IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 65

WCC No. 2004-1074

RONALD BEAULIEU

Petitioner

vs.

HUMAN DYNAMICS CORPORATION

Respondent/Insurer.

DECISION AND JUDGMENT AWARDING MEDICAL BENEFITS,

ATTORNEY FEES, PENALTIES, AND SANCTIONS

Summary: After accepting liability and paying for the claimant's prescription headache medications for several years, the respondent abruptly cut off further payments for the medications. It did so without either notice or explanation. In response to the claimant's petition to reinstate the payments, the respondent asserted it is not an insurer and is not subject to the jurisdiction of the Montana Workers' Compensation Court even though in two prior proceedings involving the same claimant and the same industrial accident it had expressly admitted it was subject to the Court's jurisdiction and that it was liable for workers' compensation benefits due the claimant. At trial the respondent offered no evidence justifying its termination of payment for the headache medications.

Held: The respondent is judicially estopped from denying it is an insurer and is liable for the claimant's headache medications. The respondent's cutoff of payments for those medications was unreasonable. Therefore, it is further liable for the claimant's attorney fees and a twenty percent penalty. Finally, sanctions are imposed on the respondent and its attorney individually for taking a position contradictory to the position taken in the two prior cases.

Topics:

> **Benefits: Medical Benefits.** Where an insurer cuts off payment for prescription headache medications it has paid for several years and provides no facts supporting its cutoff, the insurer is liable for the continued payment for the medications.
>
> **Penalties: Insurers.** Where an insurer, without notice or explanation, cuts off payment for prescription headache medications it has paid for several years, it is

liable not only for the continued payment for the medications but for a twenty percent penalty.

Attorney Fees: Medical Benefits. Where an insurer, without notice or explanation, cuts off payment for prescription headache medications it has paid for several years, it is liable not only for the continued payment for the medications but for attorney fees pursuant to section 39-71-612, MCA (1987-2001).

Sanctions. Where a party takes a position that absolutely contradicts the position it took in two prior actions, and there is no factual or legal basis for their position, sanctions are appropriate and are imposed. § 39-71-2914, MCA (1987-2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: Section 39-71-2914, MCA (1987-2003). Where a party takes a position that absolutely contradicts the position it took in two prior actions, and there is no factual or legal basis for its changing its position, sanctions are appropriate and are imposed. § 39-71-2914, MCA (1987-2003).

¶1 This matter came on for trial on Monday, August 23, 2004, after the Court denied the respondent's Motion to Dismiss. (*Beaulieu v. Human Dynamics Corporation,* 2004 MTWCC 58.)

¶2 On August 19, 2004, the respondent filed a "Trial Brief." The purpose of a trial brief is to address the issues to be tried. The respondent's "Trial Brief" did not address the issues to be tried, rather it took issue with this Court's denial of its Motion to Dismiss and reargued its Motion to Dismiss. The brief was improper and impudent: Counsel for the respondent is admonished for filing it.

¶3 Exhibits: Exhibits 1 through 6 were admitted without objection.

¶4 Witnesses and Depositions: The claimant briefly testified. No depositions were offered.

¶5 Issues Presented: The issues are set out in the Pretrial Order as follows:

E. Contested Issues of Law:

1. Whether this Court has jurisdiction over an alleged dispute where it has been determined by the Montana Supreme Court that the Respondent was not providing coverage under the Montana Workers' Compensation Act at the time of the alleged injury.

2. Whether this Court has jurisdiction in this matter where the employer was uninsured for workers' compensation purposes at the time of the alleged injury and the uninsured employers' fund has not been made a party to the dispute.

3. Whether Petitioner is entitled to reasonable medical expenses in the form of payment for medication for his headache condition pursuant to section 39-71-704, MCA.

4. Whether Petitioner is entitled to a 20% increase of award for unreasonable delay or refusal to pay benefits pursuant to section 39-71-2907, MCA.

5. Whether Petitioner is entitled to an award of costs and attorney fees.

(Pretrial Order at 3.)

PREFACE

¶6 In making the following findings of fact, the Court takes judicial notice of prior Court files and decisions in *Uninsured Employers' Fund v. Total Mechanical Heating & Air Conditioning* (*Total Mechanical)*, WCC No. 9901-8140, *Beaulieu v. UEF and Human Dynamics, Inc*. (*Beaulieu I*), WCC No. 9512-7463; and *Beaulieu v. UEF and Human Dynamics, Inc*. *(Beaulieu II*), WCC No. 9712-7880. Certified copies of those files are made a part of the record in this case.

BACKGROUND

¶7 The present petition is the third one filed by the claimant, Ronald Beaulieu (Beaulieu), with respect to an April 16, 1994 industrial injury he suffered while working for Eureka Pellet Mills, Incorporated (Eureka). As I noted in my prior Decision and Order Denying Motion to Dismiss, filed in this case on August 10, 2004:

> Beaulieu is one of a number of claimants affected by a tangled web woven by Dynamics in the mid-1990s. The facts concerning Dynamic's Montana activities are set out in *Total Mechanical Heating & Air Conditioning v. UEF*, 2002 MT 55, 50 P.3d 108, and the decisions below, 2000 MTWCC 39, 39A, and 70. As set forth in those decisions, in 1994 Dynamics enlisted thirteen Montana companies in an employee-leasing scheme under which Dynamics was to act as co-employer for the employees of the thirteen companies. Under its agreement with the companies, Dynamics assumed responsibility for workers' compensation coverage. However, Dynamics did not, in fact, provide workers' compensation insurance, rather it insisted that the Montana workers' compensation laws were preempted by ERISA. Failing in that argument, it provided faulty documents which it insisted showed it had provided retroactive workers' compensation coverage. This Court and the Supreme Court found that no coverage was provided.
>
> As a result of Dynamic's machinations, and its failure to comply with Montana workers' compensation laws, thirteen Montana companies were victimized; they were held to be employers liable for workers' compensation premiums and assessed substantial penalties amounting to more than one million ($1,000,000)

dollars. Dynamics now attempts to add to its list of victims by denying Beaulieu a forum for pursuing workers' compensation benefits even though it has accepted liability for his claim!

One of the thirteen Montana companies victimized by Dynamics was Eureka, which was Beaulieu's employer. Beaulieu's claim arose during the period Eureka was uninsured but under contract with Dynamics. In its decision in *Total Mechanical Heating and Air Conditioning*, the Supreme Court noted:

> The parties agree that workers' compensation claims filed during the UEF-claimed lapses of compensation coverage were not paid by the UEF, **but were paid by either Dynamics or Resources** [the successor to Dynamics]. Dynamics maintains that these claims were paid under Dynamics' ERISA plan and were applied against the deductible on the CGIC workers' compensation policies carried by Dynamics and Resources.

2002 MT 55, ¶ 20 (emphasis added). Beaulieu's industrial accident occurred during the period of Dynamics' responsibility and Dynamics has been paying him workers' compensation benefits since his injury.

(*Id*. at 1-2, ¶¶ 2-4.)

TRIAL COLLOQUY

¶8 At the commencement of the trial in this case, I had an extensive colloquy with counsel for the respondent. Admissions made by that counsel are considered in making the following findings of fact.

¶9 Having considered the Pretrial Order, the testimony presented at trial, the exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶10 Beaulieu was injured at work on April 16, 1994, while working for Eureka. The fact that he was injured in the course and scope of his employment is not disputed. The nature of his injuries is not disputed.

¶11 At the time of Beaulieu's industrial injury, Eureka had entered into an employee leasing agreement with Human Dynamics Corporation (HDC). *Total Mechanical,* ¶ 12.

¶12 HDC is a corporation. (In prior proceedings it has been known as Human Dynamics, Inc.) In 1994 HDC began providing "administrative services and other services including payroll, financial services, insurance services, risk management services and other services to small businesses" in Montana. *Id.*, ¶ 11. HDC did not provide its own workers to Montana client companies, rather, it "simply assumed payroll, withholding, reporting, and insurance tasks previously performed by" its clients. *Id*. Under its agreements with its

clients, the employees of the client companies become co-employees of HDC: The employees continued to work for their original Montana employers. *Id*.

¶13 HDC's agreements with its Montana client companies required HDC to "provide Workers' Compensation Coverage or it's [sic] equivalent." *Id.,* ¶ 13. It failed to do so. *Id*. Rather, it purported to establish a health and accident plan covering the employees and then claimed that the plan preempted Montana workers' compensation requirements. Its preemption argument was based on federal ERISA statues (Employee Retirement Income Security Act), 29 U.S.C. §§ 1021, *et. seq*. *Total Mechanical,* ¶ 13.

¶14 HDC's attempt to circumvent Montana workers' compensation laws was unprecedented and legally unsupported. It abandoned its contention. As set forth in my decision in *UEF v. Total Mechanical,* 2000 MTWCC 39, *aff'd* in 2002 MT 55, ¶ 14, 309 Mont. 84, ¶ 14, 50 P.3d 108, ¶ 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 [July 1994], it is indisputable that HDC and its client companies did not have Montana workers' compensation insurance covering employees of the client companies.

The foregoing findings from *Total Mechanical* make it **crystal clear** that as of July 1994, both HDC and its attorney, Andrew Utick, recognized that HDC was not a *de jure* insurer under Montana workers' compensation laws and that Eureka was an uninsured employer.

¶15 As a result of the lack of workers' compensation insurance coverage for Eureka and other client companies of HDC, the UEF commenced a proceeding for penalties under section 39-71-504, MCA. *Id*. In the course of those proceedings, HDC never asserted it was a workers' compensation insurer qualified to do business under Montana law. It admitted it had not provided its client companies with contemporaneous workers' compensation insurance coverage but attempted to convince the Montana Department of Labor and Industry (Department) that it had secured *retroactive* workers' compensation insurance coverage for its client companies. *Total Mechanical*, 2000 MTWCC 39, *aff'd*, 2002 MT 55.

¶16 As set forth in my decision in *Total Mechanical,* 2000 MTWCC 39, HDC never provided satisfactory evidence of retroactive insurance. *Id*. As a result, in 1996 the UEF determined that HDC's client companies were in fact uninsured and assessed penalties against the client companies totaling more than $1 million dollars. *Id.*, ¶ 54. The penalties were affirmed on appeal to this Court, 2000 MTWCC 39, and by the Supreme Court in 2002 MT 55.

A. 1995 Petition

¶17 On December 20, 1995, **after** both HDC and its attorney, Mr. Andrew J. Utick, had acknowledged that Eureka was uninsured, Beaulieu filed a petition with this Court. *(Beaulieu I*). The petition named the Uninsured Employers' Fund (UEF) and HDC as respondents and Eureka Pellet Mills, Incorporated, as the employer. (*Beaulieu I*, Petition for Hearing.) The petition alleged that Beaulieu suffered an industrial injury on April 16, 1994, and that Eureka "was either uninsured, or insured by Human Dynamics, Inc." (*Id.*, ¶ II.) The petition went on to allege that HDC had accepted liability for Beaulieu's claim and had paid benefits, but that it had denied payment for certain medical procedures and had not paid the proper rate for temporary total disability (TTD) benefits.

¶18 Mr. Utick, on behalf of HDC, filed a response. In that response, HDC admitted the following facts:

> A. That on April 16, 1994, the Petitioner suffered an industrial injury arising out of and in the course of his employment with Eureka Pellet Mills, Inc., of Eureka, Montana.
>
> B. That at the time of the injury, the Employer **was insured under the provisions of the Montana Workers' Compensation Act through Human Dynamics, Inc.**
>
> C. That Respondent, Human Dynamics, Inc., accepted liability for the Petitioner's injury and paid weekly temporary total disability benefits in accordance with Section 39-71-701, MCA.

(*Beaulieu I*, Response to Petition for Hearing at 1-2 (emphasis added).) In the contentions section of its response, HDC, stated:

> A. The Respondent, Human Dynamics, Inc., has paid compensation at the Claimant's correct temporary total disability rate.
>
> B. **That the Claimant has received an award of disability Social Security benefits; that by reason of such disability Social Security benefits, the Respondent is entitled to reduce the Claimant's temporary total disability rate by reason of the Social Security offset, pursuant to Section 39-71-701, MCA.**

C. That Claimant's Social Security disability award was retroactive to October 1, 1994 resulting in an overpayment in the amount of $5,442.13 as of October 31, 1995. That even offsetting the amount of underpayment claimed by the Claimant, there would remain an overpayment of $3,625.54 as of October 31, 1995.

D. That the medical benefits claimed by the Claimant were not properly prescribed by the Claimant's treating physician.

E. That the Claimant is not entitled to the disputed medical benefits; he is not entitled to an adjustment in his temporary total disability rate. The Respondent is entitled to adjust the Claimant's rate by reason of the Social Security offset and is entitled to recover the Social Security overpayment by reducing the Claimant's biweekly benefits in a weekly amount to be set by the Court.

F. The Claimant is not entitled to a penalty, reasonable costs, or attorney fees.

(*Id.* at 2 (emphasis added).)

¶19 **Nowhere** in its response did HDC challenge the jurisdiction of the Montana Workers' Compensation Court. **Nowhere** in its response did HDC allege that ERISA laws were an exclusive remedy which the claimant must assert in federal court. To the contrary, HDC and its attorney alleged that HDC was an insurer subject to Montana workers' compensation laws and submitted itself to the jurisdiction of the Montana Workers' Compensation Court. No other possible interpretation can be given its assertion that Beaulieu's employer "was insured under the provisions of the Montana Workers' Compensation Act through Human Dynamics, Inc." and its further allegation that "Human Dynamics, Inc., accepted liability for Petitioner's injury and paid weekly temporary total disability benefits in accordance with Section 39-71-701, MCA." *(Id.)*

¶20 On April 4, 1996, HDC filed a Motion for Summary Judgment along with a supporting brief. In its motion and brief, HDC asserted that it had "accepted the Claimant's figures [regarding TTD benefits] and began paying the Claimant at his correct temporary total disability rate of $126.15 as of January 20, 1996." (*Id.*, Memorandum in Support of Motion for Summary Judgment at 2.) It further alleged that it owed no additional medical benefits because of other overpayments it had made to the claimant. (*Id.* at 3.) Finally, it argued that no attorney fees or penalties should be awarded because it had acted reasonably. (*Id.* at 3-4.)

¶21 Beaulieu opposed the Motion to Dismiss on account of disputes over medical benefits due. He further asserted that the penalty and attorney fee issues required a hearing. (*Id.,* Petitioner's Response to Respondent's Motion for Summary Judgment.) In a reply brief, HDC countered that Beaulieu had failed to mediate the medical benefits at issue as required by sections 39-71-2401 and -2905, MCA, and that any further controversy over medical benefits was therefore not properly before the Court. (*Id.,* Defendant's Reply

Memorandum in Support of Motion for Summary Judgment at 2-3.) I rejected the mediation argument and denied the motion to dismiss because "[t]he amounts due for the medical costs mentioned in the petition have *not* been resolved." (*Id.*, Order Denying Motion for Summary Judgment at 1.)

¶22 HDC thereafter filed a second motion for summary judgment asserting that it had paid the remaining medical bills and that there were no remaining issues to be adjudicated. (*Id.*, Memorandum in Support of Second Motion for Summary Judgment.) It provided documentation for its payments. The motion was unopposed and on May 21, 1996, this Court entered summary judgment dismissing the petition with prejudice. (*Id*., Summary Judgment at 2.) The dismissal was unqualified; **therefore, the judgment dismissed the claims against the UEF.**

B. 1997 Petition

¶23 On December 8, 1997, Beaulieu filed a second petition with respect to his April 16, 1994 industrial injury.**1** He again named both HDC and the UEF, alleging that at the time of his injury his employer "was either uninsured, or insured by Human Dynamics, Inc." (*Beaulieu II*, Petition for Hearing at 1). He alleged that HDC had failed to pay for blood tests and physicians' charges related to his injury. He alleged that HDC's refusal to pay for the medical services was unreasonable and that it should be assessed attorney fees and a penalty. (*Id*. at 3.)

¶24 As in *Beaulieu I*, HDC responded that it provided workers' compensation coverage for the claim. In its response, it admitted:

> A. That on April 16, 1994, the Petitioner suffered an industrial injury arising out of and in the course of his employment with Eureka Pellet Mills, Inc., of Eureka, Montana.
>
> B. That at the time of the injury, the Employer **was insured under the provisions of the Montana Workers' Compensation Act through Human Dynamics, Inc.**
>
> C. **That the Respondent, Human Dynamics, Inc., accepted liability for Petitioner's industrial accident and has paid temporary total disability benefits to the Petitioner during this period of time.** The Petitioner, through his attorney, has requested the Respondent to pay the Petitioner's biweekly benefits on a timely basis.

(*Beaulieu II*, Response to Petition for Hearing at 1-2 (emphasis added).)

¶25 After filing its response in *Beaulieu II,* HDC moved to dismiss the UEF as a respondent on the ground that HDC had admitted liability for the claimant's industrial accident and that the Court did not have jurisdiction to adjudicate any dispute over coverage, i.e., the

Court lacked jurisdiction to find that HDC did *not* insure Eureka with respect to Beaulieu's industrial injury. In its supporting memorandum, Dynamics stated:

> The Petitioner [Beaulieu] has been receiving, and has been accepting, biweekly compensation benefits from Human Dynamics for almost four years now. The Petitioner has been receiving, and has been accepting medical benefits from Human Dynamics for almost four years now. **In the pleadings in the instant matter, Human Dynamics has admitted that Eureka Pellet Mills was insured through Human Dynamics. That is all that should be necessary to establish that Human Dynamics is responsible for any benefits awarded to the Claimant, and that the Uninsured Employers Fund has no standing in the matter and is not a proper party to the matter**.

(*Id.,* Memorandum in Support of Motions to Dismiss for Lack of Jurisdiction at 4 (emphasis added).) The obvious purpose of HDC's motion was to defeat any attempt to litigate the allegation that Eureka was uninsured. As in *Beaulieu I*, HDC submitted itself to the jurisdiction of this Court by tendering itself as an insurer which had accepted liability for Beaulieu's claim.

¶26 *Beaulieu II* was resolved by HDC's payment of the medical expenses at issue. (*See* correspondence in *Beaulieu II* file.) Upon receipt of that payment, counsel advised that the matter had been resolved and asked the Court to dismiss the petitions without prejudice, which it did. (*Id.*, April 1, 1998, Order Dismissing Without Prejudice.)

C. *Total Mechanical*

¶27 Meanwhile, the litigation in *Total Mechanical* proceeded. A hearing officer for the Department determined that while HDC's client companies were uninsured during 1994, HDC had provided retroactive insurance which vitiated that lack of insurance. Based on his determination that retroactive insurance was in place, the hearing officer reversed the UEF's imposition of penalties on HDC's client companies.

¶28 On appeal, this Court found that HDC had failed to provide satisfactory evidence of retroactive insurance and that the client companies were in fact uninsured. It reinstated the penalties. (*Beaulieu II,* 2000 MTWCC 39.) That decision was affirmed on appeal to the Montana Supreme Court. 2002 MT 55.

¶29 In *Total Mechanical*, HDC never asserted that it was a *de jure* workers' compensation insurer in Montana. It also abandoned any claim that Montana workers' compensation laws were preempted by ERISA. Rather, its sole defense to the UEF penalties was based on its assertion that it had provided retroactive insurance coverage. It is thus clear that **as of July 12, 1994, both HDC and its attorney, Mr. Utick, were aware that (1) HDC was not a workers' compensation insurer within the meaning of the Montana Workers'**

Compensation Act and that (2) Eureka was in fact an uninsured employer at the time of Beaulieu's industrial accident.

D. The Present Petition

¶30 In his present petition, the claimant seeks payment for medications for his headaches.

E. Facts Pertaining to Medications

¶31 For years, the claimant has been taking several medications for headaches related to his industrial accident. The medications include Depakote, Cafergot, and Naproxen, all of which he takes on a daily basis, and Stadol nasal spray on an as-needed basis. HDC paid for these medication from the time of his 1994 injury until early 2004.

¶32 The medical records provided to the Court show that the medications are medically necessary and related to the claimant's industrial injury. (Ex. 1.)

¶33 However, without notice to the claimant, HDC stopped paying for the medications in early 2004. The claimant discovered HDC's action in April 2004 when he attempted to refill his prescriptions and was refused on account of HDC's failure to reimburse the pharmacy for prior prescriptions. He testified as follows:

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Q. So what happened, then, to cause this termination of your benefits?
A. [Claimant] I haven't got a clue. The drug company, Haines Drug, [h]as been real good. And I went in on April 29th -- well, they told me about it two months before that they were not getting paid, not getting paid. And I don't know what this Triple Source Solutions -- or Systems is, I haven't got a clue, but I was getting billed from them people. And Haines Drug says, well, they're not supposed to be paying it, it's supposed to be Human Dynamics. I went in on the 29th of April and they said we haven't been paid in months. And they said, we're sorry, we just cannot afford to keep carrying you without being paid for these drugs.
THE COURT: These medications that you're taking, how long have you been on them.
MR. BEAULIEU: Four, almost five

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1 years, Judge.
2 THE COURT: Up to this year they were
3 being paid for?
4 MR. BEAULIEU: Yes, sir. As far as I
5 know they've been paid up until -- I think it's
6 February. January or February of this year is when
7 they stopped.

(Trial Tr. at 18-19.)

¶34 HDC presented no witnesses in rebuttal to the claimant's petition. This Court queried counsel for the respondent as to the basis for the sudden termination of payment for the prescriptions. Counsel asserted that HDC was entitled to cut off payment for the medications because the claimant had reached maximum medical improvement (MMI) in 1998 and was therefore entitled only to secondary medical benefits thereafter. He urged that the prescription drugs were not reimbursable secondary medical benefits:

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25 THE COURT: Well, on the merits of

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1 this case what is the basis for denying of medical
2 benefits, especially since you're paying indemnity
3 benefits?
4 MR. UTICK: Indemnity benefits -- my
5 understanding -- I'm told they're being paid at the
6 temporary total -- they're being paid on temporary
7 total basis, that's my understanding. My
8 understanding is -- I'm told that they have never
9 conceded permanent total in this case, and that has
10 never been an issue before, so I think it's being
11 paid on temp total basis. My understanding is
12 that's the reason that they declined to pay these
13 medications, is based on the medical evidence in the
14 case, Your Honor.
15 Back in November 29th of 1994 the treating
16 doctor said that this man was released to return to
17 his previous occupation. They said at that time
18 that -- the doctor said "I explained to Ron I did
19 not feel he suffered from any significant degree of
20 disability and that he's certainly retrainable for

21 some other occupation if it is necessary."
22 THE COURT: What does that have to do
23 with medical bills, especially since you're
24 continuing to pay total disability benefits?
25 MR. UTICK: Your Honor, I think I'm

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1 trying to get to the point here. A little later in
2 October 19th of 1998 Dr. Burns says this man is at
3 MMI. I think the medical evidence indicates he's at
4 MMI without being permanent total based on the
5 medical evidence.
6 Under those circumstances I think the
7 statute says that the insurer is responsible for
8 primary medical services, which is medical services
9 necessary to bring him to medical stability. He's
10 at medical stability. Beyond that --
11 THE COURT: If he's at medical
12 stability why are you paying him temporary total
13 disability benefits?
14 MR. UTICK: Your Honor, I don't know
15 why they're continuing to pay temp total disability
16 benefits; I don't think they should be. My personal
17 opinion is that they shouldn't be. But I think the
18 statute at that point comes into play in that these
19 treatments are palliative care and that the carrier
20 may not be required to furnish those benefits under
21 the statute.
22 THE COURT: They were previously
23 paying for the headache medications?
24 MR. UTICK: Yes.
25 THE COURT: They stopped -

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1 MR. UTICK: Yes.
2 THE COURT: -- this year, 2004?
3 MR. UTICK: Correct.
4 THE COURT: The decision in Total
5 Mechanical was in 2002, correct?

6 MR. UTICK: I presume so.
7 THE COURT: Why suddenly in 2004, if
8 they're taking the position that he's reached MMI,
9 he has secondary medical benefits, why do they
10 continue to pay until 2004?
11 MR. UTICK: Your Honor, I don't know
12 the answer to that question.
13 THE COURT: Why isn't the adjustor
14 here to tell me the answer? Where -- how can you
15 defend this case if you don't know the answer to
16 these questions?
17 MR. UTICK: Your Honor, I'm the
18 messenger, don't shoot the messenger. I'm trying to
19 do the best I can to convey what was told to me.
20 You're asking me questions that the adjuster knows,
21 I don't know the answer. I'm not going to represent
22 to the Court that I do.

. . . .

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7 THE COURT: Are you aware of anything
8 in writing as to why they stopped paying benefits?
9 MR. UTICK: No, Your Honor, I'm not.

(Trial Tr. at 5-9 (emphasis added).)

¶35 It is incomprehensible to this Court how an attorney can defend a termination of medical benefits if he does not even know the reason for the termination. By Mr. Utick's own admission, he was not aware of the reason his client terminated the benefits. No reason was provided to the claimant. No reason was provided to this Court. In light of the long history of HDC's payment for those medications, HDC's abrupt termination of its payments without any notice to the claimant, and its failure to provide any justification for the termination other than its attorney's post-hoc *speculation*, I find HDC's termination of the benefits to be without justification, unconscionable, and outrageous.

F. Facts Pertaining to Sanctions

¶36 After trial I held a show cause hearing to determine whether sanctions were appropriate with respect to HDC's Motion to Dismiss. My order denying the Motion to Dismiss and the facts above set out the issues concerning the motion. Those facts show that the motion flew in the face of the position HDC and its attorney took in two prior cases.

¶37 Mr. Utick justified the change of position on the decision in *Total Mechanical*. His argument is without merit. As I have noted above, HDC never asserted it was a *de jure* insurer in *Total Mechanical*, rather it initially asserted that ERISA laws preempted Montana workers' compensation laws. When it realized that the contention was a dead loser, it attempted to convince the Department and this Court that it had secured retroactive workers' compensation insurance coverage. Meanwhile, in the two prior *Beaulieu* cases, HDC was asserting it was an insurer for purposes of Beaulieu's claim. Nothing said in *Total Mechanical* affected its two-faced position.

¶38 Mr. Utick argued that HDC's present position is premised on a finding by the Supreme Court in *Total Mechanical* that employees were insured under an ERISA plan. Mr. Utick misreads the *Total Mechanical* decision. The Supreme Court refers to an ERISA plan but only in the context that HDC *asserted* that there was one: The Court never found that such plan in fact existed. The purported plan is mentioned in paragraphs 5 and 20 of the decision, 2002 MT 55. The Court wrote:

> Several months into Dynamics' Montana operations, the UEF contacted Dynamics to determine whether Dynamics was complying with Montana's workers' compensation requirements. Dynamics **informed the UEF** that it was providing workers' compensation coverage for its employees under a federal Employment Retirement Income Security Act (ERISA) plan which it claimed preempted the State of Montana's requirements. Despite having been told by state agencies in some of the other states in which Dynamics operates that ERISA did not preempt their programs, Dynamics did not contact the DLI or the UEF prior to starting its Montana operations to confirm whether ERISA coverage was acceptable under Montana's program. Very shortly thereafter, the UEF notified Dynamics in a June 1994 letter that the federal ERISA program did not preempt Montana's workers' compensation program and that Dynamics must take the necessary steps to comply with Montana's regulations. In July 1994, Dynamics' attorney acknowledged that Dynamics did not have Montana-approved workers' compensation coverage, but indicated that Dynamics was working on getting UEF-acceptable retroactive coverage. At that time, the UEF accepted policies providing retroactive coverage of previously-uninsured employers.
>
> . . . .
>
> The parties agree that workers' compensation claims filed during the UEF-claimed lapses of compensation coverage were not paid by the UEF, but were paid by either Dynamics or Resources. Dynamics **maintains** that these claims were paid under Dynamics' ERISA plan and were applied against the deductible on the CGIC workers' compensation policies carried by Dynamics and Resources.

Id., ¶¶ 5, 20 (emphasis added) (footnote omitted).

G. Post-trial Proceedings

¶39 As a result of the inconsistent positions taken by HDC in the *Beaulieu* cases, HDC's prior failure in the *Total Mechanical* case to produce documents supporting its claims concerning retroactive insurance, and the representations of its counsel at trial in this case, I became concerned with the veracity of HDC's and its attorney's representations concerning the existence of an ERISA plan and the terms of that plan. My concerns involve the integrity of the judicial process in this Court.

¶40 HDC moved to dismiss the petition in this case on the ground that it has an ERISA plan and that the claimant is bound by the plan, yet it never provided any evidence that the plan exists or of its terms. At trial HDC's attorney asserted that the plan exists and that HDC was taking a social security offset pursuant to the terms of the plan rather than under Montana law allowing for the offset. However, he conceded that **despite his representation of HDC for a full decade, he had never seen the plan.** My colloquy with counsel was as follows:

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15 THE COURT: Let me ask you another
16 question. How can you allege that this is an ERISA
17 plan if you've never seen it?
18 MR. UTICK: Your Honor --
19 THE COURT: How can I -- how can I
20 even consider the jurisdictional issue if you don't
21 offer any evidence showing that it isn't ERISA?
22 MR. UTICK: There was evidence offered
23 in the Total Mechanical case. There was evidence
24 offered from the presidents of HGC, there was
25 testimony taken in the Total Mechanical case about

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1 that and about the ERISA plan and so forth.
2 THE COURT: He claimed there was an
3 ERISA plan?
4 MR. UTICK: That was the evidence that
5 was presented in that, case Your Honor.
6 THE COURT: Is the ERISA plan in
7 evidence in Total Mechanical?
8 MR. UTICK: I don't believe the
9 written plan is in there, but there is testimony --
10 sworn testimony in that case that this is an ERISA
11 plan.

(Trial Tr. at 12-13.)

¶41 With respect to Mr. Utick's claim that the testimony of HDC's president in *Total Mechanical* established the existence of the plan, I suggest he re-read the *Total Mechanical* decision, particularly paragraph 40, in which the Supreme Court said:

> The applicable statute, § 39-71-117(3), MCA (1993), requires rebutting parties, in this case Dynamics and the Client Companies, to present "substantial credible evidence" of coverage. Such evidence if it existed, was within Dynamics' control. However, after eight years, it produced no corrected endorsement from CGIC, or any other confirmatory documentation of coverage. The only "proof" offered by Dynamics was the unpersuasive, self-serving testimony of Dynamics' president. While the hearing officer found this testimony convincing, we conclude the WCC was correct in concluding it did not constitute substantial credible evidence that Dynamics was actually insured under the CGIC policy.

2002 MT 55, ¶ 40. In *Total Mechanical,* HDC made many claims concerning the existence of insurance policies and other documents, yet it never produced the actual documents. Its failure to produce actual documents to back up its claims is by now notorious and precludes the Court from relying on its representations or the representations of its attorney concerning the existence and terms of the alleged documents.

¶42 While I rejected the ERISA claim on the basis of judicial estoppel, 2004 MTWCC 58,**2** the circumstances surrounding HDC's defense in this matter caused me to question whether in fact any ERISA plan even exists. I therefore ordered HDC to produce the "original" of the alleged ERISA plan. It replied by producing a "copy" of the plan, resulting in a further Order that the original be produced.

¶43 The copy which was produced did not have any indication that it was ever adopted by HDC.

¶44 The provisions for benefits for industrial injuries and diseases begins with a notice to the employee. The notice is as follows:

> **NOTICE!** Your employer has elected to provide benefits for injuries and illness resulting from occupational activity under the employee Welfare Benefit Plan. By making this election, your employer has elected to provide occupational injury and illness benefits as levels commensurate with the workers' compensation laws of the states in which your employer has employees. Notice is hereby given of the election by your employer to provide for injuries resulting from occupational activity under the Plan.
>
> **NOTICE!** The following provisions apply only to the Occupational Injury and Illness Benefits and Employment-Related Disability Benefits portion of the Plan. To the

extent that the provisions in this section conflict with any other provisions contained in this Plan Document, the provisions in this section shall control.

(Affidavit of G. Douglas Anderton of 9/7/04, Ex. A at 28.)

¶45 The notices quoted in the previous paragraph do not purport to establish the benefits payable for industrial injuries and illnesses.**3** Following the "notices" quoted above, the document goes on to specify benefits. Paragraph 4 specifies the indemnity benefits. The paragraph provides:

> 4. Employment-Related Disability Benefits. The Plan provides employees with a weekly benefit payment while absent from work due to occupational injury or illness.
>
> > a. Employment-[R]elated Disability Benefits are available to any employee after being absent from work for at least fourteen (14) days because of orders from a doctor; benefits will be retroactive to the first day of absence from work;
> >
> > b. The Employment-Related Disability Benefits available under the Plan are $_____ per week, not to exceed _____% of basic earnings; disability benefits are available for a maximum of _____ weeks.

(*Id.*, Ex. A at 29.) The copy of the plan provided to the Court, and certified as a true and correct copy by an Affidavit of G. Douglas Anderton, chief executive officer of HDC, does **not** contain any rate for disability benefits or any number for the maximum weeks of benefits. As quoted above, the spaces for inserting the rate and duration of benefits are **blank**.

¶46 The purported plan is also lacking in another respect. It is established by and for **Western Assurance Benefit, Incorporated** (Western Assurance) and its employees, not for HDC employees. The first paragraph reads in relevant part:

> This constitutes the Plan Document for the **Western Assurance Benefit Employee Welfare Benefit Plan** (the "Plan"). The Plan was established and is maintained by **Western Assurance Benefit, Inc.** for the exclusive benefit of its employees and their dependents, as well as for the employees (and their dependents) of members of **Western Assurance Benefit**, (the "Association"), who have elected to provide benefits under the Plan.

(*Id.*, Ex. A, Western Assurance Benefit Employee Welfare Benefit Plan, Master Plan Document at 1.)

¶47 HDC has never contended that Western Assurance is the payor of benefits to the claimant. It has consistently taken the position, including in this case, that it is the payor.

And as already noted in the previous two actions, HDC admitted liability for Beaulieu's claim. Thus, the purported plan, even if adopted and valid, is inapplicable to this case.

¶48 The document also contains specific provisions governing occupational diseases and illnesses. Those provisions are inconsistent with Montana laws governing workers' compensation and occupational disease benefits, and the provisions do not defer to Montana law.

¶49 Moreover, contrary to the representation made by HDC's counsel at trial and in *Beaulieu I*, there is no provision in the plan for a social security offset.

¶50 The copy of the plan provided by HDC raises more questions concerning the veracity of the representations made by HDC and its counsel in this and prior cases. For example, was the plan proffered to the Court ever adopted? There is no affirmative indication it was, and the blanks in the form are inconsistent with its actual adoption.

¶51 Therefore, I issued a second order requiring HDC to produce and file the alleged original plan. After reviewing ERISA laws, I also determined that other documents may shed light on whether HDC ever adopted an ERISA plan. The documents requested include the summary plan document required by law to be provided to its employees, an annual report required by law, and corporate documents showing adoption of the plan. I ordered these documents to be produced by September 20, 2004.

¶52 Further, in light of the representations of HDC's counsel that HDC is paying TTD benefits and his further lack of awareness of any reason specified by HDC for the cutoff of payment of the claimant's prescriptions, I ordered HDC to produce the claim file in this matter.

¶53 In my latest order for production, I directed HDC to produce the following documents:

> The Summary Plan Description (SPD) provided to claimant, along with all documentation showing that it was provided to claimant and the date it was provided.
>
> The annual report (Form 5500 series) filed by the plan administrator for the period encompassing April 16, 1994.
>
> Corporate minutes and/or other documentation showing the adoption of the plan and the date on which it was adopted.
>
> The claim file for the claimant excepting attorney-client communications and attorney work product, which items may be redacted. However, a log of any items withheld shall be filed in accordance with Court Rule 24.5.324(4)-(5).

(Order for Production of Further Documents at 2.)

¶54 On September 20, 2004, HDC responded to my order. It produced **none** of the documents I ordered it to produce. Rather, it filed the following affidavit of its Chief Executive Officer:

> I, G. Douglas Anderton, being first duly sworn upon his oath, deposes and says:
>
> 1. My name is G. Douglas Anderton.
>
> 2. I am the Chief Executive Officer of HUMAN DYNAMICS CORPORATION ("HDC").
>
> 3. Per the recent Order of the workers' compensation administrative judge, I provided a copy of HDC's ERISA plan to this court.
>
> 4. To date, HDC is unable to find an original copy of the plan.
>
> 5. On advice of counsel at the time of the plan's inception, and to the best of my knowledge, the original copy of the plan was filed with the federal Department of Labor.
>
> 6. I am discussing with counsel for HDC the possibility of filing a declaratory action in the United States Federal District Court in an effort to resolve and bring closure to this matter.
>
> FURTHER AFFIANT SAYETH NAUGHT
>
> (SEAL)
>
> /s/ G. Douglas Anderton
>
> SUBSCRIBED AND SWORN before me
> this 20 day of September, 2004, by G. Douglas Anderton.
> /s/ Rishel Lawes
> Notary Public
> My Commission Expires 1-5-08

(Affidavit of G. Douglas Anderton of 9/20/04 at 1.)

¶55 This Court's order for production was carefully designed to require HDC to produce documents which would show whether or not it had an ERISA plan, yet it has failed to provide any of those documents (assuming they exist at all). The copy of the purported plan does not show it was adopted and, on its face, is incomplete. Having failed to provide satisfactory evidence that it had an ERISA plan, HDC's challenge to this Court's jurisdiction fails not only legally but factually. HDC cannot come to this Court and seek dismissal based on an ERISA plan without providing satisfactory evidence that it had an ERISA plan

¶56 If HDC in fact filed a copy of its purported ERISA plan with the United States Department of Labor, then it surely could produce information showing that it did so, or request the United States Department of Labor to certify the filing of the plan. Instead, it threatens to file a declaratory action in Federal District Court. This Court invites it to do so. To prove it in fact had an ERISA plan, it will have to provide the Federal District Court with the same information that this Court has ordered it to produce and explain why it failed to do so in this Court. Moreover, my denial of HDC's Motion to Dismiss for lack of jurisdiction was not based on any alleged ERISA plan, rather it was based on HDC's admission in two prior judicial proceedings that it is a workers' compensation insurer and is liable for the claimant's industrial injury under Montana workers' compensation laws. As HDC long ago admitted, ERISA laws do not exempt HDC and its client companies from Montana workers' compensation laws. HDC took responsibility for Beaulieu's industrial injury under those laws. In light of its acceptance of liability, equity and Montana law require it be treated as an insurer subject to Montana workers' compensation laws and the jurisdiction of this Court. This Court is not enforcing the terms of any alleged ERISA plan; it is enforcing the requirements of Montana workers' compensation laws.

¶57 On its face, the reply of HDC to the Court's latest Order for Production of Further Documents does not even attempt to comply with the Order. Even if I accept HDC's claim that it is unable to find a copy of the original ERISA plan, its response does not address its failure to produce the other documents the Court ordered it to produce. As I indicated previously, this Court's order for production was carefully designed to require HDC to produce documents which would show it had an ERISA plan. I ordered it to produce documents showing its adoption of the plan; it not only failed to produce any such documents, it failed to provide an explanation for its failure. I ordered it to produce any summary plan description (SPD) which it provided to the claimant; ERISA requires the employer to provide each employee an SPD. 29 U.S.C. § 1021(a). HDC not only did not provide a copy of such SPD, it failed to explain its failure to do so. I ordered it to provide any annual ERISA report it filed with the United States Department of Labor for the time period during which the claimant was injured; those reports are required under ERISA laws. HDC neither provided any such report nor explained its failure to do so. I ordered HDC to provide the claims file for Beaulieu. It not only failed to do so, it failed to offer any excuse for its failure.

¶58 HDC's conduct in *Total Mechanical*, its admission of liability in the previous two *Beaulieu* cases, the representations of its attorney at trial, and its responses to my prior order for production of its alleged ERISA plan raised serious questions concerning the truthfulness of its representations concerning both the existence of an ERISA plan and its adjustment of Beaulieu's claim. Its response to my Order For Production of Further Documents only fortifies my concern regarding the truthfulness of its representations.

CONCLUSIONS OF LAW

A. Jurisdiction

¶59 HDC is estopped from asserting it is not an insurer liable for the claimant's April 16, 1994 industrial accident. Since HDC is an insurer-by-estoppel, this Court has jurisdiction over the present petition. *Beaulieu v. Human Dynamics Corp.*, 2004 MTWCC 58. Moreover, HDC has failed to provide any satisfactory evidence of any ERISA plan which would preempt application of Montana workers' compensation laws to this case.

B. Liability

¶60 Section 39-71-704, MCA (1993-1995), requires insurers to provide reasonable primary medical benefits to an injured claimant. Primary medical services are those services "prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability." § 39-71-116(21), MCA (1993). In *Hiett v. Missoula County Public Schools,* 2003 MT 213, 317 Mont. 95, 75 P.3d 341, the Supreme Court held that primary medical services encompass services necessary to "maintain" medical stability. Secondary medical services are "those medical services or appliances considered not medically necessary for medical stability," § 39-71-116(25), MCA (1993). An insurer must furnish secondary medical services "only upon a clear demonstration of cost-effectiveness of the services in returning the injured worker to actual employment." § 39-71-704(1)(b), MCA (1993).

¶61 Without knowing the actual reasons for HDC's termination of payment for the claimant's headache medications, HDC's attorney asserted at trial that the claimant's prescription medications were secondary services and therefore non-compensable since he reached MMI in 1998. That position is inconsistent with and flies in the face of HDC's denial that the claimant is permanently totally disabled and its assertion that HDC is paying TTD benefits. Moreover, HDC offered no evidence that the prescriptions are unnecessary to maintain medical stability.

¶62 HDC has provided no evidence justifying its denial of payments for the claimant's prescription headache medications. I find that HDC is liable for payment of the claimant's prescription medications for his headaches. It shall make immediate payment for the prescriptions that were previously filled for the claimant but for which it declined payment. Further, it shall contact the pharmacies at which the claimant fills the prescriptions and provide them with assurance that it will reimburse those pharmacies for future prescriptions.

C. Penalty and Attorney Fees

¶63 HDC's denial of payment for the claimant's drug prescriptions for his headaches is unconscionable and outrageous. It terminated payment for the prescriptions without notice to the claimant and without ever providing any reason for doing so. It did so after paying for the prescriptions for several years. At trial it offered no defense for its actions

other than its attorney's *speculation* that the prescriptions constituted secondary medical benefits. Where an insurer unreasonably denies benefits it is liable for attorney fees and a twenty percent penalty. §§ 39-71-612 and -2907, MCA (1993). Since HDC's denial of benefits was unreasonable, the claimant is entitled to both attorney fees in an amount to be determined by the Court and to a twenty percent penalty on all amounts it owes for previously filled prescriptions and for all amounts it owes in the future with respect to the claimant's headache medications.

D. Sanctions

¶64 Section 39-71-2914, MCA (1993-2003), provides:

> **39-71-2914. Signing of petitions, pleadings, motions, and other papers - requirements - sanctions.** (1) Every petition, pleading, motion, or other paper of a party appearing before the workers' compensation court and represented by an attorney must be signed by at least one attorney of record in his individual name. The signer's address also must be stated.
> (2) A party who is not represented by an attorney shall sign his petition, pleading, motion, or other paper and state his address.
> (3) The signature of an attorney or party constitutes a certificate by him that: (a) he has read the petition, pleading, motion, or other paper;
> (b) to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact;
> (c) it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and
> (d) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
> (4) If a petition, pleading, motion, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose an appropriate sanction upon the person who signed it, a represented party, or both. The sanction may include an order to pay to the other party or parties the amount of the reasonable expense incurred because of the filing of the petition, pleading, motion, or other paper, including reasonable attorney fees.

¶65 This is the third case involving HDC and Beaulieu. In the prior two cases, HDC submitted itself to this Court's jurisdiction, admitted it provided workers' compensation coverage for Beaulieu, and admitted liability for Beaulieu's claim. HDC succeeded in getting both of the prior petitions dismissed by agreeing to pay the benefits the claimant was seeking. In doing so, it succeeded in getting Beaulieu's alternative claim against the UEF dismissed.

¶66 Now, in the present proceeding, HDC repudiates its prior admissions and asserts that this Court does not have jurisdiction over the matter because it is paying benefits under an

ERISA plan over which the federal courts have exclusive jurisdiction. At trial its attorney argued that the decisions in *Total Mechanical* caused it to change its position. That argument is utterly without merit and flies in the face of the position the attorney and HDC took in the *Total Mechanical* case.

¶67 As set forth in my previous discussion of *Total Mechanical*, HDC never took the position in *Total Mechanical* that it was a *de jure* workers' compensation insurer. It initially asserted that HDC and its client companies were not subject to Montana workers' compensation laws because HDC had an ERISA plan. Early on, prior to the first two *Beaulieu* petitions, HDC came to the realization that its ERISA position was untenable and abandoned it. It then sought to convince the UEF, the Department, this Court, and the Supreme Court that it had secured retroactive insurance policies vitiating the lack of coverage. It was that position that this Court, and the Supreme Court, rejected.

¶68 In light of its contractual obligation to provide workers' compensation insurance to its clients, when HDC and its attorney filed responses to Beaulieu's prior two petitions they surely were aware that any penalties assessed against its clients would result in claims for indemnification and damages by HDC's clients. I can only conclude that their admission of liability in the first two *Beaulieu* cases was part of their strategy to show that HDC's clients were not uninsured employers. After the decision in *Total Mechanical*, HDC and its attorney apparently did not have the same incentive and did an about-face. That about-face is unconscionable. That about-face has nothing to do with the decision in *Total Mechanical,* which merely rejected HDC's assertion that its clients were insured under retroactive policies. That about-face is an affront to the integrity of this Court and the judicial system. It is not justified by the facts; it is not justified by existing law; and it is not justified by any good faith argument for a change in existing law.

¶69 I am therefore imposing sanctions against both HDC and its attorney, personally, in the amount of $375, which represents three hours of work by Beaulieu's attorney in opposing HDC's Motion to Dismiss at a rate of $125 an hour, which I find reasonable. That amount shall be remitted to Beaulieu's attorney within thirty days of this decision.

JUDGMENT

¶70 The claimant is entitled to payment for his headache medications as prescribed by his physicians. HDC shall promptly pay for any previously filled prescriptions for which it has not paid and shall continue to pay for the prescriptions until further order of this Court. Further, HDC shall contact the pharmacies at which the claimant fills the prescriptions and provide them with assurance that it will reimburse those pharmacies for future prescriptions.

¶71 As a penalty, HDC shall pay the claimant twenty percent of all amounts it pays pursuant to the preceding paragraph.

¶72 HDC shall pay the claimant's attorney fees incurred in connection with his petition in an amount to be determined by the Court. HDC shall also pay the claimant's costs.

¶73 HDC and its attorney, Mr. Andrew J. Utick, shall pay the claimant's attorney $375 as sanctions for HDC's Motion to Dismiss. Such amount shall be paid within thirty days of this decision.

¶74 Imposition of sanctions, as set forth in the previous paragraph, was made after hearing and was limited to the Motion to Dismiss. In the Pretrial Order, signed by HDC's attorney, HDC and its attorney continued to insist that this Court lacks jurisdiction and that HDC has an ERISA plan. That continued assertion of lack of jurisdiction is a continuation of the untenable position taken in the Motion to Dismiss and may warrant further sanctions. Moreover, the failure of HDC to comply with this Court's orders to produce the claims file and documents which might prove the existence of an ERISA plan may be contemptuous. That failure raises a serious issue as to whether HDC has misrepresented the existence of an ERISA plan. Since these matters involve the integrity of the judicial system, this Court reserves jurisdiction with respect to further proceedings for sanctions and contempt.

¶75 This JUDGMENT is certified as final for purposes of appeal, however, the Court reserves jurisdiction to determine whether HDC is in contempt of court and whether further sanctions are warranted.

¶76 Any party to this dispute may have twenty days in which to request a rehearing from this Decision and Judgment Awarding Medical Benefits, Attorney Fees, Penalties, and Sanctions.

DATED in Helena, Montana, this 22nd day of September, 2004.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Ms. Laurie Wallace
Mr. Andrew J. Utick
Submitted: August 23, 2004

1. Beaulieu then filed a third petition on January 14, 1998, in which he sought a penalty with respect to delayed TTD benefits. (*Beaulieu v. UEF and Human Dynamics, Inc.,* WCC No. 9801-7901.) That action was consolidated with WCC No. 9712-7880 (*Beaulieu II)* and is considered a part of that case.

2. HDC may also be equitably estopped from asserting it is not an insurer. At trial counsel for the claimant represented that as a result of HDC's acceptance of liability and payment of benefits, the claimant never filed an action against Eureka and never pursued further

benefits from the UEF. In light of the representations of HDC and the reliance of the claimant on those representations, HDC may be equitably estopped from asserting it is not an insurer subject to this Court's jurisdiction.

3. The Court anticipates that HDC may argue that the language of the first paragraph of the notice regarding "benefits at levels commensurate with the workers' compensation laws of the states in which your employer has employees" embraces and incorporates state workers' compensation laws as a part of the benefits provisions of the plan. The plain language of the plan contradicts any such argument. The notice does not pretend to extend benefits; on its face it only tells employees that the plan provides alternative benefits "commensurate" with the requirements of the state workers' compensation laws. The actual benefits afforded under the plan are the benefits specified in the subsequent provisions of the plan.