

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9611-7648

**R. ZIMMERMAN, INOCO INCORPORATED/
BIG Z TRUCKING/ZIMMERMAN TRADING COMPANY**

Appellants

vs.

**UNINSURED EMPLOYERS' FUND/
STATE COMPENSATION INSURANCE FUND**

Respondents.

ORDER ON APPEAL

Summary: Trucking company appealed decision of the Department of Labor and Industry finding it did not have workers' compensation insurance for a specific period and assessing a penalty of \$14,659.86. In addition to arguing that it should not have been governed by the Montana Workers' Compensation Act, the trucking company argued it did in fact have a workers' compensation policy through the Montana State Compensation Insurance Fund, which was issued in another name, but allegedly for the same company.

Held: To the extent the Department of Labor's order assessed a penalty against the individual owner, the decision below is reversed. The hearing officer's decision did not find reasons to ignore the protections against individual liability afforded through incorporation under Montana law. While evidence indicated several associated companies, one of which may have had a policy with State Fund, there was only one company employing the individuals in question during the time period at issue. The "new" policy with State Fund had not been purchased to cover those individuals, who had been employed previously. Under 39-71-118, MCA (1993), the individuals in question were employees for whom the employer should have purchased Montana workers' compensation insurance where they were residents of Montana and their work was controlled from Montana. The penalty assessment against the corporate entities is upheld.

Topics:

Employment: Montana employment. Under 39-71-118, MCA (1993), truck drivers were employees for whom the employer should have purchased Montana workers' compensation insurance where they were residents of Montana and their work was

controlled from Montana. A penalty assessment issued the Department of Labor is upheld against specific corporate entities.

Penalties: Uninsured Employers. To the extent the Department of Labor's order assessed a penalty against the individual owner of a corporate uninsured employer, the hearing officer's decision affirming the order is reversed. The hearing officer's decision did not find reasons to ignore the protections against individual liability afforded through incorporation under Montana law, but merely appeared to find liability against the individual as well as corporate entities.

This is an appeal from a decision of the Montana Department of Labor and Industry (Department) determining that the appellants did not have workers' compensation insurance, as required by law, for the period December 21, 1992 to May 2, 1994. Based on that determination, the Department assessed a penalty against appellants in the amount of \$14,659.86. Appellants disagreed with the determination and sought judicial review by this Court. After carefully reviewing the record below, this Court **affirms** the decision of the Department with respect to the Montana corporation known as Inoco, Inc., which was formerly known as Big Z, Inc. Insofar as the decision below may purport to impose joint or several liability for the penalty upon Robert Zimmerman and Zimmerman Trading Company, it is **reversed**.

Factual Background

A. Big Z Inc.

Robert Zimmerman operates a number of businesses. As pertains to this case, the evidence shows that he is the principal shareholder of a Montana corporation incorporated in 1982 as Roosevelt Disposal, Inc. (Tr. at 16.) In 1986 the corporate name was changed to Big Z, Inc. (*id.*) which shall hereafter be referred to as "Montana Big Z." In October 1993 the Montana corporation again changed its name, this time to Inoco, Inc., by which name it continues to be known. While there was some initial confusion of names during the hearing below, it is clear that Montana Big Z and Inoco are the same corporation. The different names were used during different time periods. For convenience, the Court will refer to the corporation as "Montana Big Z." (*Id.* at 16, 22.)

Montana Big Z is a trucking company. In 1991 the company employed 68 truck drivers and had a payroll in excess of \$250,000. (Uninsured Employers Fund [UEF] Ex. B at 15.)

In early 1992 Zimmerman incorporated a second, separate corporation in the State of Utah using the name "Big Z, Inc." (Tr. at 17.) To avoid confusing the two corporations, the Utah company will be referred to as "Utah Big Z."

Utah Big Z listed its office in Salt Lake City. (See UEF Ex. G at 1-3.) Like Montana Big Z, it was a trucking company. (Tr. at 18; UEF Ex. G.) It operated refrigerated trucks.⁽¹⁾ (Tr. at 21.) The operation was short-lived and Utah Big Z was sold in August 1992. (*Id.* at 18.)

Following Utah Big Z's cessation of business in August 1992, Montana Big Z did business in Utah. That business primarily involved trucking oil from refinery sites in Utah to construction projects in Utah, although a handful of loads were hauled in Montana and Wyoming. Montana Big Z conducted trucking operations in Utah throughout 1993.

B. Montana Policies Covering Montana Big Z.

Montana Big Z obtained workers' compensation insurance through the Montana State Compensation Insurance Fund on January 24, 1987.⁽²⁾ (State Fund [SF] Ex. 4.) That policy was canceled on December 21, 1992, for non-payment of premium. (SF Ex. 7.) Montana Big Z was thereafter uninsured until May 3, 1994, when it reinsured with the State Fund under its new name, Inoco, Inc. (UEF Ex. F at 10.) Thus, between December 21, 1992 and May 3, 1994, Montana Big Z lacked Montana workers' compensation insurance coverage.

C. Utah Coverage.

"Big Z, Inc." was covered by the Utah State Compensation Fund for the period March 28, 1992 to September 16, 1994. (UEF Ex. C at 5; Inoco Ex. 1 at 1-2.) Which Big Z was covered -- Montana Big Z or Utah Big Z -- is debatable. The initial application to the Utah Fund listed a Salt Lake City office for the corporation, which suggests that Utah Big Z was to be the insured. The office address was changed in April 1993 at the request of the bookkeeper for Zimmerman's various businesses. She wrote on the April Utah Fund billing, "Please change my address." (UEF Ex. G at 4.) She then wrote in the Billings address used by various Zimmerman businesses, including Montana Big Z. (*Id.*) Later on, at least by November 1993, the Utah Fund was notified that the name of the corporation had been changed to Inoco, Inc.

Kim Aaberg was hired as Big Z's bookkeeper in February 1992. (Tr. at 41-42) In April 1992 she was transferred to the payroll of Zimmerman Trading Company but continued to do the bookkeeping for Big Z. She also dispatched Montana Big Z truckers in 1993 (*id.* at 22-23) and prepared workers' compensation information submitted to the Utah Fund. (*Id.* at 31; Inoco Ex. 2.)

During 1992 and 1993, Aaberg was unaware of the fact that there were two Big Z corporations. (Tr. at 59.) Aaberg testified:

I didn't know there was a separate corporation with articles and the whole shebang set up in the state of Utah. I thought it was the Montana corporation at that time. I mean, I am aware now that there is a Utah corporation but I wasn't [then]. I thought it was all one corporation because it all had the same name.

(*Id.*)

If the Utah policy was intended to, and in fact, covered Utah Big Z, then Montana Big Z had no coverage either in Utah or Montana between December 21, 1992 to May 3, 1994. The record contains no information indicating that the Utah Fund ever addressed the matter, or was ever even aware there were two different corporations. (UEF Ex. C at 5-6). Neither the UEF nor the State Fund has contended that Montana Big Z was uninsured in Utah, so the matter is academic.

D. Wesley Long's Accident and Workers' Compensation Claim.

On September 1, 1993, Wesley Long (Long) was injured in a truck accident in Utah. At the time of the accident he was driving a truck for Montana Big Z. (Utah Big Z had ceased to exist more than a year prior to the accident.) Long was being paid by Montana Big Z and his wages were being reported for unemployment and workers' compensation purposes by Montana Big Z. (UEF Ex. G at 19.)

Long submitted a claim for compensation to the Utah Fund. The Utah Fund initiated benefits pending further investigation. (UEF Ex. C at 1.) After investigation, the Utah Fund denied liability for the claim, finding that Long was not a Utah employee. (*Id.* at 5-6.) In a January 6, 1995 letter to Long's attorney, the Utah Fund listed its reasons for determining that Long was not a Utah employee. According to the letter:

Please be advised that the Workers Compensation Fund has denied further payment of Mr. Long's claim for the following reasons:

- The police report for the September 1, 1993 accident lists Mr. Long as being a Montana resident.
- The medical bills received list Mr. Long with a Montana address.
- Mr. Long's driver's license is a Montana driver's license.

- At the time of Mr. Long's accident, there was not a terminal office located in Utah for quite a length of time.

- The employer's report infers that Mr. Long was supervised controlled by the dispatcher out of Billings, Montana.
- It was determined that premium was not paid for Mr. Long.

I quote Workers Compensation Fund's attorney, Shaun Howell's February 25, 1994 letter to Big Z Inc., "On April 5, 1993, our office received notification to change the insured's mailing address to a post office box in Billings, Montana, as it appears that

you were closing your Salt Lake City operations and relocating the company back to Billings in late 1992 or early 1993. According to the reported payrolls that we received in our office, the payroll dropped dramatically during that period. In July 1993, the reported trucking payroll was \$2,025. In August 1993, the reported trucking payroll was \$1,502 and for September 1993 the reported trucking payroll was \$1,507. On the employer's report submitted for Wesley Long, you reported that his payroll was approximately \$800/week (a monthly wage of \$3,467). Our office also verified wages of this amount with you over the phone. The employer's report indicated that Wesley Long was employed by the insured for at least 2 1/2 years. Given the low payrolls reported in the months of August and September, it is clear that Wesley Long's wages were not reported to us. This is also supported by the fact that there was no significant change in the report of September 1993 payroll when Wesley Long was not working. That Wesley Long's payroll was not being reported to us, indicates to us that you, the insured, did not believe Wesley Long to be a Utah employee or covered under the Utah Workers Compensation Fund's policy."

As to the issue of a potential third party claim, an initial letter was sent to Brad Ragan, Inc. the seller of the tires. When it was determined that this claim should not have been paid, no further investigation or follow up was done.

Please call me if you have any further questions.

Sincerely,

WORKERS COMPENSATION FUND OF UTAH

\s\ Dianne Madsen

DIANNE MADSEN

Legal Adjuster

(801) 288-8052

(*Id.* at 7-8.)

E. The Montana UEF Audit and Penalty.

Following denial of Long's claim by the Utah Fund, Long sought workers' compensation benefits in Montana. Since there was no Montana coverage, the Montana UEF accepted liability for the claim. That acceptance triggered an audit of Big Z.

An audit was conducted by both the UEF and the Unemployment Insurance Division (UI) of the Department. During the course of the audit, the auditors obtained wage and other information pertaining to Big Z, as well as another Zimmerman owned company known as Zimmerman Trading Company. The Big Z information was not delineated as between Utah

Big Z or Montana Big Z, and indeed none of the filings submitted by Big Z ever distinguished between the two corporations.

As a result of its audit, the UEF determined that between December 21, 1992 and May 2, 1994, Montana Big Z paid \$29,722.89 in wages. (UEF Ex. A at 6.) The wages were for five employees: Long, Joel Sparrow, Scott Johnstone, Loren Stern, and Martin Comber. (Tr. at 94; UEF Ex. A at 6.) Based on documentary evidence, the UEF auditor determined that all five employees were Montana residents. She further determined that Montana Big Z was uninsured in Montana and assessed a penalty in the amount of \$14,659.86, which is double the amount of the premium Montana Big Z would have paid for Montana coverage during the audit period. (*Id.* at 5)

The calculation of wages was based on wages Big Z reported to the Utah Uninsurance Division for 1993, on W-2 and W-3 statements for 1993 and the first quarter of 1994, and on payroll checks from Big Z to its employees for the period April 1, 1994 to May 1, 1994. (UEF Ex. B at 6-9.) Copies of payroll checks or ledgers were not introduced at hearing. However, the wage figures determined by the UEF are corroborated in significant part by independent documentation from the Utah State Fund and the Utah Unemployment Insurance Division. (UEF Exs. G; Inoco Exs. 2 and 3.) The Utah Fund information shows that Big Z reported wages of \$21,576.29 for the calendar year 1993. (UEF Ex. G at 6.) The Utah unemployment insurance reports for the fourth quarter of 1992 and the second and fourth quarters of 1993 show wages of \$18,107.35 for the three quarters. The appellant did not offer evidence disputing the accuracy of the wages calculated by the auditor.⁽³⁾

F. Residency.

UEF's determination concerning the residency of the five Big Z employees was based on the addresses Big Z listed for the five drivers, unemployment insurance records, and the determination concerning Long's residence. In her report, the UEF auditor stated in relevant part:

I determined Wesley Long, Joel Sparrow, Scott Johnstone, Loren Stern and Martin Comber to be Montana residents controlled and directed from Montana. . . . My determination was based on the Montana addresses Big Z/Inoco listed for the employees in their employee earnings records; information obtained from unemployment insurance records . . . ; and WCF's [Utah Fund's] determination that Long was a Montana resident. The Utah Highway Patrol accident report listed Long as a Montana resident with a Montana driver's license. Long's address on the accident report was 26 West Meadows Drive, Billings. The medical bills received by WCF also showed Long as having a Montana address.

(UEF Ex. A at 2.) The Court notes that the auditor requested other information from Zimmerman and Montana Big Z that would have assisted her in making her residency

determination.⁽⁴⁾ (*Id.*) Zimmerman and Montana Big Z did not comply with her request for specific information concerning the drivers. (UEF Ex. D at 6.) Indeed, Zimmerman and Montana Big Z did not cooperate with other requests made by the UEF and UI's auditors during their audits. (*Id.* at 5-6; H at 2.) Similarly, at hearing, Zimmerman and Montana Big Z presented their case through a bookkeeper who testified based on hearsay and her review of certain company records. Zimmerman and Montana Big Z failed to produce Montana Big Z's records. Written inquiries sent by the auditors to the drivers were also ignored.⁽⁵⁾ (UEF Ex. D at 10-15.)

The evidence pertaining to Long's residency is set forth in the Utah Fund letter denying liability and in other information furnished with respect to previous unemployment claims he had made in Montana, as follows:

In his claim to the Utah Fund, Long listed his address as a Montana post office address in Helena, Montana.

In talking to police following his accident, Long reported he was from Montana.

In medical reports, Long indicated he was a Montana resident.

Long filed for unemployment benefits in Montana in February 1991 and November 1992. His claim was based on employment with Montana Big Z and other Montana employers, and he listed his address as the same Helena post office box he listed on his claim for Utah workers' compensation benefits.

(UEF Ex. B at 1; 6 C at 7.) Kim Aaberg also testified that while claimant was working in Utah he lived in his truck and never rented an apartment or house in Utah. (Tr. at 25.) While this testimony was clearly based on hearsay or speculation,⁽⁶⁾ the evidence was solicited by appellant and is not challenged on appeal. The final piece of evidence concerning Long was Montana Big Z's own listing of Long as having a Montana address.

As to the other four employees working for Montana Big Z between December 21, 1992 and May 3, 1994, the evidence of residency was as follows:

For purposes of unemployment insurance, wages for Joel Sparrow were reported to the Montana UI for the second, third, and fourth quarters of 1992 and the first quarter of 1993. Montana Big Z reported Montana wages for Sparrow during all but the fourth quarter. A different Montana employer reported wages for Sparrow during the fourth quarter. (UEF Ex. B at 10.)

In August 1993 Sparrow applied in Montana for unemployment benefits. He listed his address as 2107 Harnish Road, which is the same address for Montana Big Z. (*Id.* at 9.)

Montana wages were reported by Montana Big Z to Montana UI for Scott Johnstone for the second quarter of 1994. Another employer reported Montana UI wages for Johnstone during the second, third and fourth quarters of 1994 and the first quarter of 1995. (*Id.* at 3.)

Montana wages were reported by Montana Big Z to Montana UI for Martin Comber for the second, third and fourth quarters of 1994. Another employer reported Montana wages for Comber during the fourth quarter of 1994 and the first quarter of 1995. (*Id.* at 2.)

- All five employees were listed by Montana Big Z as having Montana addresses. (UEF Ex. A at 2.)

G. Zimmerman Trading Company Policy of Insurance.

Montana Big Z did not have its own Montana workers' compensation insurance policy between December 21, 1992 and May 3, 1994. However, as a fall-back position, it asserted in the proceeding below, and asserts on appeal, that a Montana policy covering Zimmerman Trading Company should be construed as covering Montana Big Z.

Kim Aaberg was allowed to testify at hearing that, according to Zimmerman's accountant, Zimmerman Trading Company is a subsidiary of Montana Big Z. (Tr. at 16-17.) Later she testified, "According to the accountant, Zimmerman Trading has whatever INOCO has." (*Id.* at 78.) With regard to Montana Big Z and Zimmerman Trading, the accountant also told UEF auditor that "there wasn't a sole proprietorship and the taxes for all the businesses were filed under a single corporate entity." (UEF Ex. A at 4.) Zimmerman Trading did have a policy of insurance for the time frame at issue. (SF Ex. 4.)

Notwithstanding the accountant's statements to Aaberg and the auditor, the applications for insurance and reports filed by Zimmerman Trading and Montana Big Z show that they were separate entities. Zimmerman Trading and Montana Big Z filed separate UI and withholding tax reports. (UEF Ex. H at 1.) Truck drivers for Montana Big Z were listed on Montana Big Z reports. Montana Big Z drivers were paid from a Montana Big Z payroll account. (UEF Ex. A at 7-12.) While one Utah insurance premium was paid from a Zimmerman Trading account, there is no indication that Zimmerman Trading paid other premiums or any of the wages of the Montana Big Z driver.⁽⁷⁾ There were two different employer identification numbers, although both numbers were used by both entities at one time or another without any apparent logic or reason. (See Tr. at 71.)

Zimmerman Trading's applications for workers' compensation insurance are the most telling items of evidence with respect to the contention that Zimmerman Trading and Montana Big Z were/are one and the same. The applications were made to the State Fund, which issued policies of insurance based on the applications. The applications are set forth in State Fund's Exhibit 4.

The first application was made on April 7, 1992, at the same time Utah Big Z was operating reefer trucks in Utah. The application was signed by Robert Zimmerman. The application stated the applicant's name as "Zimmerman Trading Company." It stated that the company was a "New business" and had never been previously insured by the State Fund. When asked if the company was a subsidiary of another entity or if it had subsidiaries, the "NO" box was checked. The application further stated that the business was a "Sole Proprietorship." The application described the business as: "Brokerage of produce, farm commodity & petroleum by-products, salt water and transportation thereof when necessary; elevator bean sacking." (Inoco Ex. 4 at 4-5.) As potential employees, it listed brokers with estimated earnings of \$20,000, "elevator sacking" with estimated earnings of \$15,000 and "Trucking - occasional" with estimated earnings of \$10,000. (*Id.* at 6.) State Fund premium statements found at UEF's Exhibit F show that between April 1992 and August 1, 1994, Zimmerman Trading reported truck driver wages as **zero**.

Zimmerman Trading submitted a second application to the State Fund on September 26, 1994, apparently after the first policy lapsed. As in the first application, it stated that the company was a sole proprietorship. It listed potential employees as "Farm or Ranch," "Trucking", and "Clerical." However, it listed wages for farm and ranch and trucking as **zero**. The only estimated earnings reported were for "clerical" services. (*Id.* at 14.)

Proceedings and Decision Below

The UEF auditor's decision to impose a penalty was made on November 17, 1995. (UEF Ex. A.) Appellant requested a contested case hearing on November 29, 1995. (Department File.) A contested case hearing was held on August 21 and 22, 1996. On October 29, 1996, the Department's hearing officer issued his Findings of Fact; Conclusions of Law; and Order. The next day, October 30, 1996, he issued Findings of Fact; Conclusions of Law; and order Amended to Correct "Appellant" Reference Errors. The latter was issued because in some places in the original decision the hearing officer referred to appellant as "respondent" rather than "appellant."

In his decision, the hearing officer found that Long was a Montana resident⁽⁸⁾ and controlled by Montana Big Z from Montana. He further found that the Zimmerman Trading Company policy issued by the State Fund did not cover Big Z and that Big Z was uninsured during the period for which the penalty was imposed. Finally, he affirmed the proposed penalty of \$14,659.86.

This appeal by appellant followed on November 7, 1996. Briefing was completed on June 4, 1997, at which time the appeal was deemed submitted for decision.

Issues On Appeal

In its brief on appeal, the appellant states the issues as follows:

1. Whether the workers' compensation claim of Wesley Long arising out of a truck accident in the state of Utah on September 1, 1993, is compensable under the Montana Workers' Compensation Act.

2. Whether there was workers' compensation coverage in place with the State Fund under the name "Zimmerman Trading" which covers the claim of Wesley Long for its industrial accident of September 1, 1993.

(Appellants' Brief at 2.)

Appellants' statement of the issues is unsatisfactory. The issue raised in this case is not whether Long's claim is compensable in Montana, although that issue certainly underlies the ultimate issue, but whether the penalty assessed against the appellant is proper. The Court therefore restates the issue on appeal as follows:

Whether the Department decision imposing a penalty upon the appellant under section 39-71-504, MCA, was clearly erroneous or contrary to applicable statutes governing workers' compensation coverage in Montana.

Jurisdiction

The Department's jurisdiction to impose a penalty against an uninsured employer is set forth in the Montana Workers' Compensation Act at section 39-71-504, MCA, which sets forth the manner of funding for the Uninsured Employers' Fund. The law in effect at the time of the injury governs. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1991-1993 version of the Workers' Compensation Act governs. The section provides in relevant part:

The [uninsured] fund is funded in the following manner:

(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.

This Court's jurisdiction to judicially review a decision of the Department to impose a penalty is set forth in section 39-71-2401, MCA (1991), which provides in relevant part:

(2) A dispute arising under this chapter that does not concern benefits or a dispute for which a specific provision of this chapter gives the department jurisdiction must be brought before the department.

(3) An appeal from a department order may be made to the workers' compensation court.

Since the penalty imposed in this case arises under chapter 71 of Title 39, the appeal from the Department's decision was properly filed in this Court.

Standard of Review

The Workers' Compensation Act does not set forth standards of review for appeals. Therefore, judicial review is governed by the Montana Administrative Procedure Act, 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) findings of fact, upon issues essential to the decision, were not made although requested.

Under the clearly erroneous standard of subsection (2)(a)(v), the hearing officer's findings of fact may be overturned on judicial review only where they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *State Compensation Mutual Ins. Fund v. Lee Rost Logging*, 252 Mont. 97, 102, 827 P.2d 85, 88 (1992) (citing 2-4-702(a)(v), MCA). The Court may not reweigh the evidence, rather the findings of fact must be upheld if they are supported by substantial, credible evidence in the record. *Nelson v. EBI Orion Group*, 252 Mont. 286, 289, 829 P.2d 1, 3 (1992). The scope

of review with respect to conclusions of law is broader. The conclusions must be examined to determine if they are correct. *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

Discussion

The amount of the penalty imposed in this case is not at issue. What is at issue is whether the penalty should be imposed at all. Appellant argues that Long was a Utah resident working in Utah and therefore exempt from Montana workers' compensation requirements. It has ignored the residency of its other drivers. Secondly, appellant argues that if it was required to have Montana workers' compensation coverage for its employees, then it in fact had such coverage under the State Fund policy covering Zimmerman Trading Company. The UEF joins in the second argument. After some initial comments, I will address both arguments.

I. The Record Below.

As an initial matter, this Court found it frustrating to review the record below.

As reflected in the auditor's records and report, the appellant was uncooperative in the audit process and never did provide some of the information requested by the auditor. At hearing, the appellant presented its case through a bookkeeper whose testimony was based on secondhand knowledge and rank hearsay. She was allowed to testify, in effect, that the appellant's accountant said that Big Z and Zimmerman Trading were one and the same company. The accountant was never called as a witness, and therefore never subjected to cross-examination concerning his statement. His statement in any event amounted to no more than an opinion, and a questionable one at that since the legal status of business entities is usually a matter of law.

The bookkeeper was also permitted to testify concerning log sheets for loads driven by Long without appellant ever producing or disclosing the actual records to the other parties or the hearing officer. Appellant thereby circumvented the requirement that it provide the other parties with its exhibits prior to trial and prevented the opposing parties from effective cross-examination concerning the information contained in the logs.

Evidence concerning corporate entities was also offered through the bookkeeper. She was permitted to testify as to corporate status based on *her* review of corporate books and what she was told by others. Neither the originals nor copies of incorporation papers or other corporate documents were ever produced. Moreover, during the period of time covered by the penalty, she was unaware of Utah Big Z, nevertheless she was permitted to testify concerning its legal status, its period of operation, and its ultimate sale.

The review of the record has also been complicated by the state of the exhibits. Some of the exhibits were poor copies of originals and virtually unreadable.

Nonetheless, none of the parties has challenged the evidentiary rulings made at hearing or the record on which the ultimate decision was made. This Court must therefore accept the record presented to it and decide the case based on that record.

II. Who is the Appellant?

Also troubling in this appeal is the disregard of the entity responsible for the penalty. The auditor listed the employer as "Robert Zimmerman" with a d/b/a of "Big Z/Inoco Inc." (UEF Ex. A.) The decision below is captioned "R. Zimmerman, Inoco Inc.,/Big Z Trucking/Zimmerman Trading Company." They are all lumped together. In imposing the penalty, no distinction was made between Zimmerman, the individual, and the corporation in which Zimmerman is a shareholder.

Corporations are legal entities under Montana law. Incorporation insulates shareholders, officers and directors from personal liability for the corporation's obligations; yet, the auditor, the hearing officer, and the parties themselves seemingly disregarded the fact that Montana Big Z is a corporation. While the limitation of liability statutorily afforded a corporation may be disregarded in instances where corporate formalities are ignored, the decision below did not consider or address the facts necessary to impose individual liability on Zimmerman. Therefore, there is no basis for imposing individual liability upon Robert Zimmerman. The penalty must be limited to Montana Big Z, now known as Inoco, Inc.

III. The State Fund as Insurer for Big Z.

Appellant's argument that Montana Big Z was insured by the State Fund is a fall back position for Big Z. While the UEF lends its considerable support for the argument, the argument has no merit whatsoever and warrants only brief discussion.

The argument is based on an insurance policy issued by the State Fund for Zimmerman Trading Company. The applications for insurance on their face are dispositive of any contention that the policy was intended to cover Montana Big Z. The applications stated that Zimmerman Trading Company was a sole proprietorship. The initial application indicated that Zimmerman Trading Company was a "new business" and had never been insured by the State Fund. Those statements are utterly inconsistent with the fact that Montana Big Z had been in business for a number of years and previously been insured by the State Fund. Montana Big Z was a corporation, not a sole proprietorship. Moreover, the reporting of truck drivers' wages contradicts the contention. Zimmerman Trading never reported wages for the truck drivers whose wages form the basis for the penalty; Montana Big Z -- the corporation -- did.

IV. The Penalty -- Applicability of Montana Insurance Requirements.

The Montana Workers' Compensation Act requires that all employers subject to the Act provide workers' compensation insurance coverage for their employees. Section 39-71-401, MCA (1991), provides in relevant part:

39-71-401. Employments covered and employments exempted. (1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers as defined in 39-71-117 and to all employees as defined in 39-71-118. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

As set forth in the section, the insurance requirement applies to employers "as defined by 39-71-117" and to employees "as defined in 39-71-118." Thus, to determine whether Montana Big Z was uninsured, we must determine whether Montana Big Z was an "employer" within the meaning of the Montana Workers' Compensation Act and whether its truck drivers were "employees" within the meaning of the Act.

Employer is defined in section 39-71- 117, MCA (1993)⁽⁹⁾, as follows:

39-71-117. Employer defined. (1) "Employer" means:

(a) the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, and private corporation, including any public service corporation and including an independent contractor who has any person in service under any appointment or contract of hire, expressed or implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee of the deceased employer;

(b) any association, corporation, limited liability company, or organization that seeks permission and meets the requirements set by the department by rule for a group of individual employers to operate as self-insured under plan No. 1 of this chapter; and

(c) any nonprofit association, limited liability company, or corporation or other entity funded in whole or in part by federal, state, or local government funds that places community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or associations or federal, state, or local government entities.

(2) A temporary service contractor is the employer of a temporary worker for premium and loss experience purposes.

(3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses the services of a worker furnished by another person, association, contractor, firm, limited liability company, or corporation, other than a temporary

service contractor, is presumed to be the employer for workers' compensation premium and loss experience purposes for work performed by the worker. The presumption may be rebutted by substantial credible evidence of the following:

- (a) the person, association, contractor, firm, limited liability company, or corporation, other than a temporary service contractor, furnishing the services of a worker to another retains control over all aspects of the work performed by the worker, both at the inception of employment and during all phases of the work; and
- (b) the person, association, contractor, firm, limited liability company, or corporation, other than a temporary service contractor, furnishing the services of a worker to another has obtained workers' compensation insurance for the worker in Montana both at the inception of employment and during all phases of the work performed.

(4) An interstate or intrastate common or contract motor carrier doing business in this state who uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is subject to loss experience rating in this state unless:

- (a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3); or

- (b) the person, association, contractor, firm, limited liability company, or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation insurance on the drivers in Montana both at the inception of employment and during all phases of the work performed.

Substantial, uncontradicted evidence shows that Montana Big Z is a private, Montana corporation and that it employed drivers between December 21, 1992 and May 2, 1994. It was thus an employer as defined in subsection (1)(a). Assuming that Montana Big Z is an "interstate or intrastate common or contract motor carrier," it was not exempt from Montana coverage requirements since the conditions set out in subsection (4) were not met. There is no evidence indicating that the drivers were certified as independent contractors; there is no evidence that the drivers were furnished by another company which had Montana coverage applicable for the drivers; and Utah Big Z had no Montana workers' compensation policy.

The determination as to whether Montana Big Z's employees are subject to the Montana Workers' Compensation Act is governed by section 39-71-118, MCA (1993)⁽¹⁰⁾, which defines "employee" for purposes of the Act. The section provides in relevant part:

39-71-118. Employee, worker, volunteer, and volunteer firefighter defined. (1)

The term "employee" or "worker" means:

- (a) each person **in this state**, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any

appointment or contract of hire, expressed or implied, oral or written. . . . [Emphasis added.]

. . . .

(7) For purposes of this section, an "employee or worker in this state" means:

(a) **a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state;**

[Emphasis added.]

. . . .

The hearing officer found that Long was a resident of Montana and that his work was controlled by Big Z from Montana; therefore, he met the criteria of subsection (a). No express finding was made with regard to the other four Montana Big Z employees, but in imposing the full amount of the penalty the hearing officer implicitly held that the other employees were also Montana residents controlled by Big Z from Montana.

With respect to the four drivers other than Long, the only evidence offered at hearing indicated they were Montana residents and that Big Z controlled their activities from Montana. All four were listed by Montana Big Z as Montana residents. Some had previously filed unemployment claims in Montana and worked for other Montana employers. No evidence was offered to show that any of the four drivers resided other than in Montana. As to control, Montana Big Z had no terminal or office in Utah during the penalty period and uncontradicted evidence showed that its operations were conducted from Billings, Montana. Thus, even if the hearing officer erred when he failed to make an express finding as to those drivers, the error is harmless -- he could have reached no other conclusion.

With respect to Long, the hearing officer's finding was supported by substantial evidence. The rules for determining residence are set out in section 1-1-215, MCA. The section is part of a chapter which sets out definitions of general applicability and must be applied here since there is no definition of "residence" within the Workers' Compensation Act. See *SJL of Montana Associates Ltd. Partnership v. City of Billings*, 263 Mont. 142, 147, 867 P.2d 1084, 1087 (1993) ("[W]hen a word is defined in the code, that definition is applicable to other parts of the code except where the contrary is plainly indicated.").

Section 1-1-215, MCA (1995), provides:

Residence -- rules for determining. Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

(1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose.

(2) There may only be one residence.⁽¹¹⁾

(3) A residence cannot be lost until another is gained.

(4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither

parent has legal custody, the residence of the parent with whom he customarily resides is the residence of the unmarried minor child. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor child.

(5) The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

(6) The residence can be changed only by the union of act and intent.

As set forth in subsection (1), the fact that Long was working in Utah is not determinative. Therefore, other indicators of residency must be considered.

The other indicators include the following facts:

Prior to working in Utah, Long had worked in Montana not only for Montana Big Z but for other Montana employers.

Prior to his working in Utah, wages were reported to Montana UI for Long.

Long filed for Montana unemployment benefits in February 1991 and November 1992. (UEF Ex. B at 6-8.)

Even while driving in Utah, Long maintained a Montana driver's license and Montana mailing address.

Montana Big Z listed Long's address as in Montana.

Long never rented or purchased a house or apartment while in Utah. According to Kim Aaberg, he lived out of his truck.

Following his accident, Long told his medical providers that he was a Montana resident.

These facts show that prior to driving in Utah, Long was a Montana resident. There is no evidence that his residency was anywhere else. As to the contention that Long established Utah residency, subsection (3) of section 1-1-215, MCA, provides that he remained a Montana resident until and unless he "gained" a residence in Utah, while subsection (6) requires proof that Long intended to change his residence to Utah. The evidence is inconsistent with any finding that Long intended to change his residence to Utah, rather it shows that he continued to consider himself a Montana resident temporarily away from home. The hearing officer correctly determined that Long was a Montana resident during the penalty period.

* * * * *

The decision below is **affirmed** except to the extent that it imposes the penalty against any entity other than Montana Big Z (Inoco).

DATED in Helena, Montana, this 23rd day of October, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Donald R. Herndon

Mr. Daniel B. McGregor

Ms. Susan C. Witte

Ms. Christine L. Noland

Ms. Anne L. MacIntyre -- E-mailed

Submitted: June 4, 1997

1. Testimony indicated that the company's truck drivers were "reefer" drivers and that it had a "reefer" division. "Reefer" is a slang term for a refrigerated railroad car or refrigerated semi-trailer. American Heritage Dictionary, 3rd edition, 1993.

2. Its predecessor, Roosevelt Disposal, Inc., had been insured by the State Fund from 1984 to 1986.

3. Additional wages were reported by Montana Big Z to the State of North Dakota in 1994 and to the State of Wyoming for the fourth quarter of 1993. Those wages were reported to North Dakota under the name of "Interstar/Inoco, Inc." (UEF Ex. G at 21-27.) They were reported to Wyoming under the name Inoco, Inc. (*Id.* at 28.) As previously stated, Inoco, Inc., is the name Montana Big Z adopted in October 1993. According to Kim Aaberg, "Interstar, Inc." is a company incorporated by Zimmerman in North Dakota. (Tr. at 86.) Further information concerning Interstar is lacking. In any event, the amount of the wages paid by Big Z for the period of time in question was not seriously disputed by appellant.

4. The information requested included the date and place of each employee's hire, a copy of driver log books for 1993 and 1994, and location of other Montana Big Z records. (UEF Ex. A at 2.)

5. The UEF auditor received one response from Flint Bibler. That response indicated that Bibler worked at a shop and farm and that the only driving he did was of farm vehicles, and that his driving was not until 1994. (UEF Ex. D at 14-15.)

6. Aaberg was living and dispatching in Billings at the time Long was working in Utah.

7. To be sure, Kim Aaberg's salary was paid by Zimmerman even though she served as bookkeeper for Montana Big Z, did Montana Big Z dispatching, and she was initially hired by Montana Big Z. But Aaberg also testified that Zimmerman Trading "performed administrative services for other entities controlled by Mr. Zimmerman" (Tr. at 51.)

8. The hearing officer did not specifically address the residency of the other truckers employed by Big Z between December 21, 1992 and May 2, 1994.

9. In 1993 subsection (4) was amended by inserting "interstate or intrastate" and minor changes were made in style. Otherwise the statute was unchanged from the 1991 version. Both 1991 and 1993 versions are involved in this case since the penalty period overlapped the 1991 and 1993 statutes. That overlap, however, is immaterial as the statutes were virtually the same.

10. Section 39-71-118, MCA, was amended in 1993 but the amendments do not affect the provisions cited herein other than to change the number of subsection (6) of the 1991 statute to subsection (7) of the 1993 statute.

11. In 1997 subsection (2) was amended by adding "If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception."