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**FILED**

**OCT - 7 2005**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

**IN THE WORKERS' COMPENSATION COURT OF MONTANA**

ROBERT FLYNN and CARL MILLER )

v. )

MONTANA STATE FUND )

and )

LIBERTY NORTHWEST )  
INSURANCE CORPORATION )

WCC NO. 2002-0222

**RESPONDENT UNINSURED EMPLOYERS'  
FUND RESPONSE TO SUMMONS**

**I. BACKGROUND AND HISTORY**

The Uninsured Employers' Fund ("UEF") is a creation of the Montana Workers' Compensation Act (Mont. Code Ann. Title 39, chapter 71) designed to provide workers' compensation benefits to employees injured while working for an employer that did not maintain workers' compensation insurance as required by law. Section 39-71-503 (1)(a), Montana Code Annotated (MCA). The UEF is managed by the Department of Labor and Industry's Employment Relations Division, Workers' Compensation Regulation Bureau, which is located at 1805 Prospect Avenue in Helena.

The UEF was created in 1977, pursuant to Chapter 550, Laws of 1977. Prior to the creation of the UEF, the only remedy an injured employee of an uninsured employer had was to sue the employer in tort.<sup>1</sup> As the UEF was originally established, the injured employee of an uninsured employer was required to elect between claiming workers' compensation benefits from

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<sup>1</sup> An injured employee working for a properly insured employer who is hurt on the job is limited to the right to collect workers' compensation benefits as a recovery against the employer and co-workers. This is the so-called "exclusive remedy" provided by § 39-71-411, MCA. An injured worker also has the right to seek a recovery against negligent third parties. Section 39-71-412, MCA.

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the UEF or pursuing a tort action in district court against his or her employer. *See*: Section 39-71-508, MCA, (1978). In response to the harshness of Section 39-71-508, MCA (1978), and because inadequate funding for the UEF led to its insolvency, the Legislature enacted House Bill 529 in 1985 (Chapter 601, L. of 1985)<sup>2</sup>. In that bill, the Legislature amended Section 39-71-508, MCA, and enacted Section 39-71-515, MCA, to ameliorate the harshness that sometimes had resulted earlier. Unlike the original provisions, the amended statute allows an injured employee (or the survivors) to file a claim for benefits from the Uninsured Employers' Fund **and** pursue a tort action against the uninsured employer at the same time without having to make an election of remedies. Furthermore, Section 39-71-515, MCA (1985), gives an employee an additional, independent cause of action against an uninsured employer by imposing liability simply on the basis of the failure of the employer to be enrolled in a workers' compensation plan on the date of injury. Section 39-71-508, MCA (1985), specifically provides for the coordination of remedies and thus is far different than Section 39-71-411, MCA, which provides that workers' compensation is the exclusive remedy against employers, absent intentional and deliberate acts.

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<sup>2</sup> The legislative reasoning behind House Bill 529 (1985) is clearly spelled out in its preamble:

WHEREAS, it is the public policy of the State of Montana to ensure that every employee who is required to be covered under the state's workers' compensation laws, or his beneficiaries, receive, in the event of compensable injury or death, the monetary compensation to which they are entitled or are adjudged to be entitled under Title 39, chapter 71, part 7; and

WHEREAS, under current laws, an employee of an uninsured employer or the employee's beneficiaries are significantly impeded in the ability to recover full or partial compensation for a compensable injury or death; and

WHEREAS, this situation exists because of all of the following factors:

- 1) There are a significant number of uninsured employers in Montana.
- 2) The uninsured employers' fund is, for all practical purposes, insolvent.
- 3) Existing remedies for an injured employee or his beneficiaries are inadequate, particularly when the negligence of the employer is not or cannot be proven to be the proximate cause of the injury or death.

The UEF has been characterized as a safety net created to lessen the hardship of an employee who has the misfortune of being injured while working for an uninsured employer. Auto Parts of Bozeman v. Uninsured Employer's Fund, 305 Mont. 40, 23 P.3d 193. The UEF is not an insurer, but instead merely provides a substitute for the benefits that proper insurance coverage would have provided. Zempel v. Uninsured Employers' Fund (1997), 282 Mont. 424, 431, 938 P.2d 658, 663.

## II. FUNDING

The UEF does not receive any general or special tax funds for its operations or for the payment of benefits. Instead, the UEF's operations are largely funded in accordance with Section 39-71-504, MCA. That section authorizes the UEF to collect a penalty levied against uninsured employers (calculated at 200% of the insurance premium the employer would have paid had the employer been enrolled with compensation plan No. 3 or \$200, whichever is greater). Additional penalties and interest shall be collected from an employer that fails to obtain workers' compensation insurance within 30 days of being notified of the requirement or is late in making required payments. Section 39-71-504 (1)(b), MCA, also requires the uninsured employer to indemnify the UEF for any benefits paid to that employer's workers.

Because the UEF is heavily dependent upon collections from uninsured employers to pay benefits and operating expenses, the UEF is authorized to make proportionate reductions in benefits if there are insufficient funds to pay all claims, and the reductions do not entitle claimants to retroactive reimbursements in the future. Section 39-71-510, MCA. Further, Section 39-71-511, MCA, requires setoffs of claims against the fund to the extent that an employee or the employee's beneficiaries receive compensation from the uninsured employer, a third party who shares liability, or a fellow employee who shares liability. See also Thayer v. Uninsured Employers' Fund, 199 Mont. 304, 991 P. 2d 447. The UEF is also prohibited from making lump-sum payment of projected future benefits, per Section 39-71-503 (3)(a), MCA.

Although these provisions provide the UEF with many methods for collecting funds, it should be recognized that by their very nature, most uninsured employers have financially marginal operations and therefore, the UEF's source of income is never guaranteed.

## III. FINANCIAL STATUS OF FUND

As of August 1, 2005, the UEF had \$776,174 available to pay on claims. Between fiscal years 2000 and 2005, the UEF paid out approximately \$500,000 in medical and indemnity benefits each year, although payouts spiked to approximately \$940,000 in 2003. Collections during this time period averaged just over one million dollars per year, although over \$1.5 million was collected in FY 2000. The combination of benefits paid and administrative expenses associated with operating the UEF typically equal or exceed collections, so the continued financial viability of the UEF is dependent on continued success in its collection efforts. There is currently one

pending case (Workers' Compensation Court case 2005-1381) in which an individual working for an uninsured employer has, to date, incurred medical expenses in the amount of approximately \$1.3 million. It is apparent that this case alone could deplete the UEF reserves.

#### **IV. EQUITABLE FACTORS AFFECTING ABILITY OF UEF TO PARTICIPATE IN PROCESS REQUIRED BY SUMMONS**

The UEF has limited resources to conduct the type of search of its records contemplated by the Subpoena. There is only one claims examiner available to perform the search and she is otherwise fully employed. Further, there is no simple way to retrieve the data that is sought by the Summons for a few reasons. First, the closed files from about 1994 to the present are stored in boxes that are organized by time of file closure rather than by any category that would facilitate retrieval of data pertinent to this Summons. Second, the pre-1990 records are on microfiche at the Department of Administration's Records Management office, so they cannot be readily "flipped through." Third, there are very few records at all for a three or four year time period after UEF functions were administratively reassigned from the Department of Workers' Compensation to the Department of Labor and Industry in 1990. Finally, an earlier letter to the Court (Exhibit A) reflects the difficulty in electronically retrieving data that would be responsive to the Summons. As that letter states, the Department's electronic database (WCAP) has no information on benefit payments that pre-date 1995. The WCAP system also does not contain UEF claims financial data. UEF currently uses an Access/Excel program that can likely be used to retrieve data responsive to the Summons, though only to determine if indemnity benefits were paid. The program does not specify the type of benefit paid or whether there was a social security offset. In short, a time-consuming, manual review of the claims files will be required to comply with the Summons.

#### **V. STATUS OF REVIEW OF CLAIMS FILES**

By letter of July 15, 2005, the Department's Office of Legal Services notified the Court that the claims examiner mentioned in the paragraph above would begin to review non-current claim files in reverse chronological order to determine which, if any, of the claims managed by the UEF could be impacted by the Summons in the captioned matter. To date, the review has yielded two claimants and the information about them and any others will be filed separately. The UEF staff will continue its records review and will update the Court on any progress it makes in identifying affected claimants.


#### **VI. CONCLUSION**

As stated in the Zempel case, the UEF is not an insurer and is not a for-profit entity. It exists as a safety net to lessen the hardship of an employee who has the misfortune of being

injured while working for an uninsured employer. The UEF does not collect premiums as an insurance company does; instead, it collects penalties and indemnification from uninsured employers. The UEF is also restricted on paying claimants. For example, it cannot make lump sum payments, it can reduce payments proportionately if funds are not available, and it is entitled to setoffs against claims when claimants recover from the uninsured employer or third parties. Finally, because the UEF is not an insurer it is not subject to an award of attorney fees. Pekus v. UEF and Yacos, WCC No. 2002-0717.

The UEF currently is in a financially precarious position because its potential liability in one case alone exceeds available assets by over one-half million dollars. Further, the UEF has neither the staff nor system of records that would enable it to readily or timely search for potentially affected parties in the subject matter. For these reasons, the UEF respectfully requests that it be allowed to proceed with its review of files potentially affected by the ruling in the Rausch case, consistent with the limitations on UEF's resources and ability to access old files that are described above.

Dated this 7<sup>th</sup> day of October, 2005

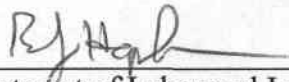
  
\_\_\_\_\_  
Brian J. Hopkins  
Agency Counsel  
Department of Labor and Industry

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the original of the foregoing document was filed with the Court and a true and correct copy of the foregoing document was, this day, personally served upon lead counsel for Petitioners, by depositing the same in the U.S. mail, postage prepaid, and addressed as follows:

Mr. Rex L. Palmer  
301 W. Spruce  
Missoula, MT 59802

DATED this 7<sup>th</sup> day of October, 2005

  
\_\_\_\_\_  
Department of Labor and Industry

State of Montana  
Department of Labor & Industry  
Judy Martz, Governor



Employment Relations Division

WC Claims Assistance Bureau  
Diana Ferriter, Bureau Chief

October 18, 2004

The Hon. Mike McCarter  
Workers' Compensation Court  
PO Box 537  
Helena, MT 59624-0537

SENT BY E-MAIL AND MAILED HARDCOPY

RE: Jeremy Ruhd v. Liberty Northwest Insurance Corporation  
WCC No. 2002-0500

Dear Judge McCarter:

At the in-person conference held on Tuesday, October 5, 2004, I agreed to provide additional information to you and the parties about claim information available from the Department. I have the following information to share with everyone at the conference.

The Department's current database (WCAP) went into production in April, 1995. Injury data was brought over from DB02 to populate WCAP. No benefit payment information was included in the conversion because insurer's reporting requirements changed from an event driven reporting method to a time driven reporting method. The two types of reporting for benefit payments were not compatible.

Earlier this year, we ran an extract of injuries from DB02 so we could locate "old" claim numbers assigned in the DB02 system. The extracted data was put into an Excel spreadsheet and is available. The extract contains the following fields - claimant name, SSN, birth date, accident date, employer name, part of body, claim number assigned in DB02, and the employer's policy number. No benefit payment information was extracted.

DB02 data can still be accessed. That system was archived by the Department of Administration. It could be put back online. The monthly cost for that access is \$2,000 per month. In order to get an extract of the data, ERD would need to contract with a software contractor to write a query to pull the specific data needed. This is what we did to get the extract earlier this year. We contracted with Northrop Grumman. The cost for that contract was \$80 an hour.

The Uninsured Employers Fund (UEF) claim information was converted from a Lotus spreadsheet to an Access application in 2000. This application tracks the compensation paid to claimants for uninsured claims expenses. The information that is recorded in the UEF application could be gained by a simple query, however, the data not recorded can be gathered from other areas but will take different methods to complete.

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Judge Mike McCarter  
October 18, 2004  
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There are 484 claimants in the UEF Access database as of 10/12/04.

The UEF Access database tracks the Compensation Type, TTD, PTD, etc, for the payments made to a claimant. The compensation paid is recorded for individual claimants but numbers could be compiled manually to determine payments paid for more than one year.

This application doesn't record the date of injury, or the First Report of Injury, but we could get that information from WCAP and match it to the records manually.

There are some records in the Lotus spreadsheet with data from the 80's that was not converted but could be researched and compiled manually.

At this time, I have not requested any of the information be compiled either electronically or manually. If you decide this information should be compiled, I will ask staff to begin putting the information together. I am available to answer any questions concerning the information in this letter or other issues or concerns any of the parties have regarding the information the Department can provide for the issues before the Court.

Sincerely,

Diana Ferriter  
Bureau Chief

C: Stephen D. Roberts, Esq.  
Lon J. Dale, Esq.  
Monte D. Beck, Esq.  
Bradley J. Luck, Esq.  
Thomas Harrington, Esq.  
Carrie L. Garber, Esq.  
Larry W. Jones, Esq.  
Greg E. Overturf, Esq.  
Mark E. Cadwallader, Esq.  
Carol Gleed



Subject: FW: Response to request for Claim Information - Common Fund

Interested Parties:

Below is the response from Judge McCarter to Diana Ferriter from her letter dated October 18, 2004 which is attached to this e-mail in Wword. If you are unable to open the attachment please let me know and I will resend it.

Pat Kessner  
Clerk of Court  
444-7784

-----Original Message-----

**From:** Mike McCarter [mailto:marsilius@mt.net]  
**Sent:** Monday, October 18, 2004 3:17 PM  
**To:** Ferriter, Diana  
**Cc:** Kessner, Patricia (WORK)  
**Subject:** Re: Response to request for Claim Information

Hi Diana,

Thanks for the letter and the information. In reading your description concerning the DB02 information which was input into WCAP, it sounds like the only pre-April 1995 claims we will be able to identify for purposes of *Raush* and *Ruhd* are those claims for which permanent total or prolonged temporary total disability were paid after April 1995. Am I correct in this?

Mike

P.S. I am copying this message to Pat Kessner in my office so she can e-mail a copy of it to all involved counsel and put a copy of my inquiring in the file.

-----Original Message-----

**From:** Ferriter, Diana  
**Sent:** Monday, October 18, 2004 3:25 PM  
**To:** 'Mike McCarter'; Ferriter, Diana  
**Cc:** Kessner, Patricia  
**Subject:** RE: Response to request for Claim Information

Mike,

Yes, you are correct. Our reporting requirements for WCAP instructed insurers to report payments on open, unsettled claims only. Any PTD claims closed or settled prior to 4/95 were not required to be reported to us.

Diana