

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

**2009 MTWCC 22**

**WCC No. 2008-2058**

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**TIMOTHY WILSON**

**Petitioner**

**vs.**

**UNINSURED EMPLOYERS' FUND**

**Respondent.**

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**ORDER DENYING UNINSURED EMPLOYERS' FUND'S MOTION FOR  
RECONSIDERATION AND GRANTING LEAVE TO FILE A THIRD-PARTY PETITION**

**Summary:** The Uninsured Employers' Fund moved this Court to reconsider its decision dismissing the alleged uninsured employer as a respondent in this case, arguing that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action. Alternatively, the UEF asked the Court to grant it leave to file a third-party petition against Elk Mountain Motor Sports, Inc. After the Legislature enacted new legislation, the UEF supplemented its briefing and argued that under the new statutory language, the putative uninsured employer is properly joined as a party. Elk Mountain objected to the UEF's motion, arguing that it could not be joined without denial of due process because it had not participated in the mandatory department mediation. The Court ordered the parties to participate in a department mediation prior to the Court's reaching a decision on the UEF's motion. The UEF subsequently informed the Court that the mediation had been completed and requested that the Court consider its motion.

**Held:** The UEF's motion for reconsideration is denied. Elk Mountain cannot simply be reinstated as a respondent that is ostensibly liable to the claimant because § 39-71-516, MCA, makes it clear that claims by injured employees against uninsured employers are exclusively within the jurisdiction of the district court. Although the newly enacted legislation does not specify in what capacity an uninsured employer is joined, it appears to the Court that the only capacity in which the UEF could join Elk Mountain would be as a third-party respondent. Therefore, the UEF's request for leave to file a third-party petition against Elk Mountain is granted.

## Topics:

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-516.** Although newly-enacted legislation (HB 119) purports to join an uninsured employer in an action against the UEF, it does not specify in what capacity the uninsured employer is joined. The potential liabilities of the uninsured employer must be clearly defined. Section 2(c) of HB119 specified that the type of judgment which may be entered against an uninsured employer would require the uninsured employer to indemnify the department. This provision implies that the uninsured employer would be joined as a third-party respondent with the UEF as a third-party petitioner. Therefore, that is how the Court will join the uninsured employer.

**Employers: Joinder.** Although newly-enacted legislation (HB 119) purports to join an uninsured employer in an action against the UEF, it does not specify in what capacity the uninsured employer is joined. The potential liabilities of the uninsured employer must be clearly defined. Section 2(c) of HB119 specified that the type of judgment which may be entered against an uninsured employer would require the uninsured employer to indemnify the department. This provision implies that the uninsured employer would be joined as a third-party respondent with the UEF as a third-party petitioner. Therefore, that is how the Court will join the uninsured employer.

**Procedure: Joining Third Parties.** Although newly-enacted legislation (HB 119) purports to join an uninsured employer in an action against the UEF, it does not specify in what capacity the uninsured employer is joined. The potential liabilities of the uninsured employer must be clearly defined. Section 2(c) of HB119 specified that the type of judgment which may be entered against an uninsured employer would require the uninsured employer to indemnify the department. This provision implies that the uninsured employer would be joined as a third-party respondent with the UEF as a third-party petitioner. Therefore, that is how the Court will join the uninsured employer.

¶ 1 On February 13, 2009, the Respondent Uninsured Employers' Fund (UEF) moved this Court for reconsideration of its January 21, 2009, Order which dismissed the alleged uninsured employer as a party to this case. In the event that the Court denied its motion for reconsideration, the UEF asked for alternative relief in the form of leave to file a third-

party petition against the alleged uninsured employer.<sup>1</sup> Neither the Petitioner Timothy Wilson (Wilson) nor the putative uninsured employer Elk Mountain Motor Sports, Inc. (Elk Mountain) filed a response to the UEF's motion. On April 21, 2009, the UEF filed a supplemental brief in support of its motion for reconsideration, bringing to the Court's attention recently enacted legislation which the UEF believed could affect the Court's decision on the motion.<sup>2</sup>

¶ 2 Elk Mountain responded to the UEF's supplemental brief on May 5, 2009. Elk Mountain objected to the UEF's motion for reconsideration, arguing that its due process and the mediation requirements of § 39-71-2401, MCA, needed to be met before it could be joined as a party under the new statutory language.<sup>3</sup>

¶ 3 On May 18, 2009, I convened a telephonic hearing with counsel for Wilson, the UEF, and Elk Mountain to discuss the pending motion and Elk Mountain's response. Counsel for Elk Mountain confirmed that its primary objection to the UEF's motion for reconsideration was that it had not participated in a department mediation. In light of the subject matter jurisdiction concerns which this raised, I ruled that the UEF's motion would be held in abeyance pending completion of the mediation.<sup>4</sup>

¶ 4 On June 26, 2009, counsel for the UEF informed the Court that the department mediation had occurred on June 22, 2009, and requested that the Court resume consideration of the UEF's motion.<sup>5</sup> On July 13, 2009, Elk Mountain filed notice with the Court that the mediation had been completed and that Elk Mountain was not in agreement with the mediator's Mediation Report and Recommendation which had been issued on July 2, 2009.<sup>6</sup>

¶ 5 Under the recently enacted legislation found at Section 3, Chapter 112, Laws of 2009 (HB 119):

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<sup>1</sup> Uninsured Employers' Fund[s] Motion for Reconsideration and Brief in Support, Docket Item No. 27.

<sup>2</sup> Uninsured Employers' Fund's Supplemental Brief in Support of its Motion for Reconsideration, Docket Item No. 31.

<sup>3</sup> Elk Mountain Motor Sports, Inc.'s Response to Uninsured Employers' Fund's Supplemental Brief in Support of its Motion for Reconsideration, Docket Item No. 32.

<sup>4</sup> Minute Book Hearing No. 4062, Docket Item No. 33.

<sup>5</sup> June 26, 2009, Letter from Leanora O. Coles to Workers' Compensation Court, Docket Item No. 34.

<sup>6</sup> Elk Mountain Motor Sports, Inc.'s, Notice That Mediation Report and Recommendation is Not Acceptable, Docket Item No. 35.

(1) An uninsured employer or an employer alleged to be uninsured is a party to all disputes concerning any benefits for which the employer may become obligated to indemnify the department pursuant to 39-71-504(1)(b).

(2)(a) After mediation pursuant to department rules, an uninsured employer or an employer alleged to be uninsured is joined as a party when a dispute over benefits is brought before the workers' compensation judge pursuant to 39-71-2905.

(b) The workers' compensation judge may enter a judgment, including a default 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.

¶ 6 Pursuant to this newly-enacted legislation, an uninsured employer or an employer alleged to be uninsured is joined as a party after a department mediation has occurred and a dispute concerning benefits is brought to this Court under § 39-71-2905, MCA. The department mediation has now occurred. However, even though the new legislation purports to join an uninsured employer in the action, it does not specify in what capacity an uninsured employer is joined. Similarly, when I originally dismissed Elk Mountain from this action, its capacity as a party was undefined. If I were to grant the UEF's motion to reconsider, Elk Mountain would again be reinstated in an undefined capacity and its potential liabilities would likewise be undefined. Therefore, the UEF's motion for reconsideration of this Court's order dismissing Elk Mountain is denied. In compliance with the statute, however, it is proper that Elk Mountain be joined in this action – but with its potential liabilities clearly defined. Towards that end, HB 119 provides guidance.

¶ 7 Notably, HB 119 did not amend § 39-71-516, MCA, which provides that claims by injured employees against uninsured employers remain exclusively within the jurisdiction of the district court. Therefore, Elk Mountain obviously cannot be joined in the present action as a party ostensibly liable to Wilson. Section (2)(c) of HB 119 specifies that the type of judgment which may be entered against an uninsured employer would require the uninsured employer to indemnify the department. This provision implies that Elk Mountain would be joined as a third-party respondent with the UEF as the third-party petitioner. Therefore, the UEF's motion for leave to file a third-party petition against Elk Mountain is granted.

#### ORDER

¶ 8 The UEF's motion for reconsideration is **DENIED**.

¶ 9 The UEF's motion for leave to file a third-party petition is **GRANTED**.

¶ 10 The UEF shall have 10 days from the date of this Order in which to file a third-party petition against Elk Mountain Motor Sports, Inc., at which time an Order Resetting Scheduling Order will be issued.

DATED in Helena, Montana, this 22<sup>nd</sup> day of July, 2009.

(SEAL)

/s/ JAMES JEREMIAH SHEA

JUDGE

c: Richard J. Pyfer  
Leanora O. Coles  
David B. Gallik  
Submitted: June 26, 2009