IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 6

WCC No. 2004-1109

MP LIVESTOCK TRUST/PERRY POLZIN TRUCKING

Petitioner

vs.

DEPARTMENT OF LABOR AND INDUSTRY,
UNINSURED EMPLOYERS' FUND

Respondent.

DECISION AND JUDGMENT

Summary: Montana employer which utilized employees furnished to it by a professional employer organization (PEO), *i.e.*, an employee leasing company, appeals a penalty imposed pursuant section 39-71-504(1), MCA (1999-2001), for being uninsured.

Held: While the Montana employer was technically uninsured upon the lapse of workers' compensation coverage provided by a professional employer organization (PEO), the Department of Labor and Industry (DLI) is estopped from imposing a penalty since section 39-8-207(4)(c), MCA (1999-2001), required the PEO to maintain the insurance and upon lapse of its insurance the DLI had a duty to order it to cease and desist from doing business and to suspend its PEO license, or at least to notify the Montana employer of the lapse of insurance so it could secure insurance or stop doing business.

Topics:

> **Employers: Insurance.** A Montana business which uses employees furnished by a professional employer organization (PEO) under a "professional employer arrangement," § 39-8-102(8), MCA (1999-2001), is an "employer" for workers' compensation purposes even though the PEO is primarily responsible for furnishing workers' compensation insurance coverage. §§ 39-8-207(4)(c) and 39-71-117(3), MCA (1999-2001). However, a Montana business which uses employees furnished by a PEO under an "employee leasing arrangement," § 39-8-102(5), MCA (1999-2001), is not an

employer for workers' compensation purposes. §§ 39-8-207(3) and 39-71-117(3), MCA (1999-2001).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-117(3), MCA (1999-2001). A Montana business which uses employees furnished by a professional employer organization (PEO) under a "professional employer arrangement," § 39-8-102(8), MCA (1999-2001), is an "employer" for workers' compensation purposes even though the PEO is primarily responsible for furnishing workers' compensation insurance coverage. §§ 39-8-207(4)(c) and 39-71-117(3), MCA (1999-2001). However, a Montana business which uses employees furnished by a PEO under an "employee leasing arrangement," § 39-8-102(5), MCA (1999-2001), is not an employer for workers' compensation purposes. §§ 39-8-207(3) and 39-71-117(3), MCA (1999-2001).

Employers: Leased Employees. A Montana business which uses employees furnished by a professional employer organization (PEO) under a "professional employer arrangement," § 39-8-102(8), MCA (1999-2001), is an "employer" for workers' compensation purposes even though the PEO is primarily responsible for furnishing workers' compensation insurance coverage. §§ 39-8-207(4)(c) and 39-71-117(3), MCA (1999-2001). However, a Montana business which uses employees furnished by a PEO under an "employee leasing arrangement," § 39-8-102(5), MCA (1999-2001), is not an employer for workers' compensation purposes. §§ 39-71-117(3) and 39-8-207(3), MCA (1999-2001).

Penalties: Uninsured Employers. A Montana business utilizing leased employees through a "professional employer arrangement" as defined in section 39-8-102(8), MCA (1999-2001), is liable for a penalty under section 39-71-504(1), MCA (1999-2001), where the professional employer organization (PEO) fails to maintain insurance for the employees and the Montana employer similarly fails to do so. §§ 39-8-207(3) and 39-71-117(3), MCA (1999-2001). However, a Montana business utilizing leased employees through an "employee leasing arrangement" as defined in section 39-8-102(5), MCA (1999-2001), is not liable for a penalty since it is not an employer for workers' compensation purposes. §§ 39-71-117(3) and 39-8-207(3), MCA (1999-2001).

Department of Labor and Industry: Duties. The Department of Labor and Industry has a duty to promptly order an uninsured employer to cease doing business. § 39-71-507(1), MCA (1999-2001).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: § 39-71-507(1), MCA (1999-2001). The Department of Labor and Industry has a duty to promptly order an uninsured employer to cease doing business.

Department of Labor and Industry: Duties. The Department of Labor and Industry has a duty to promptly suspend the license of a professional employer organization not providing workers' compensation insurance for its leased employees and to notify the Montana business to which the employees are furnished of the lapse of insurance. §§ 39-8-206 and -207, MCA (1999-2001).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: §§ 39-8-206 and -207, MCA (1999-2001). The Department of Labor and Industry has a duty to promptly suspend the license of a professional employer organization not providing workers' compensation insurance for its leased employees and to notify the Montana business to which the employees are furnished of the lapse of insurance.

Estoppel and Waiver: Estoppel by Silence. Estoppel by silence applies where the party to be estopped had a duty to speak but failed to do so with either the intent to deceive or a willingness that another would be deceived and where the party seeking to impose the estoppel did not have access to accurate information and was misled to its detriment by the silence.

Estoppel and Waiver: Estoppel by Silence. Where the Department of Labor and Industry has knowledge that a professional employer organization (PEO) is no longer insured as required by section 39-8-207(4)(c), MCA (1999-2001), it has a duty to promptly suspend the PEO's license and notify the Montana business using employees furnished by the PEO of the lapse of insurance. Its failure to do so estops it from seeking a penalty against the Montana business under section 39-71-504(1), MCA (1999-2001), where the Montana employer was without notice or knowledge of the lapse of insurance and relied to its detriment on such lack of knowledge by continuing to reimburse the PEO for workers' compensation premiums and failing to secure its own workers' compensation insurance coverage.

Estoppel and Waiver: Equitable Estoppel. Equitable estoppel requires proof of six elements: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that

knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

Estoppel and Waiver: Equitable Estoppel. The elements of equitable estoppel are satisfied and the Department of Labor and Industry (DLI) is estopped from seeking a penalty against an uninsured Montana employer utilizing employees furnished by a professional employer organization (PEO) where: (1) the DLI concealed a material fact (lapse of insurance) from the Montana employer; (2) the DLI had knowledge of the material fact (lapse of insurance) during the entire penalty period (the time of concealment); (3) the lack of insurance was unknown to the Montana employer; (4) the facts and circumstances known to the DLI at the time of the concealment were such that there was a natural and probable consequence that the Montana employer would act as if insurance were in effect by continuing to utilize the furnished employees without procuring its own insurance and by continuing to reimburse the PEO for insurance premiums it was supposedly paying; (5) in fact the Montana employer did act in such a manner; and (6) the Montana employer changed its position for the worse since its actions resulted in its reimbursing the PEO for premiums not incurred and exposed it to the very civil penalty the DLI seeks to impose.

¶1 Perry Polzin, who does business as MP Livestock Trust (hereinafter "MP Livestock"), appeals from a decision of the Department of Labor and Industry (DLI) which assessed a $26,331.53 civil penalty against him based on a finding that he was an uninsured employer during the period February 1, 2001, through August 3, 2001. The DLI's final decision was made on July 7, 2004, by a hearing officer. The decision was based upon stipulated facts. Those same stipulated facts form the factual basis for this Court's review and are set out below.

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Stipulated Facts

¶2 On August 15, 2000, T.T.C., Illinois, Inc. (TTC) entered into a Service Agreement with Perry Polzin d/b/a MP Livestock Trust. (Stip. Ex. A.)[1]

¶3 TTC was a duly licensed professional employer organization (PEO) licensed to do business in the State of Montana from 12/29/00 to 12/29/01. *(See* Stip. Ex. M consisting of nine pages, including a copy of the PEO license issued by the State of Montana and the application packet submitted by TTC.)

¶4 Up to February 1, 2001, TTC carried a qualifying workers' compensation policy covering the employees leased to Perry Polzin d/b/a MP Livestock with Credit General Insurance Co. (Credit General).

¶5 MP Livestock did not ever carry its own workers' compensation coverage on the workers leased from TTC.

¶6 The State of Montana received notification that MP Livestock was a new client company of TTC via a letter dated August 11, 2000, which was received by the DLI on August 16, 2000. (Stip. Ex. O.)

¶7 TTC had a qualifying workers' compensation insurance policy with Credit General from June 5, 1992, through February 1, 2001. On February 1, 2001, Credit General filed bankruptcy and TTC became uninsured. TTC attempted to obtain coverage from Regency Insurance Company (Regency), and then Continental Casualty/CNA (Continental). However, no coverage was ever obtained from either Regency or Continental, so TTC remained uninsured from February 1, 2001, through August 3, 2001, when TTC ceased operations in Montana. *(See* Stip. Ex. N which consists of twenty pages, including a letter to Connie Ferriter of the DLI from TTC which was received by the DLI on July 24, 2001. The attachments to that letter were provided by TTC to the DLI as verification of their efforts to obtain valid workers' compensation insurance for Montana employees. *See also* Stip. Ex. P.)

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[1]Reference to the DLI file, Case No. 2172-2003, is to the hearing officer's file. That file constitutes the record on appeal. Exhibits contained in that file consist of two sets of alphabetically numbered documents - the first set are Exhibits A through U which are exhibits that were attached to the Stipulation to Agreed Facts filed on December 2, 2003, and will be referred to herein as Stipulated Exhibits (Stip. Ex.). The second set of exhibits listed A through O are exhibits that were attached to The UEF's Response to Employer's Motion for Summary Judgment filed in the DLI file on January 21, 2004, and will be referred to herein as UEF Exhibits (UEF Ex.).

¶8 TTC notified MP Livestock of its cessation of operations via a letter dated August 3, 2001. (Stip. Ex. B.)

¶9 The State of Montana suspended TTC's PEO license via an August 24, 2001 letter from Connie Ferriter, Program Officer, Carrier Compliance Unit, DLI, to TTC. (Stip. Ex. C.)

¶10 The PEO compliance unit became aware that TTC was seeking new workers' compensation coverage when the State received TTC's PEO license renewal on or about December 28, 2000. (Stip. Ex. M.)

¶11 As early as January 11, 2001, the DLI began conducting an ongoing investigation of the status of the workers' compensation coverage covering the workers leased to Montana clients. (Stip. Ex's. Q, R, S, T, and U.)

¶12 The DLI became aware that TTC, which was insured by Credit General for workers' compensation purposes, was no longer insured by Credit General as Credit General was no longer authorized to write workers' compensation policies in Montana effective January 1, 2001. (Stip. Ex. H.)

¶13 TTC notified the DLI that Credit General was placed into liquidation as of January 5, 2001, and that all policies issued by Credit General would be cancelled effective February 4, 2001. (Stip. Ex. I.)

¶14 On February 16, 2001, the DLI through Program Officer Lacey Culver notified TTC that she was unable to locate any workers' compensation insurance for TTC as of February 4, 2001. (Stip. Ex. J.)

¶15 As of May 25, 2001, TTC had still not obtained Montana certified workers' compensation coverage for its employees in the State of Montana, including those leased to MP Livestock. (Stip. Ex. K.)

¶16 TTC provided to MP Livestock materials or a handbook for use in conducting business under the Service Agreement. (Stip. Ex's. A and D.)

¶17 On a weekly basis between February 6, 2001, and August 3, 2001, TTC sent an outgoing wire request form to their local bank and the funds were wired to the Bank of America in Dallas, Texas, for payment to the leased employees. Those wire transfers consist of twenty-five pages. (Stip. Ex. E.) Included with the payment to TTC was not only the leased employees' wages, but funds sufficient to pay TTC for unemployment insurance, workers' compensation coverage, the client's share of the Social Security obligation, and a profit to TTC.

¶18 TTC is evidently in bankruptcy. *(See* letter dated January 30, 2003, to the Uninsured Employers' Fund (UEF) from Rooks Pitts at Stip. Ex. F.)

¶19 The State of Montana, through Terry Wilson, Compliance Specialist II, has issued a Penalty Billing Notice to MP Livestock in the amount of $26,331.53. (Stip. Ex. G.)

¶20 From January 11, 2001, until TTC notified the DLI of the cessation of the operations on August 8, 2001, the DLI Compliance Unit was in regular contact with TTC. The DLI was aware of TTC's efforts to obtain workers' compensation coverage effective February 1, 2001. However, until the letter dated August 3, 2001 (Stip. Ex. B) was received by MP Livestock, MP Livestock had no notice there was any problem with the workers' compensation coverage on the leased employees.

¶21 MP Livestock did receive a Certificate of Liability Insurance from TTC (through the producer) showing TTC had workers' compensation insurance through April 30, 2001. (Stip. Ex. L.)

Proceedings and Decision Below

¶22 As can be seen from the stipulated facts, employees working for MP Livestock were not covered by workers' compensation insurance from February 1, 2001, through August 3, 2001. Based on that lack of insurance, a compliance specialist for the DLI assessed a $26,331.53 penalty against MP Livestock. The penalty was affirmed by an administrative review panel. MP Livestock then requested a contested case hearing.

¶23 The hearing officer issued his Final Agency Decision (Summary Judgment Order) on July 7, 2004. In affirming the penalty, he addressed two contentions advanced by MP Livestock. Those contentions were: (1) MP Livestock was not an employer for penalty purposes; and (2) the DLI is estopped from imposing a penalty because of its failure to notify MP Livestock of TTC's lapse in workers' compensation coverage. The hearing officer held as a matter of law that MP Livestock was an employer for purposes of workers' compensation coverage and that the DLI is not estopped from imposing a penalty because MP Livestock was responsible for discovering the lapse of TTC's policy and providing substitute coverage.

Issues on Appeal

¶24 MP Livestock raises the same issues on appeal that it raised below. I rephrase those issues as follows:

¶24a Between February 1 and August 3, 2001, was MP Livestock an employer for purposes of workers' compensation insurance of workers furnished to it by TTC?

¶24b Is the DLI estopped from seeking and collecting a penalty against MP Livestock on account of its failure to take immediate action against TTC upon learning it was uninsured and its concomitant failure to notify MP Livestock that TTC's workers' compensation coverage had lapsed?

Standard of Review

¶25 Although the facts are stipulated, this Court must still determine whether the hearing officer's conclusions of law were correct. *Erickson v. State ex rel. Bd. of Medical Examiners*, 282 Mont. 367, 371, 938 P.2d 625, 628 (1997). That review encompasses a determination as to whether the hearing officer properly construed applicable statutes, *see Steer, Inc. v. Dep't of Revenue,* 245 Mont. 470, 474-75, 803 P.2d 601, 603 (1990), and whether he properly applied the law to the facts, *Baldridge v. Bd. of Trustees,* 287 Mont. 53, 58, 951 P.2d 1343, 1346 (1997).

Discussion

I. Was MP Livestock an employer under the Workers' Compensation Act?

¶26 The penalty imposed in this case covers the period of February 1 through August 3, 2001. Since the penalty is a substantive provision, the law in effect during that period applies. *Buckman v. Montana Deaconess Hosp.,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Thus, the 1999 version of the law applies to the period of February 1 through June 30, 2001, since that version was in effect during that period. The 2001 version of the law applies to the period of July 1, 2001 through August 3, 2001. The applicable provisions of the 1999 and 2001 laws, however, are identical.

¶27 The penalty in this case was imposed pursuant to section 39-71-504(1), MCA (1999-2001), which provides:

> (1) (a) 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 based 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.

An "uninsured employer" is defined in section 39-71-501, MCA (1999-2001), as "an employer who has not properly complied with the provisions of 39-71-401." Section 39-71-401(1), MCA (1999-2001), in turn requires an employer "as defined in 39-71-117," to maintain workers' compensation insurance coverage unless exempt.[2] Thus, MP Livestock is subject to the penalty only if it was an employer as defined in section 39-71-117, MCA (1999-2001).

¶28 Section 39-71-117(3), MCA (1999-2001), states:

> (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, limited liability partnership, 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.

(Emphasis added.) There is no question that MP Livestock was using the services of workers furnished by TTC; however, under the subsection it is responsible for maintaining workers' compensation insurance coverage **unless** provisions in chapter 8 relieve it of that liability. I must therefore turn to chapter 8 for further guidance.

¶29 Chapter 8 of Title 39 regulates PEOs. A PEO is the acronym for "professional employer organization," which is defined in section 39-8-102(10), MCA (1999-2001), as follows:

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[2]Section 39-71-401(1), MCA (1999-2001), provides:

> **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.

(Emphasis added.)

(10) "Professional employer organization" means:

(a) a person that provides services of employees pursuant to one or more professional employer arrangements or to one or more employee leasing arrangements; or

(b) a person that represents to the public that the person provides services pursuant to a professional employer arrangement.

Temporary service contractors are expressly excluded from the definition. § 39-8-102(11), MCA (1999-2001).

¶30 Section 39-8-201, MCA (1999-2001), requires any PEO operating in Montana to be licensed under the chapter.[3] Numerous requirements must be met as a condition of licensing. Among them is a requirement that the PEO provide workers' compensation insurance coverage for its leased employees. Section 39-8-207(4)(c), MCA (1999-2001), provides:

(4) A professional employer organization or group shall:

. . .

(c) provide workers' compensation coverage for all employees and provide, maintain, and secure all records and documents required of employers under the workers' compensation laws of this state. A license may not be issued to a professional employer organization or group until the department receives proof of workers' compensation coverage for all employees assigned to any client location in this state.

That requirement is repeated in section 39-8-207(1)(b)(ii), MCA (1999-2001), which requires that the contract between the PEO and the client state that the PEO "assumes responsibility for the payment of wages of employees, workers' compensation premiums, payroll-related taxes, and employee benefits from its own accounts without regard to

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[3]Section 39-8-201(1), MCA (1999-2001), provides:

License required – exemption – rulemaking authority. (1) On or after July 1, 1995, a person who acts as a professional employer organization or group by entering into a professional employer arrangement or an employee leasing arrangement with a client in this state without a license or who violates the provisions of this chapter may be subject to the penalties provided in 39-8-302.

payments by the client . . . ." Thus, under chapter 8, TTC was required to provide coverage for the employees it provided to MP Livestock.

¶31 However, that requirement must be read together, reconciled, and harmonized with other sections of chapter 8 which deal with workers' compensation coverage. *Chain v. Montana Dep't of Motor Vehicles*, 2001 MT 224, ¶ 15, 306 Mont. 491, 36 P.3d 358 (In construing statutes a court "must harmonize statutes relating to the same subject, as much as possible, giving effect to each."). Two other provisions within chapter 8 come into play.

¶32 The first is section 39-8-207(1)(c), MCA (1999-2001), which requires that the contract between the PEO and the client contains:

> (c) a statement that, with respect to a worker supplied to a client by a professional employer organization or group, **the client shares joint and several liability for** any wages, **workers' compensation premiums**, and payroll-related taxes and for any benefits left unpaid by the professional employer organization or group and that, in the event that the licensee's license is suspended or revoked, this liability is retroactive to the client's entering into a contract with the licensee . . . .

(Emphasis added.) This provision renders the client – here MP Livestock – liable for unpaid workers' compensation **premiums** the PEO should have paid. It does not require the client company to independently provide workers' compensation insurance coverage or make the client company retroactively liable for the PEO's failure to provide coverage other than the premiums.

¶33 The second subsection is section 39-8-207(3), MCA (1999-2001), which provides:

> (3) When a professional employer organization or group uses a **professional employer arrangement** with the client, both the professional employer organization or group and the client are the immediate employers of the workers subject to the arrangement for the purposes of the workers' compensation laws of this state. When a professional employer organization or group uses an **employee leasing arrangement** with the client, the professional employer organization or group is the immediate employer of the workers subject to the arrangement for the purposes of the workers' compensation laws of this state.

(Emphasis added.) The section speaks to two different arrangements. The first is the "professional employer arrangement," which is defined as follows:

(8) (a) "Professional employer arrangement" means an arrangement by contract or otherwise under which:

(i) a professional employer organization or group assigns employees to perform services for a client;

(ii) the arrangement is or is intended to be ongoing rather than temporary in nature; and

(iii) the employer responsibilities are shared by the professional employer organization or group and the client.

§ 39-8-102(8)(a), MCA (1999-2001). The second arrangement is the "employee leasing arrangement," which is defined as:

> an arrangement by contract or otherwise under which a professional employer organization hires its own employees and assigns the employees to work for another person to staff and manage, or to assist in staffing and managing, a facility, function, project, or enterprise on an ongoing basis.

§ 39-8-102(5), MCA (1999-2001).

¶34 Where the arrangement is a "professional employer arrangement," the plain language of section 39-8-207(3) makes **both** the PEO **and** the client employers for workers' compensation purposes. The hearing officer correctly noted that the phrase "subject to the arrangement" modifies "worker" and does not make liability dependent upon the agreement between the PEO and the client:

> The language of the statute is clear. The workers who are "subject to the arrangement" between MPLT [MP Livestock] and the PEO have both MPLT and the PEO as their immediate employers.
>
> MPLT argued that the phrase "subject to the arrangement" in the statute modifies the phrase "both the professional employer organization or group and the client" rather than the word "workers." Under this reading, the arrangement between MPLT and the PEO would control who is an employer for purposes of liability for failure to provide compensation insurance coverage. However, the modifier comes immediately after "workers," and proper grammatical construction applies the modifier to the word immediately preceding it rather than a word or phrase earlier in the sentence. ***See,*** Richard Wydick, *Plain English for Lawyers,* Carolina Academic Press (4th Ed. 1998), pp. 49-51 ***and*** Roger Williams, *Style: Ten Lessons in Clarity and Grace* (Harper Collins College Publishers, 1994), p. 184. Since the modifier is not "dangling" ***(i.e.,*** equally likely to modify more than one word or phrase in the sentence), the meaning is clear.

> Clearly, the legislature knew how to place modifiers. In another subprovision, Mont. Code Ann. § 39-8-207(8)(a) a modifier ("subject to any contrary provisions of the contract between the client and the professional employer organization") is located to apply to "contract" *(i.e.,* the professional employer agreement). This placement makes the statutory
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> requirements of Mont. Code Ann. § 39-8-207(8)(b) subject to change by the terms of the agreement between MPLT and the PEO.

Final Agency Decision (Summary Judgment Order) at 2 (footnote omitted).

¶35 The hearing officer's interpretation is bolstered by the rule of statutory interpretation previously cited requiring that provisions of a statute be construed together in a manner which coordinates and gives effect to all of the provisions, if possible. In the case of section 39-8-207(3), MCA (1999-2001), the legislature has set out two different requirements for the two different types of PEO arrangements. For leasing arrangements, it fixed liability for workers' compensation coverage exclusively on the PEO. For professional employee arrangements, it provided for joint liability. MP Livestock's interpretation of the section would allow the PEO and the client to nullify at will the different treatment provided by the section and make the first sentence of the subsection superfluous and meaningless.

¶36 I therefore conclude that if the arrangement between TTC and MP Livestock was a professional employer arrangement, then MP Livestock was an employer liable for providing workers' compensation insurance in the event of any lapse of the coverage provided by TTC. Consequently, it was an uninsured employer during the penalty period.

¶37 The same is not true if the arrangement between TTC and MP Livestock was an employee leasing arrangement. As the second sentence of section 39-8-207(3), MCA (1999-2001), explicitly states, only the PEO is the employer for purposes of workers' compensation coverage under that arrangement. Thus, MP Livestock would **not** be an employer for workers' compensation purposes.

¶38 In upholding imposition of a penalty against MP Livestock, the DLI's hearing officer quoted and applied the first sentence of section 39-8-207(3), MCA (1999-2001), assuming, without discussion, that the arrangement between TTC and MP Livestock was a professional employer arrangement, not an employee leasing arrangement. That assumption, as well as the imposition of the penalty, cannot stand unless the exhibits

submitted by the parties in connection with their stipulation of facts show that the arrangement was in fact a professional employer arrangement.

¶39 To determine the type of arrangement, I have examined the Service Agreement between TTC and MP Livestock. (Stip. Ex. A.) The agreement indicates that the arrangement was a professional employer arrangement rather than a leasing arrangement. Paragraph 2A. indicates that TTC did not hire and then furnish the employees but, rather, "enrolled" existing employees of MP Livestock. § 39-8-102(5), MCA (1999-2001). That fact is incompatible with a leasing arrangement, which requires the PEO to furnish employees that it hired in the first instance. § 39-8-102(8)(a), MCA (1999-2001). Accordingly, I affirm the hearing officer's conclusions that during the penalty period, MP Livestock was an employer for workers' compensation purposes and is liable for the penalty imposed by the DLI unless the DLI is estopped from imposing it.

II. Is the DLI estopped from imposing the penalty?

¶40 MP Livestock also argues that the DLI's failure to notify it of TTC's failure to maintain workers' compensation insurance coverage estops it from claiming the penalty. The facts essential to its estoppel defense are:

> ¶40a On January 26, 2001, the DLI learned that TTC's workers' compensation insurance policy would lapse as of February 4, 2001. (¶13; UEF Ex's. A and C.) In fact, it lapsed on February 1, 2001.
>
> ¶40b On January 26, 2001, and thereafter, the DLI was aware that MP Livestock was a client of TTC. The DLI did not notify MP Livestock of the impending lapse. (¶20.)
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> ¶40c By February 16, 2001, a compliance officer for the DLI had determined that there was no record of insurance for TTC after February 4, 2001, and wrote to TTC advising it of that fact and notifying it that its "Montana client companies could be considered uninsured for workers' compensation purposes." (¶14; UEF Ex. D.) The DLI did not copy its letter to MP Livestock and did not otherwise notify MP Livestock of the lapse of insurance and its potential liability as an uninsured employer. (¶20.)
>
> ¶40d The DLI took no further action until May 25, 2001, when it wrote a follow-up letter to TTC advising it that, based on its review of the National

Council of Compensation Insurance (NCCI) database, it appeared that TTC was still uninsured. (¶15; UEF Ex. E.) The letter threatened to suspend TTC's PEO license if the DLI did not hear from TTC by June 25, 2001. (*Id*.) As with its prior letter, the May 25, 2001 letter was not copied to MP Livestock and that company was still unaware of any lapse of insurance. (*Id.* and ¶20.)

¶40e TTC remained uninsured thereafter. (UEF Ex's. A and F.)

¶40f On August 3, 2001, TTC notified MP Livestock and its other clients that it had ceased operations. (¶20; UEF Ex. J.) This was the first notice provided to MP Livestock indicating any problem with workers' compensation coverage with respect to employees supplied by TTC.

40g On August 8, 2001, TTC notified the DLI of its cessation of operations. (¶20; UEF Ex. K.)

40h Finally, on August 24, 2001, almost seven and one-half months after being notified that TTC's policy lapsed, the DLI suspended TTC's PEO license.

¶40i Lacking knowledge that TTC's workers' compensation insurance policy had lapsed, MP Livestock continued to pay TTC for the cost of workers' compensation premiums during the entire penalty period. (¶17.) It also did not secure its own workers' compensation insurance.

¶41 The doctrine of estoppel "is designed to prevent one party from suffering a gross wrong at the hands of another party who has brought about the condition." *Kelly v. Wallace,* 1998 MT 307, ¶ 40, 292 Mont. 129, 972 P.2d 1117. It is applicable to state agencies and has been applied against the Division of Workers' Compensation (*Mellem v. Kalispell Laundry & Dry Cleaners*, 237 Mont. 439, 774 P.2d 390 (1989)), which was absorbed into the DLI in the late 1980s.

¶42 Estoppel comes in several flavors, of which the most invoked and cited is equitable estoppel. Montana also recognizes estoppel by silence and promissory estoppel as separate doctrines, *Northwest Potato Sales, Inc. v. Beck*, 208 Mont. 310, 316, 678 P.2d 1138, 1141 (1984), although the Supreme Court has acknowledged that the lines

separating the three estoppels “are blurry at best,” *C B & F Dev. Corp. v. Culbertson State Bank*, 256 Mont. 1, 7, 844 P.2d 85, 89 (1992).

¶43 The elements for an estoppel by silence are set out in *Northwest Potato Sales, Inc. v. Beck, supra.*, which adopted the rule laid out in the 1938 case of *Sherlock v. Greaves,* 106 Mont. 206, 76 P.2d 87:

> "To constitute an estoppel by silence or acquiescence, it must appear that the party to be estopped was bound in equity and good conscience to speak, and that the party claiming estoppel relied upon the acquiescence and was misled thereby to change his position to his prejudice. [citing authority] Mere silence cannot work an estoppel. To be effective for this purpose, the person to be estopped must have had an intent to mislead or a willingness that another would be deceived; and the other must have been misled by the silence."

208 Mont. at 317, 678 P.2d at 1141 (quoting from *Sherlock,* 106 Mont. at 217, 76 P.2d at 91).

¶44 In the present case there was silence on the part of the DLI concerning the lapse of insurance. Silence, however, gives rise to an estoppel only where there is a duty to speak. *Stewart v. Casey,* 182 Mont. 185, 191, 595 P.2d 1176, 1179 (1979).

¶45 In determining whether the DLI had a duty to speak, its statutory obligations must be considered. The legislature vested it with regulatory authority over PEOs. An examination of chapter 8 shows that the entire chapter was calculated to protect not only workers in this state, but employers as well. The chapter imposes strict requirements on the relationship between PEOs and their Montana clients – requirements that protect both workers and employees. It provides the DLI with the authority to suspend any PEO license where the PEO fails to “maintain any . . . requirement of this chapter [8].” § 39-8-206(1)(e), MCA (1999-2001). One of the requirements a PEO must meet is the requirement that it have a workers’ compensation policy in place at all times. (*See* ¶30.) Suspension of a PEO’s license for failure to maintain such insurance triggers a requirement that the PEO not only immediately notify the client of the suspension but that it also provide the DLI with

satisfactory evidence that it has done so. § 39-8-206(2)(b), MCA (1999-2001).[4] Finally, section 39-71-507(1), MCA (1999-2001), provides, "When the department discovers an uninsured employer, it **shall** order the employer to cease operations until the employer has elected to be bound by a compensation plan." (Emphasis added.)

¶46 The legislative directive to the DLI that it **shall** order any uninsured employer to cease doing business created a duty on the part of the DLI to immediately order both the TTC and MP Livestock to cease doing business upon its learning that TTC's workers' compensation insurance had lapsed. The delegation to the DLI of authority to suspend the license of any PEO failing to maintain workers' compensation insurance created a duty on the DLI to suspend the license of TTC upon the lapse of insurance. It failed and neglected to carry out either duty in this case.

¶47 The requirement that a suspended PEO provide the DLI with evidence that it has informed its clients of the suspension demonstrates the legislature's judgment that PEOs are not always trustworthy. That PEOs are not always trustworthy is evidenced by the DLI's own experience with Human Dynamics Corporation, an experience which is discussed at length in a decision of this Court and by the Supreme Court on appeal of that decision. *Uninsured Employers' Fund v. Total Mechanical Heating & Air Conditioning*, *et al.*, 2000 MTWCC 39, *aff'd, Total Mechanical Heating & Air Conditioning v. Uninsured Employers' Fund, et al.,* 2002 MT 55, 309 Mont. 84, 50 P.3d 108. The DLI's experience

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[4]Section 39-8-206(2)(b), MCA (1999-2001), provides:

> (2) If a license is suspended, revoked, or not renewed, the department shall:
>
> . . . .
>
> (i) notify each client by certified mail, return receipt requested, of the suspension, revocation, or nonrenewal using language furnished by the department;
>
> (ii) notify each client in writing that the client shares joint and several liability, retroactive to the date of the client's entering into a contract with the licensee, for any wages, workers' compensation premiums, payroll-related taxes, and any benefits left unpaid by the professional employer organization or group; and
>
> (iii) **provide the department with evidence of client notification**.

(Emphasis added.)

in that case, as well as its statutory mandate, put it on notice that PEOs do not always keep their clients informed about lapses of workers' compensation insurance coverage.

¶48 Thus, as of February 1, 2001, the DLI not only had grounds to suspend TTC's license, it had a duty to do so. Indeed, by failing to suspend the license and by allowing TTC to continue to operate, it countenanced TTC's continued violation of Montana Law and exposed both employers and workers – the very entities the DLI is duty bound to protect – to unnecessary risk and liability. During its six month period of inaction, the DLI knew or should have known that workers furnished by TTC were not protected by workers' compensation coverage. It had access to the NCCI database and could have easily confirmed that MP Livestock had not provided substituted coverage. It should have known that it was possible that MP Livestock was unaware of the lapse of TTC's policy and it was surely aware that a catastrophic injury might bankrupt the company or at least seriously impact it.

¶49 The fact that the Uninsured Employers' Fund of the DLI provides benefits to workers of uninsured employers is an insufficient excuse for the DLI's failing to assure that workers are protected by actual insurance. The UEF became insolvent in the 1980s and stopped paying benefits to many injured workers. *See Lako v. Uninsured Employers' Fund,* 2002 MTWCC 53, *aff'd* 2004 MT 290. More recently, the UEF has notified the Court that a large claim currently under investigation may once more render it insolvent. *See* January 21, 2005 letter of Mark Cadwallader in *Hand v. Uninsured Employers' Fund*, WCC No. 9905-8228.

¶50 I therefore find that the DLI had a duty to immediately suspend TTC's license and order both TTC and MP Livestock to cease doing business until insurance coverage was reinstated. Its failure to do so, along with its failure to notify MP Livestock of the insurance lapse, satisfies the intent element of estoppel by silence since its actions demonstrate at least a "willingness that another [MP Livestock] would be deceived" regarding insurance coverage.

¶51 The final element –- reliance – is also satisfied. Reliance in a silence case requires that the relying party lacked the means to ascertain the true state of affairs. *Stewart v. Casey, supra*. That requirement is met since, as between MP Livestock and the DLI, only the DLI had access to accurate information concerning insurance. Every insurer doing business in Montana must provide the DLI with notice of each policy it issues. § 39-71-2204(1), MCA (1999-2001). Cancellation of any workers' compensation policy can only be

accomplished by the insurer giving the insured (here TTC) **and the DLI** twenty days notice of the impending cancellation. § 39-71-2205(1), MCA (1999-2001). In both cases, the information must be submitted to the DLI through an "advisory" or other "organization" selected by the DLI. §§ 39-71-2204(2) and 2205(2), MCA (1999-2001). The organization designated by the DLI to receive the information is currently the National Council of Compensation Insurance (NCCI), which maintains a database of workers' compensation insurance policies. The DLI has access to that database and indeed accessed it in this case to determine that TTC was without insurance. (¶14; UEF Ex. D.) MP Livestock had no similar access; it had to rely on what it was told, or more accurately what it was not told, by TTC and the DLI.

¶52 Lacking knowledge of the lapse of insurance, MP Livestock continued to reimburse TTC for workers' compensation premiums. If the penalty in this case is upheld, MP Livestock will have paid the basic workers' compensation premium for the penalty period three times. In light of the statutory duties of the DLI, it could have reasonably expected that the DLI would have ordered TTC to cease doing business immediately upon learning of the lapse of insurance. It could have reasonably expected the DLI to suspend TTC's license. Indeed, if MP Livestock was an employer for workers' compensation insurance, the DLI had a duty to order it to cease doing business until it provided workers' compensation insurance. § 39-71-507(1), MCA (1999-2001). Hence, MP Livestock's reliance on the lack of notice was reasonable.

¶53 The facts of this case also give rise to an equitable estoppel. The elements which must be proved to establish equitable estoppel are:

> (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse.

Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, ¶67, 322 Mont. 133, 95 P.3d 671. The prior analysis shows satisfaction of all six elements: (1) with a duty to act or inform, the DLI concealed a material fact (lapse of insurance) from MP Livestock; (2) the DLI had knowledge of the material fact (lapse of insurance) during the entire penalty period; (3) the lack of insurance was unknown to MP Livestock; (4) the facts and circumstances known to the DLI at the time of the concealment were such that there was a natural and probable consequence that MP Livestock would act as if insurance were in effect; (5) in fact MP Livestock did act in such a manner; and (6) MP Livestock changed its position for the worse since its actions resulted in its reimbursing TTC for premiums not incurred and exposed it to the very civil penalty the DLI seeks to impose.

¶54 I therefore find and conclude that the DLI is estopped from seeking the penalty imposed in the present case.

ORDER AND JUDGMENT

¶55 The DLI is estopped from seeking a penalty under section 39-71-504(1), MCA (1999-2001), against MP Livestock with respect to the period February 1 through August 3, 2001. The Final Agency Decision (Summary Judgment Order) is **reversed** and the penalty imposed by the DLI is **vacated**.

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

DATED in Helena, Montana, this 4th day of February, 2005.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Mark E. Westveer
Mr. Arthur M. Gorov
Submitted: November 4, 2004