

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

**2010 MTWCC 5**

**WCC No. 2008-2058**

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**TIMOTHY WILSON**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent**

**and**

**UNINSURED EMPLOYERS' FUND**

**Third-Party Petitioner**

**vs.**

**ELK MOUNTAIN MOTOR SPORTS, INC.**

**Third-Party Respondent.**

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**ORDER GRANTING UNINSURED EMPLOYERS' FUND'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**Summary:** The Third-Party Respondent contends that it should not be liable to the UEF for Petitioner's industrial injury. Although the UEF accepted liability, the Third-Party Respondent contends that the injury did not occur and that the employer was not uninsured. The UEF moved for partial summary judgment against the Third-Party Respondent, arguing that the Third-Party Respondent failed to appeal the UEF's determination within 90 days, as required by § 39-71-520(1), MCA. The Third-Party Respondent responds that the UEF cannot use facts which occurred prior to the date it was named in this lawsuit against it in a motion for partial summary judgment.

**Held:** The Third-Party Respondent did not appeal the UEF's determination to mediation within 90 days, as required by § 39-71-520(1), MCA. Therefore, its contentions that it was not uninsured on the date of Petitioner's industrial injury and that Petitioner's industrial accident did not occur are time-barred. The UEF is entitled to partial summary judgment on these issues.

**Constitutions, Statutes, Regulations, and Rules: Administrative Rules of Montana: 24.5.329.** In considering a motion for summary judgment, the Court is not limited to considering only those facts which occurred after the filing of the petition.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-520.** A Department determination regarding UEF benefits becomes final after 90 days unless a party appeals that determination to mediation. Where the third-party respondent failed to appeal that determination within 90 days, it became final and any attempt to dispute the determination is untimely.

¶1 Respondent and Third-Party Petitioner Uninsured Employers' Fund (UEF) moves this Court for partial summary judgment in this matter pursuant to ARM 24.5.329. The UEF argues that two issues raised by Third-Party Respondent Elk Mountain Motor Sports, Inc. (Elk Mountain) should be resolved in the UEF's favor as a matter of law. In its response to the UEF's third-party petition, Elk Mountain contended that it was not uninsured at the time of Petitioner Timothy Wilson's (Wilson) January 8, 2004, industrial injury, and further contended that Wilson did not sustain an industrial injury within the course and scope of his employment with Elk Mountain. The UEF argues that the determination regarding Elk Mountain's uninsured status at the time of Wilson's industrial injury is final and binding, as is the determination that Wilson sustained an industrial injury within the course and scope of his employment with Elk Mountain on January 8, 2004.<sup>1</sup>

¶2 Wilson concurs with the position the UEF has taken in its motion.<sup>2</sup> Elk Mountain objects, arguing that it was not a party to this lawsuit at the time of the determination and therefore should not be bound by it.<sup>3</sup>

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<sup>1</sup> Uninsured Employers' Fund's Motion for Partial Summary Judgment and Brief in Support Thereof, Docket Item No. 64.

<sup>2</sup> Petitioner's Response to Uninsured Employer[s]' Fund's Motion for Partial Summary Judgment, Docket Item No. 70.

<sup>3</sup> Third Party Respondent, Elk Mountain Motor Sports, Inc.'s Brief in Opposition to Uninsured Employers'

## SUMMARY JUDGMENT

¶3 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.<sup>4</sup> This matter is susceptible to summary disposition.

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### STATEMENT OF UNCONTROVERTED FACTS<sup>5</sup>

¶4 On or around February 4, 2004, the Department of Labor & Industry's Data Management Unit determined that Elk Mountain had workers' compensation coverage which had been cancelled on December 21, 2003. Montana State Fund (State Fund) confirmed that the policy was cancelled and not reinstated.

¶5 On February 5, 2004, the UEF received Wilson's First Report of Injury.

¶6 On February 27, 2004, the UEF determined that Wilson had a compensable claim pursuant to the Montana Workers' Compensation Act (WCA).

¶7 On February 27, 2004, the UEF notified Elk Mountain of its acceptance of Wilson's claim. The UEF put Elk Mountain on notice of the 90-day time limit to appeal to mediation pursuant to § 39-71-520, MCA.

¶8 On May 28, 2004, the UEF determination became final.

¶9 On June 16, 2004, the UEF sent Elk Mountain a letter notifying it of a potential lien as a result of its uninsured status and its statutory duty to indemnify the UEF for the benefits paid on Wilson's claim.

¶10 On or around June 30, 2004, Elk Mountain filed a Petition for Workers' Compensation Mediation.

¶11 On July 15, 2004, the Montana Workers' Compensation Mediation Unit dismissed Elk Mountain's request for mediation as untimely. The order stated that if Elk Mountain disputed the dismissal, it could appeal the decision to the Montana Workers' Compensation Court.

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Fund's Motion for Partial Summary Judgment, Docket Item No. 71.

<sup>4</sup> ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

<sup>5</sup> In its response brief, Elk Mountain did not dispute the factual basis of any of the "uncontroverted" facts set forth in UEF's opening brief in support of its motion for partial summary judgment. They are therefore taken as true for purposes of this Order.

¶12 On September 13, 2004, the July 15, 2004, order of the Workers' Compensation Mediation Unit became final since Elk Mountain had not appealed it.

¶13 On September 23, 2004, a second letter was mailed to Elk Mountain putting it on notice of a potential lien as the result of its uninsured status and its statutory duty to indemnify the UEF for the benefits paid on Wilson's claim.

¶14 On October 20, 2004, the UEF filed a lien in the amount of \$19,535.34 in Lewis & Clark County, pursuant to § 39-71-506, MCA.

¶15 From November 2004 through June 2005, Elk Mountain sent various payments to the UEF.

¶16 On August 8, 2005, a third letter was sent to Elk Mountain putting it on notice of a potential lien and potential collection.

¶17 On August 11, 2005, the UEF filed a lien in the amount of \$22,939 in Lewis & Clark County, pursuant to § 39-71-506, MCA.

¶18 On July 28, 2006, Elk Mountain entered into a Deferred Payment Contract with the UEF to repay benefits paid on Wilson's claim.

¶19 On November 29, 2007, the UEF sent Elk Mountain's counsel another letter concerning the UEF's continued request for indemnification from Elk Mountain for past, present, and future benefits paid on Wilson's claim.

¶20 On March 18, 2008, Wilson filed a Petition for Hearing in the Workers' Compensation Court, alleging a dispute existed over his entitlement to total disability benefits.

¶21 On April 11, 2008, the UEF filed its response to Wilson's Petition for Hearing. It generally denied liability for total disability benefits.

¶22 On July 8, 2008, the UEF sent a letter to Elk Mountain putting it on notice of a potential collection and lien as a result of its uninsured status and its statutory duty to indemnify the UEF for benefits paid on Wilson's claim.

¶23 On November 5, 2008, the UEF filed a lien in the amount of \$50,378.44 in Lewis & Clark County, pursuant to § 39-71-506, MCA.

¶24 On January 21, 2009, this Court issued an order dismissing Elk Mountain from this case. The UEF subsequently filed a motion for reconsideration and a request for leave to file a third-party petition against Elk Mountain.

¶25 On May 18, 2009, this Court placed the UEF's motion for reconsideration in abeyance pending completion of a Department mediation over the issue of the UEF's third-party indemnity claim.

¶26 On June 22, 2009, the parties participated in a Department mediation at the direction of this Court.

¶27 On July 22, 2009, this Court denied the UEF's motion for reconsideration and granted the UEF leave to file a third-party petition. The Court also deemed Elk Mountain's Petition for Resolution of Dispute Concerning Benefits moot.

¶28 On July 27, 2009, the UEF filed its third-party petition for indemnity.

¶29 On August 27, 2009, Elk Mountain filed its response to the UEF's third-party petition. Elk Mountain contended that Wilson did not sustain an industrial injury within the course and scope of his employment with Elk Mountain on January 8, 2004. Elk Mountain further contended that it was not put on notice of the 90-day time limit to appeal the UEF's acceptance of Wilson's claim to mediation. Elk Mountain further denied that the mediation requirements of the WCA had been fulfilled, and it denied that it was not enrolled under a workers' compensation plan at the time of Wilson's industrial injury.

¶30 On September 11, 2009, Elk Mountain's legal counsel provided the UEF with a copy of a February 5, 2004, letter from the State Fund to Wilson which indicated that the State Fund did not insure Elk Mountain on January 8, 2004.

#### DISCUSSION

¶31 At issue in the UEF's motion for partial summary judgment is whether Elk Mountain can at the present time dispute the Department's February 27, 2004, determination that Elk Mountain was an uninsured employer on January 8, 2004, and whether Elk Mountain can dispute liability for Wilson's industrial injury of that same date. The UEF maintains that Elk Mountain cannot raise these issues at this time. The UEF argues that the 90-day time limit imposed for appealing determinations concerning UEF benefits under § 39-71-520(1), MCA, expired on May 28, 2004, and that subsequent attempts by Elk Mountain to dispute liability are untimely and should not be considered.

¶32 Elk Mountain responds that it was not a proper party to the present case until July 27, 2009. It argues that the UEF cannot rely on any facts which happened prior to that date in support of a summary judgment motion.<sup>6</sup>

¶33 Elk Mountain devotes the bulk of its response brief to discussing the procedural history of this case and its status as a third-party respondent. Elk Mountain asserts, “It is improper to rely on facts that occurred prior to Elk Mountain being brought in as a Third Party Respondent, to support a partial summary judgment.”<sup>7</sup>

¶34 Under ARM 24.5.329(1)(a), a party may, at any time after the filing of a petition for hearing, move for summary judgment in its favor. ARM 24.5.329(2) provides that summary judgment shall be rendered if no genuine issue as to any material fact exists and if the moving party is entitled to judgment as a matter of law. I am unaware of any authority in support of the proposition that the only facts which may be relied upon by the Court in considering a motion for summary judgment are those facts which occurred after the filing of the petition. Indeed, such a requirement would render summary judgment virtually impossible in almost every case. I therefore conclude it is proper for the Court to consider facts which occurred prior to the filing of the UEF’s third-party petition.

¶35 Pertinent to this case, § 39-71-520(1), MCA, provides that a dispute concerning UEF benefits must be appealed to mediation within 90 days from the date of the determination by the Department or the determination is considered final. As the UEF sets forth above, the determination was made on February 27, 2004. The UEF immediately informed Elk Mountain in writing that it was accepting liability for Wilson’s claim for compensation and advised Elk Mountain that the decision would become final if not appealed to mediation within 90 days. Elk Mountain did not appeal the determination. Therefore, the determination became final 90 days later, on May 28, 2004.

¶36 Elk Mountain’s present attempt to dispute the UEF’s determination that Elk Mountain was an uninsured employer and that Wilson had a compensable claim within 90 days as required by § 39-71-520(1), MCA, is untimely. The UEF is therefore entitled to summary judgment on these contentions raised by Elk Mountain in its response to the UEF’s third-party petition.

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<sup>6</sup> Third Party Respondent, Elk Mountain Motor Sports, Inc.’s Brief in Opposition to Uninsured Employers’ Fund’s Motion for Partial Summary Judgment (Response Brief), at 2, Docket Item No. 71.

<sup>7</sup> Response Brief at 5.

¶37 As noted during oral argument on this motion held in this Court on February 2, 2010, this ruling does not preclude Elk Mountain from disputing Wilson's position that he is totally disabled, which is the subject of Wilson's current petition before this Court.<sup>8</sup>

JUDGMENT

¶38 The UEF's motion for partial summary judgment is **GRANTED**.

DATED in Helena, Montana, this 8<sup>th</sup> day of March, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Richard J. Pyfer  
Leanora O. Coles  
David B. Gallik  
Submitted: February 2, 2010

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<sup>8</sup> Minute Book Hearing No. 4124, Docket Item No. 79.