IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2017 MTWCC 1

WCC No. 2015-3517

JAMES SEYMOUR

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent

and

UNINSURED EMPLOYERS' FUND

Third Party Petitioner

vs.

BARRY MURNION

Third Party Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered an injury when he fell from a roof on which he claims to have been working. Respondent/Third Party Petitioner denies that Petitioner was an employee and that he was in the course of his employment at the time of his injury. However, if this Court determines otherwise, Respondent/Third Party Petitioner seeks indemnification from Third Party Respondent as an uninsured employer for all benefits paid or payable to Petitioner. Third Party Respondent denies employing Petitioner, either directly or indirectly. However, if this Court determines otherwise, Third Party

Respondent contends that Petitioner fell from the roof because of his use of alcohol or non-prescription drugs.

<u>Held</u>: At the time of Petitioner's injury, Petitioner was employed by Third Party Respondent and in the course of his employment. Petitioner's alleged use of alcohol or non-prescription drugs was not the major contributing cause of his accident, and therefore, Petitioner is entitled to benefits under the WCA. Third Party Respondent shall indemnify Respondent/Third Party Petitioner for all benefits paid or payable to Petitioner. Petitioner is entitled to his costs against Respondent/Third-Party Petitioner.

¶ 1 The trial in this matter was held on May 5, 2016, in Great Falls, Montana. Petitioner James Seymour (James) was present and represented by Charla K. Tadlock. Respondent/Third Party Petitioner Uninsured Employers' Fund (UEF) was represented by Joseph Nevin. Misty Knight, claims examiner for the UEF, and Mark Hurlbut, manager of the UEF, were also present. Third Party Respondent Barry Murnion (Barry) was present and represented by Jamie N. Bedwell.

¶ 2 <u>Exhibits</u>: This Court admitted Exhibits 1 through 5, and 12 through 19 without objection. This Court overruled the UEF's foundation objections to the transcribed portions of Exhibits 6 through 11, and admitted those exhibits in their entirety.

¶ 3 <u>Witnesses and Depositions</u>: This Court admitted the deposition of Sarah Elledge into evidence. James, Leonard Weaving, Knight, and Barry were sworn and testified at trial.

¶ 4 <u>Issues Presented</u>: This Court restates the following issues from the Pretrial Order.

Issue One: Did Barry employ James at the time of James' injury?

Issue Two: Is James entitled to benefits under the Workers' Compensation Act (WCA)?

Issue Three: Is Barry obligated to indemnify the UEF for all benefits paid or payable by the UEF to James?

Issue Four: Is James entitled to costs from the UEF? [1]

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[1] James withdrew his claim for a penalty and attorney fees pursuant to *Dostal v. Uninsured Employers' Fund*. *See* 2012 MTWCC 42 (allowing a penalty and attorney fees against the UEF under the 1991 version of the WCA, which explicitly included the UEF within the statutory definition of "insurer"). *See also Pekus v. Uninsured Employers' Fund*, 2003 MTWCC 33 (disallowing a penalty and attorney fees against the UEF under the 2001 version of the WCA, which no longer included the UEF within the definition of "insurer").

FINDINGS OF FACT

¶ 5 The following facts are established by a preponderance of the evidence.

¶ 6 At the times relevant to this case, Barry owned and operated Crown Construction as a sole proprietorship. Barry is married to Mary Murnion (Mary). Barry has employed Mary's brother, Jeff Seymour (Jeff), as a laborer. Although Barry and Mary's other brother, James, have long had a strained relationship, and although Barry emphatically denied ever employing him at the outset of his recorded statement, Barry has also employed James, paying him under the table a number of times for working on various roofing, construction, sheetrock, and siding jobs over the years.

¶ 7 Barry rarely, if ever, contacted James directly to hire him; Barry typically had Mary, Jeff, or his mother-in-law call James. James started out earning $8 an hour, but Barry eventually paid him at least $12 an hour and provided lunch. James had not worked for Barry for at least a year prior to his injury.

¶ 8 In the spring of 2014, Barry's workers' compensation insurance lapsed. He believed he was not required to carry coverage as the only people working for him at the time were his sons, Barry Jr. and Brandon, whom he claimed as dependents for tax purposes.

¶ 9 In August 2014, Barry was in a position to hire. He had spoken with Jeff about coming back to work full-time. Jeff told James that he was working for Barry as Barry's "foreman." Around Labor Day, Barry contacted the Montana State Fund to reinstate workers' compensation coverage, but Barry did not get coverage reinstated until September 17, 2014.

¶ 10 In early September, Crown Construction was in the process of re-roofing a house in Chinook. Barry maintained that he intended to complete the job with Brandon and Barry Jr., but he also hired another unidentified person to work on the job. Brandon, who was 18 years old and had recently finished high school, did not have much experience in construction and, in Barry's words, had "no skills."

¶ 11 During the first week of September, Barry Jr. was having significant problems with drugs. Barry and Jeff spent three days trying to help Barry Jr. However, Barry Jr.'s situation was dire. Barry and Jeff ultimately reported Barry Jr. to law enforcement, which arrested and jailed Barry Jr. Thereafter, Jeff and his wife, Shannon Seymour (Shannon), agreed to clean the drug paraphernalia out of the house in which Barry Jr. was living.

¶ 12 On September 7, 2014, Barry told Jeff that he was not going to be at the jobsite for at least part of the following day, as Barry planned to be in Havre to confer with a friend about Barry Jr. Although Barry claims that he told Jeff he would not hire James again, he was in a bind and, because he had to be away from the jobsite, he asked Jeff,

"would you please run by [the jobsite] and check on Brandon, help him out, whatever you've got to do until I get back."

¶ 13 Jeff called James during the evening of September 7, 2014, and stated that he and Barry needed help on a roofing job the following day. James hesitated because he had already agreed to cover a friend's shift at the Lone Tree Bar. However, Jeff persisted and James ultimately agreed to help. The two did not discuss how much James would be paid or how many hours he would work. James just assumed he and Barry would discuss these matters at a later time, as was their custom.

¶ 14 Jeff called back the next morning and told James he had already sent Shannon from Havre to James' house in Rocky Boy to pick James up, a distance of approximately 20-25 miles. Shannon arrived while James and Jeff were still on the phone, and yelled in to James, within earshot of Sandra and Kristin Taylor, about needing to get him to work.

¶ 15 In her recorded statement, Shannon recalled some of the details of the drive from James' house to the jobsite in Chinook, a distance of approximately 50 miles. For example, Shannon stated that James had mentioned drinking the night before, which she said was normal for him. But one detail Shannon failed to mention was that she drove James to pick up his tools at Weaving's house on the way, a fact confirmed by Weaving at trial.

¶ 16 Although Barry signed a UEF Payroll Report indicating that he had no employees during this time, Jeff, Brandon, and another man James did not know were working at the jobsite when Shannon dropped James off around 9 a.m.

¶ 17 In Jeff's recorded statement, he lied when asked if he was working on the roofing job; he claimed he was in the area "looking for houses and stuff and stopped to see the employer." Likewise, in his second recorded statement, Barry claimed that Jeff just stopped by to visit: "Brandon was the only one there besides Jeff and Jeff just stopped by to say hello." Barry also stated that he had not hired Jeff.

¶ 18 However, when asked at trial whether Jeff was working for him, Barry confessed that he was: "You could call it that, yeah. I had him go over there and check on my son, yes." Barry also admitted, "Jeff was there helping Brandon." Barry testified that he did not give Jeff permission to hire anyone else, but when asked on cross-examination how James would have known that Jeff was going to be at the jobsite, Barry reiterated, "That's a good question. All I know is I told Jeff to run over there to check on Brandon and help him out, whatever it took."

¶ 19 When James arrived, Jeff and Brandon were on the ground moving shingles from a tarp to the trash. After Jeff gave him instructions, James put his tool belt on, visited with Brandon for a few minutes, and climbed up a ladder. Once on the roof of the house, James met the other worker, and got to work pushing torn-off shingles down onto the tarp for Jeff and Brandon to discard.

¶ 20 At around 9:30 a.m., James slipped and fell 12 feet off the roof. He hit the cement below with both feet and heard a crack. James was transported by ambulance to the nearest hospital, where he was diagnosed with bilateral heel fractures.

¶ 21 Jeff called Barry to tell him what happened. Barry never spoke with James after his fall, nor did he pay him for the time he spent on the roof that morning. Barry's knowledge as to how and why James got to the jobsite and what occurred at the jobsite is based entirely on what Jeff, Shannon, and Brandon told him.

¶ 22 James later signed a First Report of Injury or Occupational Disease, listing Crown Construction as his employer. Since Barry did not have workers' compensation coverage in place at the time of James' injury, the UEF investigated James' claim, with field auditor Elledge taking recorded statements from James, Barry, Jeff, Shannon, Brandon, and Mary. Neither Barry, Jeff, Shannon, Brandon, nor Mary supported James' claim that he was working for Barry at the time of his injury. Based on the recorded statements, the UEF ultimately denied James' claim for insufficient evidence of an employment relationship between James and Barry.

¶ 23 However, after weighing all of the evidence, this Court finds that while Jeff was working for Barry, Jeff called James and asked him to work on the roofing job; that James agreed to work; that Jeff sent Shannon to pick James up and drive him to the jobsite so James could work; that Shannon picked James up, drove him to Weaving's house so James could get his tools, and then drove him to the jobsite; that James started working shortly after arriving at the jobsite; and that James fell off the roof while working. This Court makes these findings for the following two reasons.

¶ 24 First, this Court gives Jeff's, Shannon's, Brandon's, and Mary's unsworn statements little to no weight. Because they did not testify personally at trial, this Court could not observe their demeanor. Moreover, this Court could not assess whether they were being coached or influenced while giving their statements. This Court has this concern because Barry was present during several of their statements. It is also clear that they spoke to Barry about what had occurred before their statements, as evidenced by the conversation between Barry and Jeff during Barry's statement, and before Jeff's statement, when Barry thought he was off-mic, in which Barry is heard confirming with Jeff that, "The story is: he came up to see you, and he got up on the roof, and he fell off, and that was that, okay?" Although this Court cannot make a credibility determination because Jeff, Shannon, Brandon, and Mary did not testify at trial,[2] there are many discrepancies in their recorded statements, between their recorded statements, and between their recorded statements and Barry's testimony, which calls into question their veracity.

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[2] *Car Werks, LLC v. Uninsured Employers' Fund*, 2015 MTWCC 21, ¶ 20 (citing *Bonamarte v. Bonamarte*, 263 Mont. 170, 174-76, 866 P.2d 1132, 1134-35 (1994) and *City of Missoula v. Duane*, 2015 MT 232, ¶¶ 16-20, 380 Mont. 290, 355 P.3d 729).

¶ 25 Second, this Court finds that the story that Shannon was giving James a ride just so he could visit family does not ring true. It simply does not make sense that Shannon would drive 20-25 miles out of her way to pick James up only to turn around and give him an approximately 50-mile ride just to visit Jeff and Brandon at a jobsite in Chinook. There is no evidence to directly rebut James' testimony that Shannon took James to Weaving's house so James could get his tools, which would have been unnecessary if James was going to Chinook to visit his family. There was no explanation as to what James was going to do for the rest of his day after visiting with Jeff and Brandon, and the only reasonable explanation is that Jeff expected James to spend the entire day working at the jobsite. The evidence shows that Jeff and Brandon were on the ground and it does not make sense that James would get on the roof if he was just there to visit family. Although there were some discrepancies in James' testimony, this Court finds his testimony regarding the reason he went to the jobsite credible and this explanation makes more sense than Barry's "story" that James was just there to visit with family and got on the roof for no reason.

CONCLUSIONS OF LAW

¶ 26 This case is governed by the 2013 version of the Montana WCA since that was the law in effect at the time of James' injury.[3]

¶ 27 James bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks.[4]

Issue One: Did Barry employ James at the time of James' injury?

¶ 28 An "employer" means anyone who has a person in service under an appointment or contract of hire, expressed or implied, oral or written.[5]

¶ 29 Barry argues that he did not personally hire James, nor give Jeff or anyone else authority to do so. Thus, Barry maintains James was not his employee. However, an agent has actual authority when "the principal intentionally confers [authority] upon the agent or intentionally or by want of ordinary care allows the agent to believe that the agent possesses [authority]."[6] Once an agency relationship is created, the agent has the authority to "do everything necessary and proper and usual, in the ordinary course of business, for effecting the purpose of the agency."[7] "An agent represents the agent's

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[3] *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

[4] *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

[5] § 39-71-117(1)(a), MCA.

[6] § 28-10-402, MCA.

[7] § 28-10-405(1), MCA.

principal for all purposes within the scope of the agent's actual or ostensible authority, and all the rights and liabilities that would accrue to the agent from transactions within that limit, if the transactions had been entered into on the agent's own account, accrue to the principal."[8]

¶ 30 The evidence in this case shows that Jeff was Barry's agent, and that Jeff hired James to work on the roofing job. Barry acknowledged at trial that Jeff was working for him and admitted that he directed Jeff to go to the jobsite and do "whatever it took" and "whatever you've got to do" to help Brandon, who did not have sufficient experience to be working by himself. The directive was broad and without restriction, and under agency law, created actual authority for Jeff, as Barry's agent, to do whatever was necessary, in the ordinary course of business, to accomplish the purposes of the agency. This reasonably included hiring James on Barry's behalf, as Jeff had done in the past, to work on the roofing job. Because hiring James in this manner was consistent with Barry's past practice, and was within the scope of Jeff's actual authority on this occasion, all rights and liabilities related to that hire properly accrue to Barry. Therefore, this Court concludes that Barry employed James at the time of James' injury.

Issue Two: Is James entitled to benefits under the WCA?

¶ 31 Section 39-71-407(1), MCA, provides, that "each insurer is liable for the payment of compensation . . . to an employee of an employer . . . it insures who receives an injury arising out of and in the course of employment . . . ."

¶ 32 James was in the course of his employment under this statute. "The language 'in the course of employment,' generally refers to the time, place, and circumstances of an injury in relation to employment."[9] James was plainly injured in the course of his employment as the injury occurred in the place he was hired to be, at the time he was hired to be there, and while he was doing the work he was hired to do.

¶ 33 Barry, however, contends that James is not entitled to benefits under § 39-71-407(5), MCA, which provides, in pertinent part, "an employee is not eligible for benefits otherwise payable under [the WCA] if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident." Section 39-71-407(16), MCA, states, "As used in this section, 'major contributing cause' means a cause that is the leading cause contributing to the result when compared to all other contributing causes." The burden of proving that an employee's use of alcohol or non-

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[8] § 28-10-601, MCA.

[9] *Pinyerd v. State Comp. Ins. Fund*, 271 Mont. 115, 119, 894 P.2d 932, 934 (1995) (citing *Landeen v. Toole Cnty. Ref. Co.*, 85 Mont. 41, 54, 277 P. 615, 620 (1929)).

prescription drugs is the major contributing cause of the accident is on the workers' compensation insurer or uninsured employer.[10]

¶ 34 Here, Barry failed to carry the burden of proving that James was intoxicated or that his use of alcohol or non-prescription drugs played any role in his accident. James denied being under the influence of alcohol or other drugs at the time of his fall. There was no evidence indicating that James was intoxicated. When asked in her recorded statement whether James was intoxicated, Shannon did not say that she thought James was intoxicated; all Shannon could say was that James said he "was out drinking the night before." Although Jeff went out of his way to state several times that James had substance abuse problems in an attempt to cast James in a bad light, he did not say anything in his recorded statement about James being intoxicated that morning. (The irony of Jeff's statements is not lost on this Court, as the evidence showed that Jeff has substance abuse problems.) Brandon did not say anything in his recorded statements about James being intoxicated. Barry also went out of his way to say that James had substance abuse problems, but he was not at the jobsite when James fell and had no personal knowledge of whether James was intoxicated. None of the medical records from the day of the accident say that James was intoxicated. Thus, there is insufficient evidence for this Court to find that James was intoxicated or that his use of alcohol or nonprescription drugs played any role in his industrial accident.

¶ 35 James is therefore entitled to benefits pursuant to § 39-71-407(1), MCA, for which the UEF is liable under § 39-71-503, MCA.

Issue Three: Is Barry obligated to indemnify the UEF for all benefits paid or payable by the UEF to James?

¶ 36 By statute, the UEF "shall collect from an uninsured employer an amount equal to all benefits paid or to be paid from the fund to or on behalf of an injured employee of the uninsured employer."[11] Under § 39-71-541(2)(b), MCA, this Court may enter judgment "requiring an uninsured employer to indemnify the department with respect to any benefits paid or ordered payable by the department in relation to the claim." Because Barry was an uninsured employer, the UEF is entitled to collect from him all benefits it pays as a result of James' claim.

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[10] *See Van Vleet v. Montana Ass'n of Cntys. Workers' Comp. Trust*, 2004 MTWCC 8, ¶¶ 32-33, *rev'd on other grounds*, 2004 MT 367, 324 Mont. 517, 103 P.3d 544.

[11] § 39-71-504(1)(b), MCA.

Issue Four: Is James entitled to costs from the UEF?

¶ 37 Before 1993, the UEF was included in the WCA's definition of "insurer."[12] Thus, when a claimant prevailed against the UEF, this Court awarded the claimant his costs from the UEF under § 39-71-611(1), MCA, which states that an "insurer" shall pay reasonable costs if the insurer denies liability for and the claim is later adjudged compensable.[13]

¶ 38 In 1993, the Legislature amended the definition of "insurer," removing the reference to the UEF.[14]

¶ 39 In *Pekus v. Uninsured Employers' Fund*, the UEF argued that it could not be liable for costs, a penalty, or attorney fees, because it was not an insurer.[15] This Court held that the UEF was not subject to a penalty or attorney fees because the UEF is not an insurer, and by statute, this Court may award a penalty and attorney fees only when it finds unreasonableness on the part of an insurer.[16] However, this Court concluded that it could award costs against the UEF because "the practice of awarding litigation costs to claimants prevailing against the UEF has developed in this Court and falls within the Court's inherent power to adopt rules of practice not inconsistent with statutory provisions."[17] This Court also reasoned that "while sections 39-71-611 and -612, MCA, do not authorize costs against the UEF where the UEF is not an insurer, nothing in those provisions or in the Workers' Compensation Act prohibit an award of costs."[18]

¶ 40 In *Greene v. Uninsured Employer's Fund*, this Court awarded the claimant costs, to be paid by the uninsured employer.[19] However, this Court encouraged reconsideration of its previous rulings subjecting the UEF to costs because this Court looks to the Montana Rules of Civil Procedure for guidance when its own rules are silent and M.R.Civ.P. 54(d) states that costs may be assessed against state agencies "only to the extent allowed by law."[20]

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[12] *See, e.g.*, § 39-71-116(9), MCA (1991, *Temporary*) (" 'Insurer' means an employer bound by compensation plan No. 1, an insurance company transacting business under compensation plan No. 2, the state fund under compensation plan No. 3, or the uninsured employers' fund provided for in part 5 of this chapter.").

[13] *See, e.g.*, *Dostal v. Uninsured Employers' Fund*, 2012 MTWCC 42, ¶¶ 16, 17 (awarding costs to claimant who prevailed against the UEF because the 1991 WCA applied, which included the UEF in the definition of "insurer").

[14] *Compare* § 39-71-116(9), MCA (1991, *Temporary*), *with* § 39-71-116(11), MCA (1993).

[15] 2003 MTWCC 33, ¶ 3.

[16] *Id.*, ¶ 4.

[17] *Id.*, ¶¶ 5, 7.

[18] *Id.*, ¶ 5. *See also Fliehler v. Uninsured Employers' Fund*, 2001 MTWCC 29, ¶ 47 ("Claimant is entitled to his costs but not to attorney fees.").

[19] 2003 MTWCC 64, ¶ 4.

[20] *Id.*, ¶ 5.

¶ 41 Relying upon *Greene*, the UEF maintains that this Court should reconsider its past decisions, and rule that it is not liable for costs. Because there is no statute stating that a claimant can recover costs from the UEF, it argues that James may not recover his costs under M.R.Civ.P. 54(d)(1). Indeed, the UEF argues that the WCA prohibits an award of costs against the UEF; it argues that under § 39-71-611, MCA, this Court can award costs only against an insurer, as defined in the WCA. The UEF also argues that this Court does not have inherent authority to impose remedies, and that forcing it to pay costs, which it may not be able to recoup from uninsured employers because many lack the resources to reimburse the UEF, would diminish its limited resources to pay claims.

¶ 42 *Inter alia*, James argues that the costs provision in § 39-71-611, MCA, applies to the UEF pursuant to § 39-71-505, MCA, which states, "All appropriate provisions in the Workers' Compensation Act apply to the fund in the same manner as they apply to compensation plans No. 1, 2, and 3." Thus, he argues that he is entitled to his costs under M.R.Civ.P. 54(d)(1).

¶ 43 As a matter of law, this Court has authority to award costs to a claimant who prevails against the UEF under M.R.Civ.P. 54(d) because the WCA allows costs against the UEF. Contrary to the UEF's argument, § 39-71-611, MCA, does not state that *only* insurers can be liable for costs; it just authorizes an award of costs against insurers. As this Court recognized in *Pekus*, while the statutes limit awards of a penalty and attorney fees to cases in which this Court finds unreasonableness on the part of an insurer, § 39-71-611, MCA, does not limit awards of costs to cases against insurers. Therefore, as this Court ruled in *Uninsured Employers' Fund v. Helstowski*, a claimant who prevails in a case against the UEF is entitled to costs under § 39-71-611, MCA, because the costs provision applies to the UEF via § 39-71-505, MCA.[21] This Court will not overrule its prior decisions assessing costs against the UEF because it is not firmly convinced that those decisions are erroneous as a matter of law.[22] Moreover, this Court agrees with James that it would be unjust to deny his request for costs under the circumstances of this case, as the purpose of the UEF is to "minimize the hardships imposed when an injured worker is unable to get workers' compensation benefits as a result of the employer's failure to provide coverage."[23] Accordingly, the UEF is liable for James' costs.

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[21] 2000 MTWCC 29, ¶ 34 ("Claimant is entitled to costs from the UEF pursuant to section 39-71-611, MCA (1997), and section 39-71-505, MCA (1997), (providing that all appropriate provisions in the Workers' Compensation Act apply to the UEF in the same manner as they apply to compensation plans No. 1, 2, and 3).").

[22] *See Wood v. Montana Sch. Grp. Ins. Auth.*, 1994 MTWCC 72 (explaining that this Court will overrule its prior cases only when the judge has "reached a firm and reasoned conviction that the original decision was erroneous as a matter of law."). *See also Guethlein v. Family Inn*, 2014 MT 121, ¶ 16, 375 Mont. 100, 324 P.3d 1194 (citations omitted) (explaining, "Though *stare decisis* is not a rigid doctrine preventing reexamination of past cases, 'weighty considerations underlie the principle that courts should not lightly overrule past decisions.' *Stare decisis* provides the 'preferred course' when faced with viable alternatives.").

[23] *Thayer v. Uninsured Employers' Fund*, 1999 MT 304, ¶ 21, 297 Mont. 179, 991 P.2d 447.

JUDGMENT

¶ 44 Barry employed James at the time of James' injury.

¶ 45 James was in the course of his employment at the time of his injury and is entitled to benefits under the WCA, for which the UEF is liable under § 39-71-503, MCA.

¶ 46 Barry is obligated to indemnify the UEF for all benefits paid or payable by the UEF to James under §§ 39-71-504 and -541, MCA.

¶ 47 James is entitled to costs against the UEF.

¶ 48 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED this 17th day of January, 2017.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Charla K. Tadlock
Joseph Nevin
Jamie N. Bedwell

Submitted: January 6, 2017