 12, 1993; aff, C. Loney Concrete Construction, Inc. v. Uninsured Employers' Fund, 1998 MT 230, ____ Mont. ____, ____ P.2d ____ (1998).)
>
> The UEF met its burden of proof in this case by establishing that Auto Parts had been uninsured. The UEF did so by demonstrating its use of lawful methods and reliance on business records maintained in the exercise of its statutory authority, and its reliance on employer-provided data to assess the premium penalty, and by verifying that it expended $12,698.66 in medical payments for Hoff which Auto Parts owes. (Garcia v. Uninsured Employers' Fund, id, Neustrom v. State, 283 Mont. 179, 939 P.2d 990 (1997).)
>
> The burden of proof then shifted to Auto Parts to rebut the UEF's evidence. Auto Parts failed to do so.

(Findings of Fact; Conclusions of Law; and Final Order at 7-8.)

26 The hearing officer erred in his analysis. Under his analysis the Department was required to prove only that the UEF used "lawful methods and reliance on business records maintained in the exercise of its statutory authority" to prove Auto Parts was uninsured, and "employer-provided data" to compute the penalty. In referring to "lawful methods" and "business records maintained in the exercise of its statutory authority", the hearing officer was, of course, referring to the insurance databases which Lacy Culver consulted. The effect of his ruling was to require that the Department prove not that Auto Parts was in fact uninsured but only that the State Fund had reported it was uninsured.

27 Under section 39-71-504(1), MCA, the Department is entitled to a penalty and reimbursement if, and only if, Auto Parts was in fact uninsured, i.e., if, and only if, the State Fund in fact had no policy of insurance in effect. The fact that the State Fund asserts that the policy had lapsed and not been reinstated, and reported that information to insurance databases, does not make it so. The Department's burden of proof was more than a burden of producing evidence. It also bore the burden of persuasion on all elements of the case

against Auto Parts. *See C. Loney Concrete Construction, Inc. v. Uninsured Employers' Fund*, WCC No. 9305-6788 (1993) at 8. By limiting the Department's burden to producing evidence that Auto Parts had been reported as an uninsured employer and requiring that Auto Parts prove that in fact it was not, the hearing officer improperly shifted the burden of proof.

28 Even more egregious, the decision below disregarded Auto Parts' statutory and due process rights to contest the allegations against it. While placing the burden on Auto Parts to prove it was insured, the hearing officer precluded Auto Parts from doing so.

29 Auto Parts attempted to show that the State Fund's acceptance of the $879.34 premium payment reinstated its insurance coverage. It cited two cases -- *Jackson v. United Benefit Life Ins. Co.,*86 P.2d 1089, 1092 (Wyo. 1939) and *Collins v. Fireman's Fund Indemnity Co.,* 490 P.2d 895, 896 (Utah 1971) -- as supporting its legal argument that such acceptance reinstated the policy. (Auto Parts' proposed findings of fact, conclusions of law and order filed below on December 15, 1998.) The hearing officer refused to consider the arguments, holding that the February 4, 1998 Order entered in Auto Parts' case against the State Fund barred consideration of the argument.

30 The hearing officer's reliance on the February 4, 1998 Order was in error. Neither the doctrine of res judicata nor collateral estoppel are applicable. Those doctrines require that the issue actually adjudicated in the earlier proceeding be identical to the issue raised in the subsequent one. *Fadness v. Cody*, 287 Mont. 89, 96, 915 P.2d 584, 588 (1997) ("Identity of issues is the most crucial element of collateral estoppel."); *Parini v. Missoula County High School, Dist. No. 1*, 284 Mont. 14, 23, 944 P.2d 199, 204 (1997) (for res judicata to apply "the issues must be the same"). The February Order merely found that the Department did not have jurisdiction to determine insurance coverage in a separate proceeding commenced by Auto Parts against the State Fund. The Order did not determine the merits of Auto Parts' coverage contentions, nor did it determine that the Department lacked jurisdiction to determine coverage in a Department proceeding seeking a penalty and indemnification.

31 Section 2-4-612, MCA, which is part of the Montana Administrative Procedure Act, governs contested case hearings held before the Department. The section provides in relevant part:

> **2-4-612. Hearing -- rules of evidence, cross-examination, judicial notice.** (1) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

Whether or not insurance coverage existed was an essential issue in determining liability. The hearing officer disregarded the section by refusing to consider Auto Parts' arguments.

32 As a matter of law, the Department and its hearing officer had, and have, jurisdiction to determine whether coverage existed by fact of the State Fund's retention of the $879.34 premium payment. The question of coverage, as indicated earlier, is an essential element of the Department's claims for a penalty and indemnification. "As a general proposition, a court must necessarily have power to hear and determine all questions of law which are necessary to an ultimate decision of the issues involved." *In re Stinger's Estate,* 61 Mont. 173, 190, 201 P. 693, 698 (1921). Where a court has "jurisdiction over the parties and the subject matter, it . . . [has] authority to make a complete disposition of **all issues and all facets of the case**." *Holibaugh v. Stokes,* 13 Cal. Rptr. 528, 531 (Cal. App. 1961). Indeed, it has a duty to do so. *Meyer v. Superior Court in and For Sacramento County,* 55 Cal. Rptr. 350, 353 (Cal. App. 1966) The Department in this case was acting in a quasi-judicial capacity and, by analogy, these principles apply to it.

33 Moreover, by refusing to consider Auto Parts' arguments, the hearing officer effectively delegated the insurance determination to the State Fund. That delegation was impermissible. Courts in Montana and throughout the United States have repeatedly recognized the impropriety of statutory or administrative delegation of governmental decision-making authority to non-governmental parties, particularly where the party has economic interest in the matter at issue.

34 In *Ingraham v. Champion International*, 243 Mont. 42, 793 P.2d 769 (1990), the Montana Supreme Court addressed an amendment to the Workers' Compensation Act allowing the conversion of bi-weekly benefits into a lump-sum payment only upon the agreement of the claimant and the insurer. As the Supreme Court noted, "under the amended statute, in practical effect, a worker in need of a lump-sum conversion, unless he has the insurer's approval, cannot apply to the department, much less to a court, to determine his need." *Id*., 243 Mont. at 47, 793 P.2d at 772. The Court held that the statute improperly delegated legislative power to a private party and unconstitutionally deprived the courts of their judicial powers. *Id*., 242 Mont. at 48, 793 P.2d at 772. *See also*, *Shannon v. Forsyth,* 205 Mont. 111, 666 P.2d 750 (1983) (invalidating ordinance allowing area landowners to give "consent" to placement of mobile homes as unconstitutional delegation of legislative authority and police power to private parties).

35 Courts are particularly strict where delegation of governmental authority involves the power to impose a penalty or assessment. In *Texas Boll Weevil Eradication Foundation, Inc. v. Jack Abbott*, 952 S.W.2d 454 (1997), a private foundation was empowered by statute to levy assessments against growers. The Court reviewed the principles surrounding delegation of legislative and administrative authority to private parties, articulating a series of rules and guidelines. Among other things, the Court noted that "authority to impose penal sanctions strongly suggests an improper private delegation." *Id*., 952 S.W.2d at 474. Similarly, a line of federal cases, beginning with *R. H. Johnson & Co. v. Securities & Exchange Commission*, 198 F.2d 690 (2d Cir.), cert. denied, 344 U.S. 855, 73 S.Ct. 94, 97

L.Ed. 664 (1952), addressed the Maloney Act's delegation of authority to private securities dealers' associations to discipline members, including the imposition of penalties. The Act was held constitutional only because it required the Securities and Exchange Commission to make *de novo* findings and an independent determination of any alleged violation or penalty. *See also*, *First Jersey Securities, Inc. v. Bergen,* 605 F.2d 690 (3rd Cir. 1979), cert. den. 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980).

36 Other courts have emphasized the impropriety of delegating decision-making authority to private parties with pecuniary interest in the issues to be decided. In *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973), the United States Supreme Court considered Alabama's system of regulating optometrists, which involved resolving charges of unprofessional conduct through a Board comprised of members of a private optometrists' association. The Supreme Court observed: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id*., 411 U.S. at 579, 93 S.Ct. at 1698.

37 The same principle emerges from state court decisions. In *Corvallis Lodge No. 1411 v. Oregon Liquor Control Commission,* 677 P.2d 76 (Or. App. 1984), an Oregon Court of Appeal concluded the Oregon Liquor Commission could not adopt a rule conditioning activities by certain license-holders upon consent of other license-holders. According to the Court:

> Accountability of government is the central principle running through the delegation cases. When, as in this case, governmental power to make decisions granting or denying privileges is, in whole or in part, delegated to private individuals who have a self-interest in the decisions, accountability is necessarily attenuated.

Id., 677 P.2d at 79. In *Texas Boll Weevil Eradication Foundation, Inc. v. Abbott, supra,* the Texas Supreme Court similarly noted:

> [P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.

Id., 952 S.W.2d at 469.

38 In the present case, the statute governing imposition of penalties and indemnification does not authorize delegation of fact finding to the State Fund. The hearing officer's decision, however, had that effect. He did what the legislature is prohibited from doing, and thereby exceeded his statutory authority. Moreover, his action deprived Auto Parts of its

right to due process of law by cutting off its opportunity to prove the lack of an essential element of the case against it. An opportunity to defend is essential to due process of law. *Clinton v. Miller*, 124 Mont. 463, 478, 226 P.2d 487, 495 (1951).

II. Remedy

39 When a reviewing court determines an agency has failed to resolve factual questions or make necessary factual findings, remand is the appropriate remedy. In *Stewart v. Region II Child and Family Services,* 242 Mont. 88, 788 P.2d 913, the Supreme Court noted:

> The rules of agency review rely on the principle that the agency, and not the district court, is the finder of fact. **If a factual question is essential to an agency's decision, and the agency's findings of fact are so insufficient that they cannot be clarified or are entirely absent, the district court should remand the case to the agency for appropriate findings.** [Emphasis added.]

Id., 242 Mont. at 93, 788 P.2d at 916. In this case, factual findings on the disputed issue do not exist. Moreover, it is not clear that all available evidence concerning the circumstances of the premium payment was presented. The UEF succeeded in convincing the hearing officer that those circumstances were outside the Department's jurisdiction, hence it may not have presented evidence undercutting Auto Parts' claim.

III. Attorney Fees and Costs

40 Auto Parts requests attorney's fees and costs pursuant to section 25-10-711, MCA, which provides as follows:

> **25-10-711. Award of costs against governmental entity when suit or defense is frivolous or pursued in bad faith.** (1) In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to the costs enumerated in 25-10-201 and reasonable attorney's fees as determined by the court if:
>
> (a) he prevails against the state, political subdivision, or agency; and
>
> (b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.
>
> (2) Costs may be granted pursuant to subsection (1) notwithstanding any other provision of the law to the contrary.

41 Without deciding whether litigation of the present matter falls within the rubric of section 25-10-711, MCA, the request is premature. While Auto Parts has succeeded in obtaining a new hearing, it has not yet prevailed in this case.

ORDER

42 The May 26, 1999 decision of the Department of Labor and Industry is hereby **reversed.** The matter is **remanded** to the Department for a new hearing in accordance with this decision and order on appeal.

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

44 This decision is certified as final for purposes of appeal.

DATED in Helena, Montana, this 24th day of March, 2000 .

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Dennis E. Lind
Mr. Kevin Braun
Date Submitted: November 8, 1999

1. A number of facts, including this one, are based on testimony at the hearing. In light of the legal errors in the proceeding below, they are assumed to be true for purposes of appeal.