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## ATTORNEYS' FEES

*Arneson v. Travelers Prop. Cas., 2006 MTWCC 7* (Order Granting Partial Summary Judgment).

**Related Topics:** Penalties.

**Summary:** Respondent moves for partial summary judgment with respect to Petitioner's claim for additional travel expenses and attorneys' fees.

**Held:** Summary judgment granted. Mileage reimbursement is intended to cover the type of expenses that Petitioner is attempting to claim separately. With respect to attorneys' fees and costs, Respondent paid the medical expenses prior to adjudication and therefore is not liable for attorneys' fees pursuant to RCM 92-616, -618 (1975).

*Vanbouchaute v. Montana State Fund, 2007 MTWCC 37* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Penalties.

**Summary:** Petitioner petitioned the WCC for a determination as to whether he was entitled to receive a lumbar fusion as recommended by his physician. Petitioner also sought attorneys' fees and a penalty.

**Held:** Respondent authorized surgery shortly after the conclusion of the hearing. Respondent's conduct in denying the surgery recommended by his treating physician based initially on a file review by the managed care organization's medical advisor and then the second opinion of an independent medical examiner was unreasonable. However, since Respondent authorized the surgery before the claim was adjudged compensable by the WCC, Petitioner is not entitled to recover his attorneys' fees or costs. Petitioner is entitled to a penalty.

*Pinnow v. Halverson, Sheehy & Plath, P.C., 2008 MTWCC 53* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner entered into a settlement agreement which settled two workers' compensation claims with Respondent acting as her attorney. Although Petitioner ultimately accepted the settlement amount, she contested Respondent's right to an attorney fee, arguing that Respondent did not adequately represent her interests.

**Held:** The evidence overwhelmingly demonstrates that Petitioner was well-represented by Respondent. Respondent is entitled to its attorney fee and costs as provided for in the Attorney Retainer Agreement signed by Petitioner and Respondent.

***Briese v. MACO Workers' Comp. Trust and Joanne Briese, 2008 MTWCC 50*** (Order Denying Richard H. Renn's Motion to Award Attorney Fees) (*Appealed to Montana Supreme Court - December 22, 2008; Affirmed – August 4, 2009*).

**Summary:** Petitioner's former attorney moves the Court for an order awarding attorney fees on death benefits payable to Petitioner's children during the period of time he represented Petitioner in a claim for death benefits.

**Held:** Petitioner's former attorney is not entitled to a fee on benefits awarded to the children because he did not represent the children and the benefits payable to the children under the Stipulation for Entry of Judgment were not due to the attorney's efforts.

***Schmill v. Liberty Northwest Ins. Corp. and Montana State Fund, 2010 MTWCC 22*** (Order Regarding Calculation of Attorney Fees).

**Summary:** Petitioner Cassandra Schmill and Intervenor Montana State Fund dispute the correct calculation of common fund attorney fees on claims where an offset is taken for payment of social security disability income (SSDI) benefits. Petitioner argues that the calculation of the contingent fee should be based on the gross amount of the common fund benefit, before the SSDI offset is taken. Intervenor argues that the calculation of the contingent fee should be based on the net amount of the common fund benefit, after the SSDI offset is taken.

**Held:** Pursuant to the common fund doctrine, Schmill's counsel is entitled to reasonable attorney fees from the common fund beneficiaries. In determining which is the more reasonable method for calculating a contingent fee on common fund benefits in this case, the Court looks to the predominant practice for calculating a contingent attorney fee in cases where an SSDI offset is taken. Petitioner's counsel advised the Court that the predominant practice is to calculate the attorney fee on the net benefits after the SSDI offset is taken. Seeing no compelling reason to deviate from the predominant practice in this case, the Court orders that when calculating the attorney fee on *Schmill* common fund benefits payable by Montana State Fund, the contingent fee shall be based on the net amount of the common fund benefit, after the SSDI offset is taken.

***Montana State Fund v. UEF and Folda; UEF v. R&R Fabrication, 2010 MTWCC 10*** (Order Granting in Part and Denying in Part R&R Fabrication's Motion to Amend Response to Third-Party Petition for Indemnity).

**Summary:** Third-Party Respondent (R&R) moved the Court for leave to amend its response to the UEF's third-party petition for indemnity. Petitioner Montana State Fund stipulated to Third-Party Respondent's motion except for the proposed amendment seeking an award of attorney fees. Petitioner argues that R&R's proposed amendment requesting attorney fees is futile since attorney fees may only be awarded to claimants and Third-Party Respondent is not a claimant. Third-Party Respondent responds that § 39-71-612, MCA, does not, on its face, appear to preclude a third party from receiving attorney fees but simply provides that the insurer shall pay reasonable costs and attorney fees if certain conditions are met.

**Held:** Although § 39-71-612, MCA, does not specifically preclude an award of attorney fees to a third-party respondent, § 39-71-614, MCA, provides that the amount of an attorney's fee assessed against an insurer under § 39-71-611, MCA, or § 39-71-612, MCA, must be based *exclusively* on the time spent by the attorney in *representing the claimant*. Since R&R is not a claimant it cannot recover its attorney fees under either § 39-71-611, MCA, or § 39-71-612, MCA. Although R&R's proposed amendment seeks attorney fees, "pursuant to equitable or legal principals," § 39-71-611(3), MCA, and § 39-71-612(4), MCA, specifically prohibit an award of attorney fees "under the common fund doctrine or any other action or doctrine in law or equity." Since R&R's proposed amendment would be futile, it must be denied.

## ***BELTON CASES***

***Harrison v. Liberty Northwest Ins. Corp. and Stillwater Mining Company, 2006 MTWCC 22*** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to Montana Supreme Court - May 26, 2006; Affirmed - April 1, 2008*).

**Summary:** Petitioner petitioned the Court to determine whether Stillwater Mining Company or Liberty Northwest Insurance Corporation, insurer for Derek Brown Construction Company, was responsible for payment of his medical costs and disability benefits.

**Held:** Stillwater Mining Company (Stillwater) is responsible for the payment of Petitioner's medical costs and disability benefits. Dr. Varnavas, one of Petitioner's treating physicians, opined that Petitioner's back injury sustained while on the job at Derek Brown Construction Company (Derek Brown) occurred as a direct result of a previous occupational disease Petitioner suffered while working for Stillwater. Dr. Varnavas's opinion was not disputed by Petitioner's other treating physician, Dr. Quenemoen, who was unable to opine whether Petitioner's injury sustained while on the job at Derek Brown was a result of his occupational disease suffered while working for Stillwater. Liberty Northwest Insurance Corporation (Liberty) paid Petitioner temporary total disability benefits and also paid for Petitioner's back surgery. Stillwater must indemnify Liberty for these medical and disability benefit payments. Stillwater should continue to pay Petitioner's disability and medical benefits. Petitioner is also entitled to receive his costs from Stillwater.

***Liberty Northwest Insurance Corporation v. Valor Ins. Co., 2008 MTWCC 7*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** The claimant suffered knee and neck injuries as a result of an industrial accident on March 5, 2002. His neck injuries were diagnosed as a strain with an underlying degenerative condition. A cervical MRI taken March 23, 2005, revealed a herniated disk. In the interim, the claimant's employer switched workers' compensation insurers. Respondent, who was the insurer at the time of the claimant's industrial accident, denied liability on the grounds that the herniated disk was the result of an occupational disease which developed after July 1, 2002, when it ceased to be the insurer of claimant's employer. Petitioner, who became the employer's workers' compensation insurer on July 1, 2002, denied liability on the grounds that the herniated disk was caused by the March 5, 2002, industrial accident. Petitioner now seeks reimbursement from

Respondent of certain medical and wage-loss benefits it has paid the claimant under a reservation of rights.

**Held:** The claimant did not reach maximum medical improvement (MMI) for his cervical condition until after he was declared to be at MMI following his neck surgery. Accordingly, Respondent is liable for the claimant's neck condition and Petitioner is entitled to indemnification for the benefits it paid pursuant to *Belton v. Carlson Transport*.

***Liberty Northwest v. Montana State Fund, In Re: Ellis, 2011 MTWCC 8*** (Order Granting Respondent's Motion for Summary Judgment and Denying Petitioner's Cross-Motion for Summary Judgment).

**Note:** This is not really a *Belton* case, but is more properly categorized as an Indemnification case.

**Summary:** Respondent paid workers' compensation benefits to and on behalf of Claimant under a reservation of rights. Petitioner later admitted liability for Claimant's claim, but refused to indemnify Respondent for funds paid, arguing that the Workers' Compensation Act does not require it to indemnify another insurer for benefits paid under a reservation of rights. Respondent moved for summary judgment in its favor, and Petitioner cross-motined.

**Held:** Respondent is entitled to indemnification from Petitioner for funds it paid to and on behalf of Claimant. Petitioner is the party who is properly and primarily obligated to pay those benefits.

## **BENEFITS**

***Hedrick v. MACo Workers' Comp. Trust, 2006 MTWCC 3*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – May 3, 2006; Appeal Dismissed by Stipulation – October 12, 2006*).

**Summary:** Petitioner petitioned to receive treatment for her carpal tunnel syndrome by a Washington state physician, and for disability benefits for periods of time she claims she was disabled.

**Held:** Petition to receive treatment for carpal tunnel syndrome is granted. Petition to receive disability benefits for periods of time Petitioner claims she was disabled is denied. Subject to Petitioner's treating physician's opinion regarding Petitioner's employability during her recovery from surgery, Petitioner may be entitled to disability benefits for the period of her recovery from surgery.

***Hiett v. Montana Schools Group Ins. Auth./Montana State Fund and Liberty Northwest Ins. Corp., Intervenors, 2006 MTWCC 33*** (Order Determining Threshold Issues in Scope of Decision).

**Summary:** Following briefing by the parties, the Court determined whether the Montana

Supreme Court's ruling in this case abrogates the exclusion of palliative and maintenance care set forth in § 39-71-704(1)(f), MCA; and whether the criteria for furnishing of secondary medical services set forth in § 39-71-704(1)(b), MCA, may still apply under any circumstances or whether this section was wholly abrogated by *Hiett*.

**Held:** The *Hiett* decision has not abrogated the exclusion of palliative and maintenance care, and the secondary medical benefits provision has not been wholly abrogated by *Hiett* and may still apply to particular claims.

***Woodards v. Montana Ins. Guar. Assoc., 2007 MTWCC 55*** (Order Granting Respondent's Motion for Summary Judgment, Denying Petitioner's Motion for Summary Judgment, and Granting Respondent's Cross-Motion for Summary Judgment) (*Appealed to Montana Supreme Court – March 6, 2008; Dismissed by Stipulation – July 23, 2008*).

**Summary:** Respondent moved for summary judgment, arguing that because Petitioner is considered retired, she is not entitled to PTD benefits pursuant to § 39-71-710, MCA. Petitioner moved for summary judgment, arguing that Respondent unlawfully retroactively converted her TTD benefits to PPD benefits without notice. Respondent cross-motivated for summary judgment on the notice issue.

**Held:** Petitioner is not entitled to PTD benefits pursuant to § 39-71-710, MCA, and therefore Respondent's motion for summary judgment on this issue is granted. Because Petitioner never met the legal definition of PPD, she was never entitled to PPD benefits. Despite how either party would characterize the payment of these benefits, legally, there could not have been a retroactive "conversion" of benefits to which Petitioner was entitled. The benefits Petitioner received after reaching maximum medical improvement amounted to an overpayment of TTD benefits. Petitioner's motion for summary judgment on the retroactive conversion issue is therefore moot and Respondent is entitled to summary judgment in its favor on this issue.

***Aldrich v. Montana State Fund, 2007 MTWCC 57*** (Decision and Judgment) (*Appealed to the Montana Supreme Court - January 15, 2008; Affirmed – February 18, 2009*).

**Summary:** Petitioner petitioned this Court for an award of temporary total disability (TTD) benefits during the period of Petitioner's medical instability resulting from an occupational disease, notwithstanding the age or Social Security retirement status of Petitioner. Respondent argues that Petitioner is not entitled to TTD benefits because he has failed to prove an actual wage loss.

**Held:** Petitioner is not entitled to an award of TTD benefits. Pursuant to § 39-71-701, MCA, a worker is eligible for TTD benefits when the worker suffers a total loss of wages as a result of an injury and until the worker reaches maximum healing. In this case, at the time Petitioner contends he was no longer at maximum healing, he had not worked for approximately eleven years and had been drawing Social Security retirement benefits for approximately two years. None of the facts presented to this Court establish that Petitioner suffered any wage loss as a result of his injury when he was no longer at maximum healing.

Petitioner, therefore, has failed to meet his burden of proof that he was entitled to receive TTD benefits.

***Fabbi v. Valley Forge Ins. Co., 2008 MTWCC 16*** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to the Montana Supreme Court - May 14, 2008; Appeal Dismissed Pursuant to Joint Motion – November 26, 2008*).

**Summary:** Petitioner petitioned the Court for temporary total and temporary partial disability benefits for the time periods between January 24, 2001, and November 14, 2001, and from May 2, 2002, through September 29, 2002. Petitioner also requested attorney fees, costs, and a penalty. Respondent argued that Petitioner was not entitled to the requested benefits because her physician released her to her time-of-injury job and Petitioner voluntarily terminated her employment with Respondent's insured.

**Held:** After being released to return to work without restrictions, Petitioner advised her employer that she was not available for further work until she notified it otherwise. Petitioner never notified her employer that she was available for work after that time. Because Petitioner voluntarily terminated her employment with her time-of-injury employer for the balance of time, she is not entitled to the requested benefits.

***Vanvallis v. Liberty Northwest Ins. Corp., 2008 MTWCC 25*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner was injured in the course and scope of her employment as a full-time employee. She returned to her time-of-injury job on a part-time basis because of her physician-ordered work restrictions, but was unable to adequately perform the job duties of her time-of-injury job. Petitioner's employer placed her in an alternative part-time position which allowed her to work within her 25-hours-per-week restriction. Petitioner petitioned this Court for a determination of whether the 25-hours-per-week job constitutes regular employment within the meaning of § 39-71-116(24), MCA.

**Held:** The Court concludes that Petitioner's job, which employed her 25 hours per week, every week, is substantial and significant, and constitutes "regular employment" within the meaning of § 39-71-116(24), MCA.

***Lafountain v. Montana State Fund, 2008 MTWCC 46*** (Judgment).

**Summary:** Petitioner suffered an industrial injury on September 17, 2002. Respondent accepted liability and paid benefits. Petitioner contends that he is entitled to payment of lost wages at the rate of \$1,610 per week. Petitioner further contends that Respondent should authorize him to travel to Germany for a surgical procedure which is not available in the United States. Respondent contends that Petitioner has been paid indemnity benefits at the correct rate, and that he is not entitled to travel for surgery.

**Held:** Petitioner is not entitled to the amount of wage-loss benefits he seeks as a matter of law. Although Petitioner satisfied the Court that he is in pain from his industrial injury and

that he is motivated to improve his condition and return to work, Petitioner did not meet his burden of proof regarding his entitlement to the specific treatment he desires.

***Quick v. Montana State Fund, 2008 MTWCC 27*** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to Montana Supreme Court - July 1, 2008; Cross-Appeal Filed - July 15, 2008; Affirmed - May 13, 2009*).

**Related Topics:** Penalties.

**Summary:** Petitioner petitioned the Court for retroactive and future domiciliary care benefits, a higher rate of pay for domiciliary care provided by Petitioner's wife, Dolly, a 20% penalty, attorney fees, and costs. Petitioner argued that Respondent was placed on notice that Petitioner required domiciliary care at the time of his 1984 accident, and that Dolly has been providing the care since then. Respondent argued that it did not have notice that Petitioner needed domiciliary care until February 1, 2007, the first day a medical opinion was received by it stating that domiciliary care was warranted. Prior to trial, Respondent conceded that Petitioner required 24-hour domiciliary care. Respondent began paying a rate of \$7.50 per hour to Dolly, effective February 1, 2007.

**Held:** Petitioner is not entitled to retroactive domiciliary care prior to February 1, 2007, because Respondent was not put on notice that domiciliary care was warranted until this date. Significantly, Petitioner's attorney in 2005 stated in a letter to Respondent that a claim for domiciliary care benefits had never been made. Respondent's rate of \$7.50 per hour is unreasonable. The evidence establishes that similar rates were paid for domiciliary care not provided by a person with RN skills in the late 1980s, and in the present case, the evidence establishes that Petitioner requires his care to be provided by a person with RN skills. The Court finds that, based upon the testimony of a qualified professional, \$20.00 per hour is a reasonable rate of pay for Dolly because she is an RN. Further, the Court finds that Petitioner is entitled to a 20% penalty because Respondent's rate is an unreasonable rate.

***Drake v. Montana State Fund; and Hilbert v. Montana State Fund, 2011 MTWCC 2*** (Order Denying Petitioner's Motions for Summary Judgment and Granting Respondent's Cross-Motions for Summary Judgment).

**Summary:** Petitioners suffered industrial injuries while the 5<sup>th</sup> Edition of the AMA Guides was in effect but reached MMI after the 6<sup>th</sup> Edition came into effect. They challenge Respondent's decision to award them impairment ratings as determined under the 6<sup>th</sup> Edition. Petitioners argue that impairment ratings should be calculated under the Guides in effect on the date of their industrial injury. Respondent argues that impairment ratings should be calculated under the Guides in effect on the date an injured worker reaches MMI.

**Held:** Section 39-71-703, MCA, provides that an injured worker's impairment rating is to be determined by the "latest" edition of the Guides. Section 39-71-711, MCA, provides that an impairment rating is a purely medical determination which must be determined

by an impairment evaluator after a claimant has reached maximum healing and must be based on the “current” edition of the Guides. The “latest” or “current” edition of the Guides is the most recent edition in existence on the date an injured worker reaches MMI. In Petitioners’ cases, the 6<sup>th</sup> Edition existed on the date they each reached MMI. Petitioners’ motions for summary judgment are denied and Respondent’s cross-motions for summary judgment are granted.

***Poindexter v. Montana State Fund, 2010 MTWCC*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner was off work after an industrial accident. Respondent informed Petitioner that his treating physician was releasing him to return to work with restrictions and that his employer had a modified job available. Petitioner alleges that he called his employer and was informed that no work was available. Petitioner’s employer claims that he instructed Petitioner to report to work, but Petitioner did not report for work at the agreed-upon time. Petitioner alleges that Respondent incorrectly and unreasonably terminated his TTD benefits.

**Held:** Petitioner has not proven his entitlement to TTD benefits for the time period of September 23, 2009, through February 21, 2010. Respondent did not unreasonably terminate Petitioner’s TTD benefits. Petitioner is not entitled to his costs, attorney fees, or a penalty.

***Chapman v. Twin City Fire Ins. Co., 2010 MTWCC 30*** (Findings of Fact, Conclusions of Law and Judgment and Order Resolving Pending Motion) (*Appealed to Supreme Court – December 29, 2010; Dismissed with Prejudice – February 15, 2011*).

**Summary:** Petitioner alleges she suffered an industrial injury to her low back when her employer required her to move her belongings from one workstation to another. Respondent denied liability because it did not believe Petitioner suffered an industrial injury.

**Held:** The facts demonstrate that Petitioner suffered a compensable industrial injury. However, the facts further demonstrate that Petitioner’s injuries are not as severe as she claims, nor did Petitioner prove that the subsequent termination of her employment was related to her industrial injury. Petitioner has proven entitlement to certain medical benefits, but neither to wage-loss benefits nor a penalty.

***Stewart v. Liberty Northwest Ins. Corp., 2010 MTWCC 14*** (Order Denying Respondent’s Motions for Summary Judgment).

**Related Topics:** Equity – Estoppel & Waiver

**Summary:** After this Court determined that Petitioner was not entitled to an increased impairment rating because Petitioner failed to establish a causal relationship between her industrial injury and chronic pain, Respondent discontinued payment for Petitioner’s pain

patches. Petitioner petitioned the Court for an order directing Respondent to resume coverage and payment for this prescription and any other necessary pain medications. Respondent moved for summary judgment, arguing that Petitioner is collaterally estopped from bringing this second cause of action because the issue of causation was resolved in the trial concerning Petitioner's impairment rating.

**Held:** Respondent's motion is denied. In *Lund v. State Compensation Mut. Ins. Fund*, the Montana Supreme Court held that a second action in a workers' compensation claim which seeks a different type of benefit based on different statutory criteria than the benefit sought in the first action does not satisfy the identical issue element of collateral estoppel. In Petitioner's first action, she sought an increased impairment rating. Section 39-71-711, MCA, sets forth the statutory criteria for impairment ratings. Petitioner's current action seeks to establish Respondent's liability for payment of certain medical benefits. Section 39-71-704, MCA, sets forth the statutory criteria for medical benefits. Since the issue in the present action differs from the issue raised and decided in the prior action, collateral estoppel does not apply.

***Wright v. ACE American Ins. Co., 2010 MTWCC 11*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – June 23, 2010; Affirmed - March 15, 2011*).

**Related Topics:** Maximum Medical Improvement

**Summary:** Petitioner suffered an industrial injury to his left shoulder. After surgery, his shoulder pain worsened and he also experienced cervical symptoms. Although Petitioner subsequently saw several doctors, none offered viable treatment options except pain management. Petitioner sought medical treatment on his own with a former Billings doctor, now practicing in Wyoming, who recommended a second shoulder surgery. Respondent has denied Petitioner's request for that surgery. Petitioner further alleges that he is unable to work and should receive TTD benefits. Respondent alleges that Petitioner's treating physician signed job analyses and has released him to return to work, thereby rendering him ineligible for TTD benefits.

**Held:** Petitioner is entitled to additional medical benefits. Although Petitioner's treating physician, a pain management specialist, does not recommend further surgical treatment, the Court finds the opinion of an orthopedic surgeon, who believes Petitioner is likely to improve with additional surgery, more persuasive. Since additional medical treatment is reasonably expected to improve Petitioner's condition, he is not at MMI. Since he also has not been released to return to his time-of-injury employment, he is entitled to TTD benefits. As the prevailing party, Petitioner is entitled to his costs. Petitioner has not demonstrated that Respondent was unreasonable in adjusting his claim and therefore Petitioner is not entitled to attorney fees or a penalty.

***Hart v. Hartford Ins. Co. of the Midwest, 2010 MTWCC 8*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Supreme Court – May 7, 2010; Remanded to WCC for Further Proceedings – August 24, 2010*).

**Summary:** Petitioner petitioned the Court for certain periods and amounts of temporary total, temporary partial, and back-owing medical benefits. Petitioner injured his low back in the course and scope of his employment. Petitioner's employer provided him with light-duty employment, but Petitioner missed several days of work. Petitioner's relationship with his initial treating physician was terminated due to Petitioner's drug seeking behavior. A new physician examined Petitioner at Respondent's request. This physician concluded that Petitioner was at MMI and assigned him a 0% impairment rating. Petitioner continued to seek medical care through several physicians, often seeking narcotic medication. Petitioner failed to seek pre-authorization for any of his medical treatment at issue in this case.

**Held:** Petitioner is not entitled to any retroactive temporary total disability benefits because his employer offered him job duties within his restrictions and no physician removed him from work entirely. Petitioner is entitled to retroactive temporary partial disability benefits effective December 30, 2008, when he was restricted to 5 hours maximum with the possibility of not being able to work at all on some days. Petitioner is not entitled to past medical benefits because his personal conduct and broken contracts leave little room for a determination that the treatment bills at issue were for undisputedly necessary treatment.

*Murphy v. Montana State Fund, 2010 MTWCC 6* (Decision and Judgment).

**Summary:** Petitioner sought a lump-sum conversion of his permanent total disability benefits.

**Held:** In a bench ruling, the Court concluded that Petitioner is entitled to a lump-sum conversion of his permanent total disability benefits as he planned to use the funds to purchase a feedlot. Petitioner came to trial fully prepared, having sought financing and with a reasonable business plan. His self-employment venture would not pay more than his bi-weekly benefits would provide him a saleable asset upon retirement. The provisions of ARM 24.29.1202 were thus satisfied.

*Carey v. American Home Assurance Co., 2010 MTWCC 3* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner broke her left wrist while working as the front end manager at Sam's Club. Shortly after she returned to work, Petitioner's job position was eliminated at Sam's Club stores nationwide as part of a restructuring plan. Petitioner opted not to apply for other management positions at Sam's Club, but applied for hourly positions instead. The only position she was offered was as a part-time food demonstrator. Petitioner declined the position and accepted a severance package. She later filed this petition, arguing that she was terminated due to her industrial injury and that she is entitled to TTD and PPD benefits, as well as her costs, attorney fees, and a penalty.

**Held:** Petitioner lost her job at Sam's Club due to the elimination of her time-of-injury job position and due to the unavailability of any other position which Petitioner desired and for which she was qualified. Petitioner is not entitled to TTD or additional PPD benefits. Because Petitioner is not the prevailing party, she is not entitled to her costs, attorney fees, or a penalty.

***Pugh v. Charter Oak Fire Ins. Co., 2010 MTWCC 1*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner petitioned the Court for a determination of temporary total disability (TTD) benefits due to her. Petitioner argues that she was constructively discharged from her time-of-injury employment and is entitled to TTD benefits pursuant to § 39-71-701(4), MCA. Petitioner contends she is also entitled to TTD benefits for a period of time following her cubital tunnel release surgery.

**Held:** Petitioner voluntarily resigned her employment and was not constructively discharged. Petitioner failed to meet her burden of proof that she suffered a total loss of wages as a result of her injury after her voluntary resignation.

***MACo Workers' Compensation Trust v. Klinkam, 2011 MTWCC 26*** (Findings of Fact, Conclusions of Law and Judgment).

**Topic:** Benefits: Social Security Offset

**Summary:** Petitioner claims it is entitled to an offset pursuant to § 39-71-701(5), MCA, which provides that an insurer is entitled to an offset if the claimant collects social security disability payments “because of the injury” for which the claimant also receives workers’ compensation benefits.

**Held:** Respondent receives social security disability benefits for a multitude of reasons in addition to the knee injury for which she receives workers’ compensation benefits. Respondent’s knee injury was only one of eleven conditions considered severe by the Social Security Administration’s Administrative Law Judge in his determination that Respondent was entitled to benefits. Petitioner is not entitled to an offset.

***MACo Workers' Compensation Trust v. Klinkam, 2012 MTWCC 25*** (Order Denying Petitioner’s Request for Benefits under § 39-71-610, MCA).

**Summary:** Petitioner appeals the determination by the Department of Labor & Industry, Employment Relations Division, denying her request for benefits under § 39-71-610, MCA. The Department denied Petitioner’s request on the grounds that Petitioner’s benefits were converted to permanent partial disability benefits and not terminated as the statute requires.

**Held:** Petitioner admits that she continues to receive compensation benefits; therefore, her compensation benefits have not been terminated. Rather, her benefits have been converted from one type of compensation benefit to a different type of compensation benefit. Pursuant to § 39-71-610, MCA, Petitioner does not qualify for “additional biweekly compensation benefits.”

***Marlon Clapham v. Twin City Fire Ins. Co., 2012 MTWCC 27*** (Order Granting Partial Summary Judgment in Favor of Petitioner).

**Summary:** Petitioner moved for summary judgment, arguing that Respondent violated the provisions of § 39-71-608, MCA, when it agreed to pay his claim under a reservation of rights

and then refused to pay medical expenses and failed to accept or deny his claim, or request authorization to continue paying his claim under the statute, after the 90-day time period had expired. Petitioner contends he is entitled to acceptance of his claim, attorney fees, and a penalty. Respondent admits it did not pay Petitioner's medical expenses and that it did not accept or deny his claim within 90 days as required by the statute. However, Respondent argues that it was not obligated to pay any benefits under § 39-71-608, MCA, and that the only consequence it may face for failing to comply with the 90-day deadline is attorney fees and a penalty if the claim is later adjudged compensable.

**Held:** Petitioner is not entitled to acceptance of his claim for Respondent's failure to obtain written consent to make compensation payments for more than 90 days under a reservation of rights. However, Petitioner is entitled to a penalty if his claim is found to be compensable. Respondent is obligated to pay certain medical expenses incurred during the time period it placed Petitioner's claim under § 39-71-608, MCA.

***Kim Trevino v. Montana State Fund, 2013 MTWCC 1*** (Order Granting Respondent's Motion for Summary Judgment) (*Reconsideration Granted – March 29, 2013*).

**Summary:** Respondent moved for summary judgment on Petitioner's claim of entitlement to permanent partial disability and vocational rehabilitation benefits, arguing that Petitioner was at maximum medical improvement and released to return to her time-of-injury employment and that Petitioner believes she is capable of performing her time-of-injury job. Petitioner objected to Respondent's motion, arguing that a question of fact exists as to whether she can perform her time-of-injury job.

**Held:** The undisputed facts support a conclusion that Petitioner is capable of performing her time-of-injury job. Thus, she is not entitled to additional permanent partial disability benefits nor vocational rehabilitation benefits and Respondent is entitled to summary judgment in its favor.

***Suzanne O'Mahoney v. Liberty Ins. Corp., 2013 MTWCC 6*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court – April 3, 2013; Appeal Dismissed Pursuant to Stipulation June 12, 2013; Judgment vacated and withdrawn pursuant to stipulation of the parties*).

**Summary:** Petitioner alleges she is permanently and totally disabled due to right arm pain from her industrial injury. Respondent argues that Petitioner has had several jobs approved for her by her treating physician, and that her subjective pain complaints are insufficient to support a finding of permanent total disability.

**Held:** While Petitioner is undergoing evaluation and treatment at a pain clinic upon referral of her treating physician, she is not at MMI and her claim for permanent total disability is premature. She is entitled to continuation of temporary total disability benefits while she completes her pain treatment.

## BENEFITS/PENALTIES

*Sharon Stewart v. Liberty Northwest Ins. Corp.*, 2012 MTWCC 11 (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to MSC –April 30, 2012; Cross-appealed to MSC – May 14, 2012; Affirmed – April 23, 2013*).

**Summary:** Petitioner suffers from ongoing pain in her right knee since her industrial accident and two arthroscopic surgeries. The WCC ruled in an earlier decision that Petitioner was not entitled to an increase in her impairment rating for her chronic pain. Following the earlier ruling, the Respondent denied further liability for Petitioner's pain medication. Petitioner contends that Respondent unreasonably denied her medication, and she is entitled to the pain medication, penalty, attorney fees, and costs.

**Held:** Petitioner has demonstrated that her original injury and resulting surgeries are causally related to her need for ongoing pain medication. She is entitled to continued payment of her medication without a reservation of rights by Respondent. As Respondent acted reasonably in reliance on the WCC's earlier ruling that Petitioner was not entitled to an increased impairment rating for her chronic pain, Petitioner is not entitled to a penalty or attorney fees.

## BURDEN OF PROOF

*Slavin v. Montana State Fund*, 2009 MTWCC 36 (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner petitioned the Court for acceptance of his workers' compensation claim and payment of appropriate benefits. Petitioner alleged that an accident and injury occurred in the course and scope of his employment at H & H Express. Petitioner, two coworkers, and the claims adjuster testified to the events surrounding the day of the alleged accident and injury.

**Held:** Petitioner is not entitled to acceptance of his claim. After reviewing the totality of the evidence and observing the witnesses at trial, the Court did not find Petitioner's trial testimony regarding the events surrounding his alleged accident and injury to be credible. The Court found the other witnesses' testimony credible. Petitioner testified that he may or may not have informed a coworker about his injury when they worked together on the morning of the alleged accident. Petitioner also testified that the coworker may or may not have observed him limping while at work. In his recorded statement given to the claims adjuster only six days after the alleged accident, however, Petitioner unequivocally stated that the coworker asked why he was limping and Petitioner informed him more than once that his knee hurt. The coworker testified at trial that he did not observe Petitioner limping and did not ask him about his alleged injury. A different coworker testified that he spoke with Petitioner and observed him on the morning of the alleged accident and did not perceive Petitioner suffering any pain. Finally, in Petitioner's recorded statement, he failed to mention his fishing guide activities that occurred on the same day as the alleged accident and injury. This omission also factored in the Court's determination that Petitioner's version of events was not credible.

***Hinman v. Montana State Fund, 2007 MTWCC 2*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - January 16, 2007; Affirmed - October 30, 2007*).

**Summary:** Petitioner petitioned the Court for workers' compensation benefits because of chemical exposures occurring during his employment with Specialized Automotive.

**Held:** Petitioner is not entitled to any workers' compensation benefits. Petitioner has not met his burden of proving his chronic obstructive pulmonary disease was caused by the chemical exposures occurring during his employment with Specialized Automotive.

***Johnson v. MHA Workers' Comp. Trust, 2007 MTWCC 17*** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to Montana Supreme Court - June 21, 2007; Appeal Dismissed on Appellant's Motion –October 19, 2007*).

**Summary:** Petitioner petitioned the Court relative to two claims for benefits. The first relates to an injury that allegedly occurred on February 18, 2005. The second relates to an injury that allegedly occurred on October 4, 2005.

**Held:** Regarding her February 18, 2005, claim, Petitioner has not met her burden of proof that she suffered a compensable injury. The Court concludes Petitioner suffered a compensable injury to her right shoulder and arm on October 4, 2005.

***Foster v. Montana Schools Group Ins. Auth., 2007 MTWCC 18*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Causation.

**Summary:** Petitioner sustained a left knee injury on September 6, 2005, while employed by Respondent's insured, Evergreen School District. On October 27, 2005, Petitioner underwent a left knee arthroscopy with a partial medial meniscectomy. On November 22, 2005, Petitioner was released to full duty by her treating physician. On December 20, 2005, Petitioner returned to her treating physician noting severe pain and catching in her left knee. Ultimately, an MRI conducted on May 19, 2006, showed evidence of an avascular necrosis of the subchondral area of the lateral femoral condyle. Petitioner contends that the avascular necrosis is causally related to either her injury of September 6, 2005, or the medial meniscectomy of October 27, 2005. Alternatively, Petitioner contends that an additional arthroscopy should be authorized to determine whether she has sustained a repeat meniscal tear. Respondent has denied liability, contending that Petitioner has failed to establish a causal relationship between the avascular necrosis and her industrial injury. Respondent also contends that Petitioner has failed to establish on a more-probable-than-not basis that she has sustained a repeat meniscal tear.

**Held:** Petitioner has failed to establish on a more-probable-than-not basis that the avascular necrosis is causally related to either her injury of September 6, 2005, or her arthroscopy of October 27, 2005. With respect to the possibility of a repeat meniscal tear,

Petitioner has likewise failed to establish on a more-probable-than-not basis that such an injury exists. The MRI conducted on May 19, 2006, showed no evidence of a tear, and her treating physician's testimony that there may be a 5-10% chance that the MRI may have missed it does not satisfy Petitioner's burden of proof.

*Somerville v. Montana Assoc. of Counties Workers' Comp. Trust, 2007 MTWCC 36* (Order Denying Petitioner's Motion for Reconsideration).

**Summary:** Petitioner moves for reconsideration of this Court's conclusion that Petitioner failed to meet his burden of proof that he was entitled to benefits. Petitioner urges the Court to reweigh the evidence and find in his favor.

**Held:** Petitioner's motion is denied. Petitioner directs the Court's attention to the same evidence which the Court already considered and the sum of his argument is that the Court should assign more weight to the discrepancies in the testimony of Respondent's witnesses, and less weight to the discrepancies in Petitioner's testimony. Having already considered the evidence which Petitioner emphasizes in his brief, the Court concluded Petitioner failed to meet his burden of proof. Upon reconsideration, that determination stands.

*Healy v. Liberty Northwest Ins. Corp., 2007 MTWCC 43* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Physicians.

**Summary:** Petitioner injured his low back in a work-related incident in 2005. He had previously settled a workers' compensation claim for a low-back injury in 1998. While Petitioner complained of severe pain in his low back and leg and an MRI revealed a herniated disk, the PA-C who was treating him and the PA-C's supervising physician concluded that no objective medical findings supported Petitioner's subjective complaints of pain. Petitioner was released to work without restriction, but he did not return to work and sought medical treatment elsewhere, eventually having back surgery performed. The physician from whom Petitioner last sought treatment opined that Petitioner's back condition was permanently aggravated by his 2005 industrial injury. Respondent denies liability for benefits from the date Petitioner was released to work without restriction.

**Held:** Petitioner has demonstrated by a preponderance of the evidence that his back condition was permanently aggravated as a result of his June 9, 2005, industrial injury. Respondent is therefore liable for payment of workers' compensation benefits.

*Heffner v. Montana State Fund, 2007 MTWCC 40* (Order Denying Petitioner's Motion for Reconsideration).

**Summary:** Petitioner moves for reconsideration of this Court's decision that Petitioner failed to meet his burden of proof that he was entitled to benefits.

**Held:** Petitioner’s motion is denied. Petitioner contends the Court failed to properly consider the 1979 workers’ compensation statutes regarding his burden of proof. Specifically, Petitioner argues that he established it was medically possible that his injury was causally related to his industrial accident and this constitutes acceptable proof to meet his burden. However, Petitioner failed to meet his burden of proof that his injury was more probably than not caused by his industrial accident. Petitioner further argues the Court erred in excluding certain exhibits. Having revisited the exhibits in question and the rulings on these evidentiary matters, I see no reason to disturb my earlier rulings.

***Iron v. Montana State Fund, 2008 MTWCC 15*** (Findings of Fact, Conclusions of Law, and Judgment).

**Related Topics:** Credibility.

**Summary:** While performing his job duties, Petitioner was struck in the head by a metal lid which blew off a pressurized canister. Respondent accepted liability for Petitioner’s facial injuries, but denied liability for an alleged injury to Petitioner’s cervical spine. Petitioner sought treatment on his own and eventually had a cervical fusion performed. He now seeks medical and TTD benefits for his cervical condition and surgery, as well as costs, attorney fees, and a penalty.

**Held:** While Petitioner’s underlying cervical condition progressed from the time of his industrial accident in 2004 until his cervical fusion in 2007, Petitioner’s lack of credibility, lack of objective medical findings, and his treating physician’s inability to attribute the cause of his cervical progression to the industrial accident, lead the Court to conclude that Petitioner has not met his burden of proof. Respondent is therefore not liable.

***Russell v. Watkins & Shepard Trucking Co., Inc., 2008 MTWCC 36*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 18, 2008; Affirmed and Remand for Further Proceedings - June 24, 2009*).

**Summary:** Petitioner alleges that several of his health ailments were caused by chronic low-level carbon monoxide exposure which occurred while driving a semi-truck for Respondent. Respondent responds that Petitioner has failed to prove that his health problems were caused by chronic low-level carbon monoxide exposure and has failed to prove that he was exposed to an elevated level of carbon monoxide while driving for Respondent.

**Held:** Petitioner has met his burden of proof regarding his diagnosed cognitive dysfunction condition and his claim regarding his cognitive dysfunction is compensable. Regarding his other health ailments, Petitioner has not proven that it is more probable than not that they were caused by his carbon monoxide exposure and his claim for compensation regarding the remaining conditions is denied.

***Distad v. Montana State Fund, 2009 MTWCC 16*** (Order Denying Reconsideration) (*Appealed to the Montana Supreme Court - May 8, 2009; Dismissed with Prejudice – June 26, 2009*).

**Summary:** Petitioner moves for reconsideration of this Court's March 20, 2009, Findings of Fact, Conclusions of Law and Judgment in which this Court concluded that Petitioner is not entitled to reopen his settlement based upon a mutual mistake of fact and that Petitioner is not entitled to a penalty. Respondent Montana State Fund objects to Petitioner's motion.

**Held:** Although Petitioner sets forth three allegations which he argues entitle him to reconsideration, none of these allegations affect my conclusion that Petitioner did not meet his burden of proof regarding the cause of his back condition. Petitioner's motion for reconsideration is therefore denied.

***Ingle v. Montana State Fund, 2011 MTWCC 3*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – March 2, 2011; Appeal Dismissed - 05/26/11*).

**Related Topics:** Causation

**Summary:** Petitioner alleges that she has suffered medical problems caused by carbon monoxide exposure at her workplace. Respondent denied liability for Petitioner's injuries, alleging that she has not proven that her medical conditions occurred as a result of carbon monoxide poisoning.

**Held:** Although the Court finds that Petitioner was exposed to a small amount of carbon monoxide at her workplace, the Court concludes Petitioner did not meet her burden of proof regarding the relationship of that exposure to the symptoms she has exhibited.

***Grande v. Montana State Fund, 2011 MTWCC 21*** (Order Denying Petitioner's Motion to Amend Findings of Fact, Conclusions of Law, and Judgment).

**Summary:** Petitioner moves the Court to amend its Findings of Fact, Conclusions of Law, and Judgment to reflect entitlement to medical benefits for treatment of Petitioner's rheumatoid arthritis between August 2007 and August 2009.

**Held:** Petitioner's motion is denied. The parties asked the Court to make a general determination regarding whether Petitioner suffered from an occupational disease arising out of and in the course and scope of his employment and, if so, whether he was entitled to payment of temporary total disability benefits and reasonable medical benefits related to the treatment of his occupational disease. The Court resolved these general issues in the affirmative and entered judgment for Petitioner. Petitioner did not raise the specific issue of whether he would be entitled to medical benefits if his job duties temporarily aggravated his rheumatoid arthritis.

***Peterson, Dennis v. Uninsured Employers Fund / Uninsured Employers Fund v. Ramona McDunn d/b/a McDunn's Riverview Mini Storage, 2012 MTWCC 7*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner contends that he suffers an industrial injury to his shoulder during an encounter with a malfunctioning storage unit door at his workplace. His employer did not have workers' compensation insurance and the UEF denied the claim on the grounds that insufficient evidence supports Petitioner's contentions. Petitioner further contends that the UEF unreasonably denied his claim. The UEF contends that the uninsured employer should indemnify it if the Court determines that Petitioner's claim is compensable.

**Held:** Petitioner has not met his burden of proof and the UEF is therefore not liable for his claim. The UEF did not unreasonably deny the claim.

***Holmes, Jerry v. Safeway, Inc., 2012 MTWCC 8*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner, who suffers from a pre-existing back condition, injured his low back in an industrial accident soon after starting to work for Respondent. Petitioner alleges he was hired to work full-time and that he suffered a permanent aggravation to his low back which precludes him from returning to work in any capacity. Respondent contends that Petitioner's industrial injury caused a temporary aggravation of his underlying condition, and that it did not hire Petitioner as a full-time employee.

**Held:** Petitioner has not met his burden of proof regarding his claim that he is permanently totally disabled. Petitioner has not proven his entitlement to additional temporary total disability benefits. Respondent correctly calculated Petitioner's average weekly wage under §39-71-123(3)(a), MCA. Petitioner has not proven that he is entitled to additional temporary partial disability benefits.

***Erving, Dawn v. Hartford Accident & Indemnity Company, 2012 MTWCC 4*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner contends that she suffered aggravations or injuries to her right knee and low back arising out of and in the course of her employment and that Respondent should be liable for those conditions. Respondent denied liability. Petitioner further contends that Respondent unreasonably denied her claim and she is therefore entitled to a penalty and attorney fees.

**Held:** Petitioner has not met her burden of proof and Respondent is therefore not liable for her claim. Petitioner is not entitled to a penalty and attorney fees.

***Louann Koch v. Employers' Ins. Group, 2012 MTWCC 14*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner was injured in a non-work-related motor vehicle accident in October 2009. In March 2010, she slipped and fell at work but did not believe she suffered any significant injury from the industrial accident. Her back condition worsened and by May 2010, she could not perform her job duties. Petitioner contends that her physical complaints changed after the May 2010 industrial accident and that it caused her current condition. Respondent denied

liability for Petitioner's claim, contending that she has not proven that her industrial accident caused her injuries.

**Held:** Petitioner suffered a compensable injury in the course and scope of her employment and she is entitled to workers' compensation benefits.

***Kelly Taylor v. Montana State Fund, 2012 MTWCC 17*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner fell at work on May 27, 2009. She did not formally seek medical treatment, but she discussed subsequent back pain with her primary care provider. Petitioner self-treated with medication and exercise. In July 2009, she discussed ongoing back pain with her healthcare provider during a regular check-up. On September 7, 2010, she suffered a significant increase in back pain symptoms while standing up after painting her toenails. Although Respondent initially accepted liability for her May 2009 industrial accident, it later denied certain benefits, contending that Petitioner's ongoing back problems were unrelated to her industrial accident. Petitioner contends that Respondent should be liable for additional workers' compensation benefits and that it has unreasonably denied these benefits, therefore entitling her to her attorney fees and a penalty. Petitioner moved to compel disclosure of expert witness testimony or, alternatively, to limit expert witness testimony.

**Held:** Respondent disclosed the relevant facts of expert witness testimony to Petitioner in advance of trial and Respondent did not surprise or take unfair advantage; therefore the Court will not compel expert witness disclosure or limit expert witness testimony. Petitioner has shown on a more probable than not basis that her ongoing back problems are related to her May 27, 2009, industrial accident, and she is entitled to workers' compensation coverage for her back condition. Petitioner is entitled to her costs. Respondent did not unreasonably deny workers' compensation benefits. Therefore, Petitioner is not entitled to attorney fees or a penalty.

***Marlon Clapham v. Twin City Fire Ins. Co., 2012 MTWCC 34*** (Order Resolving Respondent's Motion in Limine and Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered a work-related back injury in 2002. In 2010, he changed jobs. He later filed an occupational disease claim against his new employer. Respondent denied Petitioner's claim on the grounds that his employment did not cause his back condition. Petitioner contends that he developed a compensable occupational disease while working for Respondent's insured.

**Held:** Petitioner has not proven that he developed an occupational disease while working for Respondent's insured. He is therefore not entitled to the benefits he seeks.

***Wendy Tuttle v. First Liberty Ins. Corp., 2012 MTWCC 37*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court November 19, 2012; Judgment Vacated and Withdrawn Pursuant to Stipulation of Parties*).

**Summary:** Petitioner alleges her current disability is a result of her September 2008 industrial accident, entitling her to reinstatement of disability benefits retroactive to the time her benefits were terminated in December 2008 and payment of medical expenses. Respondent counters that Petitioner was placed at MMI with a 0% impairment rating three and a half months post-injury, and that a temporal relationship between Petitioner's industrial accident and the herniated disks discovered over two years post-MMI is insufficient proof of causation.

**Held:** Respondent is correct that a temporal relationship between Petitioner's current disability and her industrial accident, without more, is insufficient to meet her burden of proof. However, there is ample factual and historical evidence in this case that correlate the objective medical findings of the two herniated disks to Petitioner's work-related injury. Petitioner has therefore met her burden of proof in establishing on a more probable than not basis that the herniated disks in her thoracic and lumbar spine, and her current disability for which she seeks benefits, are causally related to her September 2008 industrial accident. Petitioner has not demonstrated an entitlement to benefits retroactive to the time her benefits were terminated in December 2008. Petitioner is entitled to temporary total disability benefits as of April 27, 2011, the date on which her doctor issued a report stating she could no longer perform her duties.

***Travis Gary v. Montana State Fund, 2012 MTWCC 38*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffers from low-back pain due to an L4-5 herniated disk. Petitioner claims his current condition is a result of his 2005 industrial injury and wants Respondent to pay for surgery and related, unpaid medical expenses. Respondent denies liability for Petitioner's current condition, maintaining Petitioner's herniated disk is a result of naturally-occurring degeneration unrelated to his industrial injury.

**Held:** Petitioner has the burden of proving a causal connection between his current herniated disk and his industrial accident. Without proof of medical causation on a more-probable-than-not basis that his current condition is causally related to his industrial injury, Petitioner has failed to meet his burden of proof.

***Jeffrey L. Drivdahl v. Zurich American Ins. Co. et al., 2012 MTWCC 43*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner contends that he is permanently totally disabled due to his industrial injury. Respondent contends that Petitioner is not entitled to permanent total disability benefits because his treating physician has approved several job analyses.

**Held:** The weight of the evidence supports Petitioner's entitlement to permanent total disability benefits.

***Shawna Hardie v. Montana State Fund, 2012 MTWCC 44*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner fell in her employer's parking lot, landing on her backside, causing immediate low-back pain. Her pain improved over time and she sought no medical attention until months later, but failed to relate the onset of pain to the fall at work for over ten months. Respondent denied Petitioner's claim on the basis of a lack of objective medical evidence.

**Held:** Petitioner has shown by a preponderance of the evidence that her fall at work caused the objective medical findings of a bulging disk and annular tear in her lumbar spine revealed in an MRI some ten months post-injury. She is entitled to past and future medical and indemnity benefits related to her low-back condition.

*Vanessa Gaudette v. Montana State Fund, 2013 MTWCC 7* (Findings of Fact, Conclusions of Law, and Judgment).

**Summary:** Petitioner contends that she has suffered either from Multiple Chemical Sensitivity or somatoform disorder since reacting to odors during renovations at her workplace. Although Respondent accepted liability for her respiratory condition, Petitioner contends that Respondent has unreasonably refused to accept liability for her continuing condition. Respondent contends that Petitioner suffered only a temporary aggravation of an underlying respiratory condition, that she has reached maximum medical improvement for that aggravation, and that her present complaints are not causally related to her industrial injury.

**Held:** Petitioner has not met her burden of proving that her present condition is causally related to her industrial injury. She reached maximum medical improvement for a temporary aggravation of an underlying condition and is not entitled to further indemnity or medical benefits.

*Stormy L. Langston v. MACo Workers' Compensation Trust, 2013 MTWCC 15* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner alleges her workplace environment aggravated her COPD, resulting in a compensable occupational disease. Respondent denies that Petitioner suffered an occupational disease.

**Held:** Petitioner's claim for occupational disease benefits is not supported by a preponderance of the medical evidence and is therefore denied. Medical evidence, including opinions of treating physician and IME Dr. Hewitt, did not support Petitioner's claim that elevated carbon dioxide levels following fire in office building aggravated symptoms of her COPD. Evidence indicated Petitioner's claimed COPD aggravation was more likely related to her 23 years of smoking and recent upper-respiratory infection.

## CASUAL EMPLOYMENT

*Weidow v. Uninsured Employers' Fund, 2009 MTWCC 4* (Order Denying in Part and Granting in Part, Petitioner's Motion for Partial Summary Judgment).

**Summary:** Petitioner moved this Court for partial summary judgment on the affirmative defenses raised by the Uninsured Employers' Fund and the Bradley Howard/Howard Family 1995 Trust that Petitioner was an independent contractor and was a casual employee. Weidow was paid by the hour and was provided tools for use in his work as a carpenter on a Yellowstone Club home owned by the Howard Family Trust. Howard claimed the home was intended to be used as a family vacation property and not as a business or income generating property. The parties have filed an Agreed Statement of Undisputed Facts.

**Held:** Petitioner's motion is denied in part and granted in part. There are material facts in dispute that preclude summary judgment on the casual employment issue. With regard to the independent contractor defense, there are no material facts in dispute and Petitioner is entitled to summary judgment that he was not acting as an independent contractor at the time of his injury.

***Raymond v. Uninsured Employers' Fund, 2009 MTWCC 31*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Petitioner Matthew R. Raymond was injured on July 29, 2007, while working on the construction of a cabin. He worked on the project for eleven months. The property was owned by Joseph and Jean Seipel. Each week, Petitioner called on Joseph Seipel at the office of Market Research Group, a company which performs appraisals and conducts market research which Joseph operates as a sole proprietorship. Joseph paid Petitioner with checks bearing the Market Research Group name and address. Neither Joseph nor Market Research Group carried workers' compensation insurance at the time of Petitioner's injury. The Uninsured Employers' Fund denied liability for Petitioner's claim on the grounds that Petitioner was engaged in casual employment.

**Held:** Although Petitioner was paid out of the Market Research Group checking account, the evidence demonstrates that Joseph wrote many personal checks on that account. Joseph testified that he did not deduct personal expenses, including the money paid to Petitioner, as a business expense. While some evidence suggests that Joseph may have had a "profit motive" for the Lincoln property, ultimately, Petitioner offered insufficient proof to meet his burden. Therefore, I conclude Petitioner was engaged in "casual employment" as defined by § 39-71-116(6), MCA.

## CAUSATION

***Zahn v. Town Pump, Inc., and Employers Ins. of Wausau Mut. Co., 2006 MTWCC 30*** (Order Granting Petitioner's Motion for Summary Judgment) (*Order Vacated Pursuant to Settlement and Agreement of the Counsel - October 11, 2006*).

**Related Topics:** Wages.

**Summary:** This matter has been submitted to the Court for decision on a statement of

stipulated facts. Petitioner sustained an injury to his low back while working for Town Pump, Inc. (Town Pump) in 1996. At the time of Petitioner's initial injury, Town Pump was self-insured and retained Putman and Associates, Inc. (Putman) to adjust the claim on its behalf. After undergoing surgery in 2003 to treat his injured low back, Petitioner's treating physician released him to return to work on a full-time basis. On December 4, 2003, Petitioner underwent a functional capacity evaluation (FCE) at Putman's request, during which Petitioner sustained an injury to his neck. This injury required surgery and has disabled Petitioner from work. At the time of the neck injury and the FCE, Petitioner was still an employee of Town Pump. However, at the time of the 2003 injury, Town Pump was enrolled under Plan No. 2 of the Montana Workers' Compensation Act and was insured by Respondent Employers Insurance of Wausau Mutual Company. The parties agree that Petitioner's 2003 neck injury is compensable. However, Respondents contend that Petitioner's indemnity benefits should be paid at the 1996 rate since the FCE and resulting injury was a consequence of the 1996 injury. Petitioner contends he should be compensated at the 2003 rate since the neck injury is a new injury. Petitioner has moved for summary judgment on this issue.

**Held:** Summary judgment is granted. Petitioner sustained a new compensable injury resulting from an FCE that had been requested by Putman who was acting on behalf of his current employer, Town Pump.

***Heckel v. Uninsured Employers' Fund, 2007 MTWCC 11*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Independent Contractors, Uninsured Employers' Fund.

**Summary:** An apartment manager who received a rent reduction in exchange for collecting rents and doing chores around the building where he resided argued that an infection he suffered in his arm was caused by a cut sustained during an altercation while he was attempting to eject a trespasser from the building, and therefore he is entitled to workers' compensation benefits. The building owner responded that the apartment manager was not an employee because he did not receive wages, that the apartment manager never notified the building owner of the injury, and that the medical evidence does not support the apartment manager's assertion that his arm infection was a result of the altercation.

**Held:** Although the Court concludes that the building owner knew of the altercation shortly after it occurred, and that the apartment manager was an employee because he received a rent reduction in exchange for his labors, ultimately, nothing in the medical records support a finding that the arm infection was a result of the altercation in the apartment building. Petitioner is therefore not entitled to workers' compensation benefits.

***Hunter v. Hartford Ins. Co. of the Midwest, 2007 MTWCC 13*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered an industrial injury in the course and scope of his employment on May 5, 1998. Petitioner contended that his right knee conditions were

causally related to the May 5th accident. Respondent responded that Petitioner's right knee conditions were a natural progression of Petitioner's 1983 industrial injury.

**Held:** The preponderance of the medical evidence demonstrates that Petitioner's right knee conditions are causally related to the May 5, 1998, accident. Petitioner is entitled to receive medical benefits and all other benefits provided under the Workers' Compensation Act.

***Oksendahl v. Liberty Northwest Ins. Corp., 2007 MTWCC 24*** (Order Granting Petitioner's Motion for Summary Judgment) (*Appealed to Montana Supreme Court- July 9, 2007; Affirmed – April 22, 2008*).

**Summary:** Petitioner suffers from arthritis in his thumbs, which his treating physician and an IME doctor both opine would have developed irrespective of his employment. However, both doctors agree that Petitioner's employment probably aggravated or accelerated his thumb condition. Petitioner and Respondent both argue they are entitled to summary judgment as a matter of law as to whether Petitioner's thumb condition is a compensable occupational disease.

**Held:** Petitioner's motion for summary judgment is granted. Respondent's Motion for Summary Judgment is denied. Petitioner had been a carpenter all his life, the last five years of which were working for Respondent's insured. Both of the doctors who offered opinions stated that Petitioner's work aggravated this condition. The test for causation of an occupational disease is whether Petitioner's employment constituted a significant aggravation or significant contribution to his condition. Petitioner has established that the aggravation or contribution was significant.

***Heffner v. Montana State Fund, 2007 MTWCC 29*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner petitioned the Court for payment of medical expenses associated with Petitioner's 2004 herniation of his L4-L5 or L5-S1 disk.

**Held:** Petitioner's L4-L5 or L5-S1 disk herniation is not causally related to his May 6, 1980, industrial injury. Accordingly, Respondent is not liable for Petitioner's medical expenses associated with the 2004 herniation.

***Kratovil v. Liberty Northwest Ins. Corp., 2007 MTWCC 30*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court –September 25, 2007; Affirmed and Remanded for Further Proceedings – December 29, 2008*).

**Related Topics:** Last Injurious Exposure.

**Summary:** Petitioner worked as a plumber/pipefitter for nearly 30 years and suffered from problems with his hands and wrists which he attributes to an occupational disease. Petitioner also twisted his hands and wrists when a drill he was operating locked up, but he did not file an industrial accident claim on this incident. Petitioner also suffered injuries

in a motorcycle accident. Respondent claims it is not liable for Petitioner's occupational disease claim because Petitioner admits he used his hands to break his fall during the motorcycle accident and Petitioner first experienced symptoms in his hands prior to working for Respondent's insured.

**Held:** Although Respondent argues that it should not be liable for Petitioner's occupational disease because Petitioner experienced soreness in his wrists prior to working as a plumber/pipefitter and subsequently may have injured his hands and wrists in a motorcycle accident, Respondent's insured was the employer of last injurious exposure and, even assuming Petitioner injured his hands and wrists in the motorcycle accident, his employment with Respondent's insured nonetheless significantly aggravated or contributed to his occupational disease. Therefore, Respondent is liable for benefits.

*Lanes v. Montana State Fund, 2007 MTWCC 39* (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - November 7, 2007; Affirmed – September 3, 2008*).

**Related Topics:** Last Injurious Exposure.

**Summary:** Although Respondent accepted liability for Petitioner's left knee occupational disease, it has denied liability for Petitioner's subsequent occupational disease claim for his right knee. At the time of his left knee claim, Petitioner worked as an electrician for Respondent's insured. At the time of his right knee claim, Petitioner worked as a minister. Respondent alleges that Petitioner's church is the employer of last injurious exposure. Petitioner contends that his work for his church did not permanently aggravate his right knee condition.

**Held:** The aggravation to Petitioner's right knee caused by his work as a minister was merely temporary additional pain that would alleviate with rest and does not constitute a significant aggravation or contribution. However, Petitioner's work as an electrician significantly aggravated or contributed to his right knee condition. Therefore, Respondent, as the insurer of the employer where Petitioner suffered his last injurious exposure, is liable.

*Stewart v. Liberty Northwest Ins. Corp., 2007 MTWCC 41* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** While working for Respondent's insured, Petitioner sustained an injury to her right knee. She then underwent two arthroscopic surgeries, after which she continues to experience ongoing pain which she attributes to nerve damage suffered during her surgeries. Petitioner petitioned the Court for an increase in her impairment rating because of her ongoing pain.

**Held:** Petitioner is not entitled to an increased impairment rating. Although Petitioner's treating physician testified that Petitioner's condition is related to her knee surgery, he further testified that he ultimately has no idea how Petitioner's condition could be related

to her surgery. This is insufficient to establish causation. Because Petitioner has failed to prove a causal connection between her industrial injury or subsequent surgeries and her chronic pain condition, her petition for an increased impairment rating is denied.

***Uffalussy v. St. Patrick Hospital and Health Sciences Center, 2007 MTWCC 45*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered a work-related low-back injury on November 5, 1997. After the injury, Petitioner suffered balance difficulties that caused an unsteady gait. Additionally, Petitioner began to experience depressive episodes. In January 1998, Petitioner was involved in a motor vehicle accident (MVA) and suffered a whiplash-type injury with a possible closed head trauma. Petitioner later developed cognitive impairment. Several doctors related the cognitive impairment to the head traumas Petitioner suffered as a result of several falls due to her balance difficulties, Petitioner's depression, chronic pain, fibromyalgia, and the possible head trauma sustained in the MVA. Petitioner argued that her inability to work because of her cognitive impairment was related back to her 1997 low back injury. Respondent argued that Petitioner's cognitive impairment was not caused by the industrial injury but was caused by the 1998 MVA.

**Held:** Petitioner's cognitive impairment is causally related to her industrial injury. Three physicians who treated Petitioner related her cognitive impairment to various factors including Petitioner's several head injuries suffered as a result of falls, depression, chronic pain, fibromyalgia, and the possible head injury suffered in the 1998 MVA. The physicians were unable to apportion the different factors and the evidence established that the falls subsequent to the MVA, the depression, and the chronic pain were all related to the industrial injury. To the extent that Respondent attributes Petitioner's cognitive impairment to the subsequent MVA, the evidence is not persuasive that Petitioner even sustained a head injury of any consequence as a result of the MVA. The MVA was a low-impact collision after which Petitioner reported to emergency room personnel that she "thinks" she hit the back of her head on the vehicle's headrest in the accident. Petitioner reported no loss of consciousness. No bumps or lacerations on her head were observed and the ER physical examination of Petitioner's head revealed it to be "normocephalic, atraumatic." The evidence establishes that Petitioner is unable to work because of her cognitive impairment. Therefore, Petitioner is entitled to TTD benefits for the periods of time she was unable to work due to her cognitive impairment.

***Feuerherm v. Liberty Northwest Ins., 2007 MTWCC 50*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner injured her shoulder in an industrial accident in August 2001. She was placed at maximum medical improvement and given an impairment rating in December 2002. She subsequently attended school and worked at jobs whose duties were within her permanent restrictions. Her shoulder was never pain free from the time of her industrial accident forward, and it significantly worsened in the summer of 2004. A 2005 MRI revealed rotator cuff tears. Upon his review of her 2002 shoulder MRI, her treating physician concluded that a tear had been missed on the older MRI. He further opined that the condition had progressed and was

probably caused by Petitioner's 2001 industrial accident and that surgery was warranted. Respondent denied liability.

**Held:** Petitioner's current problems with her right shoulder, including the rotator cuff tears, were caused by her August 2001 industrial accident. Respondent is liable for continuing medical care for Petitioner's right shoulder.

***Barnea v. Ace American Ins. Co., 2007 MTWCC 58*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Physicians.

**Summary:** On May 17, 2004, Petitioner was injured while lifting a heavy beam as part of his job duties as a boilermaker. At the time, he primarily felt pain in his lower back and right hip. However, he also asserted that he had neck and shoulder pain which worsened significantly over time and when he decreased his pain medication. Petitioner's treating physician did not make note of Petitioner's neck and shoulder pain until July 21, 2004, although he later asserted that Petitioner had complained of neck and shoulder pain at the outset. A January 23, 2006, cervical MRI revealed a herniated disk or protrusion, and surgery was recommended. Respondent denied liability for Petitioner's neck and shoulder condition.

**Held:** Although Petitioner's neck and shoulder pain was not mentioned in Petitioner's medical records until two months after the industrial accident, the Court has no reason to doubt the assertion of Petitioner's doctor that he had simply failed to record it as he was focused on Petitioner's more severe lumbar complaints. Furthermore, Petitioner's subsequent treating physician also opined that Petitioner's cervical and shoulder conditions were likely caused by the industrial accident. Respondent is therefore liable.

***Rach v. Montana State Fund, 2008 MTWCC 20*** (Order Granting Respondent's Motion for Summary Judgment).

**Summary:** Respondent moved for summary judgment based on the grounds that no medical opinion was rendered by any physician which causally linked Petitioner's heart condition to his alleged industrial injury.

**Held:** Because Petitioner has failed to prove any causal link of his heart condition to his alleged accident, Respondent's motion for summary judgment is granted.

***Hagemann v. Montana Contractor Comp. Fund, 2008 MTWCC 35*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - August 6, 2008; Dismissed by Motion - September 26, 2008*).

**Related Topics:** Burden of Proof, Physicians.

**Summary:** Petitioner developed an abdominal muscle strain after he ran up a flight of

stairs and sprinted some distance to prevent an accident on a construction site. He subsequently developed pneumonia and a pulmonary embolism which he attributed to his industrial injury. Petitioner's treating physician testified that the pneumonia and pulmonary embolism were causally related to his industrial injury. Respondent accepted liability for the muscle strain but denied liability for Petitioner's pulmonary conditions, asserting that they were not caused by his industrial accident.

**Held:** Petitioner has met his burden of proving that it was more probable than not that his pulmonary conditions were caused by his industrial accident.

*Dewey v. Montana Contractor Comp. Fund, 2009 MTWCC 17* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner's left wrist was injured in an industrial accident on August 7, 2007. He continued working with restrictions and subsequently reported pain and numbness in his right wrist. Electro diagnostic testing indicated that Petitioner had bilateral carpal tunnel syndrome. Respondent obtained an IME and denied liability on causation grounds.

**Held:** Although the Court believes from the medical evidence presented that Petitioner has bilateral carpal tunnel syndrome, Petitioner has not proven it was causally related to his employment with Respondent's insured.

*Montana State Fund v. Zurich American Insurance Company, In re: Golt, 2009 MTWCC 3* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** In 1995 Petitioner and Claimant settled a 1993 workers' compensation claim for Claimant's low back, closing indemnity benefits but leaving medical benefits open. In 1998 Claimant purchased a bar and restaurant which she ran as a sole proprietor. Claimant eventually accepted a clerical position for an employer insured by Respondent, while continuing to run her bar and restaurant. Claimant's job duties with Respondent's insured changed over time, requiring her to spend more of her workday seated. Claimant experienced increased pain in her back which she attributed to sitting in one place for too long. Petitioner's claims adjuster believed that Claimant's condition could no longer be attributed to her 1993 industrial injury and he suggested she file a claim with Respondent while Petitioner continued to pay her benefits under a reservation of rights. Respondent denied liability. Petitioner continued to pay for Claimant's medical care, including back surgery, while pursuing indemnification from Respondent.

**Held:** The evidence presented in this case leads me to conclude that the current condition of Claimant's back was neither caused by her 1993 industrial injury nor her 2006 occupational disease. Therefore, neither Petitioner nor Respondent are entitled to receive indemnification from the other. Since Claimant is not a party to this action, this Court cannot order her to reimburse either insurer.

*Chapman v. Twin City Fire Ins. Co., 2010 MTWCC 36* (Findings of Fact, Conclusions of law and Judgment and Order Denying Motion for Sanctions) (*Appealed to the Supreme Court – December 29, 2011; Dismissed with Prejudice – February 15, 2011*).

**Related Topics:** Burden of Proof

**Summary:** Petitioner alleges she suffered an occupational disease from working at computer workstations which were not properly ergonomically configured.

**Held:** Although the medical evidence demonstrates that Petitioner suffers from a cervical condition, Petitioner has not proven that a causal relationship exists between her condition and her employment. Her occupational disease claim is therefore denied.

*Mullaney v. Montana State Fund, 2010 MTWCC 27* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner filed an occupational disease claim for injuries to her neck, shoulders, and low back which she alleges were caused by poor ergonomic conditions in her workspace. Respondent denied Petitioner's claim, alleging that her complaints are not causally related to her employment. Petitioner then filed this claim for workers' compensation benefits.

**Held:** Petitioner's treating physician opined that her conditions were caused by her exposure to a non-ergonomic workspace while she was employed at Respondent's insured. Since the opinion of the treating physician is entitled to greater weight, the Court concludes that Respondent is liable for Petitioner's occupational disease claim.

*Petriz v. Montana State Fund, 2010 MTWCC 17* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Burden of Proof

**Summary:** Petitioner suffered a myocardial infarction while at work on July 6, 2009. Petitioner alleges that his work activities were unusually strenuous and caused the myocardial infarction. Respondent argues that Petitioner has failed to prove under § 39-71-119(5)(a), MCA (2009), that his work activities were the primary cause of his condition.

**Held:** Petitioner has not proven that it is more probable than not that his work activities were the primary cause of his myocardial infarction. Petitioner's treating physician testified that he could not say with a reasonable degree of medical certainty that Petitioner's exertion at work caused his myocardial infarction. An independent medical opinion from a physician who specialized in cardiovascular disease and interventional cardiology was that Petitioner's myocardial infarction was due to coronary atherosclerosis and his work activities were not the primary cause. The only medical opinion that Petitioner's work exertion was the primary cause of his condition came from a non-treating physician who specialized in neurology.

***Fleming v. Montana Schools Groupol Insurance Authority, 2010 MTWCC 13*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Evidence, Burden of Proof

**Summary:** Petitioner sustained an injury on May 4, 2007, while working for Respondent's insured. Respondent initially accepted liability. Respondent denied further liability after receiving an unsolicited opinion from an IME physician who opined that Petitioner's condition was a temporary aggravation of a preexisting condition. Petitioner contends that Respondent unreasonably denied further liability.

**Held:** Petitioner suffered a permanent aggravation of her preexisting condition. Respondent is liable for payment of further benefits associated with Petitioner's permanent aggravation. The IME physician's written opinion that Petitioner did not suffer a permanent aggravation of her preexisting condition is inconsistent with his deposition testimony. Respondent's denial was not unreasonable because it attempted to obtain Petitioner's treating physicians' opinions about the IME report prior to denying liability.

***Grande v. Montana State Fund, 2011 MTWCC 15*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court- August 22, 2011; Affirmed –March 20, 2012*).

**Related Topics:** Burden of Proof

**Summary:** Petitioner left his job as a truck driver due to arthritic conditions in his hands and filed an occupational disease claim. Respondent denied Petitioner's claim, arguing that the conditions were not caused by Petitioner's employment and that aggravations of non-work-related conditions are not compensable as occupational diseases.

**Held:** Petitioner has proven that his job duties are the major contributing cause of his condition and he is therefore suffering from a compensable occupational disease. He has further proven that his occupational disease currently precludes him from returning to his time-of-injury employment. Petitioner is entitled to TTD benefits, reasonable medical benefits, and his costs.

***Ford v. Sentry Casualty Company, 2011 MTWCC 19*** (Findings of Fact, Conclusions of Law, and Judgment and Order Resolving Respondent's Motion in Limine) (*Appealed to Supreme Court – July 27, 2011; Affirmed – July 24, 2012 - 2012 MT 156*).

**Related Topics:** Burden of Proof

**Summary:** Petitioner suffered a work-related injury to his neck for which Respondent accepted liability. Petitioner argues that Respondent should be liable for his cervical disk condition, which Respondent denies is related to the industrial accident. Petitioner further argues that Respondent should be liable for ongoing TTD benefits, and that it unreasonably adjusted his claim. Respondent contends Petitioner is at MMI and has been released to return to work without restrictions, and that it has reasonably adjusted Petitioner's claim.

**Held:** Although Petitioner suffers from ongoing headaches, neck pain, and tingling sensations in his fingers as a result of his industrial accident, Petitioner has not proven that his cervical disk condition was caused or aggravated by his industrial accident. Petitioner’s subjective complaints associated with his industrial injury do not correlate with the objective medical findings for which he seeks surgery. Petitioner has not proven that he is entitled to TTD benefits because no doctor has disputed that he is able to return to work without restrictions. Since Petitioner is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

***McLeish v. Rochdale Insurance Co. 2011 MTWCC 18*** (Order Granting Respondent’s Motion for Summary Judgment).

**Summary:** Respondent moves this Court for summary judgment. Respondent argues that Petitioner’s injury does not arise out of his employment as required by § 39-71-407(1), MCA, because it resulted from an idiopathic fall onto a level surface. Petitioner argues that his injury is compensable because the event resulting in the injury occurred at work.

**Held:** Respondent’s motion is granted. Section 39-71-407(1), MCA, requires that a claimant’s injury “arise out of” his employment in order to be compensable. An injury which results from an idiopathic fall onto a level surface does not arise out of one’s employment.

***Bjorgum, Christopher v. Montana State Fund, 2011 MTWCC 29*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered a cerebellar hemorrhage nearly two years after he was seriously injured in a work-related MVA. He alleges that the industrial accident caused his hemorrhage and that blood-thinning medication which he took to treat his work-related injuries increased the hemorrhage’s severity. Respondent denied liability for the cerebellar hemorrhage, contending that it is not related to Petitioner’s industrial accident. Petitioner further contends that Respondent unreasonably denied liability and that it should be held subject to a penalty and payment of his attorney fees.

**Held:** Petitioner’s cerebellar hemorrhage occurred due to the rupture of an arteriovenous malformation which developed as a result of his industrial accident. Respondent is therefore liable for the condition. Although Respondent denied liability, it was not unreasonable as Petitioner’s treating physician did not offer a definitive opinion regarding the cause of Petitioner’s condition and other medical experts offered conflicting opinions.

***Christian Cornelius v. Lumbermen’s Underwriting Alliance et al., 2012 MTWCC 13*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner reached MMI for an industrial injury to her back and settled her claim with medical benefits reserved. After changing employers, she began to suffer increased back problems approximately a year and a half later – which was also approximately two months after she switched to a workstation which she did not find ergonomically suitable. After the insurer liable for her industrial injury denied further payment of medical benefits, she filed an occupational disease claim against her new employer. The new employer’s insurer denied

liability and did not pay benefits. Petitioner alleges that she is suffering from an occupational disease for which the second insurer is liable. Petitioner contends that she is entitled to total disability benefits because a doctor has opined she is unable to work. Petitioner contends that the insurer unreasonably refused to pay her benefits under § 39-71-407(5), MCA, since the liability dispute was between insurers.

**Held:** Petitioner suffers from an occupational disease. She reached MMI for her previous industrial injury and suffered a permanent aggravation while working for her post-injury employer. Petitioner presented the undisputed medical opinion that she is unable to work and she is therefore entitled to indemnity benefits. Since the liability dispute was between two insurers, the insurer for her then-current employer was unreasonable in refusing to pay her benefits as required by § 39-71-407(5), MCA. She is therefore entitled to her attorney fees and a penalty.

## CLAIM FILES

*Porter v. Liberty Northwest Ins. Corp., 2007 MTWCC 42* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Benefits, Jurisdiction, Penalties, Physicians.

**Summary:** Petitioner injured his back in an industrial accident for which Respondent accepted liability. Petitioner sought chiropractic treatment and subsequently alleged that the treatment aggravated a preexisting cervical condition. Petitioner ceased to treat with the chiropractor and began to treat with a physician who had previously treated his cervical condition without Respondent's approval to change treating physicians. Months after he last treated Petitioner, the chiropractor declared him to be at MMI and released him to his time-of-injury job without restriction. The chiropractor withdrew that opinion when he learned Petitioner had treated with other doctors. Prior to filing this lawsuit, Petitioner's counsel requested a complete copy of Respondent's claims file and Respondent provided only certain material until compelled to remit the remainder pursuant to subpoena. Petitioner moved this Court to adopt guidelines to compel insurers to turn over claims files upon request. Petitioner further alleged that Respondent's adjusting of his claim was unreasonable.

**Held:** Petitioner failed to prove that the chiropractic treatment aggravated his preexisting cervical condition. Except for the chiropractor's withdrawn opinion, no doctor has found Petitioner to be at MMI and he is therefore entitled to TTD benefits retroactive to the date of termination. Respondent's refusal to reinstate TTD benefits in light of the lack of a doctor's opinion that Petitioner was at MMI or released to return to work is unreasonable and Petitioner is therefore entitled to a penalty. Respondent's adjustment of this claim, taken as a whole, was likewise unreasonable and Petitioner is entitled to his attorney fees. This Court has no jurisdiction to set forth the claims file guidelines Petitioner desires because it does not have jurisdiction over a claim until a petition has been filed.

***Long v. New Hampshire Ins. Co., 2009 MTWCC 14*** (Findings of Fact, Conclusions of Law and Judgment) (*Judgment Vacated and Withdrawn Pursuant to Stipulation of Parties*).

**Related Topics:** Penalties.

**Summary:** Although he remained off work from his time-of-injury employment, Petitioner returned to work at his concurrent employment as a car salesman. He informed the claims adjuster assigned to his case that he was returning to his concurrent employment, and the adjuster consented to Petitioner's continued receipt of biweekly benefits while working as a car salesman. Petitioner's claim was then transferred to another claims adjuster, who denied that Petitioner had received consent to receive benefits while working. She terminated Petitioner's benefits and demanded repayment of the benefits he had received. Petitioner requested the adjuster notes from his claim, believing that the notes would substantiate his claim that he had consent to return to his concurrent employment. The new adjuster refused to provide them and informed Petitioner he would have to petition this Court to receive them. Petitioner then petitioned this Court, arguing that he is entitled to ongoing benefits and alleging that Respondent was unreasonable in its adjustment of his claim. Respondent moved to strike Petitioner's spreadsheet which was attached to his response brief regarding waiver defense.

**Held:** The adjuster's notes which authorized Petitioner to receive temporary total disability(TTD) benefits after he had returned to work at his alternate employment constitutes written consent. Respondent acted unreasonably in its adjustment of Petitioner's claim by attempting to conceal the existence of the adjuster's note which authorized Petitioner's TTD benefits, by threatening Petitioner with legal action if he failed to return benefits he was rightfully paid, and by failing to maintain its claims file in accordance with § 39-71-107(3),MCA. Petitioner is entitled to ongoing and back-owing TTD benefits, his costs, attorney fees, and a 20% penalty. Although not identical, the spreadsheet attached to Petitioner's response brief regarding waiver defense was substantially similar to the exhibit which was withdrawn at trial and was not probative of the legal issue under consideration. Respondent's motion to strike is granted.

## COMMON FUND

***Flynn v. Montana State Fund*** (Order Determining Status of Final, Settled, Closed, and Inactive Claims) (*Affirmed in Part, Reversed in Part – November 25, 2008; 2008 MT 394*).

**Summary/Status:** Prior decision held that social security offset must be reduced by one-half of attorney fees expended in obtaining Social Security benefits. Global common fund certification granted on remand. "Settled" and "final" claims defined.

***Miller v. Montana State Fund*** (Consolidated into *Flynn* matter).

***Rausch/Ruhd v. Montana State Fund and Liberty Northwest.***

**Summary/Status:** Prior decision held that a global common fund was created with respect to impairment awards for PTD claimants. Enforcement proceedings underway.

***Reesor v. Montana State Fund*** (On appeal at Montana Supreme Court) (*Remanded Pending Approval of Settlement – October 15, 2008; Settlement Approved with Montana State Fund – October 16, 2008; Montana Supreme Court Order Dismissing Appeal with Prejudice – November 5, 2008*).

**Summary/Status:** Limitation on permanent partial disability benefits due to reaching social security retirement age declared unconstitutional by the Montana Supreme Court. Common fund certification denied on remand by Workers' Compensation Court. Enforcement procedures underway.

***Ruhd v. Liberty Northwest*** (Global Common Fund Created with Consolidation into *Rausch/Ruhd Matter*).

***Satterlee v. Lumberman's Mutual Casualty*** (On Appeal at Montana Supreme Court) (*Appeal Dismissed by Montana Supreme Court re: Rule 54(b) Certification; Re-Appealed to Montana Supreme Court – July 1, 2008*).

**Summary/Status:** Constitutional challenge to retirement provisions of § 39-71-710, MCA. Class certification has been requested.

***Schmill v. Liberty Northwest Ins.*** (On Appeal at Montana Supreme Court) (*Findings and Conclusions of Special Master Denying Responding Insurers' Motion to Dismiss on "Gateway Legal Issues."*)

**Summary/Status:** The Montana Supreme Court's decision of June 7, 2005, states that *Schmill I* is retroactive to all cases not yet final or settled at time of its issuance. Common fund attorney fees are proper and the common fund created in *Schmill I* results in a global lien.

***Stavenjord v. Montana State Fund*** (*Appealed to Montana Supreme Court – May 8, 2008; Cross-Appeal by Respondent; Remanded Pending Approval of Settlement – August 20, 2008; Settlement Approved with Montana State Fund – October 15, 2008; Montana Supreme Court Order Dismissing Appeal with Prejudice Pursuant to Stipulation of Parties and Approval of WCC – November 5, 2008*).

**Summary/Status:** Previous decisions held that claimants suffering occupational diseases after June 30, 1987, may seek permanent partial disability benefits under Workers' Compensation Act. WCC granted limited common fund certification on remand. Common fund certification denied by Montana Supreme Court. Remanded to WCC for further proceedings. Enforcement proceedings underway.

***Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp., 2010 MTWCC 20*** (Order Re: Paid in Full) (*Appealed to Supreme Court – July 29, 2010; Cross-Appealed to Supreme court by Montana State Fund – August 25, 2010; Affirmed 2011 MT 300*).

**Related Topics:** Benefits

**Summary:** The Court requested briefing on the definition of “paid in full” as used in the definition of a settled workers’ compensation claim for purposes of determining the retroactive application of workers’ compensation judicial decisions.

**Held:** For purposes of determining the retroactive application of a judicial decision in the workers’ compensation field, a claim that has been “paid in full” is defined as a claim in which all benefits to which a claimant is entitled are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of the judicial decision, the claim is no longer considered “paid in full” and is subject to retroactive application of the decision.

## CONSTITUTIONAL LAW

***Thompson v. State Of Montana, 2005 MTWCC 53*** (Order Granting Motions for Summary Judgment) (*Appealed to Supreme Court – May 15, 2006; Reversed – August 17, 2007*).

**Summary:** Petitioners filed an action for declaratory judgment seeking to have the Court declare subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), unconstitutional as violative of Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners subsequently filed motions for summary judgment on these issues.

**Held:** Summary judgment is granted. Section 39-71-604(3), MCA (2003), and section 50-16-527(5), MCA (2003), violate the petitioners’ constitutional right of privacy as guaranteed by Mont. Const., Art. II, § 10, and no compelling state interest exists to justify such violation. Moreover, the Court also finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), violate the petitioners’ constitutional right to due process as guaranteed by Mont. Const., Art. II, § 17, and no rational basis exists to justify such violation.

***Baker v. Transportation Ins. Co., 2006 MTWCC 42*** (Order Granting Partial Summary Judgment to Respondent).

**Summary:** Petitioner Frances Baker, Personal Representative of the Estate of Bruce Baker, petitioned the Court to receive permanent partial disability benefits in the form of a 100% impairment award. Respondent Transportation Insurance Company moves this Court for summary judgment, arguing that § 39-72-703, MCA, prohibits Petitioner from receiving an impairment award. In the event the Court finds Petitioner is prohibited from receiving an impairment award under the 1985 version of the Occupational Disease Act, Petitioner asks the Court to find § 39-72-703, MCA (1985), unconstitutional.

**Held:** Respondent’s motion for summary judgment is granted. Petitioner petitioned the Court for permanent partial disability benefits in the form of an impairment award. Under

the 1985 version of the Occupational Disease Act, § 39-72-703, MCA, prohibits occupational disease claimants from receiving partial disability benefits. The Montana Supreme Court has ruled that an impairment award is a component of partial disability benefits under pre-1987 law. *Fellenberg v. Transportation Ins. Co.*, 2005 MT 90, 326 Mont. 467, 110 P.3d 464. Accordingly, Petitioner is barred from receiving an impairment award. Section 39-72-703, MCA (1985), is constitutional. In *Eastman v. Atlantic Richfield Co.*,<sup>1</sup> the Montana Supreme Court held that, prior to the 1987 amendments to the workers' compensation laws, a rational basis existed for unequal benefit awards to occupational disease claimants as opposed to occupational injury claimants. Though the Court has since questioned the continued validity of *Eastman*, it has not overruled it. Therefore, pursuant to *Eastman*, this Court finds § 39-72-703, MCA, constitutional.

***Horizon Custom Homes, Inc. v. Uninsured Employers' Fund, In re: Flink, 2007 MTWCC 8*** (Order Granting Motion to Dismiss).

**Related Topics:** Mediation, Uninsured Employers' Fund.

**Summary:** Respondent moved for an order to dismiss Petitioner's action on the grounds that Petitioner did not request mediation of Respondent's determination within 90 days as required by § 39-71-520(1), MCA. Petitioner argues that § 39-71-520, MCA, is unconstitutional because it violates Petitioner's right to equal protection under the law. Petitioner further argues that it should be entitled to review the medical records of the claimant because Petitioner believes Respondent may have improperly paid all or part of the claim.

**Held:** Section 39-71-520, MCA, is not unconstitutional because the classes at issue are not similarly situated. Petitioner is not entitled to review the claimant's medical records because Petitioner failed to appeal Respondent's determination to mediation within 90 days. Therefore, this Court is without jurisdiction to review Respondent's determination.

***Wilkes v. Montana State Fund, 2007 MTWCC 9*** (Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment) (*Appealed to Supreme Court - March 23, 2007; Affirmed - February 5, 2008*).

**Summary:** Petitioner moved for summary judgment, arguing that § 39-71-703, MCA (2001), is unconstitutional to the extent that it denies permanent partial disability benefits for age, education, and lifting to claimants who do not suffer a wage loss. Respondent also moved for summary judgment, arguing that § 39-71-703, MCA, is constitutional.

**Held:** Petitioner's motion for summary judgment is denied. Respondent's motion for summary judgment is granted. In 1995, the Legislature codified benefits based on age, lifting, and education for permanent partial disability claimants who suffered a wage loss after returning to work while providing no additional benefits based on age, education, and lifting to those claimants who received an impairment award but suffered no wage loss after returning to work. Because these two classes are not similarly situated, the Court concludes there is no violation of Petitioner's equal protection rights.

***Weidow v. Uninsured Employers' Fund, 2008 MTWCC 56*** (Order Deeming Respondent's Motion to Dismiss to be a Motion for Summary Judgment, Denying the Motion for Summary Judgment, and Declaring § 39-71-520(2), MCA, to be Unconstitutional).

**Related Topics:** Mediation, Uninsured Employers' Fund.

**Summary:** Respondent Uninsured Employers' Fund moved for dismissal because it contends Petitioner did not timely file his petition with this Court. The UEF argues § 39-71-520(2), MCA, requires a petitioner to file a petition before this Court within 60 days of the mailing of the mediator's report or the UEF's determination becomes final. The mediator's report and recommendation was mailed on January 31, 2007. UEF notified the mediator and Petitioner that it would not accept the mediator's recommendation on February 21, 2007. Petitioner petitioned this Court on April 10, 2007, 69 days after the mediator's report was mailed. Petitioner argues that a reasonable interpretation of § 39-71-520(2), MCA, is that it is the mediator's report, and not the UEF's determination, that becomes final if no party petitions the Court within 60 days. Petitioner argues that another reasonable interpretation of the statute would allow 85 days to petition the Court. Petitioner argues that the statute is discretionary and not jurisdictional. Finally, Petitioner raises multiple constitutional challenges arguing that § 39-71-520(2), MCA, is void for vagueness, violates his constitutional right to equal protection under the law, and is an impermissible exercise of sovereign immunity.

**Held:** Although Petitioner's contention that the department mediator's report becomes final absent a petition filed in this Court within 60 days is a reasonable interpretation, so is UEF's interpretation that the UEF's determination becomes final if no petition is filed. The time limit provided for in § 39-71-520(2), MCA, is not tolled during the 25-day period which the parties have to notify the mediator whether they accept the mediator's recommendation. The time limits imposed in § 39-71-520, MCA, are jurisdictional and bar this Court from waiving them upon equitable grounds. However, § 39-71-520(2), MCA, can reasonably be interpreted to mean that either the UEF's determination or the department mediator's report becomes final if a petition is not filed in this Court within 60 days. Therefore, the statute is unconstitutionally vague because it requires those of ordinary intelligence to guess as to its meaning.

***Raymond v. Uninsured Employers' Fund, 2008 MTWCC 52*** (Order Denying Uninsured Employers' Fund's Motion for Reconsideration).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Respondent moved this Court to reconsider its decision dismissing the alleged uninsured employer from this case. Respondent contends that the Court did not have all the necessary facts available to it when it reached its decision, and that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action.

**Held:** Respondent's arguments have not persuaded the Court that the statutory procedures can be circumvented without impinging upon the due process rights of uninsured employers. Accordingly, Respondent's motion for reconsideration is denied.

*Satterlee v. Lumberman's Mut. Cas. Co., 2008 MTWCC 29* (Order Granting Respondent Montana State Fund's Motion for Partial Summary Judgment) (*Appealed to Montana Supreme Court - July 1, 2008; Affirmed – 2009 MT 368*).

**See Also:** 2005 MTWCC 55.

**Summary:** Respondent Montana State Fund moved the Court for partial summary judgment regarding Petitioners' two remaining constitutional challenges to § 39-71-710, MCA: (1) Whether § 39-71-710, MCA, violates Petitioners' right to due process; and (2) Whether § 39-71-710, MCA, unconstitutionally or impermissibly discriminates against Petitioners based on their age.

**Held:** Respondent's motion is granted. Section 39-71-710, MCA, does not violate Petitioners' substantive due process rights because it is reasonably related to a permissible legislative objective. Section 39-71-710, MCA, does not unconstitutionally discriminate against Petitioners based on their age because it is rationally related to a legitimate governmental purpose.

*Briese v. Ace American Ins. Co., 2009 MTWCC 5* (Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment, Denying Petitioner's Cross-Motion for Summary Judgment, and Denying Respondent's Request for Sanctions).

**Related Topics:** Penalties.

**Summary:** Respondent moved this Court for summary judgment and also requested sanctions against Petitioner and Petitioner's counsel. Petitioner cross-motivated for summary judgment. Petitioner petitioned this Court for an increase in his average weekly wage calculation and for a 20% penalty on unpaid *Lockhart* attorney fees. Petitioner argues that vacation pay accrued during the four pay periods prior to his injury and paid post-injury should be included in his average weekly wage calculation. Petitioner further argues that the funds he withdrew from his company-sponsored 401(k) account should be utilized in his wage calculation. Respondent contends that accrued vacation paid after the date of injury and monies withdrawn from a 401(k) account are both excluded from the definition of wages pursuant to § 39-71-123, MCA (2003). Respondent also contends that Petitioner is not entitled to a 20% penalty on his *Lockhart* fees pursuant to § 39-71-2907, MCA. Respondent requests the Court to sanction Petitioner and Petitioner's counsel for their allegedly frivolous and meritless claims.

**Held:** Respondent's motion for summary judgment on Petitioner's entitlement to an increase in his average weekly wage calculation is granted. Respondent's motion for summary judgment regarding the 20% penalty on a *Lockhart* lien is denied. Petitioner's cross-motion for summary judgment on the constitutionality of § 39-71-123, MCA, is

denied. Respondent's request for sanctions is also denied. Vacation pay accrued pre-injury but paid post-injury and employer contributions to a pension plan are excluded from the definition of wages when all parts of § 39-71-123, MCA, are read as a whole. Petitioner may seek a 20% penalty on a *Lockhart* lien because the *Lockhart* lien represents a portion of the "full amount of benefits due" Petitioner. Section 39-71-123, MCA, does not violate Petitioner's right to equal or due process. The Court does not find that Petitioner or his attorney have acted in such a way as to warrant sanctions. Even though I do not find some of Petitioner's arguments persuasive, I do not find that the arguments were advanced in bad faith or for any improper purpose.

***Walters v. Flathead Concrete Products, 2011 MT 45*** (Opinion of the Montana Supreme Court)

**Summary:** Deceased worker's mother brought survivorship and wrongful death claims against decedent's employer. The District Court granted summary judgment to employer and denied mother's motion for summary judgment on claim that workers' compensation statutes, which resulted in payment of only \$3,000, were unconstitutional. Mother appealed.

**Held:** The mother argued that the district court erred in holding that her claims were barred by the exclusive remedy provision of the WCA and denying her claim that Mont. Code Ann. §§ 39-71-411 and 39-71-721(4), were unconstitutional. The supreme court noted that the son's injury was covered by the WCA, and he had some possibility of recovery. Although she was the son's parent, the mother did not satisfy the federal definition of dependency incorporated into the WCA which would have entitled her to wage loss payments. She received a lump sum payment of \$3,000 paid to the decedent's surviving parent or parents, Mont. Code Ann. § 39-71-721(4). The Legislature logically directed wage loss benefits to those persons who depended upon them, and paid a small amount to those who did not. The WCA was not arbitrary or unreasonable, and satisfied due process and the quid pro quo. The judgment was affirmed.

***Malcolmson v. Liberty Northwest, 2011 MTWCC 6*** (Order Granting Petitioner's Motion for Summary Judgment).

**Related Topics:** Attorneys' Fees

**Summary:** Petitioner moves for summary judgment for reinstatement of her medical benefits which were terminated after she refused to allow Respondent to communicate *ex parte* with her healthcare providers. Petitioner argues that § 39-71-604(3), MCA (2007), and § 50-16-527(5), MCA (2007), unconstitutionally violate her right of privacy under Article II, Section 10, of the Montana Constitution, and her right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner raises both as applied and facial constitutional challenges. Petitioner further argues that she is entitled to recovery of her attorney fees and costs under the private attorney general doctrine. Respondent responds that the statutes Petitioner challenges are constitutional, and that Petitioner waived her right to pursue a claim for attorney fees and costs.

**Held:** As applied to the facts of Petitioner's claim, §§ 39-71-604(3), and 50-16-527(5),

MCA, are unconstitutional under Article II, Section 10, of the Montana Constitution. Petitioner does not seek to limit Respondent's ability to obtain relevant healthcare information regarding her claim; she seeks only to be advised that the communications with her treating physicians are taking place and to be included in the communications in order to protect her constitutional right of privacy. Petitioner is not entitled to her attorney fees and costs under the private attorney general doctrine. Although she alleges she waived only her right to pursue these claims under § 39-71-611, MCA, the stipulation to which she agreed contains no such limiting language.

***Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp., 2010 MTWCC 21*** (Order Denying Common Fund Insurers' General Motion to Dismiss).

**Summary:** Common Fund Insurers moved this Court to dismiss the common fund claims asserted against them on five grounds: (1) Because Common Fund Insurers were not parties to *Flynn I*, enforcement of the *Flynn* common fund violates their right to due process; (2) Petitioners lack standing to pursue common fund claims against Common Fund Insurers; (3) Petitioners failed to mediate the common fund claims against Common Fund Insurers; (4) requiring Common Fund Insurers to identify potential *Flynn* beneficiaries impermissibly reverses the burden of proof; and (5) Petitioners' counsel's attorney fees are limited to the actual amount incurred by the active litigants.

**Held:** Common Fund Insurers' motion to dismiss is denied. Common Fund Insurers' due process and standing arguments were rejected by the Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp. (Schmill III)*. Mandatory mediation does not apply to *Flynn* common fund benefits because *Flynn I* resolved the dispute concerning the entitlement to these benefits. Requiring Common Fund Insurers to identify *Flynn* beneficiaries does not shift the burden of proof to Common Fund Insurers. The insurers' burden in this case is to identify claimants whose right to increased benefits has already been established as a matter of law pursuant to *Flynn I*. This Court has previously rejected Common Fund Insurers' fee calculation argument in *Rausch v. Montana State Fund*. In *Rausch*, this Court held that Common Fund Insurers' argument was based upon a fundamental misinterpretation of the common fund doctrine.

***Alexander v. Bozeman Motors, Inc., 2010 MT 135*** (Opinion of the Montana Supreme Court).

**Related Topics:** Summary Judgment

**Summary:** The District Court of the Eighteenth Judicial District, Gallatin County, Montana, granted summary judgment in favor of appellees, employer and supervisors, on appellant employees' claims of negligence, intentional battery, and negligence infliction of emotional distress. The district court held that the employees' claims were barred by the exclusivity provision of the Workers' Compensation Act, Mont. Code Ann. 39-71-413.

**Held:** The employees argued that they had presented evidence demonstrating that the employer intentionally injured them, allowing them to avoid the exclusivity provision. The supreme court found that while the employees averred that the employer intentionally and deliberately exposed one employee to dangerous conditions in the office, and did not respond to his complaints that he

was becoming ill, these allegations did not establish that the employer had actual knowledge that requiring the employee to work in his office would result in certain injury. The fact that the subsequent employee had previously raised the same complaints, and then lost consciousness in the office, did raise a genuine issue of material fact as to whether the employer had actual knowledge that requiring the second employee to work in the same office, without investigating or addressing the alleged contamination, was certain to cause him injury. The employees failed to prove beyond a reasonable doubt that Mont. Code Ann. § 39-71-413 was unconstitutional.

***Tina Malcomson v. Liberty Northwest, 2013 MTWCC 21*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner withdrew her consent allowing Respondent to have ex parte communications with her medical providers. She then signed a release allowing Respondent to obtain relevant medical information, but requiring Respondent to give her the opportunity to participate in any communications. Respondent terminated Petitioner's benefits, arguing that it is entitled to pursue ex parte communications with an injured worker's medical providers pursuant to §§ 39-71-604(3) and 50-16-527(5), MCA. Petitioner petitioned this Court, arguing that these statutes unconstitutionally violate her right of privacy under Article II, Section 10, of the Montana Constitution, and her right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution.

**Held:** As applied to the facts of Petitioner's claim, § 39-71-604(3), MCA, is unconstitutional under Article II, Section 10, of the Montana Constitution. Petitioner does not seek to limit Respondent's ability to obtain relevant healthcare information regarding her claim; she seeks only to be advised that the communications with her treating physicians are taking place and to be included in the communications in order to protect her constitutional right of privacy. Although its provisions are identical to the language of § 39-71-604(3), MCA, this Court lacks the jurisdiction to rule on the constitutionality of § 50-16-527(5), MCA, since it is not part of the Workers' Compensation Act. Strict scrutiny applied in constitutional analysis considering right of privacy set forth under Article II, Section 10 is a fundamental right which "shall not be infringed without the showing of a compelling state interest."

## COSTS

***Briese v. Ace American Ins. Co., 2006 MTWCC 6*** (Order on Costs).

**Summary:** Petitioner filed a claim for costs pursuant to the Court's award of costs in its Findings of Fact, Conclusions of Law and Judgment. Respondent objected to two of the costs claimed by Petitioner. First, Respondent objected to paying the cost of Petitioner's copy of a transcript of a deposition taken by Respondent. Second, Respondent objected to paying the cost of a fee charged to Petitioner by an expert witness for responding to questions Petitioner's counsel posed to the expert in a letter prior to the expert's deposition.

**Held:** Petitioner's claim for the copy of the deposition transcript is granted. Under the rules

of the Workers' Compensation Court, the Court may grant reasonable costs. As a practical consideration, a deposition transcript is generally necessary to prepare for trial and to prepare for examination of other witnesses. Additionally, the Court encourages all parties to file proposed findings of fact and conclusions of law. A deposition transcript is needed to accurately reflect the record in those findings of fact and conclusions of law. Petitioner's claim for the cost of the expert fee charged for answering Petitioner's letter prior to the deposition is denied. The letter was unnecessary since Petitioner was allowed to depose the expert at no cost and the letter was not specifically used by Petitioner in the deposition.

***Mack v. Transp. Ins. Co., 2007 MTWCC 19*** (Order On Costs).

**Summary:** Petitioner submitted a claim for costs pursuant to this Court's holding in its Findings of Fact, Conclusions of Law and Judgment. Respondent objected to paying the full amount of the costs associated with taking Petitioner's deposition in Elko, Nevada. The basis for Respondent's objection is that Petitioner's deposition was taken both for his claim in this Court and a civil action Petitioner was pursuing against the State of Montana in the First Judicial District Court. Respondent, therefore, argues that Petitioner should only be entitled to recover 50% of the costs associated with this deposition.

**Held:** Pursuant to ARM 24.5.342(3): "The court will allow reasonable costs. The reasonableness of a given item of cost claimed is judged in light of the facts and circumstances of the case, and the issues upon which the claimant prevailed." In the present case, it is neither reasonable, nor equitable, for Respondent to pay the full costs associated with a deposition that was taken for the benefit of two separate claims. The costs in dispute are reduced by 50%.

***Heffner v. Montana State Fund, 2007 MTWCC 34*** (Order On Costs).

**Summary:** Respondent filed an Application for Taxation of Costs per ARM 24.5.342.

**Held:** ARM 24.5.342 states that costs may be awarded to a prevailing claimant. Respondent is not a claimant. Therefore, Respondent is not entitled to costs.

***Rau v. Montana State Fund, 2008 MTWCC 34*** (Order Regarding Application for Costs).

**Summary:** Respondent objects to two specific items of costs which Petitioner seeks as the prevailing party: Petitioner's request for the expert fees of Dr. Olshansky; and Petitioner's request for the expert fees of Dr. Cory. Dr. Olshansky did not testify at trial or by deposition and did not provide any type of report. Dr. Cory did not testify at trial or by deposition, although his report was entered into evidence.

**Held:** Respondent's objections to Petitioner's application for costs regarding the expert fees of Drs. Olshansky and Cory are sustained. Dr. Olshansky's fee is disallowed because he did not testify nor was any report or medical record submitted into evidence. Dr. Cory's fee is disallowed because he did not testify at trial or by deposition, and while a report from Dr. Cory was admitted into evidence and relied upon by the Court in reaching its determination in this matter, the Court cannot determine from Petitioner's application what

services are included in the fee attributed to Dr. Cory.

***Stewart v. MACO Workers' Compensation Trust, 2008 MTWCC 22*** (Order Regarding Charges for Copying Claim Files).

**Summary:** Petitioner moved the Court for an order requiring Respondent to provide him with a free copy of his claim file. Respondent responded that it is well-recognized in Montana law that it may charge for such copies and that its charge of \$149 for copying a 283-page claim file is appropriate.

**Held:** Respondent may charge Petitioner the same amount as is commonly charged by businesses offering photocopy services to the public which are located in the same community as the claim file is maintained.

***Porter v. Liberty Northwest Ins. Corp., 2008 MTWCC 12*** (Order Regarding Applications for Costs and Attorney Fees).

**Summary:** Respondent objects to four specific items of costs which Petitioner seeks as the prevailing party. Respondent further objects to Petitioner's application for attorney fees for the work performed on Petitioner's case by a nurse consultant. Finally, Respondent objects to Petitioner's application for fees pertaining to hours spent on the portion of Petitioner's claim specific to his cervical condition which this Court concluded was not compensable.

**Held:** Respondent's objections to Petitioner's application for costs regarding the travel and lodging expenses Petitioner's counsel incurred in attending trial are sustained as not recoverable under ARM 24.5.342. Respondent's objections to Petitioner's application for costs associated with Dr. Mack's deposition are sustained since Petitioner did not prevail upon the issue to which Dr. Mack testified. For the same reason, Respondent's objections to Petitioner's application for attorney fees associated with Dr. Mack's testimony are sustained. Finally, Respondent's objection to Petitioner's application for attorney fees for work performed on his case by a nurse consultant is sustained because a nurse consultant is not an attorney and therefore her fees cannot be characterized as attorney fees.

***Russell v. Watkins & Shepard Trucking Co., Inc., 2009 MTWCC 27*** (Order Regarding Application for Costs).

**Summary:** Respondent objects to several specific items of costs which Petitioner seeks as the prevailing party, including deposition costs, expert witness fees, travel and lodging expenses, and copy charges for certain medical records. Respondent argues that many of these items relate only to portions of Petitioner's case where Petitioner did not prevail, and further argues that Petitioner's counsel cannot recover the costs for travel and lodging he incurred to attend trial in Helena. Respondent also argues that it cannot be required to pay for independent medical examinations which were performed by expert witnesses prior to rendering their opinions.

**Held:** Respondent's objections to Petitioner's application for costs regarding items which the Court found did not relate to the issue on which Petitioner prevailed are sustained. Petitioner's counsel cannot recover the costs for travel and lodging he incurred to attend the trial in this case. The Court concluded that fees relating to IMEs performed by expert witnesses are recoverable as costs as they were conducted as part of Petitioner's trial preparation and were part of the basis for the opinions the experts reached.

***Heth, Jr. v. Montana State Fund, 2009 MTWCC 19*** (Order Regarding Application for Costs).

**Summary:** Respondent objects to four specific items of costs which Petitioner seeks as the prevailing party: Petitioner's request for the expert fees of Dr. Rosen; two different services provided by Medical Management Resources; and Petitioner's request for reimbursement of the cost of mediation services from Corette, Pohlman & Kebe. Respondent argues that all of these expenses were incurred after this Court conducted the trial in this matter, and therefore they are not reimbursable costs under ARM 24.5.342.

**Held:** Respondent's objections are sustained. This Court has previously held that the expert fees of a doctor who did not testify at trial or by deposition and who did not create a report submitted into evidence are not recoverable. This Court has also previously held that the cost of appellate mediation is not a recoverable cost. ARM 24.5.342 does not provide for the reimbursement of costs which Petitioner incurred after the trial and which were not part of the Court's deliberations in reaching a decision in this matter.

***Fleming v. Montana Schools Group Insurance Authority, 2010 MTWCC 25*** (Order Regarding Petitioner's Application for Taxation of Costs).

**Summary:** After prevailing at trial, Petitioner submitted an application for taxation of costs totaling \$3,475.63. Respondent objects to Petitioner's application to recover costs in the amount of \$20 for postage and long-distance telephone charges. Respondent also objects to Petitioner's application to recover costs in the amount of \$735.98 for travel expenses incurred in attending her deposition and trial.

**Held:** Petitioner is not entitled to recover the \$20 flat fee her attorney charged for postage and long-distance telephone charges. ARM 24.5.342 specifically provides that long-distance telephone expenses and postage expenses are generally found to be reasonable when documented. A predetermined flat fee does not qualify as documentation. Petitioner is not entitled to recover her costs incurred in attending her deposition and trial. This Court has previously disallowed recovery of a claimant's travel costs and Petitioner cites no authority where the Court has allowed recovery of a claimant's travel costs. ARM 24.5.342 neither specifically allows nor prohibits the recovery of costs for a claimant's travel to attend her deposition or trial. It provides that the Court will allow reasonable costs. The reasonableness of a given item of costs claimed is judged in light of the facts and circumstances of the case. Petitioner has not persuaded the Court that the facts and circumstances of her case warrant recovery of her travel costs. Petitioner is awarded the balance of her application for taxation of costs totaling \$2,719.65.

## COURSE AND SCOPE

***Popenoe v. Liberty Northwest Ins. Corp., 2006 MTWCC 37*** (Order Granting Petitioner’s Motion for Summary Judgment) (*Appealed to Supreme Court - December 15, 2006; Appeal Dismissed, Case Remanded to WCC - February 7, 2007; Order Vacated and Withdrawn Pursuant to Stipulation of Counsel, and Order and Judgment of Court - February 8, 2007*).

**Summary:** Petitioner moved for summary judgment after Respondent denied his claim for workers’ compensation benefits. Respondent filed a cross-motion for summary judgment. Petitioner broke his ankle when he fell in his employer’s parking lot while removing his bicycle from the back of a friend’s truck approximately five minutes before the start of his shift. Petitioner claims that his injury is compensable under the “premises rule,” while Respondent argues that Petitioner’s injury is not compensable because it falls under the “going and coming” rule, now codified by § 39-71-407, MCA, and because Petitioner’s actions at the time of his injury were not within the scope of his employment.

**Held:** Summary judgment is granted in favor of Petitioner. Montana case law has established that after an employee has arrived at his employer’s premises and he is no longer engaged in traveling to or from the site of his employment, an injury suffered by the employee is compensable under the “premises rule.” Petitioner is entitled to attorney fees and a penalty because, in light of the applicable statutes and case law, Respondent’s denial of benefits was unreasonable.

***Bevan v. Liberty Northwest Ins. Corp., 2006 MTWCC 38*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - December 15, 2006; Affirmed - December 21, 2007*).

**Summary:** Petitioner was a customer service and sales representative for Blackfoot Telephone Communications. She was involved in a motor vehicle accident during an authorized paid break as she returned to work. Respondent denied liability on the grounds that Petitioner was outside the course and scope of her employment.

**Held:** Petitioner was within the course and scope of her employment when she was involved in a motor vehicle accident during an authorized paid break.

***Michalak v. Liberty Northwest Ins. Corp., 2007 MTWCC 14*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – March 22, 2007; Affirmed – January 3, 2008*).

**Summary:** Petitioner attended a company picnic hosted by his employer at the employer’s lake home and was injured while riding a wave runner on the water. Respondent denied liability.

**Held:** Section 39-71-118, MCA, which defines “employee” does not preclude Petitioner from receiving benefits because he was acting within the course and scope of his employment at the time of his injury even though he was engaged in a recreational activity.

***Driggers v. Liberty Northwest Ins. Corp., 2007 MTWCC 60*** (Order Granting Petitioner’s Motion for Summary Judgment and Denying Respondent’s Motion for Summary Judgment) (*Appealed to Montana Supreme Court – January 28, 2008; Appeal Dismissed – March 14, 2008*).

**Related Topics:** Attorneys’ Fees, Costs, Penalties.

**Summary:** Petitioner moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent opposed the motion and cross-motivated for summary judgment, contending that Petitioner failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requested an award of attorney fees, costs, and a penalty.

**Held:** Petitioner’s motion for summary judgment is granted and Respondent’s cross-motion for summary judgment is denied. Respondent is correct that both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA, must be satisfied for Petitioner’s injury to be compensable. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies the second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions to the going and coming rule. This Court fails to appreciate any notable distinctions between the present case and the cases of *McMillen*, *Ellingson*, and *Gordon*, which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job. To the extent that there is any distinction between the present case and the Montana Supreme Court’s decisions in *McMillen*, *Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court also finds Respondent’s denial of Petitioner’s claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

***Rau v. Montana State Fund, 2008 MTWCC 26*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 25, 2008; Remanded to WCC for Consideration of Entry of Judgment from Settlement - October 15, 2008*).

**Related Topics:** Causation.

**Summary:** Petitioner fainted while waiting on a customer. Her head struck the floor, which caused severe injuries. Respondent denied liability, arguing that her faint was not caused by her work or work environment.

**Held:** Since the medical evidence demonstrated that the reason for Petitioner’s faint was more probably than not her changing position from standing to sitting as required by her job duties, Petitioner’s job duties, however seemingly benign, caused the faint which in turn

caused her head injury. Therefore, Petitioner's injury occurred within the course and scope of her employment and is compensable.

***Charlson v. Mont. State Fund, 2011 MTWCC 7*** (Order Denying Petitioner's Motion for Summary Judgment and Granting Summary Judgment in Favor of Respondent)

**Summary:** Petitioner worked on two different job sites for his employer. Petitioner was injured in an automobile accident while traveling to one job site to start his shift. Petitioner moves for summary judgment, arguing that his injury should be compensable as a work-related injury under the exception to the "going and coming" rule found at § 39-71-407(3)(a)(ii), MCA. Respondent opposes Petitioner's motion, arguing that Petitioner was simply driving to work to report for his regular shift and his injury is not compensable under the "going and coming" rule.

**Held:** Petitioner's automobile accident which occurred on his way to work is not compensable under § 39-71-407(3)(a)(ii), MCA. Simply traveling to the workplace prior to the start of a work shift does not make travel part of an employee's job duties. Respondent's cross-motion for summary judgment is granted.

***Peck v. International Paper Co., 2010 MTWCC 35*** (Order Denying Respondent's Motion for Summary Judgment and Granting Petitioner's Cross-Motion for Summary Judgment)

**Summary:** Respondent moved for summary judgment, arguing that Petitioner brought his claim against the wrong insurer as he has not correctly identified which entity was his employer at the time he left his employment. Petitioner filed a cross-motion for summary judgment, alleging that Respondent is correctly identified as the party liable for his occupational disease claim.

**Held:** Under the control test, Petitioner was an employee of the company for which Respondent is the successor-in-interest. Therefore, Respondent is properly identified as Petitioner's employer for the purposes of Petitioner's occupational disease claim.

***Weidow v. UEF v. Bradley Howard/Howard Family 1995 Trust, 2010 MT 292*** (Opinion of the Montana Supreme Court).

**Related Topics:** Equity – Estoppel, Procedure

**Summary:** The employer hired the claimant to work on the construction of a residence and did not provide workers' compensation coverage. After the claimant sustained injuries while working on the house, he filed a claim for benefits with UEF, which was denied on the basis that he was a casual employee. A mediator recommended that the parties reach a settlement that included lost wages and medical costs. The claimant notified the mediator that he accepted the recommendation. UEF rejected the recommendation. The claimant filed his petition for administrative review more than 60 days after the mailing of the mediator's report. Appellant employer sought review of a decision from the Workers' Compensation Court, which refused to dismiss appellee claimant's petition as untimely under Mont. Code Ann. § 39-71-520(2)(c)

(2005), determined that the claimant's employment was not casual employment under Mont. Code Ann. § 39-71-116(6) (2005), ordered the Uninsured Employers' Fund (UEF) to pay medical benefits to the claimant, and required the employer to indemnify UEF.

**Held:** The court held that the doctrine of equitable tolling was applicable to extend the deadline in § 39-71-520(2)(c) because the statute was ambiguous as to what constituted a final determination. The administrative decision unnecessarily addressed constitutional issues, but it reached the correct result. Substantial evidence, which included a business property characterization in federal tax filings, supported a finding that the employer did not intend to use the house as a residence. Thus, the casual employment exemption in Mont. Code Ann. § 39-71-401(2)(b) did not apply. The court affirmed the decision.

***Hallquist v. Independent Contractor Central Unit, 2010 MTWCC 16*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner appeals an Independent Contractor Central Unit decision which held that his automotive repair business employed five workers between January 1, 2006, and September 30, 2007. Petitioner contends that each of the alleged employees ran an independent business from the same address as Petitioner's auto repair business, although Petitioner performed administrative tasks for all the independent businesses, including collecting funds to pay the shop overhead.

**Held:** It is undisputed that two of the five alleged employees did not work out of the same shop as P & M Transmission between January 1, 2006, and September 30, 2007. A third alleged employee was indisputably an employee and was paid wages as part of vocational rehabilitation training until October 2007. The remaining two alleged employees meet the criteria for independent contractors under the AB test.

***Hopkins v. UEF v. Kilpatrick, 2010 MTWCC 9*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – August 23, 2010; Affirmed – March 22, 2011*).

**Related Topics:** Major Contributing Cause

**Summary:** Petitioner was injured in a grizzly bear attack at a private bear park in West Glacier, Montana. Petitioner petitioned the Court for a determination that he was an employee of the alleged employer, Russell Kilpatrick, at the time of the attack. Petitioner contended that he was performing duties in the course and scope of his employment. Kilpatrick responded that Petitioner worked as a volunteer at the bear park. Kilpatrick and the Uninsured Employers' Fund contended that Petitioner was not acting in the course and scope of his employment. Kilpatrick and the UEF further argued that Petitioner's use of marijuana was the major contributing cause of the accident.

**Held:** Kilpatrick employed Petitioner at the bear park. Kilpatrick controlled the details of Petitioner's work and paid him cash daily for the services he performed. Petitioner acted in the course and scope of his employment when he was attacked as he entered the bear pen to feed the bears. Petitioner fed the bears at Kilpatrick's request and Kilpatrick benefitted from services

Petitioner performed at the bear park. Petitioner's marijuana use was not the major contributing cause of the accident. No evidence was presented regarding Hopkins' level of impairment on the day of the attack. Although Petitioner admitted to smoking marijuana before arriving at work on the morning of the attack, it is difficult for the Court to conclude that the *major* contributing cause of the grizzly bear attack was anything other than the grizzly. Petitioner was not attacked when he inexplicably wandered into the grizzly pen. Petitioner was attacked while performing a job Kilpatrick had paid him to do – feeding grizzly bears.

***Weidow v. UEF v. Bradley Howard/Howard Family 1995 Trust, 2010 MTWCC 2*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – February 19, 2010; Affirmed - December 30, 2010*).

**Related Topics:** Uninsured Employers' Fund

**Summary:** Petitioner began working on a residential construction project on property owned by Bradley Howard or the Howard Family 1995 Trust as an employee of the general contractor. Howard fired the general contractor and began paying Petitioner directly. Petitioner was injured on the job on June 13, 2006. Howard did not have workers' compensation insurance. Bradley Howard/Howard Family 1995 Trust argue that neither is liable for Petitioner's injuries because Petitioner was a casual employee.

**Held:** Petitioner's activities while employed by Howard do not constitute casual employment. The UEF is therefore liable for Petitioner's medical benefits. Petitioner has not proven that he is entitled to indemnity benefits. Pursuant to § 39-71-541, MCA, Bradley Howard/Howard Family 1995 Trust must indemnify the UEF for benefits paid to Petitioner.

***McCullom v. Montana State Fund, 2012 MTWCC 6*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered injuries from an explosion in his camping trailer, where he stayed while working on a jobsite. Petitioner alleged that he was an on-call employee and that he was camping in part because his employer expected him to arrive at the jobsite quickly if he were recalled after hours. Petitioner's employer denied that Petitioner was on call and alleged that Petitioner was not one of the employees that would have been recalled to the jobsite. Respondent contends that Petitioner's injuries did not occur within the course and scope of his employment.

**Held:** Petitioner was not an on-call employee and his employer received no benefit from his decision to camp near the jobsite. Petitioner's injury did not occur within the course and scope of his employment and it is therefore not compensable.

***John Erhard v. Liberty Northwest Ins. Corp., 2012 MTWCC 26*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner broke his leg while moving into housing provided by his employer prior to beginning his first work shift. Respondent denied Petitioner's claim for workers' compensation

benefits, alleging that Petitioner was not within the course and scope of his employment at the time of his accident and injury.

**Held:** Petitioner was not an employee of Respondent's insured at the time his accident and injury occurred. He was not within the course and scope of employment because no employment existed. Therefore, Respondent is not liable for Petitioner's claim.

## CREDIBILITY

***Vallance v. Montana Contractor Comp. Fund, 2006 MTWCC 26*** (Findings of Fact, Conclusions of Law and Judgment, and Order Denying Summary Judgment).

**Summary:** Petitioner filed an occupational disease claim after a 2004 MRI showed that he had herniated disks. However, a 1996 MRI showed those same disks to be bulging. Petitioner has memory difficulties and did not report an accurate history to the physicians who initially concluded that his back problems were from an occupational disease, as those physicians were not aware that Petitioner had suffered several specific traumas to his back both on the job and outside of work.

**Held:** Petitioner, who has a history of back traumas, including two industrial accidents which he did not report to his employer, has failed to prove that his current back problems stem from an occupational disease rather than an industrial accident or some other specific trauma.

***Johnson v. Liberty Mut. Fire Ins. Co., 2007 MTWCC 1*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - February 2, 2007; Appeal Dismissed with Prejudice - May 14, 2007*).

**Summary:** Petitioner alleges she fell at work, injuring her neck and upper back, and that she reported the injury to co-managers who left that employment shortly thereafter and apparently failed to file the report. Petitioner later filed a claim form with Respondent, alleging a progressive neck injury. Respondent accepted Petitioner's claim regarding degenerative changes in her neck, but has since denied her upper back claim.

**Held:** Although it is certainly plausible that an injured worker may submit a report of injury which a supervisor then fails to file properly, the empirical evidence presented in this case does not support Petitioner's claim. Petitioner's extensive contemporary medical records contain no evidence that Petitioner ever claimed that she was injured in a fall at work until nearly two years after she left this employment. Petitioner's claim is denied.

***Somerville v. Montana Assoc. of Counties Workers' Comp. Trust, 2007 MTWCC 20*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner alleges that he injured his back within the course and scope of his employment while operating a loader on June 15, 2005. Petitioner claims he informed his

supervisor and a coworker about the incident shortly after it occurred. Petitioner's supervisor and coworker both claim that Petitioner was not operating a loader on that date, and that Petitioner admitted to them that he had injured his back outside of work on the evening of June 14, 2005.

**Held:** Although the Court was not entirely convinced of the credibility of Petitioner's supervisor and coworkers, Petitioner also was not entirely credible. The Court, therefore, concludes that Petitioner has failed to meet his burden of proof.

***Hanson v. Cedar Valley Construction, Inc., and Uninsured Employers' Fund, 2008 MTWCC 32*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 21, 2008; Dismissed Pursuant to Stipulation - September 17, 2008*).

**Summary:** Petitioner petitioned the Court for a determination that he suffered a compensable industrial injury to his low back on May 14, 2007, during his employment with Cedar Valley Construction, Inc. Petitioner requested that the Court award temporary total disability benefits and determine the proper rate to be paid for such benefits. Additionally, Petitioner requested costs and attorney fees.

**Held:** The only evidence presented to the Court that Petitioner sustained an injury while working for Cedar Valley is Petitioner's own testimony. The Court does not find Petitioner's version of events to be credible. Therefore, the Court concludes that Petitioner has failed to meet his burden of proof.

***Keller v. Rochdale Ins. Co., 2008 MTWCC 5*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner petitioned the Court for benefits related to an alleged industrial injury arising out of her employment with Four Corners Restaurant and Casino.

**Held:** Based on the evidence presented at trial and on the Court's determination that Petitioner was not a credible witness, Petitioner's claim for benefits is denied. Petitioner's version of the events on the date of her alleged injury differs dramatically from her coworkers' versions. The Court finds the coworkers that testified about the events in question credible. Furthermore, the medical documentation reflects that Petitioner reported the onset of her low-back pain prior to the alleged injury date.

***Bagley v. Montana State Fund, 2009 MTWCC 29*** (Finding of Fact, Conclusions of Law and Judgment).

**Related Topics:** Costs, Attorneys' Fees, Penalties.

**Summary:** After Petitioner David Bagley suffered an industrial injury to his right arm, his employer assigned him to alternate job duties which consisted of completing coursework for an electrician's apprenticeship. Bagley asserted that he was unable to complete the hours to which his treating physician released him to return to work due to severe pain.

Bagley's employer terminated his employment for failing to complete his work hours and for not reporting to work. Bagley argues he is entitled to temporary total disability benefits and that Respondent Montana State Fund has unreasonably refused to pay his benefits.

**Held:** The facts of this case unambiguously demonstrate that Bagley was terminated from his employment for disciplinary reasons. He refused to work the hours to which he had been released, and he then failed to report to work at all. Although Bagley's treating physicians disagree as to whether Bagley is restricted from using his right hand for writing as part of his job duties, they both agree that he is able to work in a sedentary position. Bagley's former employer made such a position available to him, and had Bagley not been fired for cause, he would have been able to continue in that position. Bagley's request for reinstatement of TTD benefits is denied. Since Bagley is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

*Sherwood v. Watkins & Shepard Trucking and Great West Casualty Co., 2010 MTWCC 19* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Maximum Medical Improvement, Benefits

**Summary:** Petitioner suffered numerous industrial injuries over several years of working as a commercial truck driver. Petitioner's employer terminated him after he was missing for several hours with his truck. Although he was unable to account for his disappearance at the time, Petitioner later alleged that he fell and lost consciousness the day before his disappearance, which caused him to become confused the following day. Petitioner alleges that the sum of his industrial injuries and the medications he takes have rendered him totally disabled and that either of two previous employers should be liable for his condition.

**Held:** The Court does not believe that Petitioner's alleged fall and loss of consciousness occurred. The Court does not find Petitioner's report of another alleged industrial accident to be credible. Therefore, the employer at the time of Petitioner's previous, undisputed industrial injuries is liable for his present condition. Petitioner has presented no evidence that he is at MMI and therefore he is not entitled to permanent total disability benefits. Based on the evidence presented, the Court concludes Petitioner is entitled to temporary total disability benefits as of September 28, 2009.

*Bagley v. Montana State Fund, 2009 MTWCC 41* (Order Denying Petitioner's Motion for Reconsideration).

**Related Topics:** Evidence

**Summary:** Petitioner moved the Court to reconsider its decision, arguing that the Court should not have found him incredible and further arguing that evidence presented at trial does not support the Court's findings regarding his modified job duties, his attendance at a learning center, and the severity of his underlying medical condition.

**Held:** Petitioner has not persuaded the Court that it misapprehended his credibility. While Petitioner would prefer that the Court make different findings, the findings Petitioner has objected to are all supported by evidence found in the record submitted for the Court's consideration.

***Martin v. Montana State Fund, 2011 MTWCC 25*** (Findings of Fact, Conclusions of Law and Judgment, Order Granting Petitioner's Motion to Exclude Consideration of Evidence of Probation Violation, Order Denying Petitioner's Motion to Compel, and Order Denying Petitioner's Motion to Supplement Record).

**Summary:** Petitioner alleges that he injured his low back while preparing metal siding for installation on a job site. Respondent denied Petitioner's claim, alleging that its investigation led it to conclude that Petitioner was not injured in the course and scope of his employment. In separate motions, Petitioner moves this Court to exclude evidence regarding an alleged probation violation, moves to compel Respondent to produce an investigative report, and moves to supplement the record with a 2007 W-2 form to refute the employer's testimony that Petitioner first worked for him in March 2008.

**Held:** Petitioner has not proven that he was injured as a result of an industrial accident. Petitioner's motion to exclude evidence of an alleged probation violation is granted because the evidence is not relevant to the issue in this case. Petitioner's motion to compel production of an investigative report is denied because the report is protected work product. Petitioner's motion to supplement the record is denied because it is irrelevant as to whether Petitioner's first day of employment with the employer occurred in 2007 or 2008.

## DISABILITY

***Peterson v. Montana Schools Group Ins. Auth., 2006 MTWCC 14*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – May 5, 2006; Dismissed by Stipulation – July 26, 2006*).

**Pertinent Notes:** Permanent total disability, re-affirming *Weisgerber*.

**Summary:** Petitioner suffered a compensable occupational disease in his right arm and shoulder, rendering him unable to return to his custodian/maintenance position with the school district. After Petitioner reached maximum medical improvement and his treating physician approved five job analyses, Respondent terminated Petitioner's temporary total disability benefits. However, Petitioner's treating physician only considered whether Petitioner was employable in the five job analyses based solely upon the condition of Petitioner's shoulder, and did not take Petitioner's other serious health problems into consideration.

**Held:** Petitioner's occupational disease, taken in conjunction with the rest of his health problems and his lack of education or skills, renders him unemployable. Because he has

reached maximum medical improvement, he is no longer eligible for temporary total disability benefits, as defined by § 39-71-116(34), MCA (1997). Petitioner is therefore permanently totally disabled within the meaning of § 39-71-116(24), MCA (1997).

***Benhart v. Liberty Northwest, 2007 MTWCC 3*** (Decision and Judgment).

**Summary:** Petitioner suffered a work-related injury on January 15, 2003. Prior to his injury, he had been diagnosed with Hepatitis C. Subsequent to Petitioner's injury, and for unrelated reasons, his Hepatitis C worsened and his health declined. Respondent denied liability for PTD benefits, arguing that although Petitioner's Hepatitis C predated his work-related injury, the Hepatitis C did not cause Petitioner's health to decline until after his work-related injury. Petitioner argued that even without taking his Hepatitis C into account, his work-related injury rendered him permanently totally disabled.

**Held:** The parties agreed that Petitioner's condition prior to the effects of the Hepatitis C limited Petitioner to, at most, a part-time job which his treating physician approved only on a trial basis and that it was reasonably foreseeable that Petitioner would be physically unable to function at that level. However, no job analyses were submitted. The Court concludes that even without taking Petitioner's subsequent complications from Hepatitis C into account, he is permanently totally disabled.

***McLaughlin v. Northwestern Corp., 2011 MTWCC 9*** (Order Denying Respondent's Motion to Dismiss and Motion for Summary Judgment).

**Summary:** Respondent moves for dismissal of the Petition for Trial, or alternatively, summary judgment in its favor regarding Petitioner's request for a hiring preference under § 39-71-317(2), MCA. Respondent alleges that Petitioner is not entitled to a hiring preference because the parties settled Petitioner's claim on a disputed liability basis.

**Held:** Section 39-71-317(2), MCA, requires a hiring preference where a worker has suffered a qualifying injury. Since the parties settled Petitioner's claim on a disputed liability basis, whether Petitioner suffered a qualifying injury is a question of fact to be determined by the Court. This case is not appropriate for dismissal nor summary judgment.

## DISCOVERY

***Russell v. Watkins & Shepard Trucking Co., 2007 MTWCC 5*** (Order Regarding Respondent's Motion in *Limine*).

**Summary:** Respondent moved in *limine* to exclude an Addendum report and medical opinions because the report was not provided to Respondent in a timely manner.

**Held:** The Court ordered Petitioner to produce all discoverable medical records, excluding any reports or opinions not disclosed by the Court’s deadline. The Court further held that Respondent would be granted leave to conduct an additional IME after it examined the records, if Respondent so desired.

***St. Paul Travelers Companies, Inc. v. Liberty Northwest Ins. Corp., 2007 MTWCC 44*** (Order Granting Motion to Compel and Awarding Attorneys’ Fees and Costs).

**Summary:** Petitioner moved this Court to compel Respondent to answer certain requests for production and an interrogatory to which Respondent had either objected to or provided answers which Petitioner argued were incomplete. Petitioner further requested sanctions pursuant to ARM 24.5.326 in the form of attorney fees and costs.

**Held:** Respondent’s refusal to answer certain of Petitioner’s discovery requests on the basis that the information sought was irrelevant does not satisfy the requirements of Mont. R. Civ.P. 26 because these requests could reasonably lead to the discovery of admissible evidence. The Court agrees with Petitioner that certain of Respondent’s responses were incomplete or nonresponsive. Petitioner is entitled to reasonable attorney fees and costs pursuant to ARM 24.5.326

***Fore v. Transp. Ins. Co., 2008 MTWCC 49*** (Order Granting Petitioner’s Motion to Compel).

**Summary:** Petitioner Billy Fore moves the Court to compel Respondent Transportation Insurance Company to produce approximately 800,000 pages of Environmental Protection Agency documentation contained on ten compact disks. Petitioner argues that Respondent is required to produce the documentation in discovery because Respondent asserted the “last injurious exposure” rule in its response to Petitioner’s petition for benefits. Respondent responds that Petitioner’s discovery request is improper because: (1) the information is not peculiarly within the possession of Respondent but is available to be obtained by other means; and (2) the information is a public record and obtainable under the Freedom of Information Act.

**Held:** Petitioner’s motion to compel is granted. Pursuant to Rule 26(b)(1), Mont. R. Civ. P., Respondent is generally required to produce discovery that is relevant and not privileged. However, the Court shall limit discovery if it determines that the discovery sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. In this case, Respondent has failed to show that Petitioner may obtain the compact disks from a source that is more convenient, less burdensome, or less expensive. Respondent may charge Petitioner a reasonable amount to recoup its cost in copying the compact disks.

***Vandervalk v. Montana State Fund, 2009 MTWCC 24*** (Order Granting Motion to Quash Subpoenas *Duces Tecum* and Denying Motion for Protective Order).

**Summary:** The State of Montana moved to quash two Subpoenas *Duces Tecum* which were issued by this Court and served upon it at Kurt Vandervalk’s request. The State

argues that the subpoenas were not served in accordance with ARM 24.5.331, that the discovery sought is unduly burdensome, and that the items requested bear no relationship to Vandervalk's petition in this Court. The State further moved for a protective order which would prohibit Vandervalk from serving additional subpoenas upon it. Vandervalk responds that he has a right to the information he seeks under Article II, § 9 of the Montana Constitution.

**Held:** Vandervalk's subpoenas are quashed as they were not served in accordance with ARM 24.5.331. Furthermore, even if re-served properly, the substance of Vandervalk's request is unduly burdensome upon the State and appears to largely seek information which is not relevant to his claim before this Court. However, the State's motion for a protective order is preemptive and overly broad and is therefore denied.

***Hopkins v. Uninsured Employers' Fund, 2009 MTWCC 13*** (Order Denying Uninsured Employers' Fund's Motion to Compel).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Respondent Uninsured Employers' Fund (UEF) moved the Court for an Order compelling Intervenor to produce his state and federal tax returns, with all schedules, for the years 2004 through 2007. Intervenor responds that, because the central issue in this case is whether Petitioner was Intervenor's employee on the date of his injury, November 2, 2007, the tax returns for any years besides 2007 are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. With respect to Intervenor's 2007 tax return, Intervenor states that he has not produced that return because he has not yet filed a tax return for 2007.

**Held:** The UEF's motion is denied. The UEF argues that the tax returns for the years 2004 through 2007 are relevant, or at least reasonably calculated to lead to the discovery of admissible evidence, "in light of Petitioner, Brock Hopkins, [sic] assertion that he worked for and was paid by [Intervenor] for the years 2004 through 2007." The UEF's argument basically boils down to Intervenor's tax returns being discoverable because the UEF "believes" they are discoverable. Beyond the UEF's conclusory assertion, however, the UEF offers no explanation or argument as to *how* Intervenor's tax returns from the years preceding Petitioner's date of injury are relevant or reasonably calculated to lead to the discovery of admissible evidence.

***Connors v. U.S. Fidelity & Guarantee, 2010 MTWCC 7*** (Order Granting Petitioner's Motion for a Protective Order, Denying Respondent's Motion to Compel, and Denying Petitioner's Motion to Compel).

**Related Topics:** Procedure, Penalties, Attorneys' Fees

**Summary:** This case involves only the issue of whether Petitioner is entitled to attorney fees and a penalty. Petitioner moved for a protective order against Respondent's first discovery requests, alleging that the information Respondent sought was irrelevant in light of the narrow

issues presented for determination. Respondent moved to compel Petitioner to answer that discovery. Petitioner also moved to compel Respondent to respond to some of Petitioner's discovery requests which pertain to Respondent's relationship with the IME doctor.

**Held:** Respondent has not convinced the Court that it is entitled to the discovery it seeks. Its motion to compel is therefore denied and Petitioner's motion for a protective order is granted. Petitioner's motion to compel is denied as Petitioner relies solely on a previous ruling of this Court which does not support Petitioner's position.

*Salazar v. Montana State Fund, 2011 MTWCC 28* (Order Granting Respondent's Motion in Limine).

**Summary:** Respondent moved in limine for an order excluding two documents which it disclosed inadvertently in discovery and which contained information about reserves it set in this case. Petitioner opposes Respondent's motion. While acknowledging that Respondent inadvertently disclosed the reserve information, Petitioner refuses to return the documents and argues that he intends to introduce the reserve information into evidence to prove that Respondent unreasonably adjusted his claim

**Held:** Respondent's motion is granted. The reserve information is wholly irrelevant to the issues before the Court and is protected under the work product doctrine. Petitioner may not use the documents at issue as trial exhibits.

## DRUG AND ALCOHOL USE

*Heth v. Montana State Fund, 2008 MTWCC 19* (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - June 13, 2008; Affirmed - May 5, 2009*).

**Related Topics:** Burden of Proof.

**Summary:** Petitioner was in a single-vehicle accident involving the septic pumper truck he drove for his employer. Petitioner's blood-alcohol content (BAC) tested at .0874 shortly after the accident and beer cans were found in and around the truck. Respondent argued that it is not liable for Petitioner's workers' compensation claim because alcohol was the major contributing cause of the accident. Petitioner argued that alcohol was not the major contributing cause of the accident, and in any event, his employer knew that he drank alcohol on the job and therefore he is not barred from recovery under § 39-71-407(4), MCA.

**Held:** Although Respondent proved that alcohol was the major contributing cause of the accident, Petitioner proved that his employer knew he used alcohol while performing his job duties. Therefore, Petitioner is eligible for workers' compensation benefits.

## EMERGENCY TRIALS

***Rogers v. Montana State Fund, 2005 MTWCC 58*** (Order Denying Request for Emergency Trial).

**Summary:** Petitioner alleges he suffered a dislocated shoulder and torn rotator cuff while in the employ of Respondent's insured. Petitioner requests an emergency trial based on his allegation that he needs shoulder surgery as soon as possible along with his medical bills paid, and payment of temporary total disability benefits.

**Held:** The request for an emergency trial setting is denied. ARM 24.5.311 requires good cause be shown to justify the setting of an emergency trial. To determine whether good cause exists, the rule requires that "[f]acts constituting the emergency must be set forth in the petition in sufficient detail for the court to determine whether an actual emergency exists." In the present case, other than Petitioner's conclusory allegation that he needs shoulder surgery as soon as possible and his medical bills paid, Petitioner offers no details for the Court to determine whether good cause exists to set an emergency trial.

***Lyons v. Montana State Fund, 2006 MTWCC 17*** (Order Denying Request for Emergency Trial).

**Summary:** Petitioner alleges he sustained injuries while employed by Respondent's insured. According to Petitioner's Emergency Petition, Respondent has denied liability on the grounds that Petitioner allegedly failed to timely notify his employer of his injuries pursuant to § 39-71-603, MCA (2005). Petitioner requests an emergency trial setting.

**Held:** The request for an emergency trial setting is denied. ARM 24.5.311 requires good cause be shown to justify the setting of an emergency trial. To determine whether good cause exists, the rule requires that "[f]acts constituting the emergency must be set forth in the petition in sufficient detail for the court to determine whether an actual emergency exists." In his petition, Petitioner expounds at length as to the circumstances of his injury and the timing of his notice to his employer. However, he devotes one sentence in support of justification for an emergency setting. In this sentence, Petitioner offers no details which would allow the Court to determine whether good cause exists to set an emergency trial.

***Travelers Insurance Company v. Ulrich-Goodwin, 2006 MTWCC 188*** (Order Denying Request for Emergency Trial).

**Related Topics:** Independent Medical Examinations.

**Summary:** Petitioner requests an emergency hearing and declaratory ruling pursuant to ARM 24.5.311 and 24.5.351.

**Held:** The request for an emergency setting is denied. ARM 24.5.311 requires that good cause be shown to justify the setting of an emergency trial. To determine whether good cause exists, the rule requires that "[f]acts constituting the emergency must be set forth in

the petition in sufficient detail for the court to determine whether an actual emergency exists.” In the present case, Petitioner has petitioned for declaratory relief seeking, apparently, a ruling that Respondent be required to travel from her home in Kalispell to an independent medical examination (IME) in Bozeman. Section 39-71-605(1)(b), MCA (2005), mandates that an IME must be conducted at a “place that is as close to the employee’s residence as is practical.” Although Petitioner states that it is willing to pay all expenses and endeavor to make Respondent’s travel from Kalispell to Bozeman for the IME as convenient as possible, it has offered no details in its petition as to how the Court might find that an examination in Bozeman is as close to Respondent’s residence as practical. Accordingly, the Court cannot find good cause exists to justify an emergency setting.

## **EQUITY - ESTOPPEL & WAIVER**

***Johnson v. Liberty Northwest Ins. Corp., 2007 MTWCC 7*** (Order Denying Respondent’s Motion to Compel).

**Summary:** Respondent Liberty Northwest Insurance Corporation moved the Court to compel Petitioner to reveal the terms of a settlement agreement between Petitioner and International Paper Company. Liberty argues that in the original petition to the Workers’ Compensation Court, Petitioner alleged that he suffers asbestos-related lung disease as a result of his employment with Champion International Company and/or Stimson Lumber Company. Petitioner entered into a disputed liability settlement agreement with International Paper (successor-in-interest to Champion) on April 20, 2005. Thereafter, International Paper was dismissed from the case. Liberty, Stimson’s insurer, argued that Petitioner was judicially estopped from pursuing his claim against Liberty if the settlement terms revealed that International Paper and Petitioner settled the case for a substantial sum.

**Held:** Liberty’s motion to compel is denied. The settlement between Petitioner and International Paper is a disputed liability settlement agreement. Because no set of facts contained in the settlement agreement would support Respondent’s judicial estoppel argument, the Court will not compel Petitioner to reveal the terms of the agreement.

***Young v. Montana State Fund, 2008 MTWCC 2*** (Decision and Judgment).

**Summary:** On August 15, 2005, Petitioner sent a demand letter to Respondent, requesting payment of a permanent partial disability (PPD) award pursuant to *Reesor v. Montana State Fund*. The following day, the Montana Supreme Court ruled in *Otteson v. Montana State Fund*, that PPD awards were not payable to permanently totally disabled claimants and thus Petitioner was not entitled to receive the PPD benefits paid by Respondent. Respondent nonetheless paid Petitioner a PPD award on August 22, 2005. Respondent requested return of these funds on November 21, 2005. Petitioner refused, and Respondent began recouping the PPD award by reducing Petitioner’s biweekly benefits by \$23.78. Petitioner argues that for equitable reasons, Respondent is not entitled to the

return of the PPD award.

**Held:** Insofar as Petitioner changed his position for the worse based upon his belief that Respondent had paid him a PPD award and would not request its return, Respondent is equitably estopped from recouping that portion of the erroneous payment from Petitioner. Therefore, of the \$16,625 Respondent erroneously paid to Petitioner, Respondent is entitled to reduce Petitioner's biweekly benefits to recoup a total of \$10,529.

***Murphy v. Montana State Fund, 2010 MTWCC 39*** (Order Granting Respondent's Motion to Amend Response to Petition for Trial).

**Related Topics:** Procedure

**Summary:** Respondent asks for leave to amend its response to Petitioner's petition for trial to add a contention that Petitioner did not notify his employer of his injury within 30 days of the industrial accident. Petitioner opposes Respondent's motion, arguing that Respondent has waived its right to assert this defense.

**Held:** Respondent's motion to amend is granted. Petitioner's contention that Respondent cannot successfully defend its claim on these particular grounds is not a basis for precluding the amendment.

***McLaughlin v. Northwest Corporation, d/b/a Northwestern Energy, 2011 MTWCC 17*** (Order Denying Respondent's Motion for Summary Judgment).

**Summary:** Respondent moved for summary judgment on Petitioner's claim to a rehiring preference pursuant to § 39-71-317(2), MCA. Respondent claims Petitioner is equitably estopped from claiming a rehiring preference because Petitioner's former attorney represented in a settlement letter that Petitioner would give up his entitlement to a rehiring preference if he settled his claim on a disputed liability basis. Petitioner contends that Respondent rejected his initial settlement offer and the rehiring preference was never addressed again. Petitioner contends that when the case settled two and half months later, the settlement agreement unambiguously settled only his claim for benefits and not the rehiring preference. Petitioner contends that language which may have been construed as encompassing the rehiring preference was removed from the Petition for Settlement at Petitioner's request and with Respondent's assent.

**Held:** Respondent's motion is denied. To prevail on a claim of equitable estoppel, a party must establish all six elements by clear and convincing evidence. Respondent has not established all the elements of equitable estoppel.

## EVIDENCE

***Thompson v. State Of Montana, 2006 MTWCC 1*** (Order Denying Intervenor's Request to Present Testimony at Oral Argument).

**Summary:** Intervenor, Liberty Northwest Insurance Corporation, requested leave to present testimony at the oral argument on its motion for reconsideration.

**Held:** Liberty's request is denied. Absent compelling reasons, the Court does not view an oral argument on a motion for reconsideration as an opportunity to present evidence that could have been adduced either with the briefing of the original motion or with the briefing of the motion for reconsideration.

***Kilgore v. Transp. Ins. Co., 2008 MTWCC 47*** (Order Denying Respondent's Motion to Allow a Post-Trial Deposition of Robert Marozzo and Denying Introduction of Respondent's Proposed Exhibit 24).

**Summary:** Respondent moves this Court to allow a post-trial deposition of Robert Marozzo, a former W.R. Grace management official, for the purpose of rebutting or impeaching Petitioner's allegedly inconsistent testimony regarding her W.R. Grace termination date. Respondent also moves the Court for admission of proposed Exhibit 24, a copy of a W.R. Grace "Pay Roll Change Notice" which indicates that Petitioner was discharged from W.R. Grace effective March 23, 1987. Respondent argues that proposed Exhibit 24 should also be admitted as either rebuttal and/or impeachment evidence.

**Held:** Petitioner testified at her deposition and at trial that her termination from W.R. Grace occurred in September 1987. However, although she testified at her deposition that her termination was precipitated by missed work days as a result of being snowed in while visiting family in Washington, she recalled at trial that her missed work days actually resulted from a neck injury she sustained due to a July 1987 car accident. Respondent asserts that Petitioner's inconsistent testimony opens the door for Marozzo's testimony and the admission of proposed Exhibit 24. At the time of the pretrial conference the parties stipulated that the 1987 statutes applied to Petitioner's claim. After the pretrial conference, Respondent sought to amend the Pretrial Order and sought to dispute the applicable statutory year in contravention of ARM 24.5.318(4). Respondent also sought to introduce proposed Exhibit 24 in support of its argument. Regardless of whether Respondent attempts to couch its evidence as rebuttal or impeachment evidence, Respondent is seeking to introduce untimely disclosed evidence in order to fundamentally alter the issues that were agreed to at the pretrial conference and that were incorporated into the Pretrial Order. In light of the statutory year stipulation, there is simply nothing for Respondent to either impeach or rebut.

***Hilbig v. Uninsured Employers' Fund, 2008 MTWCC 43*** (Order Denying the Uninsured Employers' Fund's Motion to Find Summary Judgment Inappropriate and Granting the UEF's Motion for an Extension of Time to Respond).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Respondent UEF moved the Court to find summary judgment inappropriate pursuant to ARM 24.5.329(1)(c), or in the alternative to grant the UEF an extension of time

to file a response brief. The UEF asserted that it had recently learned of medical evidence which would place a material fact in dispute and would thereby render summary judgment inappropriate in the case.

**Held:** Two days before trial, the parties agreed in a conference call with the Court that the only issue in dispute was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved. The UEF conceded during this conference that it had no medical evidence to support its contention that Petitioner was not injured to the extent claimed in the subject accident. Based upon these representations, the Court vacated the trial and directed Petitioner to file a motion for summary judgment to resolve the one legal issue that was in dispute. In light of the procedural history of this case and the representations of counsel which have contributed to this procedural history, it would be manifestly unjust if the Court were to now allow the UEF to interject medical evidence through the back door which would have not been admitted had this matter proceeded to trial as scheduled. The UEF's motion to find summary judgment inappropriate is denied. The UEF has 10 days from the date of this Order in which to respond to Petitioner's summary judgment motion, and must confine its brief only to the evidence which was admitted by stipulation and which would have been relied upon had this matter proceeded to trial as scheduled.

***Lira v. Insurance Co. of State of Penn., 2011 MTWCC 1*** (Order Denying Respondent's Motion *in Limine*).

**Summary:** Petitioner's co-worker (Schmidt) shot him in the head during an at-work altercation. Respondent moves *in limine*, seeking an order allowing it to introduce into evidence statements made by Schmidt alleging he was acting in self-defense. Respondent argues that the statements qualify as statements against interest and are therefore excepted from the hearsay rule.

**Held:** Schmidt's statements that he acted in self-defense when he shot Petitioner would not tend to subject Schmidt to criminal liability so much as they would tend to exculpate him from criminal liability. A person in Schmidt's position would be expected to claim some sort of justification for his action, irrespective of whether he believed it to be true. The statements therefore do not qualify as statements against interest under Mont. R. Evid. 804(b)(3) and are not admissible.

***Montana State Fund v. Simms, 2010 MTWCC 41*** (Order Excluding Dr. Schabacker's June 28, 2007, Opinion Letter and Excluding the Use of any Confidential Criminal Justice Information not Disseminated in Accordance with the Criminal Justice Information Act).

**Summary:** Respondent moves to exclude an opinion letter of his treating physician which was elicited by Petitioner. Respondent argues that the letter was based on surveillance videos which were confidential criminal justice information which Petitioner disclosed in violation of the Criminal Justice Information Act. Respondent also moves to preclude the use or further publication or dissemination of the surveillance videos in these proceedings because of Petitioner's alleged violations of the Criminal Justice

Information Act. Petitioner argues that the surveillance was properly disclosed. Although Petitioner concedes the surveillance is now confidential criminal justice information, Petitioner argues it did not become confidential criminal justice information until after Respondent's treating physician reviewed the surveillance.

**Held:** The surveillance constituted confidential criminal justice information before it was disclosed to Respondent's treating physician and was disseminated in violation of the Criminal Justice Information Act. The opinions elicited from Respondent's treating physician and any other physicians to whom the surveillance was improperly disseminated are excluded. Respondent's motion to prospectively preclude the use of the surveillance "for all time" and "for any purpose," even if the surveillance is disseminated in compliance with the Criminal Justice Information Act, is overbroad and is denied.

*Estate of Richard Hirth v. Montana State Fund, 2012 MTWCC 47* (Order Denying Petitioner's Motion to Exclude Certain Reports and Testimony).

**Summary:** Petitioner moved to exclude the reports and testimony of two medical doctors who reviewed Petitioner's medical records and disputed the impairment rating assigned by Petitioner's treating physician. Respondent opposes Petitioner's motion, arguing that it would be denied due process of law if it were denied the opportunity to challenge the impairment rating assigned by Petitioner's treating physician.

**Held:** The arguments Petitioner has raised go to the weight rather than the admissibility of the evidence in question. Petitioner's motion is denied.

## INCARCERATION

*Mccuin v. Montana State Fund, 2006 MTWCC 41* (Order Denying Petitioner's Motion for Summary Judgment and Granting Summary Judgment to Respondent).

**Related Topics:** Benefits.

**Summary:** Petitioner moved for summary judgment arguing that his permanent partial disability benefits did not lapse during the time he was incarcerated.

**Held:** While Petitioner would otherwise have been entitled to permanent partial disability benefits pursuant to § 39-71-703, MCA, he was ineligible for such benefits during the time he was incarcerated pursuant to § 39-71-744, MCA. Although Petitioner would have been entitled to any such benefits which remained subsequent to his release from prison, due to an overpayment of his temporary total disability benefits, any amount which would otherwise have been due was offset by the amount overpaid.

*Hopkins v. UEF v. Kilpatrick, 2010 MTWCC 18* (Order Denying Motion for Reconsideration).

**Summary:** Third-Party Respondent moves the Court to reconsider its Findings of Fact,

Conclusions of Law and Judgment. Specifically, Third-Party Respondent requests the Court reconsider two factual findings.

**Held:** Having considered Third-Party Respondent's arguments, the Court sees no reason to reconsider either factual finding. The motion for reconsideration is denied.

## INDEPENDENT CONTRACTORS

*Howe v. Uninsured Employers' Fund, In re: Kurtz, 2006 MTWCC 27* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Petitioner is an independent contractor who worked on a residential construction project. Petitioner's brother worked on the project with him and introduced Petitioner to an acquaintance who then also began to work on the project. When the newly-hired worker was injured in an accident on the job, the Uninsured Employers' Fund determined that Petitioner was the employer of the injured worker. Petitioner appeals that determination.

**Held:** Petitioner has failed to prove by a preponderance of the evidence that he was not the employer of the injured worker.

*Kinney v. Uninsured Employers' Fund, 2007 MTWCC 10* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Petitioner was injured on his first day working at a hardware store and cabinetmaking shop while he was clearing out an area of the shop in which he could create woodcarvings on cabinet doors. He claimed he was an employee hired to apprentice as a cabinetmaker and to create woodcarvings. The shop owner claimed Petitioner was an independent contractor hired only to create woodcarvings on cabinet doors and to occasionally peel logs for furniture.

**Held:** While only a handful of facts were established due to the short nature of Petitioner's relationship with the cabinetmaking shop prior to his injury, the facts which were established support a finding that Petitioner was an independent contractor and not an employee.

*Bowler v. Independent Contractor Central Unit, 2008 MTWCC 42* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner appealed the Independent Contractor Central Unit's Determination

to this Court. Petitioner argued that the ICCU wrongly determined that Gregory D. Holm performed services for Rick's Flooring as an employee between October 6, 2005, and December 23, 2006.

**Held:** Holm did not possess a valid independent contractor exemption certificate during the time he was working with Petitioner. The Court therefore applies the two-part test to determine Holm's employment status. Applying this test, the Court concludes that Gregory D. Holm was Petitioner's employee during the time at issue. The ICCU's Determination is affirmed.

*Emergency Preparedness Systems, LLC v. Scobie, 2009 MTWCC 28* (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – 09/16/09; Appeal Voluntarily Dismissed – 12/28/09*).

**Summary:** Respondent William C. Scobie filed a wage claim against Emergency Preparedness Systems, LLC, in the Wage and Hour Unit of the Montana Department of Labor on April 3, 2007. Scobie alleged he was owed wages for work performed for EPS between January 1, 2005, and March 30, 2007. The Wage and Hour Unit referred the question of whether Scobie was an independent contractor or an employee to the Independent Contractor Central Unit. The ICCU determined Scobie was an employee of EPS and not an independent contractor. EPS appealed the ICCU determination to this Court.

**Held:** The Court applies a two-part test to determine Scobie's employment status as either an employee or independent contractor. First, the Court must determine whether four control factors are met. Second, the Court must determine whether the individual is engaged in an independently established trade, occupation, profession, or business. Both parts of the test must be satisfied by a convincing accumulation of undisputed evidence in order to establish independent contractor status. EPS failed to satisfy the first part of the test. Therefore, the ICCU's determination that Scobie was an employee is affirmed.

*McCone County v. State of Montana, WC Regulation Bureau, Independent Contractor Central Unit, 2012 MTWCC 19* (Order Denying Petitioner's Motion for Summary Judgment and Granting Summary Judgment in Favor of Respondent).

**Summary:** Petitioner moves for summary judgment on its appeal of an Independent Contractor Central Unit Decision, finding its contract worker to be an employee rather than an independent contractor for the purposes of her unemployment insurance claim. Respondent opposes the motion and, as there are no material issues of fact, requests summary judgment in its favor as a matter of law.

**Held:** There being no material issues of fact remaining as to the status of a worker who contracted with Petitioner, the WCC may grant summary judgment to the non-moving party as a matter of law. Solely for the purposes of Title 39, Chapter 51, MCA, and the contract worker's unemployment insurance claim, Petitioner's contract worker does not meet the definition of an independent contractor and is therefore an employee, as she had no workers' compensation

insurance on herself and no independent contractor exemption certificate. As pertains to any issues beyond Chapter 51, any determination regarding the worker's status would be an advisory ruling, from which Court is jurisdictionally constrained. As pertains to the July 12, 2011, Decision which is the subject of this de novo proceeding, the ICCU has conceded, and the WCC agrees, that Decision is vacated by operation of McCone County's appeal to WCC.

## INDEPENDENT MEDICAL EXAMINATIONS

***Whitford v. Montana State Fund, 2006 MTWCC 11*** (Order Granting Motion to Require Independent Medical Examination).

**Related Topics:** Equity (Estoppel and Waiver).

**Summary:** Respondent has requested Petitioner to submit to an independent medical examination pursuant to § 39-71-605(2), MCA (2005), and Petitioner has refused. The basis for Petitioner's refusal is his contention that his occupational disease claim predated the repeal of § 39-72-602, MCA (2003), which, Petitioner contends, controls in the present case. Petitioner also contends that Respondent should be precluded by the doctrines of waiver or estoppel from seeking an IME pursuant to § 39-71-605(2), MCA (2005), because Respondent was aware that Petitioner had sought an evaluation through the Department of Labor and Industry pursuant to § 39-72-602, MCA (2003), and failed to object to this process.

**Held:** Respondent's motion is granted. Because the law pertaining to independent medical examinations is procedural, the current statute applies and Respondent is entitled to an independent medical examination pursuant to § 39-71-605(2), MCA (2005). Respondent was under no affirmative obligation to object to the panel examination and its failure to do so neither constitutes a waiver of Respondent's right to seek an independent medical examination nor does it stop Respondent from seeking an independent medical examination pursuant to § 39-71-605(2), MCA (2005). Although an insurer's right to an independent medical examination is not unlimited, good cause exists in the present case to require Petitioner to submit to one.

***Stillwater Mining Company v. Bunch, 2006 MTWCC 43*** (Order Denying Motion to Compel IME).

**Summary:** Petitioner moves to compel Respondent, who resides in Vail, South Dakota, to travel to Billings, Montana, for an independent medical examination.

**Held:** Petitioner's motion is denied. Petitioner may renew its motion provided it submits information to the Court consistent with the four factors set forth previously by the WCC in *Mack v. Montana State Fund, 2005 MTWCC 28*.

***Haman v. Wausau Ins. Co., 2007 MTWCC 49*** (Order Granting Respondent's Motion to Compel Attendance at an Independent Medical Examination, and Granting in Part and Denying in Part Petitioner's Motion for Protective Order).

**Summary:** Respondent moved to compel Petitioner to attend a follow-up independent medical examination (IME) with Dr. Gregg Singer. Petitioner argues that a follow-up IME is unnecessary. As this motion specifically pertains to Dr. Singer, Petitioner argues that, in conducting the previous IME, Dr. Singer ignored her complaints of pain and pushed her to the point where she was in pain for several days after the examination. Moreover, Petitioner alleges that Dr. Singer did not note her pain complaints in his IME report. If the Court grants Respondent's motion to compel, Petitioner moves for a protective order to allow Petitioner's husband to be present during the entire examination and to videotape the examination.

**Held:** Respondent's motion to compel is granted. The Court finds good cause to allow a follow-up examination with Dr. Singer. Petitioner's motion for a protective order is granted in part and denied in part. Petitioner's husband may not be present for the examination. However, Petitioner's counsel may be present for both the history-taking portion of the IME and the examination itself. The entire IME will be recorded by a fixed video camera.

***Challinor v. Montana Ins. Guar. Assoc., 2008 MTWCC 21*** (Order Denying Respondent's Motion to Compel an Independent Medical Examination).

**Summary:** Respondent moved this Court to compel Petitioner, who lives in Orofino, Idaho, to attend an IME it had scheduled in Missoula, Montana. Petitioner objected on the grounds that the IME was not scheduled as practical to his residence as required by § 39-71-605(1)(b), MCA, and further argued that Respondent's request was untimely as it was made only three days prior to the expert witness disclosure deadline required by this Court's scheduling order.

**Held:** Respondent's motion to compel the IME is denied on the ground that Respondent did not demonstrate it scheduled the IME as close to Petitioner's residence as practical. While Respondent's request for an IME was untimely, Respondent has been diligent in preparing for trial and good cause for the un-timeliness has been shown. If Respondent can cure the location issue by April 11, 2008, its request for an IME will not be barred for un-timeliness.

***Carlton First Strike v. Montana Contractor Comp. Fund, 2008 MTWCC 9*** (Order Granting Respondent's Motion to Compel an IME).

**Summary:** Respondent moved to compel Petitioner to attend an independent medical examination. Petitioner argues that since Respondent already denied liability for his claim, Respondent is not entitled to further investigation.

**Held:** Under § 39-71-605(2), MCA, Respondent is entitled to obtain an IME because a dispute exists concerning the claimant's physical condition and/or the cause or causes of any injury or disability the claimant may have.

*Schoenen v. Uninsured Employers' Fund, 2008 MTWCC 1* (Order Denying Respondent's Motion for an Independent Medical Examination).

**Summary:** Respondent Uninsured Employers' Fund has moved the Court to order Petitioner to attend an independent medical examination.

**Held:** Respondent did not request Petitioner to attend an independent medical examination until after the deadline for designating witnesses and filing expert witness' summaries had expired. Therefore, Respondent's motion is denied as untimely.

*Vandervalk v. Montana State Fund, 2009 MTWCC 15* (Order Denying Petitioner's Motion for Emergency Independent Medical Examination and Travel Reimbursement).

**Summary:** Petitioner moves the Court to order Respondent to arrange and pay for an IME, and to order Respondent to reimburse Petitioner for travel expenses and for certain medications he has purchased. Respondent responds that it is not statutorily obligated to arrange and pay for the IME Petitioner seeks, and further responds that the issues regarding reimbursement of certain expenses have facts in dispute and are better resolved after a trial has been held.

**Held:** While an insurer has a right to request an IME pursuant to § 39-71-605, MCA, the Court is aware of no statutory or case authority for the proposition that Petitioner is entitled to obtain an IME at Respondent's expense. As to Petitioner's claim for reimbursement of certain out-of-pocket expenses, the Court agrees with Respondent that this claim is best characterized as a motion for summary judgment and is better resolved on the merits at trial. The Court therefore declines to consider this issue on summary judgment under ARM 24.5.329(1)(b). Petitioner's motion is denied.

*Salazar v. Montana State Fund, 2011 MTWCC 10* (Order Denying Petitioner's Motion for Protective Order).

**Summary:** Petitioner moved for a protective order to prevent Respondent from obtaining an IME, arguing that Respondent does not have an absolute right to a "Rule 35 Examination," and that Respondent could have Petitioner's treating physician address Respondent's questions instead. Respondent argues that it is entitled to an IME under § 39-71-605, MCA, because Petitioner's condition has changed since it obtained a previous IME.

**Held:** Respondent is entitled to an IME under § 39-71-605, MCA. Salazar does not deny that his condition has changed, nor has he explained why he believes the Court should look to the Rules of Civil Procedure to the apparent exclusion of § 39-71-605(1)(a), MCA, in determining State Fund's entitlement to an IME.

*Sherwood v. Watkins & Shepard Trucking, 2010 MTWCC 42* (Decision and Judgment).

**Summary:** Petitioner requests that he be evaluated at Respondent's expense by Dr. Bill Rosen regarding chronic pain and medication intake issues. Respondent requests the Court to require Petitioner to undergo an evaluation in a multi-disciplinary setting at the Rehabilitation Institute of Washington. Both parties request direction on the appropriate course to address Petitioner's drug addiction.

**Held:** In a bench ruling, the Court concluded that Petitioner presented no evidence that a new evaluation by Dr. Rosen would yield different results than the evaluation Dr. Rosen conducted in 2009. Therefore, Petitioner is not entitled to a new evaluation by Dr. Rosen. Although Respondent established that the Rehabilitation Institute of Washington is the closest available place to provide Petitioner with the in-patient treatment both parties agree is needed, it has not been established that the Rehabilitation Institute of Washington is the closest available place to provide the evaluation for such treatment. Respondent shall investigate whether the Rehabilitation Institute of Washington will accept an evaluation performed by Montana physicians and whether Montana physicians are available to perform the required evaluation closer to Petitioner's home. If the evaluation can be done closer to Petitioner's home, it shall be done as close as practical to Petitioner's home in accordance with § 39-71-605(1)(b), MCA. If the Rehabilitation Institute of Washington is the closest practical location to accomplish the evaluation, the evaluation may be conducted at the Rehabilitation Institute of Washington.

***Svensden v. Montana State Fund, 2011 MTWCC 14*** (Order Granting Motion to Compel Petitioner to Attend an Independent Medical Examination).

**Summary:** Respondent moved this Court to compel Petitioner to attend an IME. Petitioner concedes Respondent is entitled to an IME but objects to the IME being performed by Dr. Schumpert. Petitioner argues that Dr. Schumpert has a conflict of interest because the industrial hygienist who conducted an on-site evaluation of Petitioner's workplace was employed by the same entity that employs Dr. Schumpert.

**Held:** Respondent's motion to compel an IME with Dr. Schumpert is granted. Petitioner cites no precedent in support of his argument that Dr. Schumpert's previous working relationship with the industrial hygienist precludes him from performing the IME. Any conflict of interest, real or perceived, may go to the weight the Court assigns to Dr. Schumpert's opinion. It does not provide a basis to preclude Dr. Schumpert from performing the IME.

***Perlinski v. Montana Schools Group Insurance Authority, 2011 MTWCC 16*** (Order Granting Petitioner's Motion for Protective Order and Denying Respondent's Motion to Compel an Independent Medical Evaluation).

**Summary:** Respondent moved for an order compelling Petitioner to attend an IME with Dr. Emil Bardana in Portland, Oregon. Respondent contends that an out-of-state IME is justified because there are no Montana physicians with the same level of experience as Dr. Bardana. Petitioner moved for a protective order holding that she not be required to attend the out-of-state IME.

**Held:** Respondent’s motion to compel the IME in Portland is denied. Petitioner’s motion for a protective order is granted. Out-of-state IMEs should be viewed with disfavor when an adequate examination can be conducted in Montana. Section 39-71-605, MCA, requires that an IME shall be conducted at a place that is as close to the employee's residence as is practical by a physician with “adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute.” Respondent has failed to demonstrate that an adequate IME cannot be conducted in Montana.

***Dodge v. Montana Insurance Guaranty Association, 2011 MTWCC 20*** (Order Denying Respondent’s Motion to Compel an Independent Medical Examination).

**Summary:** Respondent moved for an order compelling Petitioner to attend an IME with Dr. John R. Harrison in Missoula pursuant § 39-71-605, MCA. Respondent claims that Petitioner’s condition has changed since his last IME necessitating an additional examination. Specifically, Respondent argues that it only learned of Petitioner’s subjective complaints of memory loss since Petitioner underwent the last IME. Petitioner objects to the additional IME on the grounds that his condition has not changed since undergoing two separate IMEs in the past year.

**Held:** Respondent’s motion to compel a third IME is denied. An insurer is entitled to additional IMEs where there is an indication that claimant’s medical condition has changed or there is some other sound reason. Respondent has not shown a sound reason nor a change in Petitioner’s condition to warrant an additional IME. Respondent has been aware of Petitioner’s subjective complaints of memory loss since at least 2006, long before the most recent IMEs.

***Loren Chapman v. Smurfit-Stone Container Enterprises, Inc., 2013 MTWCC 12*** (Order Affirming DOL/ERD’s Order Directing Medical Examination).

**Summary:** Petitioner appeals an order of the Department of Labor & Industry, Employment Relations Division directing a medical examination, requiring Petitioner to submit to a two-day psychiatric evaluation by William Stratford, M.D. Petitioner argues that this independent medical evaluation is neither reasonable nor necessary under the Workers’ Compensation Act.

**Held:** Sufficient grounds exist for an evaluation of Petitioner’s psychological and cognitive conditions after being on temporary total disability benefits over seven and a half years. Respondent may pursue an independent psychiatric examination to evaluate Petitioner’s condition.

## JURISDICTION

***Baker v. Transp. Ins. Co., 2007 MTWCC 6*** (Order on Respondent’s Motion in *Limine*).

**Summary:** Respondent moved in *limine* to preclude Petitioner from presenting (1) evidence regarding Bruce Baker’s medical expenses, and (2) a letter from Dr. Alan Whitehouse assigning various impairment ratings to Mr. Baker.

**Held:** Respondent's motion to preclude Petitioner from using the letter from Dr. Whitehouse at trial is moot in light of the Court's earlier ruling that Petitioner is not entitled to benefits in the form of an impairment rating. Respondent's motion to preclude Petitioner from presenting evidence regarding Mr. Baker's medical expenses based on this Court's lack of jurisdiction is denied. Under the 1985 Occupational Disease Act, jurisdiction of a claim is conferred on this Court when a dispute over benefits exists. In a letter dated August 8, 2002, Respondent denied Petitioner's claim in its entirety based on the ostensible running of the statute of limitations. Therefore, a dispute exists and this Court has jurisdiction of the claim.

***Horizon Custom Homes, Inc. v. Uninsured Employers' Fund, In re: Flink, 2007 MTWCC 8*** (Order Granting Motion to Dismiss).

**Related Topics:** Constitutional Law, Mediation, Uninsured Employers' Fund.

**Summary:** Respondent moved for an order to dismiss Petitioner's action on the grounds that Petitioner did not request mediation of Respondent's determination within 90 days as required by § 39-71-520(1), MCA. Petitioner argues that § 39-71-520, MCA, is unconstitutional because it violates Petitioner's right to equal protection under the law. Petitioner further argues that it should be entitled to review the medical records of the claimant because Petitioner believes Respondent may have improperly paid all or part of the claim.

**Held:** Section 39-71-520, MCA, is not unconstitutional because the classes at issue are not similarly situated. Petitioner is not entitled to review the claimant's medical records because Petitioner failed to appeal Respondent's determination to mediation within 90 days. Therefore, this Court is without jurisdiction to review Respondent's determination.

***Michalak v. Liberty Northwest Ins. Corp., 2007 MTWCC 14A*** (Order Granting Petitioner's Motion Nunc Pro Tunc).

**Summary:** Pursuant to ARM 24.5.337, Petitioner moved to amend the Court's Findings of Fact, Conclusions of Law and Judgment in this matter, *nunc pro tunc*. Respondent opposed the motion, arguing that this Court lacks jurisdiction to decide the motion because Respondent has already appealed the Court's Findings of Fact, Conclusions of Law and Judgment to the Montana Supreme Court.

**Held:** Petitioner's motion is granted. Pursuant to Rule 60(a) of the Montana Rules of Civil Procedure, this Court may correct clerical mistakes at any time of its own initiative or on the motion of any party. The Montana Supreme Court has ruled that a district court retains jurisdiction to correct clerical errors even after an appeal has been perfected. The Court made a clerical error in its decision when it misidentified a person in the Findings and Conclusions. Therefore, the Court retains jurisdiction to correct its clerical error.

**Montana State Fund v. Simms, 2008 MTWCC 3** (Order Denying Respondent’s Motion to Dismiss).

**Summary:** Respondent moved to dismiss Petitioner’s Petition for Declaratory Ruling on the grounds that this Court lacks the jurisdiction to reopen its Order and Judgment Dismissing with Prejudice more than a year and a half after it was entered. Petitioner responds that, pursuant to § 39-71-2909, MCA, this Court may review, diminish, or increase awarded benefits which were allegedly obtained through fraudulent representations.

**Held:** Respondent bases its motion upon *State Comp. Ins. Fund v. Chapman*. *Chapman* was decided under a previous version of § 39-71-2909, MCA, which did not include fraud or deception as grounds upon which this Court could review an award of benefits. Since the current version of the statute permits the Court to do so, the Court has the jurisdiction to consider Petitioner’s Petition for Declaratory Ruling. Respondent’s motion to dismiss is therefore denied.

**Stavenjord v. Montana State Fund, 2008 MTWCC 4** (Order Regarding Identification and Notification of Potential Beneficiaries) (*Appealed to Montana Supreme Court –May 8, 2008; Remanded for Further Proceedings (Pending Settlement) –August 20, 2008; Dismissed–November 5, 2008*).

**Summary:** After denying common fund status in this matter, the Montana Supreme Court remanded it to this Court to determine an appropriate procedure by which potential Stavenjord beneficiaries will be identified and notified of their interests related to increased Stavenjord-type benefits and to determine whether it is impracticable or impossible for this Court to comply with the Supreme Court’s remand order without the assistance of a common fund counsel.

**Held:** Having considered the issues presented, the Court concludes it is impossible for this Court to comply with the Supreme Court’s remand order. Therefore, no further action can be taken by the Court as this matter now stands.

**Robinson v. Montana State Fund, 2008 MTWCC 55** (Order Granting in Part Respondent’s Motion to Dismiss).

**Pertinent Notes:** WCC now a “court of record” pursuant to § 3-1-102, MCA (2007).

**Summary:** Respondent moved this Court to dismiss certain causes of action which were petitioned for by Petitioner. After oral argument clarified the present status of the claims set forth in the Petition, the Court considered whether it had subject matter jurisdiction to hear Petitioner’s claims.

**Held:** Under *Thompson v. State of Montana*, this Court lacks subject matter jurisdiction to hear Petitioner’s causes of action for declaratory judgment. Petitioner’s causes of action relating to benefits and a penalty on those benefits remain.

***Benton v. Uninsured Employers' Fund, 2008 MTWCC 41*** (Order Granting Respondent Alan Meyer and Erica Rodriguez, d/b/a Rogue Transportation's Motion for Summary Judgment).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Rogue Transportation, an Oregon business, moves the Court for summary judgment arguing, *inter alia*, that pursuant to § 39-71-117(4), MCA, it was not an employer of Mickey Benton at the time of his accident and death because it did not maintain a place of business in Montana. Petitioner contends that Rogue did maintain a place of business in Montana because Rogue maintained a place of business wherever its vehicle was located.

**Held:** Rogue did not maintain a place of business in Montana pursuant to § 39-71-117(4), MCA. Rogue's motion for summary judgment is granted.

***Miller v. Liberty Mut. Fire Ins. Corp., 2008 MTWCC 18*** (Order Denying Respondent's Motion to Dismiss).

**Summary:** Respondent moved to dismiss Petitioner's Petition for Trial on the grounds that this Court lacks jurisdiction to hear Petitioner's constitutional challenge to an administrative rule under the Montana Supreme Court's holding in *Thompson v. State of Montana and Liberty Northwest Ins. Corp.*<sup>1</sup> as Petitioner's claim does not make a direct claim for benefits. Petitioner responded that his claim does make a direct claim for benefits and furthermore, that the holding of *Thompson* does not preclude this Court's jurisdiction in cases where indirect claims for benefits are made but only in cases where no claims for benefits are made. The Department of Labor and Industry as *amicus curiae* argued that Petitioner's claim involves a claim for benefits and that this Court therefore has jurisdiction to hear the case.

**Held:** In his Petition for Trial, Petitioner's prayer for relief includes asking the Court to order Respondent to pay for medical expenses for which Respondent has denied coverage because Petitioner did not obtain preauthorization as required by ARM 24.29.1515(2), the administrative rule which Petitioner argues is unconstitutional. Therefore, Respondent is mistaken in its assertion that Petitioner did not make a direct claim for benefits and this Court does have jurisdiction to hear Petitioner's claim. Whether Respondent is correct in asserting that *Thompson* does not allow this Court to hear constitutional issues which indirectly involve a claim for benefits is immaterial.

***Woodards v. Montana Ins. Guar. Assoc., 2008 MTWCC 11*** (Order Denying Petitioner's Motion for Reconsideration).

**Summary:** Petitioner seeks reconsideration of the Court's Order granting summary judgment in favor of Respondent and denying Petitioner's motion for summary judgment. Petitioner argues that the Court failed to consider Petitioner's entitlement to an impairment award in rendering its decision.

**Held:** The Court cannot reconsider Petitioner’s entitlement to an impairment award because this issue was never submitted for the Court’s consideration in the first place. Accordingly, Petitioner’s Motion for Reconsideration is denied.

*Montana State Fund v. Simms, 2009 MTWCC 9* (Order Denying Motion for Grant of Use and Derivative Use Immunity).

**Summary:** Respondent moved this Court for an Order granting use and derivative use immunity for himself and his wife. Petitioner and the Office of the Attorney General for the State of Montana both objected to Respondent’s motion.

**Held:** This Court lacks the authority to grant the immunity Respondent seeks. His motion is denied.

*Montana State Fund v. Simms, 2010 MTWCC 40* (Order Denying Respondent’s Motion to Dismiss and Granting Petitioner’s Motion to Compel).

**Related Topics:** Procedure

**Summary:** The parties signed a settlement agreement. Respondent accepted a post signature payment for the agreed-to amount from Petitioner, but neither party submitted the settlement agreement to the Department of Labor and Industry for approval. Respondent moves for dismissal of the present case, arguing that the Court lacks jurisdiction to hear Petitioner’s petition for a declaratory ruling because no “settlement” occurred. Respondent further alleges that the Court lacks jurisdiction since the settlement agreement purported to settle Respondent’s claim in its entirety, when the parties had only disputed and mediated the issue of his entitlement to domiciliary care benefits. Petitioner also moves this Court to compel Respondent to respond to its First Combined Discovery Requests. Respondent responds that he believes the Court should first rule on his motion to dismiss, since the motion would dispose of the case if the Court grants it.

**Held:** Respondent’s motion to dismiss is denied. The parties entered into a binding settlement agreement and this Court has jurisdiction to review its validity. Since the motion to dismiss is denied, Respondent must respond to Petitioner’s discovery requests.

*Charlson v. Montana State Fund, 2010 MTWCC 23* (Order Denying Respondent’s Motion to Dismiss).

**Related Topics:** Mediation, Penalties, Attorneys’ Fees

**Summary:** Respondent moves to dismiss Petitioner’s Petition for Hearing for lack of subject matter jurisdiction. Respondent contends the mediation requirements have not been fully satisfied because Petitioner did not reject the mediator’s recommendation. Alternatively, Respondent moves the Court to dismiss Petitioner’s claim for attorney fees and penalty because there is no evidence Respondent acted unreasonably in the adjustment of

Petitioner's claim. Respondent contends that Petitioner can move to amend his petition to reinstate his claim for attorney fees and penalty if discovery reveals unreasonable conduct by Respondent.

**Held:** Respondent's motion is denied. Petitioner's counsel's letter to the mediator constituted a rejection of the mediator's recommendation. Regarding Petitioner's claim for attorney fees and penalty, the Court has a well-established procedure for pursuing a claim for attorney fees and penalty. ARM 24.5.301(3) required Petitioner to claim attorney fees and penalty in his petition or risk waiving that claim. Petitioner is required to file a particularization of the grounds or basis for his claim in accordance with the

Court's scheduling order. Both the parties and the Court are better served by following the procedure established by the Court's rules and scheduling order.

***Jensen v. Uninsured Employers' Fund and Montana State Fund AND Uninsured Employers' Fund v. Paul Kessler, Steven Kessler, and Jeff Hunter d/b/a Artistic Exteriors jointly and severally, and Daniel Christianson, Individually and/or sole proprietor, 2011 MTWCC 24*** (Order Dismissing Uninsured Employers From First-Party Petition).

¶ 1 During a conference call with the parties, I raised the issue of whether the Workers' Compensation Court has jurisdiction to hear an action by Jensen against Paul Kessler, Steven Kessler, and Jeff Hunter d/b/a Artistic Exteriors, and Daniel Christianson (collectively "uninsured employers").

¶ 2 An employee cannot bring an action for benefits directly against an uninsured employer in the Workers' Compensation Court. Such an action can only be brought in District Court pursuant to §§ 39-71-515 and -516, MCA. In *Raymond v. Uninsured Employers' Fund and Foothills Research Institute, LLC, Market Research Group, and Joseph Seipel*, I dismissed the uninsured employer because the Court lacked Order Dismissing Uninsured Employers from First-Party Petition - Page 2 jurisdiction over a dispute between an injured worker and the uninsured employer pursuant § 39-71-516, MCA.1

## **ORDER**

¶ 3 Paul Kessler, Steven Kessler, and Jeff Hunter d/b/a Artistic Exteriors, and Daniel Christianson are **DISMISSED** from the first-party petition.

¶ 4 As reflected above, the caption is amended consistent with this Order.

## **LAST INJURIOUS EXPOSURE**

***Johnson v. Liberty Northwest Ins. Corp., 2009 MTWCC 20*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner Raymond Johnson petitioned the Court for occupational disease benefits arising out of and in the course of his employment with Stimson Lumber Company. Johnson has lived in Libby, Montana, since 1963. He worked at the lumber mill in Libby from 1963 to 2001. Stimson purchased the mill in 1993 and was the owner on Johnson's last day of work. The mill contained asbestos in several areas including the top and floor

of the big dryer and the pipe wrap surrounding steam pipes. In 2001, Johnson was diagnosed with asbestosis.

**Held:** Johnson suffers from an occupational disease as a result of his employment with Stimson Lumber Company. Johnson was exposed to copious amounts of asbestos during his employment at the mill from multiple sources – including his employment from 1993 through 2001, while the mill was owned by Stimson. The negative pressure environment created in the plywood plant further exacerbated Johnson’s asbestos exposure. Both of Johnson’s treating physicians diagnosed him with asbestosis. Johnson’s exposure to asbestos during the eight years he worked for Stimson was sufficient to cause his asbestos-related diseases. Johnson’s exposure to asbestos during the years he was employed by Stimson constituted his last injurious exposure to the hazard of his disease.

***Banco v. Liberty Northwest Insurance Corp., 2011 MTWCC 13*** (Order and Judgment on Stipulated Record) (*Appealed to Supreme Court – June 20, 2011; Affirmed – January 1, 2012*).

**Summary:** Petitioner worked part-time as a food server for Respondent’s insured and concurrently worked full-time as a cook for an employer insured under the federal workers’ compensation system. Petitioner left her employment at Respondent’s insured while continuing to work at her other job. Petitioner filed a workers’ compensation claim, alleging that she developed an occupational disease in her right shoulder. Respondent denied liability.

**Held:** Under the “last injurious exposure” rule as set forth in *In re Mitchell*, the employer who is liable for an occupational disease is the employer at which the claimant was last exposed to the working conditions of the same type and kind which gave rise to the occupational disease. In this case, Petitioner continued to be exposed to those working conditions at her other employment after she quit her job at Respondent’s insured. Therefore, Respondent is not liable for Petitioner’s occupational disease.

***Liberty Northwest v. Montana State Fund – In RE: Claim of Gary Mitchell, 2009 MT 386***

**Issue:** What constitutes a “last injurious exposure” under the 2005 version of the Montana Workers’ Compensation Act?

**Held:** The quantum of proof required under the “last injurious exposure” rule to establish liability for an OD claim is “potentially causal.”

## ***LOCKHART LIENS***

***Dildine v. Liberty Northwest Ins. Corp., 2008 MTWCC 14*** (Order Granting Petitioner’s Motion for Summary Judgment and Denying Respondent’s Cross-Motion for Summary Judgment) (*Appealed to the Montana Supreme Court - April 15, 2008; Affirmed – March 24, 2009*).

**Related Topics:** Jurisdiction.

**Summary:** Petitioner moved the Court for summary judgment on the issue of her attorney's entitlement to a 20% fee on medical benefits pursuant to a *Lockhart* lien. Respondent cross-motoned for summary judgment, arguing that Petitioner's attorney was not entitled to the *Lockhart* fee because the attorney's efforts were not the cause of its acceptance of liability. Respondent further argued that this Court lacked jurisdiction to decide the issue of *Lockhart* liens in light of Justice Nelson's concurring opinion to the Montana Supreme Court's ruling in *Pinnow v. Montana State Fund*.

**Held:** Petitioner's motion is granted. As recently reiterated by the Montana Supreme Court in its majority opinion in *Pinnow v. Montana State Fund*, this Court has jurisdiction to decide disputes concerning attorney fees. Petitioner's attorney is entitled to a *Lockhart* fee because the Court finds that his efforts led to Respondent's acceptance of Petitioner's claim.

## LUMP SUMS

***Miller v. Sears, 2005 MTWCC 54*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** The petitioner petitioned for a lump-sum conversion of his lifetime expectancy of permanent total disability benefits.

**Held:** Conversion of lifetime permanent total disability benefits to a lump sum is granted. The petitioner demonstrated financial need that relates to the necessities of life. The petitioner and his wife provide a home for themselves, two of their adult children, and his elderly, disabled mother. The petitioner and his family currently reside in a multilevel rental home that is difficult for both the petitioner and his mother to navigate because of the stairs. The petitioner and his wife demonstrated that a lump sum would enable them to build or buy and modify a home which would accommodate the petitioner's and his mother's disabilities. The petitioner, with the assistance of his wife, is competent to handle his financial affairs. The petitioner and his wife have thus far managed their financial affairs with limited resources and setbacks beyond their control. However, it is apparent from the testimony that the petitioner and his wife's ability to manage their resources is being heavily taxed by their need to borrow against the petitioner's wife's retirement plan and that their ability to continue to borrow against this retirement plan is nearly exhausted. Although the Court might not otherwise exercise jurisdiction over a dispute regarding the total conversion of permanent total disability benefits pursuant to section 39-71-741(2)(d), MCA (1989), the parties in this case have agreed that this Court may properly exercise jurisdiction over this dispute pursuant to section 39-71-2905, MCA (1989).

***Barnard v. Liberty Northwest, 2006 MTWCC 35*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – November 13, 2006; Affirmed – July 22, 2008*).

**Summary:** Petitioner petitioned for a lump-sum conversion of his permanent total disability benefits, testifying that he would use the money for a new mobile home, driveway improvements, a newer motor vehicle, and additional cattle. Respondent responded that Petitioner's request should not be granted because his lump sum exceeds the \$20,000 limit

permissible under § 39-71-741, MCA, or in the alternative, because Petitioner will not use the lump sum to obtain necessities of life.

**Held:** Section 39-71-741(1)(c), MCA, limits the Department of Labor and Industry to awarding lump-sum conversions in part to a total of \$20,000. However, it does not limit conversions in whole to that amount. Petitioner’s planned use for the proposed lump-sum conversion meets Petitioner’s necessities of life pursuant to § 39-71-741(1)(c), MCA. Furthermore, it is in his and his family’s best interests and is therefore granted.

***Sanchez v. Montana State Fund, 2007 MTWCC 25*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner petitioned for a lump-sum conversion of his permanent total disability benefits pursuant to § 39-71-741, MCA. Respondent argues that a lump-sum conversion is not in Petitioner’s best interests.

**Held:** Petitioner has not met the lump-sum criteria of § 39-71-741(1)(c), MCA. He has failed to demonstrate financial need and the Court is not persuaded that a lump-sum conversion is in his best interests.

***Benhart v. Liberty Northwest Ins. Co., 2008 MTWCC 6*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner petitioned the Court to order Respondent to convert his PTD benefits to a lump sum.

**Held:** Petitioner’s petition is denied. He has not demonstrated that he is entitled to a lump-sum conversion pursuant to § 39-71-741, MCA.

## MAJOR CONTRIBUTING CAUSE

***Faulkner v. Hartford Underwriters Ins. Co., 2007 MTWCC 15*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Last Injurious Exposure.

**Summary:** Faulkner petitioned the Court for payment of wages and medical benefits which he argues he is entitled to as a result of an occupational disease suffered while performing his duties as a janitor at National Electronics Warranty (“NEW”). Faulkner began working at NEW as maintenance worker on March 4, 2002, and his work in this position included sweeping, mopping, and scrubbing, and other activities involving lifting and working with his arms raised above shoulder level. Prior to his employment at NEW, Faulkner was employed by Big Sky Transfer & Storage (“Big Sky”), and filed a workers’ compensation claim on January 11, 2000, relating to a lifting injury to his neck and shoulder for which Montana State Fund accepted liability. After reaching MMI for the injury, Faulkner settled his claim with the

State Fund, leaving medical benefits open. He thereafter continued to treat with Dr. Peterson for his neck and shoulder pain. Beginning in March 2004, Faulkner began to experience increased right shoulder and neck pain, decreased range of motion, daily headaches, and numbness in his hands. His symptoms did not improve, and additional symptoms developed over time. On September 12, 2005, Dr. Peterson noted Faulkner's right shoulder and upper extremity symptoms had worsened and that the symptoms were an aggravation of his previous injury from January 11, 2000, and not a new injury. Dr. Peterson took Faulkner off work as of that date, and later opined in a letter to Faulkner's counsel that Faulkner's work activity at NEW "materially and substantially aggravated his pre-existing injury" of January 11, 2000, after Faulkner had reached MMI on August 4, 2000. Following an IME of Faulkner, Dr. Schumpert noted that Faulkner's status changed over the course of less than one year after he began working at NEW, as he had markedly reduced right shoulder range of motion as of October 2004. Dr. Schumpert also opined, on a more-likely-than-not basis, that Faulkner's work at NEW aggravated his pre-existing shoulder condition.

**Held:** Petitioner suffers from an occupational disease as a result of performing his duties as a janitor and is entitled to wage-loss and medical benefits.

Under the 2005 version of the Montana Workers' Compensation Act, an occupational disease is defined as "harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift." § 39-71-116(20)(a), MCA. An occupational disease is considered to have arisen out of employment if: (1) the occupational disease is established by objective medical findings; and (2) the events occurring on more than a single work day or work shift are the "major contributing cause" of the occupational disease in relation to other factors contributing to the occupational disease. § 39-71-407(a) and (b), MCA. Under the new statutory framework, "major contributing cause" means "a cause that is the leading cause contributing to the result when compared to all other contributing causes." § 39-71-407(13), MCA. "When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease." § 39-71-407(10), MCA.

Under the 2005 version of the Workers' Compensation Act, the Court does not need to determine whether Faulkner's OD is related to the January 2000 injury, or is a new distinct OD unrelated to the 2000 injury. The Court only needs to determine whether the events that occurred during Faulkner's employment at NEW were the "major contributing cause" of his OD in relation to other factors. Based on the trial testimony of Dr. Peterson, the medical evidence, and the evidence regarding Faulkner's work activities, the Court concludes Faulkner sustained an OD in the course and scope of his employment at NEW. Faulkner's employment activities at NEW were the "major contributing cause" of his OD in relation to other factors.

***Liberty Northwest Ins. Corp. v. Montana State Fund, In re: Mitchell, 2008 MTWCC 54***  
(Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - January 16, 2009; Affirmed - November 12, 2009*).

**Related Topics:** Last Injurious Exposure.

**Summary:** Mitchell suffers from a low-back condition as a result of his lifetime of employment in heavy-labor positions. He worked for State Fund’s insured in 2002 and his back condition began to worsen at that time, although he continued to work. Mitchell was employed by Liberty Northwest’s insured from August through October 2005. He filed separate claims with Liberty Northwest and State Fund for his low-back condition. Liberty Northwest argues that it is not liable for the claimant’s claim under the last injurious exposure rule. Liberty Northwest also argues that the WCA requires a claimant to prove that the “major contributing cause” of his OD is the employment where he was last injuriously exposed to the hazard of the disease.

**Held:** The plain meaning of § 39-71-407(9), MCA, contains no requirement that the “employment” which is the “major contributing cause” of a claimant’s occupational disease derive from a particular employer. The WCC concluded that Mitchell’s lifetime of heavy-labor employment was the “major contributing cause” of his low-back condition, and that he was last injuriously exposed to the hazard of his OD while he was employed by Liberty Northwest’s insured. Therefore, Liberty Northwest is liable for Mitchell’s low back condition.

***Grande v. Montana State Fund, 2011 MTWCC 15*** (Findings of Fact, Conclusions of Law, and Judgment) (*Appealed to Montana Supreme Court- August 22, 2011; Affirmed – March 20, 2012*).

**Summary:** Petitioner left his job as a truck driver due to arthritic condition in his hands and filed an occupational disease claim. Respondent denied Petitioner’s claim, arguing that the conditions were not caused by Petitioner’s employment and that aggravations of non-work-related conditions are not compensable as occupational diseases.

**Held:** Petitioner has proven that his job duties are the major contributing cause of his condition and he is therefore suffering from a compensable occupational disease. He has further proven that his occupational disease currently precludes him from returning to his time-of-injury employment. Petitioner is entitled to TTD benefits, reasonable medical benefits, and his costs.

## **MAXIMUM MEDICAL IMPROVEMENT**

***Copeland v. Montana State Fund, 2006 MTWCC 45*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Disability.

**Summary:** Three years after a head injury, Petitioner continues to exhibit symptoms and has not returned to work. Petitioner alleges he is not at MMI and that he has not received proper treatment for his industrial injury, including treatment for a preexisting depression that was exacerbated by his injury, and his TTD benefits should be reinstated. Respondent alleges that Petitioner is at MMI, has received an impairment rating, has been released to work at approved jobs, and is therefore not eligible for TTD benefits.

**Held:** Petitioner has not reached MMI and is entitled to reinstatement of his TTD benefits.

***Wilson v. UEF v. Elk Mountain Motor Sports, Inc., 2010 MTWCC 33*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Disability (PTD), Attorneys' Fees, Penalties

**Summary:** Petitioner suffered an industrial injury on January 8, 2004, while working for Third-Party Respondent. Third-Party Respondent was not enrolled in a workers' compensation insurance program at the time. Respondent/Third-Party Petitioner accepted the claim. Petitioner alleges he is permanently totally disabled and entitled to a penalty and attorney fees. Respondent/Third-Party Petitioner and Third-Party Respondent contend that Petitioner has not reached maximum medical healing and, therefore, is not permanently totally disabled. Petitioner, Respondent/Third-Party Petitioner and Third-Party Respondent ask this Court to determine: 1) whether Petitioner has reached maximum medical healing; 2) whether Petitioner is permanently totally disabled; 3) whether a preponderance of the objective medical findings supports entitlement to permanent total disability; 4) if Petitioner is not permanently totally disabled, whether he is temporarily totally disabled, permanently partially disabled, or otherwise disabled; 5) whether Third-Party Respondent is obligated to indemnify Respondent/Third-Party Petitioner for all benefits paid or payable; 6) whether Petitioner is entitled to a penalty and attorney fees; and 7) whether Third-Party Respondent's contentions are improper in light of this Court's ruling granting Respondent/Third-Party Petitioner's motion for partial summary judgment.

**Held:** Petitioner has reached maximum medical healing within the meaning of § 39-71-116(18), MCA. Petitioner is permanently totally disabled within the meaning of § 39-71-116(24), MCA. A preponderance of objective medical findings supports Petitioner's entitlement to permanent total disability. Issue 4 is moot, and Issues 5 and 7 were resolved by this Court's Order Granting Respondent/Third-Party Petitioner's motion for partial summary judgment. Petitioner is not entitled to a penalty or attorney fees.

***Sherwood v. Watkins & Shepard Trucking and Great West Casualty Co., 2011 MTWCC 4*** (Order Denying Respondent Watkins & Shepard Trucking's Motion for Reconsideration, Resolving Petitioner's Request for Amendment to Findings of Fact and Conclusions of Law, and Granting Petitioner's Application for Taxation of Costs).

**Summary:** Respondent moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, arguing that the Court erred in finding that Petitioner was not at MMI and concluding that Petitioner was therefore entitled to TTD benefits. Petitioner moved for amendment of the Court's findings of fact and conclusions of law, arguing that he is entitled to TTD benefits retroactively from an earlier date than the Court held. Petitioner further applied for taxation of his costs.

**Held:** Petitioner is not at MMI. The medical evidence demonstrates that Petitioner is currently unable to perform any job duties due to his medication regimen. He is

therefore entitled to TTD benefits and Respondent's motion for reconsideration is denied. Petitioner is entitled to TTD benefits retroactive to the date a physician opined he was unable to work. Petitioner's Application for Taxation of Costs is granted.

***Hale v. Liberty Mutual Middle Market, 2010 MTWCC 28*** (Findings of Fact, Conclusion of Law and Judgment).

**Related Topics:** Benefits

**Summary:** Petitioner suffered an injury to his left leg on January 2, 2006. He is currently off work and receiving temporary total disability benefits. Petitioner alleges that he is permanently totally disabled. He argues that his benefits should be converted to permanent total disability benefits and that it is in his best interest to receive those benefits in a lump sum. Petitioner further alleges that Respondent has unreasonably refused to convert his benefits and that he is entitled to his costs, attorney fees, and a penalty.

**Held:** Petitioner is not at maximum healing. Under § 39-71-116(25), MCA, a worker cannot be declared permanently totally disabled until after he reaches maximum healing. Therefore, Petitioner is not permanently totally disabled. Since this issue is dispositive of Petitioner's case, the Court does not reach the other issues presented.

***Newman v. Montana State Fund, 2011 MTWCC 12*** (Order Denying Petitioner's Motion for Partial Summary Judgment).

**Summary:** Petitioner moves for partial summary judgment on the issue of whether Respondent properly terminated her indemnity and medical benefits. Petitioner seeks judgment, as a matter of law that Respondent acted without medical or legal basis when it terminated her medical benefits and refused to reinstate her indemnity and medical benefits. Respondent argues that factual disputes exist concerning whether Petitioner had reached maximum medical improvement before it terminated her benefits and whether any continuing treatment is causally related to Petitioner's industrial injury.

**Held:** Material factual disputes regarding Petitioner's MMI status preclude summary ruling. Petitioner's motion is therefore denied.

## MEDIATION

***Howe v. Uninsured Employers' Fund, In re: Kurtz, 2005 MTWCC 59*** (Order Denying Motion To Dismiss).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Respondent, Uninsured Employers' Fund, sought to dismiss the Petition for

Appeal for failure to file a timely appeal to mediation. Respondent argued that § 39-71-520(1), MCA (2003), required Petitioner to file for mediation with the mediation unit within ninety days if Petitioner disputed Respondent's determination that he was the employer of the claimant. Although Petitioner did not complete the specific form used by the UEF to appeal a determination, he did send a letter addressed to "Labor & Industry" on January 20, 2004, which expressed his disagreement with Respondent's determination and stated unambiguously that he was not the Claimant's employer. The letter was received by Respondent on January 23, 2004. However, Respondent did not forward the letter to the mediation unit until after the ninety-day period to appeal had expired.

**Held:** The motion to dismiss is denied. Section 39-71-520(1), MCA (2003), states that a dispute concerning Uninsured Employers' Fund benefits must be appealed to mediation within ninety days. The statute does not specifically address in any way, however, the method by which an appeal is perfected. Petitioner, acting *pro sé*, notified Respondent by letter that he disputed its determination. This letter was addressed to the Department of Labor and Industry and was received by Respondent within the ninety-day period. Although Petitioner did not use the form provided by Respondent, his letter dated January 20, 2004, put Respondent on notice of Petitioner's disagreement and substantively complied with the requirement of § 39-71-520(1), MCA (2003), to appeal to mediation within ninety days.

***Auchenbach v. Uninsured Employers' Fund, 2006 MTWCC 13*** (Order Denying Respondent's Motion to Dismiss).

**Related Topics:** Equity (Estoppel & Waiver), Uninsured Employers' Fund.

**Summary:** Respondent Uninsured Employers' Fund filed a motion to dismiss based on lack of jurisdiction due to Petitioner's failure to file her Petition for Hearing with the Workers' Compensation Court within sixty days after the mailing of the Mediator's Report and Recommendation, as required under § 39-71-520(2), MCA (2003). The UEF, however, had failed to respond to the Mediator's Report and Recommendation within twenty-five days, as required under § 39-71-2411(6), MCA (2003). Moreover, Respondent failed to respond to the Recommendation within sixty days, leaving Petitioner in the dark regarding Respondent's position on the Recommendation and whether settlement had been achieved. Pursuant to § 39-71-520(2)(c), MCA (2003), Petitioner could not file a petition before this Court until there had been a failure to reach settlement through mediation. Until Respondent fulfilled its statutory obligation to either accept or reject the Mediator's Report and Recommendation, there was no failure to reach settlement.

**Held:** Respondent's motion to dismiss is denied. As a fundamental matter of equity, this Court cannot allow a party to sit on its hands while a time limitation runs on a *pro sé* petitioner while, at the same time, ignoring its own affirmative statutory duty to act. Respondent is equitably estopped from relying on § 39-71-520(2)(c), MCA (2003), because it failed to comply with § 39-71-2411(6), MCA (2003), by failing to respond to the Recommendation within twenty-five days. The elements of both equitable estoppel and estoppel by silence or acquiescence are satisfied in this case. Respondent cannot stay

silent in the face of a statute requiring it to respond, continue its silence after receiving a letter from the Mediation Unit requesting Respondent's response, and then rely on a time limitation set forth in a statute which precludes Petitioner from filing a petition with this Court prior to Respondent's response to the Recommendation.

***Wood v. Montana State Fund, 2007 MTWCC 53*** (Order Granting Petitioners' Motion to Amend Petition).

**Summary:** Petitioners move the Court to allow them to amend their petition after a deposition allegedly revealed new information regarding Respondent's adjusting of this claim. Respondent opposes the motion, arguing that the new contentions raise issues which have not been mediated.

**Held:** Petitioners' motion to amend is granted. Mont. R. Civ. P. 15(a) allows amendment of a petition to be freely given where justice so requires. Although Petitioners' amended petition adds new contentions, it does not raise new issues and therefore mediation is not required.

***Benton v. Uninsured Employers' Fund, 2008 MTWCC 23*** (Order Granting Respondent Uninsured Employers' Fund's Motion to Dismiss).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Respondent Uninsured Employers' Fund moves the Court to dismiss Petitioner's Petition for Hearing because the petition was not timely filed pursuant to § 39-71-520, MCA, which requires a petition for trial in this Court be filed within sixty days of the mailing of the mediator's report. Petitioner's response brief to the UEF's motion to dismiss challenging the constitutionality of § 39-71-520, MCA, was untimely filed and the UEF argues that Petitioner's constitutional challenge should not be considered.

**Held:** Because Petitioner's response brief was not timely filed pursuant to ARM 24.5.316, Petitioner's substantive argument that § 39-71-520, MCA, is unconstitutional will not be considered. Pursuant to § 39-71-520, MCA, a party must file a petition with this Court within sixty days of the mailing of the mediator's report if the parties fail to reach a settlement and the parties do not stipulate in writing to a longer time period. If a petition is not filed within sixty days, the Department's determination is final. In the present case, the mediator's report was mailed on October 29, 2007. Petitioner filed the Petition for Hearing on February 27, 2008. Petitioner's petition was filed several days late and therefore must be dismissed with prejudice.

***Emergency Preparedness Systems, LLC v. Scobie, 2008 MTWCC 44*** (Order Denying Respondent's Motion to Dismiss).

**Summary:** Respondent moved to dismiss Petitioner's petition arguing that Petitioner failed to timely request mediation of the Independent Contractor Central Unit's employment status determination as prescribed by § 39-71-415, MCA. The crux of Respondent's argument

is that Petitioner's September 12, 2007, letter – which unambiguously identified itself as an appeal of both the ICCU's Determination and the Wage and Hour Unit's Determination, and which went on for five pages to detail the manner in which Respondent disagreed with both Determinations – was not sufficient to constitute a request for mediation of the ICCU's Determination because Petitioner did not employ the precise verbiage necessary to request mediation and Petitioner did not address his letter to the correct individual at the Department of Labor and Industry. Respondent also argued that the petition should be dismissed because Petitioner failed to secure replacement counsel in a timely manner.

**Held:** Respondent's motion is denied. Petitioner's detailed letter satisfies the mediation request requirements set forth in § 39-71-415, MCA. Petitioner's letter clearly expressed his disagreement with the ICCU Determination and was timely submitted to the Department of Labor and Industry. To accept Respondent's argument would be to exalt form over substance – an argument that this Court rejected in *Howe v. UEF*. Regarding Respondent's argument that the petition should be dismissed for Petitioner's failure to secure replacement counsel in a timely manner, Respondent fails to cite to any authority in support of this argument. Accordingly, Respondent's argument on this ground is not well-taken.

***Schreckendgust v. Montana Schools Group Ins. Auth., 2009 MTWCC 23*** (Order Granting Respondent's Motion to Strike, Granting Respondent's Motion for Summary Judgment, and Denying Petitioner's Cross-Motion for Summary Judgment).

**Related Topics:** Statute of Limitations.

**Summary:** Montana Schools Group Insurance Authority moved for summary judgment on the grounds that Petitioner Judy Schreckendgust failed to file her claim in this Court within two years of MSGIA's denial of benefits, as required by § 39-71-2905, MCA. Schreckendgust contended that the parties agreed that she could seek treatment from her treating physician and MSGIA reneged on this agreement. Schreckendgust cross-motivated for summary judgment against MSGIA for "failing to uphold the agreement." In purported support of her contention that MSGIA had accepted liability for Schreckendgust to treat with her treating physician, Schreckendgust submitted the department mediator's report for the Court's consideration. MSGIA moved to strike the mediator's report and all references to the report pursuant to § 39-71-2410, MCA.

**Held:** MSGIA's motion to strike is granted. Section 39-71-2410, MCA, requires that, but for limited exceptions, all proceedings before the department mediator are confidential. This case does not fall within one of those exceptions. Regarding the cross-motions for summary judgment, § 39-71-2905, MCA, requires that a petition for hearing before the Workers' Compensation Judge be filed within two years after benefits are denied. MSGIA denied Schreckendgust's claim on May 18, 2005, and Schreckendgust did not file her petition in this Court until January 16, 2009, nearly three years and eight months after benefits were denied. Schreckendgust's claim is therefore time-barred pursuant to § 39-71-2905, MCA. Accordingly, MSGIA's motion for summary judgment is granted and Schreckendgust's cross-motion for summary judgment is denied.

***Emmons v. MHA Workers Compensation Reciprocal, 2009 MTWCC 10*** (Order Denying Petitioner’s Motion for Summary Judgment, and Respondent’s Cross-Motion for Summary Judgment, Granting Respondent’s Motion to Strike Petitioner’s Addendum to Her Summary Judgment Brief, and Granting Respondent’s Motion to Strike Petitioner’s Reply Brief).

**Related Topics:** Sanctions.

**Summary:** Petitioner moved for summary judgment. Respondent cross-motivated for summary judgment, alleging Petitioner failed to provide notice of her injury within thirty days, as required by § 39-71-603(1), MCA. Respondent further moved the Court to strike two of Petitioner’s pleadings related to the motions for summary judgment on the grounds that Petitioner’s pleadings contained inadmissible information regarding confidential mediation proceedings.

**Held:** Petitioner’s motion for summary judgment is denied because Petitioner failed to comply with the requirements of ARM 24.5.329(3). Irrespective of Petitioner’s failure to comply with this rule, it is readily apparent from the briefs that Petitioner’s claim is not appropriate for summary judgment because there are facts in dispute. Respondent’s cross-motion for summary judgment is denied because Petitioner timely provided notice to her employer of her alleged injury in compliance with § 39-71-603(1), MCA. Respondent’s motions to strike two of Petitioner’s pleadings are granted on the grounds that the substance of Petitioner’s pleadings attempted to place confidential mediation information before the Court which is specifically prohibited under § 39-71-2410, MCA. Petitioner has made multiple attempts to introduce information from the confidential mediation proceedings in contravention of § 39-71-2410, MCA. Petitioner is cautioned that any further attempts will result in an order to show cause why sanctions should not be imposed.

***Burke v. Roseburg Forest Products Co., 2009 MTWCC 32*** (Order Granting Respondent’s Motion to Dismiss).

**Summary:** Respondent moved to dismiss Petitioner’s petition based on Petitioner’s failure to complete the mediation process before filing her Petition for Hearing as required by § 39-71-2408(1), MCA and § 39-71-2905, MCA. Although the mediator had not issued her report prior to the filing of Petitioner’s petition, Petitioner argued that the Court should nevertheless exercise jurisdiction because the purposes of mediation had been served.

**Held:** Respondent’s motion is granted. The Court lacked jurisdiction over this matter prior to the completion of the statutorily-mandated mediation process. Although the Court might conceivably exercise jurisdiction now that the statutorily-mandated mediation process had been completed, albeit two months after the petition was filed, the case would be moving forward under a cloud of uncertainty as to whether jurisdiction could be retroactively restored. Although dismissing the petition and restarting the process is inconvenient at this juncture, it is much more impractical to proceed to trial with the specter of restarting the process after an appeal. The more prudent course of action is to dismiss the petition without prejudice.

## NOTICE OF INJURY

*Siebken v. Liberty Northwest Ins. Co., 2007 MTWCC 48* (Decision and Judgment) (*Appealed to the Montana Supreme Court - January 17, 2008; Affirmed - October 21, 2008*).

**Summary:** Petitioner was involved in a work-related physical altercation on December 11, 2004. He reported the incident to his supervisor the same day, but did not report any injury because he did not know he was injured. On May 26, 2006, he learned that he had a cervical condition which was likely caused by the altercation. Petitioner filed a claim for compensation on July 3, 2006. Respondent argues that it is not liable for Petitioner's condition because Petitioner did not report an accident and injury within 30 days as required by § 39-71-603, MCA.

**Held:** Petitioner failed to notify his employer within 30 days of when he learned that his work-related incident was the probable cause of his injury. His claim is therefore time-barred under § 39-71-603, MCA.

*Siebken v. Liberty Northwest Ins. Co., 2007 MTWCC 56* (Order Denying Petitioner's Motion for Reconsideration).

**Summary:** Petitioner asks the Court to reconsider its decision in this matter. It alleges that the Court erred in failing to take into account Montana Supreme Court precedent regarding what constitutes an unexpected traumatic incident or unusual strain. Respondent responds that the issue was not whether Petitioner suffered an unexpected traumatic incident or unusual strain, but whether he reported it in a timely manner. Respondent argues that the Court correctly determined that while Petitioner suffered an unexpected traumatic incident or unusual strain, Petitioner failed to report it to his employer within 30 days as required by § 39-71-603, MCA.

**Held:** While Petitioner may have suffered a strain which was unusual in its effect, he nonetheless did not report it within 30 days of learning that he had done so. His motion for reconsideration is denied.

*Fournier v. Montana Schools Group Insurance Authority, 2009 MTWCC 34* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner Jeannine Fournier petitioned the Court for a determination of whether she properly reported her accident within thirty days pursuant to § 39-71-603(1), MCA. Petitioner worked as a special education paraprofessional at Kalispell Middle School. She slipped and fell on some ice in the school parking lot and injured her ankle. The following day, Petitioner's ankle was examined by a physician and he diagnosed her with a "SPRAIN OF ANKLE DELTOID." Approximately three to four weeks after Petitioner's accident, she approached a teacher in the school hallway and inquired about what she needed to do to report her injury. The teacher advised Petitioner to proceed to the school office and obtain an accident report form. Petitioner obtained the accident report form from the school office, but did not complete and return the form within thirty days of her accident.

**Held:** Petitioner failed to properly report her injury to her employer pursuant to § 39-71-603(1), MCA. The Court concluded that Petitioner did not satisfy the notice requirement when she approached a teacher and inquired as to what she needed to do to report her injury because the teacher was not in a supervisory capacity relative to Petitioner at the time of her accident. The Court also concluded that Petitioner did not satisfy the notice requirement because she did not complete and return the school's accident report form within thirty days of her accident. Finally, the Court concluded that although the notice requirement may not have begun to run until after Petitioner sought medical care, she did so the day after her accident. The evidence established that a completed accident report form was not returned to the school office until thirty-four days after she sought medical care. Therefore, Petitioner's notice was untimely.

***Delong, Todd v. Montana State Fund, 2012 MTWCC 3*** (Findings of Fact, Conclusions of law and Judgment).

**Summary:** Petitioner contends he injured his back while lifting a motor at work. Although Petitioner's employer had no formal policy for reporting work-related injuries, Petitioner informed him that he had injured his back, that his pain was not resolving, and that he intended to seek medical treatment. Petitioner did not file a workers' compensation claim until more than 30 days after the incident. The employer denied any knowledge of Petitioner's industrial injury until getting a call about the report from Respondent. Respondent denied Petitioner's claim for failure to give timely notice to his employer, pursuant to § 39-71-603, MCA.

**Held:** Petitioner and two former coworkers testified that everyone at the business, including the employer, knew about Petitioner's industrial accident shortly after its occurrence. The employer's deposition testimony to the contrary was not credible. The Court concluded the employer had actual notice of Petitioner's industrial injury within 30 days of its occurrence.

***Robert Morse v. Liberty Northwest Ins. Corp., 2012 MTWCC 16*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** In 2009, Petitioner sought medical treatment for hip pain and learned that his condition was likely attributable to two industrial accidents which occurred in the fall or winter of 2006. Although no one has located a contemporaneous incident report, Petitioner contends that he reported both accidents to his employer's safety officer. The safety officer testified that he recalls filling out an incident report for Petitioner's first accident and recalls Petitioner reporting the second accident. Respondent denied Petitioner's claims on the grounds that he did not timely report his injury to his employer within 30 days, as required by § 39-71-603, MCA, and that he failed to comply with the claims filing time limitations found in § 39-71-601, MCA.

**Held:** Petitioner reported his industrial accidents to his employer, and the employer later mislaid the paperwork for one injury, and failed to prepare a report for the second.

The employer's actions can be imputed to Respondent, and Petitioner is entitled to an additional 24 months in which to file his claim under § 39-71-601, MCA. Petitioner's second industrial accident falls within the additional time limit and is therefore compensable.

## NOTICE OF TERMINATION OF BENEFITS – COLES REQUIREMENTS

*Schoeneman v. Liberty Ins. Corp., 2007 MTWCC 28* (Order Granting Petitioner’s Motion for Summary Judgment).

**Summary:** Petitioner moved for summary judgment, requesting reinstatement of his temporary total disability benefits because Respondent terminated them without 14 days’ written notice. Respondent argues that it was paying these benefits pursuant to § 39-71-608, MCA, and because Petitioner was not at maximum medical improvement when his treating physician released him to work in some capacity, § 39-71-609(2), MCA, allows an insurer to terminate temporary total disability benefits without notice.

**Held:** Petitioner’s motion for summary judgment is granted. Respondent bases its case on reading a single sentence of a statute out of the context of the remainder of the statute and the Workers’ Compensation Act as a whole. The Court is not persuaded by this interpretation.

*Dostal, Ginger v. Uninsured Employers Fund, 2012 MTWCC 5* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Respondent ceased paying Petitioner TTD benefits when it came to believe she had returned to work, and additionally because her treating physician had placed her at MMI and approved job analyses. Respondent refused to pay Petitioner her impairment award because it alleged it had overpaid TTD benefits. Petitioner alleges that she is entitled to ongoing TTD benefits and her impairment award and that Respondent has unreasonably withheld these payments, thus entitling her to attorney fees and a penalty award.

**Held:** Petitioner does not receive wages in any form for the occasional labor she performs for her ex-husband’s lawn care business. Therefore, she has not returned to work. The job analyses approved by Petitioner’s treating physician are not for jobs in Petitioner’s labor market and therefore Respondent did not comply with the Coles criteria prior to terminating Petitioner’s TTD benefits. Respondent has not overpaid Petitioner’s TTD benefits. Petitioner is entitled to reinstatement of her TTD benefits and payment of her impairment award. Respondent unreasonably withheld these payments. The Court will hear oral argument on the issue of whether Respondent can be ordered to pay Petitioner’s attorney fees and a penalty.

## PENALTIES

*Brown v. Hartford Ins. Co. of the Midwest, 2009 MTWCC 38* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Benefits, Burden of Proof.

**Summary:** Petitioner worked full-time cutting hair at a salon and began to experience pain and numbness in her hands and wrists. A PA-C diagnosed her with carpal tunnel syndrome and

requested referral to a physician. Respondent did not grant the referral until after it denied Petitioner's claim, citing a lack of causative evidence within the 30-day investigative period. Although the physician disagreed with the specific diagnosis of carpal tunnel syndrome, he concluded that Petitioner suffered from "an occupational disease related to overuse." Respondent again denied the claim, asserting that the physician's diagnosis was "ambiguous." Petitioner's employer then discontinued allowing her to work in a modified position to accommodate her restrictions, stating that it provided modified positions only for workers with accepted workers' compensation claims. Petitioner argues that she is entitled to acceptance of her claim, medical and indemnity benefits, and her costs, attorney fees, and a penalty for Respondent's unreasonable denial of her claim.

**Held:** Respondent is liable for Petitioner's occupational disease claim. Petitioner is entitled to medical and indemnity benefits. Respondent unreasonably denied Petitioner's claim and Petitioner is entitled to her attorney fees and a 20% penalty.

*Popenoe v. Liberty Northwest Ins. Corp., 2006 MTWCC 37* (Order Granting Petitioner's Motion for Summary Judgment) (*Appealed to Supreme Court - December 15, 2006; Appeal Dismissed, Case Remanded to WCC - February 7, 2007; Order Vacated and Withdrawn Pursuant to Stipulation of Counsel and Order and Judgment of Court - February 8, 2007*).

**Summary:** Petitioner moved for summary judgment after Respondent denied his claim for workers' compensation benefits. Respondent filed a cross-motion for summary judgment. Petitioner broke his ankle when he fell in his employer's parking lot while removing his bicycle from the back of a friend's truck approximately five minutes before the start of his shift. Petitioner claims that his injury is compensable under the "premises rule," while Respondent argues that Petitioner's injury is not compensable because it falls under the "going and coming" rule, now codified by § 39-71-407, MCA, and because Petitioner's actions at the time of his injury were not within the scope of his employment.

**Held:** Summary judgment is granted in favor of Petitioner. Montana case law has established that after an employee has arrived at his employer's premises and he is no longer engaged in traveling to or from the site of his employment, an injury suffered by the employee is compensable under the "premises rule." Petitioner is entitled to attorney fees and a penalty because, in light of the applicable statutes and case law, Respondent's denial of benefits was unreasonable.

*Porter v. Liberty Northwest Ins. Corp., 2007 MTWCC 42* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner injured his back in an industrial accident for which Respondent accepted liability. Petitioner sought chiropractic treatment and subsequently alleged that the treatment aggravated a preexisting cervical condition. Petitioner ceased to treat with the chiropractor and began to treat with a physician who had previously treated his cervical condition without Respondent's approval to change treating physicians. Months after he last treated Petitioner, the chiropractor declared him to be at MMI and released him to his time-of-injury job without restriction. The chiropractor withdrew that opinion when he

learned Petitioner had treated with other doctors. Prior to filing this lawsuit, Petitioner's counsel requested a complete copy of Respondent's claims file and Respondent provided only certain material until compelled to remit the remainder pursuant to subpoena. Petitioner moved this Court to adopt guidelines to compel insurers to turn over claims files upon request. Petitioner further alleged that Respondent's adjusting of his claim was unreasonable.

**Held:** Petitioner failed to prove that the chiropractic treatment aggravated his preexisting cervical condition. Except for the chiropractor's withdrawn opinion, no doctor has found Petitioner to be at MMI and he is therefore entitled to TTD benefits retroactive to the date of termination. Respondent's refusal to reinstate TTD benefits in light of the lack of a doctor's opinion that Petitioner was at MMI or released to return to work is unreasonable and Petitioner is therefore entitled to a penalty. Respondent's adjustment of this claim, taken as a whole, was likewise unreasonable and Petitioner is entitled to his attorney fees. This Court has no jurisdiction to set forth the claims file guidelines Petitioner desires because it does not have jurisdiction over a claim until a petition has been filed.

***Driggers v. Liberty Northwest Ins. Corp., 2007 MTWCC 60*** (Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Motion for Summary Judgment) (*Appealed to Montana Supreme Court – January 28, 2008; Appeal Dismissed – March 14, 2008*).

**Summary:** Petitioner moved this Court for summary judgment, arguing that he was injured in the course and scope of his employment because he was injured while driving to work in a vehicle furnished by his employer and for which the employer paid for gas, oil, maintenance, and insurance. Respondent opposed the motion and cross-motivated for summary judgment, contending that Petitioner failed to satisfy both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA. Petitioner further requested an award of attorney fees, costs, and a penalty.

**Held:** Petitioner's motion for summary judgment is granted and Respondent's cross-motion for summary judgment is denied. Respondent is correct that both parts of the two-part test set forth at § 39-71-407(3)(a)(i), MCA, must be satisfied for Petitioner's injury to be compensable. Petitioner satisfies the first part of the test because he was injured while driving a vehicle furnished by his employer. Petitioner satisfies the second part of the test, that the travel was necessitated by and on behalf of the employer as an integral part or condition of his employment, based upon the well-established case law in Montana regarding the exceptions to the going and coming rule. This Court fails to appreciate any notable distinctions between the present case and the cases of *McMillen*, *Ellingson*, and *Gordon*, which establish that an employee is usually entitled to compensation when injured during travel to or from his employment where he receives a specific allowance to get to and from his job. To the extent that there is any distinction between the present case and the Montana Supreme Court's decisions in *McMillen*, *Ellingson*, and *Gordon*, it may be only that the incident in this case is even more squarely within the scope of the exception to the going and coming rule. Therefore, the Court also finds Respondent's denial of Petitioner's claim unreasonable and he is entitled to attorney fees, costs, and a penalty.

***Quick v. Montana State Fund, 2008 MTWCC 27*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court - July 1, 2008; Cross-Appeal Filed - July 15, 2008; Affirmed - May 13, 2009; 2009 MT 162*).

**Related Topics:** Benefits (Domiciliary Care).

**Summary:** Petitioner petitioned the Court for retroactive and future domiciliary care benefits, a higher rate of pay for domiciliary care provided by Petitioner's wife, Dolly, a 20% penalty, attorney fees, and costs. Petitioner argued that Respondent was placed on notice that Petitioner required domiciliary care at the time of his 1984 accident, and that Dolly has been providing the care since then. Respondent argued that it did not have notice that Petitioner needed domiciliary care until February 1, 2007, the first day a medical opinion was received by it stating that domiciliary care was warranted. Prior to trial, Respondent conceded that Petitioner required 24-hour domiciliary care. Respondent began paying a rate of \$7.50 per hour to Dolly, effective February 1, 2007.

**Held:** Petitioner is not entitled to retroactive domiciliary care prior to February 1, 2007, because Respondent was not put on notice that domiciliary care was warranted until this date. Significantly, Petitioner's attorney in 2005 stated in a letter to Respondent that a claim for domiciliary care benefits had never been made. Respondent's rate of \$7.50 per hour is unreasonable. The evidence establishes that similar rates were paid for domiciliary care not provided by a person with RN skills in the late 1980s, and in the present case, the evidence establishes that Petitioner requires his care to be provided by a person with RN skills. The Court finds that, based upon the testimony of a qualified professional, \$20.00 per hour is a reasonable rate of pay for Dolly because she is an RN. Further, the Court finds that Petitioner is entitled to a 20% penalty because Respondent's rate is an unreasonable rate.

***Narum v. Liberty Northwest Ins. Corp., 2008 MTWCC 30*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Montana Supreme Court - July 1, 2008; Affirmed – April 14, 2009*).

**Related Topics:** Attorneys' fees.

**Summary:** In March 2004, Petitioner and Respondent settled Petitioner's claim for a hip condition with Respondent accepting liability and leaving medical benefits reserved. In December 2006, Respondent ceased paying for Petitioner's medical treatment for his hip, and further refused to pay for hip replacement surgery, stating that it did not believe Petitioner's need for a hip replacement was caused by his industrial accident.

**Held:** Respondent cannot accept liability for a hip condition and settle a claim with medical benefits reserved and then later simply change its mind and refuse to pay benefits. Petitioner is entitled to payment of his medical benefits for treatment of his left hip, and is further entitled to his costs, attorney fees, and a penalty for Respondent's unreasonable refusal to pay benefits which were agreed to as part of the settlement of Petitioner's claim.

***Montana State Fund v. Simms, 2008 MTWCC 39*** (Order Granting Petitioner’s Motion for Sanctions).

**Summary:** Petitioner moved for sanctions against Respondent’s former counsel Geoffrey C. Angel pursuant to §§ 39-71-2901, -2914, MCA, after Angel entered a Notice of Conflict and Motion to Withdraw from his representation days before multiple depositions were scheduled to be taken. In his Notice of Conflict and Motion to Withdraw, Angel alleged that “newly discovered information” led him to recognize a potential conflict in the matter which necessitated his withdrawal from the case. In his response to Petitioner’s motion for sanctions, however, Angel asserted that it was actually the denial of his motion to dismiss and the failure of mediation to resolve the case that led him to conclude he should withdraw his representation. Finally, at a hearing on these issues ordered by the Court, Angel claimed that he had recognized the potential conflict from the time the Petition for Declaratory Ruling was filed, but that what actually triggered his motion to withdraw was learning that Petitioner was contacting witnesses for a potential criminal fraud investigation. Angel asserted that he did not provide this as a basis for withdrawing in any of his previous pleadings because he believed it might be privileged information.

**Held:** Angel violated § 39-71-2914, MCA, causing unnecessary delay and needless expense on Petitioner’s part. Not only did Angel fail to withdraw promptly when it became evident that withdrawal would be necessary, but he also continued to take action in this case which caused Petitioner to expend time and money for depositions which then had to be cancelled because of his withdrawal. Sanctions are ordered.

***Skiff v. Montana State Fund, 2009 MTWCC 8*** (Findings of Fact, Conclusions of Law and Judgment) (*Notice of Appeal filed by Petitioner - April 3, 2009; Appeal and Cross-Appeal Dismissed with Prejudice by Stipulation of Counsel – July 20, 2009*).

**Summary:** Respondent accepted liability for Petitioner’s industrial accident which caused Petitioner’s paraplegia. Respondent currently pays Petitioner’s wife \$7.50 per hour for .75 hours of daily domiciliary care. Respondent converted Petitioner’s benefits after Petitioner informed Respondent that he disagreed with Respondent’s vocational rehabilitation proposal. Petitioner argues that he is entitled to 2.8 hours of daily domiciliary care at a rate of either \$9.84 or \$18.88 per hour. Petitioner further argues that Respondent’s vocational proposal was unreasonable, that Respondent unreasonably converted his benefits, and that Respondent has been unreasonable in its adjustment of Petitioner’s claim, and therefore the Court should award Petitioner his costs, attorney fees, and a penalty.

**Held:** Petitioner is entitled to have his wife provide .5 to 1 hour of daily domiciliary care at an hourly rate of \$7.50 per hour until June 22, 2007, and \$9.84 thereafter. Regarding the reasonableness of Respondent’s vocational rehabilitation plan, after Petitioner rejected Respondent’s initial proposal, Respondent requested Petitioner’s input in developing an alternative plan and Petitioner failed to respond to Respondent’s request. The Court therefore finds that Respondent has not failed to offer a reasonable vocational plan.

Respondent properly converted Petitioner's benefits. Respondent did not act unreasonably and therefore Petitioner is not entitled to attorney fees or a penalty.

***Briese v. Ace American Ins. Co., 2009 MTWCC 5*** (Order Granting in Part and Denying In Part Respondent's Motion for Summary Judgment, Denying Petitioner's Cross-Motion for Summary Judgment, and Denying Respondent's Request for Sanctions).

**Related Topics:** Sanctions, Wages.

**Summary:** Respondent moved this Court for summary judgment and also requested sanctions against Petitioner and Petitioner's counsel. Petitioner cross-motivated for summary judgment. Petitioner petitioned this Court for an increase in his average weekly wage calculation and for a 20% penalty on unpaid *Lockhart* attorney fees. Petitioner argues that vacation pay accrued during the four pay periods prior to his injury and paid post-injury should be included in his average weekly wage calculation. Petitioner further argues that the funds he withdrew from his company-sponsored 401(k) account should be utilized in his wage calculation. Respondent contends that accrued vacation paid after the date of injury and monies withdrawn from a 401(k) account are both excluded from the definition of wages pursuant to § 39-71-123, MCA (2003). Respondent also contends that Petitioner is not entitled to a 20% penalty on his *Lockhart* fees pursuant to § 39-71-2907, MCA. Respondent requests the Court to sanction Petitioner and Petitioner's counsel for their allegedly frivolous and meritless claims.

**Held:** Respondent's motion for summary judgment on Petitioner's entitlement to an increase in his average weekly wage calculation is granted. Respondent's motion for summary judgment regarding the 20% penalty on a *Lockhart* lien is denied. Petitioner's cross-motion for summary judgment on the constitutionality of § 39-71-123, MCA, is denied. Respondent's request for sanctions is also denied. Vacation pay accrued pre-injury but paid post-injury and employer contributions to a pension plan are excluded from the definition of wages when all parts of § 39-71-123, MCA, are read as a whole. Petitioner may seek a 20% penalty on a *Lockhart* lien because the *Lockhart* lien represents a portion of the "full amount of benefits due" Petitioner. Section 39-71-123, MCA, does not violate Petitioner's right to equal or due process. The Court does not find that Petitioner or his attorney have acted in such a way as to warrant sanctions. Even though I do not find some of Petitioner's arguments persuasive, I do not find that the arguments were advanced in bad faith or for any improper purpose.

***Long v. New Hampshire Ins. Co., 2009 MTWCC 14*** (Findings of Fact, Conclusions of Law and Judgment) (*Judgment Vacated and Withdrawn Pursuant to Stipulation of Parties*).

**Summary:** Although he remained off work from his time-of-injury employment, Petitioner returned to work at his concurrent employment as a car salesman. He informed the claims adjuster assigned to his case that he was returning to his concurrent employment, and the adjuster consented to Petitioner's continued receipt of biweekly benefits while working as a car salesman. Petitioner's claim was then transferred to another claims adjuster, who denied that Petitioner had received consent to receive benefits while working. She terminated Petitioner's benefits and

demanded repayment of the benefits he had received. Petitioner requested the adjuster notes from his claim, believing that the notes would substantiate his claim that he had consent to return to his concurrent employment. The new adjuster refused to provide them and informed Petitioner he would have to petition this Court to receive them. Petitioner then petitioned this Court, arguing that he is entitled to ongoing benefits and alleging that Respondent was unreasonable in its adjustment of his claim. Respondent moved to strike Petitioner's spreadsheet which was attached to his response brief regarding waiver defense.

**Held:** The adjuster's notes which authorized Petitioner to receive temporary total disability (TTD) benefits after he had returned to work at his alternate employment constitutes written consent. Respondent acted unreasonably in its adjustment of Petitioner's claim by attempting to conceal the existence of the adjuster's note which authorized Petitioner's TTD benefits, by threatening Petitioner with legal action if he failed to return benefits he was rightfully paid, and by failing to maintain its claims file in accordance with § 39-71-107(3),MCA. Petitioner is entitled to ongoing and back-owing TTD benefits, his costs, attorney fees, and a 20% penalty. Although not identical, the spreadsheet attached to Petitioner's response brief regarding waiver defense was substantially similar to the exhibit which was withdrawn at trial and was not probative of the legal issue under consideration. Respondent's motion to strike is granted.

## PHYSICIANS

*Montana State Fund v. Michael H. Pardis, D.C., 2006 MTWCC 21* (Decision and Judgment).

**Summary:** Insurer appealed ruling by hearing officer for the Department of Labor and Industry which held that insurer was liable for payment to chiropractor for treatments provided to four patients even though those treatments far exceeded statistical averages presented by insurer's experts. The insurer did not obtain independent medical examinations of the patients and therefore could not prove the patients had reached maximum medical improvement prior to the cessation of treatment. Furthermore, as regards one of the four patients, the insurer did not have the authority to direct the patient to obtain treatment from another physician.

**Held:** The Final Agency Decisions are affirmed.

*Alberts v. Transportation. Ins. Co., 2006 MTWCC 34* (Order Granting Petitioner's Motion to Allow Medical Treatment, Granting Respondent's Motion to Preserve Evidence, and Denying Petitioner's Motion for Interim Benefits Pursuant to § 39-71-610, MCA).

**Related Topics:** Independent Medical Examinations.

**Summary:** Petitioner's treating physician diagnosed her with Thoracic Outlet Syndrome (TOS) and opined it is more likely than not a work-related condition. Respondent has refused to authorize surgery to alleviate the condition because three other doctors have disagreed with the diagnosis. Petitioner moved this Court for an order allowing her to obtain medical treatment for her TOS. Respondent objected, but requested that if the

Court grants Petitioner's motion, that Respondent be allowed to have a physician observe the surgery. Petitioner further moved for interim benefits pursuant to § 39-71-610, MCA.

**Held:** Petitioner's motion to allow medical treatment is granted. The opinion of a treating physician is entitled to greater weight, and the diagnosis of TOS was reached with reasonable medical judgment on the part of Petitioner's treating physician. Respondent's motion to allow observation of the surgery is granted. Petitioner's motion for interim benefits pursuant to § 39-71-610, MCA, is denied because Petitioner has not demonstrated that she is entitled to them.

***Mack v. Transp. Ins. Co., 2007 MTWCC 16*** (Findings of Fact, Conclusions of Law, and Judgment).

**Summary:** Petitioner petitioned the Court for an increase in his impairment award based on the opinion of his treating physician.

**Held:** Petitioner is entitled to an increased impairment award.

## PLEADINGS

***Lanz v. Liberty Northwest Ins. Corp., 2006 MTWCC 2*** (Order Denying Motion for Reconsideration).

**Summary:** Following this Court's Order dismissing Bozeman Deaconess Health Services, Petitioner filed a motion for rehearing.

**Held:** The motion for reconsideration is denied. ARM 24.5.337 states that a motion for reconsideration "shall" be filed within twenty days from service of the Order for which reconsideration is sought. In this case, Petitioner's motion was filed eleven days after the time by which her motion was required to be filed.

***Shell v. Valor Ins. Co. and Fremont/Western Guar. Fund and Montana State Fund, 2006 MTWCC 12*** (Order Granting Leave to File Amended Petition).

**Summary:** Petitioner Nita Marlene Shell moved the Court for leave to file an amended petition, asserting that she was within the deadline set for amending pleadings from this Court's scheduling order, and further arguing that she is entitled to amend her pleading under Mont. R. Civ. P. 15(a). Respondent Valor Insurance Company filed a pleading captioned Response to Motion; however, Respondent did not substantively address the merits of Petitioner's motion, but rather raised arguments regarding the substance of Petitioner's petition.

**Held:** Petitioner's motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. Furthermore, failure of the adverse party to timely file an answer brief may be deemed an admission that the motion

is well taken. Merely captioning a document as a "Response to Motion" but failing to substantively address the merits of that motion within the body of the brief is insufficient to constitute substantive opposition to that motion. Petitioner's motion is granted.

***Kratovil v. Liberty Northwest Ins. Corp., 2007 MTWCC 38*** (Order Denying Respondent's Motion for Reconsideration) (*Appealed to Supreme Court September 25, 2007- Affirmed and Remanded for Further Proceedings – December 29, 2008*).

**Summary:** Respondent asks the Court to reconsider its decision in this matter because it alleges that it raised the issue of Petitioner's alleged failure to comply with the one-year claim filing period, and that this Court did not address Respondent's argument when deciding this case. Petitioner responds that Respondent's motion should be denied because Respondent never pled a statute of limitations affirmative defense.

**Held:** Pursuant to ARM 24.5.302(1)(a), the Court will not consider a statute of limitations defense unless it is listed in the contentions of the Response to Petition for Hearing, and Respondent did not do so in this case. Moreover, Respondent failed to set forth a statute of limitations defense in the Pretrial Order, which supersedes all pleadings. Therefore, Respondent's motion for reconsideration on the grounds that Petitioner allegedly failed to comply with the one-year claim filing period is denied.

***Woodv. Montana State Fund, 2007 MTWCC 53*** (Order Granting Petitioners' Motion to Amend Petition).

**Summary:** Petitioners move the Court to allow them to amend their petition after a deposition allegedly revealed new information regarding Respondent's adjusting of this claim. Respondent opposes the motion, arguing that the new contentions raise issues which have not been mediated.

**Held:** Petitioners' motion to amend is granted. Mont. R. Civ. P. 15(a) allows amendment of a petition to be freely given where justice so requires. Although Petitioners' amended petition adds new contentions, it does not raise new issues and therefore mediation is not required.

***Stokes v. Liberty Mutual, 2009 MTWCC 21*** (Order Denying Respondent's Motion to Dismiss).

**Summary:** Liberty moved to dismiss Stokes' petition, alleging that Stokes failed to state a claim for which relief could be granted. Stokes responded that Liberty has not paid medical benefits to which he is entitled under the settlement, and further discussed his dissatisfaction with the settlement, including allegations of mutual mistake of fact.

**Held:** In his petition, Stokes asked the Court to order Liberty to pay for medical expenses that he believes are related to his industrial injury, and further requested that his settlement be reopened "due to ongoing disability." His response to Liberty's motion further expounds upon these prayers for relief. While not perfectly pled, Stokes' petition states a claim for which relief could be granted. Liberty's motion is therefore denied.

***Keller v. Liberty Northwest, Inc., 2009 MTWCC 25***(Order Granting Leave to File Amended Response to Petition for Hearing).

**Summary:** Respondent Liberty Northwest, Incorporated, moved to amend its response to Petitioner Kimberly M. Keller’s Petition for Hearing. Liberty’s amendment would include a contention that Keller’s request to reopen her settlement is barred by the two-year statute of limitations found in § 27-2-203, MCA. Keller opposes Liberty’s motion on the grounds that the amendment Liberty seeks would be futile because the two-year statute of limitations had not run.

**Held:** Liberty’s motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. In this case, Liberty sought to amend its response only a day after it had timely filed its response to Keller’s petition. Although Keller characterizes Liberty’s proposed statute of limitations defense as “nonviable,” that is not readily apparent from the pleadings. Liberty should be allowed to pursue discovery on this matter and determine whether the defense is viable.

***Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp., 2010 MTWCC 26*** (Order Granting Petitioners’ Motion to Amend Petition for Hearing).

**Related Topics:** Attorneys’ Fees

**Summary:** Petitioners ask the Court for leave to amend their Petition for Hearing to include claims for attorney fees and penalties, alleging that the insurers have failed to identify and pay benefits owing to claimants whose entitlement to those benefits are undisputed.

**Held:** Petitioners’ motion to amend is granted. Leave to amend is freely granted where justice so requires. Petitioners filed their motion to amend in accordance with the deadlines set by this Court.

***Ivie v. MUS Self-Funded Workers’ Compensation Program, 2010 MTWCC 15*** (Order Granting Respondent’s Motion to Strike and Correct Heading).

**Related Topics:** Procedure

**Summary:** Petitioner Michael A. Ivie filed a petition in which he identified the Respondents as Intermountain Claims, Inc. and Montana University System Workers’ Compensation Program. Montana University System Workers’ Compensation Program moved to strike Intermountain from the caption and to correct the heading to identify it by its correct name, MUS Self-Funded Workers’ Compensation Program. Ivie does not oppose the motion to correct the caption but does oppose the motion to strike Intermountain from the caption. Ivie argues that Intermountain should remain a party to the action because it was responsible for adjusting Ivie’s claim.

**Held:** MUS’s motions are granted. Intermountain is a third-party claims administrator

MUS contracted to adjust Ivie's claim. MUS is the insurer. Under the Montana Workers' Compensation Act, any potential liability for benefits, penalty, and attorney fees lies with MUS as the insurer. Although the Court may be able to exercise jurisdiction over Intermountain as a respondent in this case, Ivie has presented no reason why the Court should exercise such jurisdiction.

## PROCEDURE

*Fleming v. International Paper Co., and Liberty Northwest Ins. Corp., 2005 MTWCC 57*(Order Denying the Filing of a Reply Brief and Reconsideration of Order Dismissing International Paper Company) (*Appealed to Supreme Court – December 27, 2005; Reversed and Remanded –September 23, 2008*).

**Summary:** The petitioner alleges he suffers from asbestos-related lung disease as a result of his employment at a Libby, Montana, lumber mill from 1960 to May 28, 1998. The mill was owned by Champion International Company until November 1, 1993. It was thereafter owned by Stimson Lumber Company, which is insured by Liberty Northwest Insurance Corporation. Upon its motion, this Court previously dismissed International Paper Company pursuant to § 39-72-403, MCA (2003). Liberty Northwest's motion to dismiss was denied. From the Court's order dismissing International Paper, Petitioner sought reconsideration. This motion was denied on August 17, 2005. Petitioner then filed a second motion for reconsideration of this Court's Order denying Petitioner's first motion for reconsideration. With respect to Petitioner's second motion for reconsideration, he also moves the Court for leave to file a reply brief.

**Held:** Petitioner's motion for leave to file a reply brief is denied. ARM 24.5.337 provides only for the filing of an initial brief in support of a motion for reconsideration and, upon receipt of a response or the expiration of the time for filing a response, the motion is deemed submitted. The rule does not allow for the filing of a reply brief in support of a motion for reconsideration and the Court declines to read such a provision into the rule. Being fully briefed, Petitioner's motion for reconsideration is deemed submitted and is denied. Although ARM 24.5.337(1) allows for reconsideration of *any* order or decision of the Workers' Compensation Court, which would include an order denying a motion for reconsideration, the interests of judicial economy and finality mandate that the Court will entertain motions for "re-reconsideration" only under compelling circumstances. The Court finds no such circumstances in the present case. To the extent that Petitioner raises a new argument which was not raised in either his response to International Paper's motion to dismiss, by way of Petitioner's own motion before International Paper was dismissed from this suit, or in Petitioner's first motion for reconsideration, the Court does not reach the merits of this argument because it is being raised for the first time in Petitioner's second motion for reconsideration. Petitioner has offered no compelling reason why this argument was not raised before a second motion for reconsideration. Absent such a compelling reason, the Court will not consider an issue that has not been raised previously despite ample opportunity to do so.

***Thompson v. State of Montana, 2006 MTWCC 4*** (Order Granting Leave to Respond to Respondent's Request to Take Judicial Notice).

**Summary:** Respondent, State of Montana, requested the Court to take judicial notice of legal arguments raised in another case pending before this Court. Petitioners requested leave to respond to those matters which are the subject of judicial notice and the State objects to Petitioners' request.

**Held:** Leave to respond is granted. Pursuant to Rule 202(e), Mont. R. Evid., when a party requests the Court to take judicial notice of law, another party to the action is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the law noticed.

***Satterlee v. Lumberman's Mut. Cas. Co., 2006 MTWCC 8*** (Order Granting Respondents' Motions to Strike).

**Summary:** Respondents, Montana State Fund and Lumberman's Mutual Casualty Company, filed motions to strike a reply brief and affidavit filed by Petitioners in support of a motion for reconsideration.

**Held:** Respondents' motions to strike are granted. ARM 24.5.337 provides only for the filing of an initial brief in support of a motion for reconsideration and, upon receipt of a response or the expiration of the time for filing a response, the motion is deemed submitted.

***Lapier v. Montana State Fund and Associated Loggers Exchange, Third-Party Respondent, 2006 MTWCC 25*** (Order Granting Motion to Join Third-Party Respondent).

**Summary:** Respondent moved to join another insurer as a third-party respondent because Petitioner worked for an employer insured by the proposed third party, Associated Loggers Exchange (ALE), after Petitioner worked for Respondent's insured. Petitioner has filed an occupational disease claim. Respondent alleges that ALE is liable for Petitioner's occupational disease pursuant to § 39-72-303(1), MCA (2003) – the last injurious exposure rule. Petitioner objects to the joining of the third party as untimely. ALE objects on the grounds that Petitioner's claim against it, if any, would be barred by the statute of limitations. Alternatively, ALE argues that it could not be subject to the last injurious exposure rule because Petitioner did not reach maximum medical improvement before working for ALE's insured.

**Held:** While the proposed third-party respondent may have valid defenses in this case, those defenses cannot be resolved in a motion to join, but must be decided on their merits. Furthermore, the alleged un-timeliness of Respondent's motion to join was caused by Petitioner's delayed response to Respondent's discovery request. Motion to join is granted.

***Satterlee v. Lumberman's Mut. Cas. Co., 2006 MTWCC 29*** (Order Granting Petitioners' Motion for Reconsideration, Continuing Respondents' Cross-Motion for Summary Judgment, and Granting Petitioners Leave to File a Motion and Brief Pursuant to Mont. R. Civ. P. 56(F)).

**Summary:** This Court erroneously certified the Order denying Petitioners' motion for partial summary judgment as final for purposes of appeal. Petitioners filed a motion for reconsideration asking the Court to remove final certification of the Order. In this same motion, Petitioners also request leave to conduct additional discovery before a final Order is entered.

**Held:** Petitioners' motion for reconsideration is granted to the extent that final certification is removed from the Order denying Petitioners' motion for partial summary judgment. The Court prematurely certified the Order as final in light of the fact that the Order was a denial of Petitioners' motion for summary judgment. Since the denial of Petitioners' motion did not constitute a final judgment, the Court was required to justify its certification pursuant to Rule 54(b), Mont. R. Civ. P. Also pending before this Court is a cross-motion for summary judgment by Respondent Montana State Fund. Before any final Order is entered in this matter, however, Petitioners request leave to conduct additional discovery. In their motion, Petitioners do not specify the nature or subject matter of the discovery they are seeking although the Court can infer it would pertain to the financial evidence adduced by Respondents. With respect to this request, the Court will temporarily reserve ruling on State Fund's motion for summary judgment and will entertain a motion, pursuant to Rule 56(f), Mont. R. Civ. P., in which Petitioners shall state specifically: (1) the discovery they are seeking; and (2) how the proposed discovery could preclude summary judgment for Respondents.

*Satterlee v. Lumberman's Mut. Cas. Co., 2006 MTWCC 36* (Order Denying Petitioners' Motion to Allow Discovery and Granting Respondents' Cross-Motion for Partial Summary Judgment) (*Appealed to Supreme Court – December 1, 2006; Appeal Dismissed Without Prejudice Re: Rule 54(b) Certification – December 11, 2007; Re-Appealed to Montana Supreme Court - July 1, 2008; Affirmed - 2009 MT 368*).

**Summary:** In its July 12, 2006, Order, this Court granted Petitioners leave to file a motion and brief pursuant to Mont. R. Civ. P. 56(f) to state specifically: (1) the discovery they are seeking; and (2) how the proposed discovery could preclude summary judgment for Respondents. Additionally, the Court continued Respondents' cross-motion for partial summary judgment.

**Held:** Petitioners' motion for an order allowing discovery is denied. Respondents' cross-motion for partial summary judgment is granted.

*Cardwell v. Uninsured Employers' Fund, 2007 MTWCC 31* (Order On Costs).

**Summary:** Petitioner filed an application for costs twelve days after this Court's entry of Findings of Fact, Conclusions of Law and Judgment. Respondent objected upon the grounds that Petitioner's application was untimely pursuant to ARM 24.5.342(1).

**Held:** ARM 24.5.303(3) states that three days shall be added to the prescribed period of time whenever service of a notice or other paper is accomplished by mail. Accordingly,

Petitioner had thirteen days from this Court's entry of judgment within which to file his application for costs. Therefore, the application, which was filed twelve days after the Court's entry of Findings of Fact, Conclusions of Law and Judgment was timely.

***Benton v. Uninsured Employers' Fund et al., 2008 MTWCC 40*** (Order Granting Petitioner's Motion for Reconsideration).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Petitioner moves the Court for reconsideration of its Order Granting the Uninsured Employers' Fund's Motion to Dismiss because Petitioner's brief in opposition to the Uninsured Employers' Fund's Motion was not timely.

**Held:** Petitioner's motion is granted. The Court granted the UEF's motion to dismiss with prejudice because Petitioner failed to set forth any circumstances establishing good cause for the untimely filing of her response brief. In her Motion for Reconsideration, Petitioner explained that her brief was untimely because her counsel mistakenly calendared the deadline pursuant to Mont. R. Civ. P. 6(a) instead of ARM 24.5.303. In light of the dispositive nature of the Order granting UEF's motion and the explanation Petitioner has now offered, the Court is satisfied that Petitioner's motion for reconsideration should be granted.

***Pinnow v. Halverson, Sheehy & Plath, P.C., 2008 MTWCC 31*** (Order Granting Intervenor's Motion for Summary Judgment, Dismissing Intervenor, and Changing Caption).

**Summary:** Intervenor moved for summary judgment on whether the Stipulation for Settlement is valid and enforceable. Respondent concurred with Intervenor's arguments. Petitioner did not file a response to Intervenor's motion.

**Held:** Under ARM 24.5.329(3), any party opposing a motion for summary judgment shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party. Under ARM 24.5.316(4), failure to file briefs may subject the motion to summary ruling. Failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well-taken. Intervenor's motion for summary judgment is therefore well-taken.

***Raymond v. Uninsured Employers' Fund, Respondent, and Foothills Research Institute, LLC, Market Research Group, and Joseph Seipel, Uninsured Employers, 2008 MTWCC 45*** (Order Dismissing Uninsured Employers, Denying All Pending Motions, and Amending Caption).

**Related Topics:** Uninsured Employers' Fund.

**Summary:** Various motions have been submitted and are pending in this case. This order resolves underlying issues concerning which parties are properly named in this action at

this time.

**Held:** Upon consideration of the motions and the applicable statutes, the Court concludes that the procedural posture of this case is such that the alleged uninsured employers are not proper parties to this action at this time. They are dismissed from this case and all pending motions are denied. The caption shall be amended to reflect only Petitioner and Respondent as named parties.

***Keller v. Liberty Northwest, Inc., 2009 MTWCC 25*** (Order Granting Leave to File Amended Response to Petition for Hearing).

**Summary:** Respondent Liberty Northwest, Incorporated, moved to amend its response to Petitioner Kimberly M. Keller's Petition for Hearing. Liberty's amendment would include a contention that Keller's request to reopen her settlement is barred by the two-year statute of limitations found in § 27-2-203, MCA. Keller opposes Liberty's motion on the grounds that the amendment Liberty seeks would be futile because the two-year statute of limitations had not run.

**Held:** Liberty's motion is granted. This Court has consistently held that leave to amend pleadings shall be freely given when justice so requires. In this case, Liberty sought to amend its response only a day after it had timely filed its response to Keller's petition. Although Keller characterizes Liberty's proposed statute of limitations defense as "nonviable," that is not readily apparent from the pleadings. Liberty should be allowed to pursue discovery on this matter and determine whether the defense is viable.

***Florence v. Morales & UEF, 2011 MTWCC 5*** (Order Granting Respondent Uninsured Employers' Fund's Motion to Dismiss).

**Related Topics:** Mediation

**Summary:** Respondent Uninsured Employers' Fund moved for dismissal of Petitioners' Petition for Hearing on the grounds that the petition was time-barred and therefore beyond the jurisdiction of this Court. Respondent Victor Morales joined in the UEF's motion. Petitioners responded that they do not believe Morales suffered a work-related injury and that they missed the deadlines due to their own medical issues.

**Held:** Petitioners' Petition for Hearing is dismissed since they failed to request mediation of the UEF's determination within 90 days pursuant to § 39-71-520(1), MCA.

***Bailey v. UEF and Longhorn Apartment Complex; UEF v. Longhorn Apartment Complex, 2010 MTWCC 34*** (Order Granting Third-Party Respondent's Motion to Dismiss) (*Appealed to the Supreme Court – January 31, 2011; Cross Appealed to Supreme Court – February 15, 2011; Dismissed with Prejudice 04/11/11*).

**Related Topics:** Mediation

**Summary:** Third-Party Respondent moves to dismiss Petitioner's Petition for Hearing because it was filed more than 60 days after the mediator's report was mailed to the parties and was therefore untimely pursuant to § 39-71-520(2), MCA. Petitioner filed his petition 62 days after the mediator's report was mailed. Petitioner responds that Rule 6(e), M.R.Civ.P., applies to the 60-day deadline set forth in § 39-71-520(2), MCA, and extends the time Petitioner had to file his petition by 3 days. Petitioner argues that his petition was therefore filed timely.

**Held:** Third-Party Respondent's motion is granted. Rule 6(e), M.R.Civ.P., does not apply to the time limit prescribed by § 39-71-520(2), MCA. Petitioner's petition was therefore untimely.

***Dostal v. UEF, 2010 MTWCC 38*** (Order Denying Partial Summary Judgment).

**Summary:** Respondent moved for partial summary judgment, arguing that Petitioner failed to timely appeal the Uninsured Employers' Fund's denial of her claim for reinstatement of temporary total disability benefits to mediation within 90 days of the determination and did not petition this Court within 60 days of the mailing of the mediator's report on two occasions. Petitioner argued that her claim is not susceptible to the time limits set forth in § 39-71-520, MCA, because those time limits did not exist on the date of her industrial injury.

**Held:** Although Respondent argued that Petitioner's claims were subject to the statutes of limitations set forth in § 39-71-520, MCA, because the time limits are procedural and not substantive, the Montana Supreme Court held in *Fleming v. Int'l Paper Co.* that the statutes of limitations in effect on the date of the worker's industrial injury are the time limits which apply. Since the time limits set forth in § 39-71-520, MCA, did not exist on the date of Petitioner's industrial injury, they do not apply to her claim. Respondent's motion for partial summary judgment is denied.

***Chapman v. Twin City Fire Ins. Co., 2010 MTWCC 43*** (Order Denying Petitioner's Motions for Clarification and New Hearing).

**Summary:** Petitioner has filed a "Motion for Clarification" and a "Motion for New Hearing." The motion for clarification was submitted on December 28, 2010. The motion for new hearing is not fully briefed. On December 29, 2010, Petitioner filed a Notice of Appeal.

**Held:** The Court lacks jurisdiction to consider the merits of the motions because jurisdiction over the case passed to the Montana Supreme Court when Petitioner filed her Notice of Appeal. Accordingly, the motions are denied.

***Hopkins v. UEF v. Kilpatrick, 2010 MTWCC 12*** (Order Denying Rule 60(a), M.R.Civ.P. Motion to Amend Judgment to Correct Clerical Mistake).

**Summary:** The Uninsured Employers' Fund (UEF) moved the Court to amend its Judgment to require the third-party respondent to indemnify the UEF for any benefits paid or payable by the UEF to Petitioner. The UEF characterized the omission of this

issue in the Court's Findings of Fact, Conclusions of Law and Judgment as a "clerical mistake."

**Held:** The UEF's motion is denied. The omission of this issue in the Court's Findings of Fact, Conclusions of Law, and Judgment was not a "clerical mistake." The Court did not address the issue of whether the third-party respondent was obligated to indemnify the UEF because it was not presented as a disputed issue in the final pretrial order.

***Malcomson v. Liberty Northwest, 2011 MTWCC 11*** (Order Granting Respondent's Motion for Reconsideration).

**Summary:** Respondent moves for reconsideration of this Court's prior Order Granting Petitioner's Motion for Summary Judgment for the reason that the Court did not grant Respondent's timely request for a hearing on Petitioner's motion for summary judgment prior to entering its Order.

**Held:** The motion for reconsideration is granted. ARM 24.5.329(5) provides that when a party timely requests a hearing on a summary judgment motion, "[t]he court will thereupon set a time and place for hearing." The rule is not discretionary. The prior Order is vacated. Counsel shall confer and contact the Court to schedule a hearing.

***In re: Dorothy Cissel v. Employers Compensation Ins. Co. et al., 2012 MTWCC 12*** (Order Resolving Employers Compensation Ins. Co.'s Motion for More Definitive Statement).

**Summary:** One of the named respondents moved for a more definite statement, arguing that, from Petitioner's Petition for Hearing, it could not discern the roles nor potential liability of the other respondents, nor could it avail itself of the defenses otherwise available to it because Petitioner's prayer for relief did not set forth her claims with sufficient specificity.

**Held:** Only Employers Compensation Insurance Company is properly before the WCC as a respondent in this case and Petitioner shall amend her petition accordingly. Petitioner provided additional contentions in her response to this motion which shall also be incorporated into her amended petition. Although Respondent further alleges that Petitioner did not comply with ARM 24.5.301 in her Petition for Hearing, Respondent has not set forth with any specificity the nature of Petitioner's alleged non-compliance. The Court concluded Petitioner otherwise satisfied the requirements of notice pleading and the additional information Respondent seeks is best obtained through discovery.

***Troy Baker v. Fireman's Fund Ins. Co., 2012 MTWCC 15*** (Order Certifying Prior Decision as Final).

The Findings of Fact, Conclusions of Law and Judgment filed March 22, 2012, was not certified as final due to the outstanding issue of Petitioner Troy Baker's entitlement to attorney fees and costs, which was to be determined after the parties had conferred to determine when Respondent Fireman's Fund Ins. Co. paid Baker's disputed medical bills.

On April 20, 2012, the Court received counsel for Respondent's e-mail notification which represented the parties had resolved the dispute on attorney fees and costs.

Accordingly, pursuant to ARM 24.5.348(2), the Findings of Fact, Conclusions of Law and Judgment filed March 22, 2012, is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

Any party to this dispute may have twenty days in which to request reconsideration from the Findings of Fact, Conclusions of Law and Judgment filed March 22, 2012.

***Michele Baldwin v. Old Republic Ins. Co., 2012 MTWCC 20*** (Order Resolving Petitioner's Motion to Compel).

**Summary:** Petitioner moved to compel Respondent to answer certain discovery requests, contending that Respondent has stated that it intends to provide most of the discovery sought, but has failed to do so in spite of having a significant amount of time to do so. Petitioner further seeks her fees and costs in bringing this motion. Respondent acknowledges that Petitioner is entitled to most of the discovery she seeks, but argues that an order to compel is unnecessary as it intends to supplement its discovery responses at some point in the future. Respondent argues that one of the interrogatories Petitioner has posed is unnecessary and unduly burdensome.

**Held:** Respondent shall not be compelled to answer the interrogatory it has objected to as the information sought does not appear relevant to the case before this Court. Respondent is compelled to answer the remaining interrogatories Petitioner has brought forth for this motion. Petitioner is entitled to her fees and costs in bringing this motion.

***Lynn Gerber v. Montana State Fund, 2012 MTWCC 21*** (Order Denying Petitioner's Motions for Joinder and Class Action Status).

**Summary:** Petitioner moved for joinder of his petition with that of another, and subsequently clarified that he also seeks class action status. Respondent opposed Petitioner's motions, arguing that Petitioner has not proven that he is entitled to joinder or class action status.

**Held:** Although Petitioner contends that his case meets the requirements for joinder and for class action status, he has put forth no evidence in support of his contentions. His motions are therefore denied.

***Robert Morse v. Liberty Northwest Ins. Corp., 2012 MTWCC 24*** (Order Denying Respondent's Petition for New Trial and Denying Respondent's Request for Amendment to the Findings of Fact and Conclusions of Law).

**Summary:** Respondent petitioned for a new trial and requested amendment to the findings of fact and conclusions of law the Court issued in this matter. Respondent contended that the Court reached issues beyond the issue presented by the parties for resolution, the Court erred in determining that Respondent's insured acted as its agent when it accepted Petitioner's accident

report, and the Court erroneously found that Petitioner's industrial accident occurred on a specific date. Petitioner objected to Respondent's contentions of error.

**Held:** The Court's decision did not exceed the scope of the issue presented in the Pretrial Order. The Court correctly concluded that the employer acted as Respondent's agent when it accepted Petitioner's accident report. Finally, the Court determined that Respondent's belief that the Court found a date certain for Petitioner's industrial accident to be in error. Respondent's petition and request are therefore denied.

***Christian Cornelius v. Lumbermen's Underwriting Alliance, 2012 MTWCC 29*** (Order Denying Respondent's Motions for a New Trial, Amendment to Findings of Fact and Conclusions of Law, and for Reconsideration).

**Summary:** Respondent moved for a new trial, amendment to this Court's findings of fact and conclusions of law, and reconsideration of this Court's decision, arguing that the Court erred in finding it liable for Petitioner's occupational disease claim and for awarding Petitioner TTD and medical benefits, plus her attorney fees and a penalty.

**Held:** Respondent has not proven that it is entitled to any of the relief sought in its motions. Its motions for a new trial, amendment to the findings of fact and conclusions of law, and reconsideration are denied.

***Mitchael D. Mackey v. ACE American Ins. Co., 2012 MTWCC 46*** (Order Granting Respondent's Motion to Exclude Evidence or Argument Regarding Petitioner's OD Claim, Striking Confidential Mediation Information from Petitioner's Response Brief, and Vacating Scheduling Order).

**Summary:** Respondent moved in limine to preclude Petitioner from presenting any evidence or argument regarding a newly-asserted occupational disease claim. Petitioner opposes Respondent's motion, arguing that although he had filed a petition for trial contending that he had suffered an industrial injury and his petition for mediation stated that his claim did not involve an occupational disease, the parties had in fact mediated the occupational disease issue, and Respondent could not argue that it was surprised by Petitioner's assertion of this claim.

**Held:** The evidence presented establishes that the parties did not mediate the issue of an occupational disease claim. As mediation of an issue is a jurisdictional prerequisite, the parties must mediate the issue before the Court can hear it. The portion of Petitioner's response brief in which he sets forth information from the parties' mediation before the department is stricken as it is inadmissible pursuant to § 39-71-2410, MCA. The Scheduling Order is vacated pending mediation of the occupational disease claim.

***Estate of Richard Hirth v. Montana State Fund, 2013 MTWCC 2*** (Order Denying Petitioner's Motion in Limine).

**Summary:** Petitioner moved in limine to exclude the testimony of two of Respondent's expert witnesses, contending that Respondent's witness disclosures were inadequate.

**Held:** Petitioner has not followed this Court's procedure for resolving disputes regarding allegedly inadequate witness disclosures and therefore the Court will not consider Petitioner's motion.

***Hartford Ins. Co. of the Midwest v. Montana State Fund, In re: Brian McKirdy, 2013 MTWCC 4*** (Order Granting Petitioner's Motion for Reconsideration).

**Summary:** Petitioner moved for reconsideration of this Court's Order which denied Petitioner's cross-motion for summary judgment in part. Petitioner asked the Court to reconsider its determination that Petitioner failed to prove the third element of equitable estoppel regarding its claim against Respondent. Respondent objected to Petitioner's motion for reconsideration.

**Held:** Petitioner's motion for reconsideration is granted. The Court concluded that Petitioner fulfilled the third element of equitable estoppel. Therefore, the Court further considered Petitioner's arguments regarding the remaining elements of equitable estoppel and determined that Petitioner likewise fulfilled the requirements for the fourth, fifth, and sixth elements. The Court therefore determined that Respondent is equitably estopped from asserting a defense against Petitioner under § 39-71-603(2), MCA.

***Rod Overholt v. Liberty Northwest Ins., 2013 MTWCC 5*** (Order Denying Petitioner's Motion to Exclude Evidence and Limit Discovery and Ordering Respondent to Produce Audio Recording of Statement).

**Summary:** Petitioner moved to prohibit Respondent from pursuing discovery concerning any previous injuries, medical records, and employment information, arguing that since Respondent had denied liability because Petitioner's industrial injury occurred in North Dakota, the discovery information Respondent sought would be irrelevant to its grounds for denial. Petitioner further sought to prohibit Respondent from using a recorded statement Petitioner gave since Respondent had failed to provide Petitioner with a copy of the audio recording. Respondent objected to Petitioner's motion, arguing that it is entitled to this discovery under the broad rules applicable to this matter.

**Held:** Under the broad rules of discovery applicable to this matter, Respondent is entitled to pursue the discovery of the information it may seek regarding Petitioner's previous injuries, medical records, and employment information insofar as such discovery is reasonably calculated to lead to the discovery of admissible evidence. Therefore, Petitioner's motion is denied. Respondent is ordered to produce to Petitioner a copy of the audio recording of Petitioner's statement.

***Kim Trevino v. Montana State Fund, 2013 MTWCC 10*** (Order Granting Petitioner's Motion for Reconsideration).

**Summary:** Petitioner moved for reconsideration of this Court's order which granted summary judgment in favor of Respondent. Petitioner argues that the Court incorrectly concluded as a matter of law that she can perform her time-of-injury job when such a conclusion requires a

factual analysis necessitating a trial. Respondent objected to Petitioner's motion, arguing that she is merely re-arguing the same position she set forth in her opposition to Respondent's summary judgment motion.

**Held:** Petitioner's motion is granted. As the Court noted in its summary judgment order, the WCC views summary judgment motions with disfavor and all reasonable inferences must be made in favor of the non-moving party. Petitioner presented evidence which, at a minimum, raised a question of fact as to whether her employer did not return her to her time-of-injury job because she was unable to perform it, whether the FCE evaluator's "reservations" actually constitute restrictions that preclude a return to her time-of-injury job, and whether Trevino's subjective belief as a lay person that she can return to her job must be viewed in the context of her history at this job which has twice resulted in her injury.

*Peter Nease v. Montana Contractor Compensation Fund, 2013 MTWCC 20* (Order Denying Petitioner's Motion in Limine and Objection to Medical Records)

**Summary:** Petitioner moved to exclude testimony of law enforcement officers, law enforcement records, and medical records relating to an altercation which occurred after his industrial injury, arguing that these witnesses and records were irrelevant and prejudicial. Respondent responded that it had not identified any law enforcement officers as witnesses and that it had not obtained any law enforcement records, but that it intended to offer the medical records which it believed to be relevant because the records indicated that the injuries Petitioner sustained in the altercation were to the same area of the body as his industrial injury.

**Held:** Since Respondent indicated that it does not intend to call any law enforcement officers as witnesses nor offer the law enforcement records regarding the altercation, Petitioner's motion to exclude those witnesses and records is premature. Petitioner's objections to the medical records go to their weight and not admissibility. Petitioner's motion to exclude the medical records is therefore denied.

## REOPENING OF SETTLEMENTS

*Stokes v. Liberty Mutual, 2009 MTWCC 39* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner settled his indemnity benefits on an accepted-liability low-back claim in August 2008. Petitioner subsequently required an additional back surgery for which the insurer paid medical benefits. Petitioner argues that his settlement should be reopened because he did not foresee the need for an additional surgery at the time he settled his claim and because he has been unable to obtain employment. Petitioner asserts that he has applied for the positions approved by job analyses submitted to his treating physician, but the actual positions exceed his physical restrictions and he has therefore been ineligible for them.

**Held:** The Court found no mutual mistake of fact and therefore no grounds exist to support reopening Petitioner's settlement.

***Vandervalk v. Montana State Fund, 2009 MTWCC 35*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court –February 11, 2010; Joint Motion for Dismissal and REMAND for further proceedings*).

**Summary:** Petitioner argued that one of his settled workers' compensation claims should be reopened and that he should receive wage-loss and vocational rehabilitation benefits. He further argued that his use of Vioxx for his carpal tunnel syndrome caused him to suffer cardiovascular problems and that Respondent should be liable for his cardiovascular condition. Petitioner further argued that Respondent should reimburse him for travel expenses and for out-of-pocket expenses he has incurred in filling prescriptions. Respondent responded that it is only liable for medical expenses incurred in the treatment of Petitioner's carpal tunnel syndrome for which it accepted liability. Respondent further responded that the evidence demonstrates that Vioxx did not cause Petitioner's cardiovascular condition and further contends that it has paid for all of Petitioner's prescriptions relating to his carpal tunnel syndrome symptoms. Respondent alleges that Petitioner is not entitled to reopen his settlement, and that Petitioner is not statutorily entitled to rehabilitation benefits or reimbursement of the specific travel expenses he has incurred.

**Held:** Petitioner has not presented evidence upon which the Court can order his settlement reopened. He is therefore not entitled to additional indemnity or rehabilitation benefits. Petitioner has not proven that his cardiovascular condition was accelerated by his use of Vioxx. Petitioner is not entitled to reimbursement of the travel expenses he seeks as these expenses are not compensable under § 39-71-704, MCA. As for his out-of-pocket prescription expenses, Petitioner has proven that he is entitled to reimbursement of \$142.99 for an OxyContin prescription from September 2006.

***Gamble v. Sears, 2006 MTWCC 5*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court – February 23, 2006; Affirmed – June 5, 2007*).

**Summary:** Petitioner petitioned for the May 15, 2001 settlement by the parties to be set aside based on a mutual mistake of fact.

**Held:** Where Petitioner and Respondent mistakenly believed Petitioner had reached MMI at the time the parties entered a settlement agreement, when in fact she had a non-healed fracture in her neck which required surgical treatment, the mutual mistake of fact was material and the settlement agreement is set aside.

***Kruzich v. Old Republic Ins. Co., 2006 MTWCC 23*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - June 14, 2006; Reversed – June 10, 2008*).

**Summary:** Petitioner, who suffered a traumatic brain injury as a result of an industrial accident, petitioned to have the compromise and settlement agreement set aside when he developed a movement disorder many years later as a result of the injury.

**Held:** The settlement is set aside because of a mutual mistake of a material fact.

***Harter v. Liberty Northwest Ins. Corp., 2006 MTWCC 39*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Supreme Court - December 18, 2006; Dismissed - May 23, 2007*).

**Summary:** Petitioner petitioned to reopen his settlement with Respondent. Petitioner alleged that Respondent committed fraud in settling Petitioner's claim and asked the Court to award past and future workers' compensation benefits.

**Held:** Petitioner is not entitled to reopen his settlement. Respondent did not commit fraud when it settled Petitioner's claim. No mutual mistake of fact exists. Petitioner is not entitled to any further workers' compensation benefits.

***Drury v. International Paper Co.; and O'Brien v. International Paper Co., 2010 MTWCC 32*** (Order Denying Petitioner's Motions to Enforce Settlement and Granting Petitioner's Alternative Motions for Trial).

**Note:** This is not a Re-Open case but rather the Settlement was never enforceable.

**Summary:** Petitioners agreed to settle their respective claims with Respondent. The agreement was reflected in an e-mail exchange between Petitioners' counsel and Respondent's counsel. The e-mail specifically reserved medical benefits but was silent as to whether the settlement included potential death benefit claims. When Petitioners' counsel forwarded proposed stipulations for judgment to Respondent's counsel which specifically reserved death benefits, Respondent's counsel objected, contending that he had never agreed to reserve death benefits. Petitioners move to enforce the settlements. Respondent argues that the settlement agreements should not be forced because the parties never reached a meeting of the minds regarding resolution of potential death benefit claims.

**Held:** Petitioners' motions to enforce the settlements are denied. Petitioners' counsel's e-mail to Respondent's counsel was silent as to the resolution of death benefits. It would be no more reasonable to infer that death benefits were excluded from the settlement, as Petitioners suggest, than to infer that they were included in the settlement, as Respondent believed. There was no meeting of the minds as to this material term. Petitioners' motions for trial are granted.

***Keller v. Liberty Northwest Ins. Corp., 2010 MTWCC 4*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Supreme Court – March 16, 2010; Reversed and Remanded – December 28, 2010; 2010 MT 279*).

**Summary:** Petitioner petitioned the Court for reinstatement of her medical benefits. Petitioner argues that a mutual mistake of fact occurred in this case. Petitioner contends that the parties failed to account for the onset of nerve damage and/or chronic nerve inflammation and winging

of her right scapula as the major injury and cause of Petitioner's pain at the time they entered into two settlement agreements.

**Held:** No mutual mistake of fact occurred in this case. Even if Petitioner was unaware that her condition at the time she entered into the settlement agreements included scapular winging and long thoracic nerve damage, she failed to establish that Respondent entered into the settlement agreements under the same mistaken belief. Therefore, the settlement agreements will not be set aside.

***McGlinchey v. Montana State Fund, 2011 MTWCC 30*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** After Petitioner received a Social Security determination that she was disabled from the time of her industrial accident forward, she sought to reopen her settlement agreement, arguing that the parties entered into the agreement under a mutual mistake of fact since neither believed at the time of the settlement that she would never be able to work again.

**Held:** Notwithstanding the Social Security determination, the evidence presented demonstrates that Petitioner was able to, and in fact did, return to work following her industrial accident. Therefore no mutual mistake of fact occurred and Petitioner is not entitled to reopen her settlement.

***Pearson v. Montana Insurance Guarantee Association, 2012 MTWCC 1*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered an industrial injury, including a traumatic brain injury, in 1995. In 1997, he settled his claim. Petitioner contends that his settlement agreement with Respondent is void, invalid, or unenforceable and that this Court should order his claim reopened. Petitioner further argues that the insurer unreasonably adjusted his claim and that he should be entitled to reasonable attorney fees and a penalty. Respondent contends that: Petitioner's claim is barred by a statute of limitations; no grounds exist to order reopening of Petitioner's settlement; and statutorily, it cannot be held liable for attorney fees or a penalty.

**Held:** Petitioner was not competent to enter into the settlement agreement and it is therefore void. Respondent is not an insurer within the meaning of that term under the Workers' Compensation Act. Therefore, it cannot be subject to attorney fees or a penalty under §§ 39-71-611, -2907, MCA.

***Baker v. Fireman's Fund Ins. Co., 2012 MTWCC 9*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner attempts to reopen a settlement agreement based on a mutual mistake of fact. Petitioner's counsel entered into settlement discussions with Respondent. Respondent contends that the parties reached a binding settlement agreement closing all benefits. Petitioner argues that his counsel did not have authority to settle his claim and maintains he has always intended to reopen the settlement.

**Held:** Petitioner entered into a binding settlement agreement. Petitioner authorized his counsel to negotiate and settle his claim. The parties reached an agreement after several offers and counteroffers. Petitioner's unvoiced intention to not be bound to the terms of the agreement until reviewed in writing does not prevent the formation of a binding agreement.

***Tom Griffin v. Liberty Northwest Ins. Corp., 2013 MTWCC 11*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner contends that he is entitled to reopen a settlement he entered into with Respondent. He further argues that Respondent is liable for the payment of certain medical bills. Respondent responds that the parties entered into a valid settlement agreement which closed Petitioner's medical benefits and that Petitioner has no grounds for reopening the settlement agreement.

**Held:** Petitioner has not proven that he is entitled to reopen his settlement nor that he was coerced into entering into the settlement. Since the parties agreed to close Petitioner's entitlement to medical benefits as part of the settlement terms, Respondent is not liable for the payment of medical bills which were incurred from treatment which occurred after the date of settlement.

***Paul Bond v. Associated Loggers Exchange, 2013 MTWCC 13*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner sought to reopen a settlement agreement, arguing that Respondent should be liable for additional benefits relating to medical treatment Petitioner recently obtained which he contended related to his industrial injury. Respondent objected, arguing that Petitioner had no grounds for reopening the settlement, and further arguing that Petitioner's claim must fail either for causation or because his claims for medical benefits are barred by § 39-71-704(1)(e), MCA.

**Held:** Petitioner has not demonstrated any legal grounds for reopening the settlement agreement. Therefore, his claims for additional medical, indemnity, and vocational rehabilitation benefits are denied.

## SANCTIONS

***The St. Paul Travelers Companies, Inc. v. Liberty Northwest Ins. Corp., 2007 MTWCC 44*** (Order Granting Motion to Compel and Awarding Attorneys' Fees and Costs).

**Summary:** Petitioner moved this Court to compel Respondent to answer certain requests for production and an interrogatory to which Respondent had either objected to or provided answers which Petitioner argued were incomplete. Petitioner further requested sanctions pursuant to ARM 24.5.326 in the form of attorney fees and costs.

**Held:** Respondent's refusal to answer certain of Petitioner's discovery requests on the

basis that the information sought was irrelevant does not satisfy the requirements of Mont. R. Civ.P. 26 because these requests could reasonably lead to the discovery of admissible evidence. The Court agrees with Petitioner that certain of Respondent's responses were incomplete or nonresponsive. Petitioner is entitled to reasonable attorney fees and costs pursuant to ARM 24.5.326.

<http://wcc.dli.mt.gov/tools/Settlements.htm> **SETTLEMENT LANGUAGE**

*Jones v. Albertsons, Inc.*, 2007 MTWCC 26 (Order Denying Request for Stipulated Settlement, Dismissal, and Judgment).

**Summary:** The parties have asked this Court to approve a joint Stipulation for Dismissal and Order for Dismissal with Prejudice in settlement of a pending claim.

**Held:** The parties' request is denied because it contains terms that are unenforceable, as well as contrary to statute and the expressed public policy of this State as set forth in § 39-71-105, MCA. The WCC declined to approve a settlement that sought to settle "any and all claims, filed or unfiled, known or unknown, that she may have had under the Workers' Compensation Act or Occupational Disease Act as a result of her employment with the Respondent, Albertsons, Inc." The parties essentially asked the WCC to allow them to enter into a legally invalid contract. The WCC declined to do so.

## STATUTES OF LIMITATIONS

*Clemons v. Liberty Northwest Ins. Corp.*, 2006 MTWCC 16 (Order Denying Respondent's Motions to Dismiss, for Summary Judgment, and for a Protective Order).

**Summary:** Petitioner alleges he suffers from asbestos-related lung disease as a result of his employment at a Libby, Montana, lumber mill from 1969 to 1995. The mill was owned by St. Regis Paper Company and then Champion International Company until November 1, 1993. It was thereafter owned by Stimson Lumber Company, which is insured by Respondent Liberty Northwest Insurance Corporation. Respondent moves for a protective order until the Court rules on the pending motions to dismiss and for summary judgment. Respondent moves for dismissal and summary judgment based on the following assertions: (1) Petitioner failed to file a petition within two years from the date Respondent denied Petitioner's claim as required under § 39-71-2905(2), MCA; (2) Petitioner is judicially estopped from claiming his work at Stimson is the cause of his asbestos-related disease because of Petitioner's complaint in a separate district court case; and (3) Petitioner's treating physician agreed with an article which put the latency period at fifteen years or more between exposure to asbestos and signs of exposure appearing on x-ray.

**Held:** Respondent's motions to dismiss and for summary judgment are denied. Likewise, Respondent's motion for a protective order is denied. (1) Section 39-71-2905(2), MCA, is a statute of limitations that reads "[a] petition for hearing before the workers' compensation

judge must be filed within 2 years after benefits are denied.” However, § 39-71-2905(2), MCA, does not apply to this case because this statute became effective July 1, 1997, and applies “to claims for injuries occurring on or after [the effective date].” Petitioner alleges the exposure to asbestos that caused his asbestos-related disease occurred between 1969 and March 31, 1995, the date on which he ceased working at the mill. (2) Petitioner’s district court complaint against other parties who allegedly were responsible for Petitioner’s exposure to asbestos is not inconsistent with his claim that asbestos from his employment at Stimson contributed to or caused his asbestos-related lung disease. (3) Respondent’s evidence concerning the latency period for asbestos-related lung disease does not establish as an uncontroverted matter that Petitioner was not injuriously exposed to asbestos during his employment with Stimson. Accordingly, this is an issue that should be decided at trial.

***Cardwell v. Uninsured Employers’ Fund, 2006 MTWCC 20*** (Order Denying Respondent’s Motion to Dismiss).

**Related Topics:** Independent Contractors, Occupational Diseases, Uninsured Employers’ Fund.

**Summary:** Respondent Uninsured Employers’ Fund filed a motion to dismiss based on Petitioner’s failure to file a claim alleging an occupational disease within one year, as required by § 39-72-403, MCA (2003). In Petitioner’s original Petition for Trial he stated that he suffered an injury arising out of and in the course of his employment. Petitioner did not allege that he suffered an occupational disease. After the deposition of Petitioner’s chiropractor, who opined that Petitioner’s injury could be considered a repetitive-use injury which happened over time, Petitioner filed an Amended Petition for Trial and alleged that he suffered an injury or occupational disease.

**Held:** Respondent’s motion to dismiss is denied. Petitioner initially believed his condition was caused by a single incident that occurred while hanging Sheetrock on or about July 20, 2004. All documentary evidence including his first report of injury and his original petition to the Court reflected this belief. After the deposition of Petitioner’s chiropractor, however, he became aware that his injury could have been caused by repetitive use over time, after which he filed the Amended Petition for Trial alleging an occupational disease. Since Petitioner neither knew nor reasonably should have known that his condition may have been the result of an occupational disease before he was alerted to this possibility by the testimony of his chiropractor, the statute of limitations did not begin to run until that time. Accordingly, Petitioner’s Amended Petition for Trial was filed within the time prescribed by § 39-72-403, MCA (2003).

***Palmer v. Safeco, 2006 MTWCC 44*** (Order Granting Respondent’s Motion for Summary Judgment).

**Summary:** Respondent moved for summary judgment regarding Petitioner’s request for ongoing medical benefits, arguing that because Petitioner had not used his benefits for more than 60 consecutive months, his benefits terminated pursuant to § 39-71-704(1)(e), MCA (1997). Petitioner responded that the statute should be tolled because he was

receiving medical treatment for difficulties which he was unaware stemmed from his industrial accident at the time of treatment.

**Held:** Because § 39-71-704(1)(e), MCA (1997), is a statute of repose, it cannot be tolled. Therefore, Respondent's motion for summary judgment is granted.

*Evans v. Liberty Northwest Ins. Corp., 2007 MTWCC 23* (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to the Supreme Court - June 29, 2007; Cross-Appeal filed - July 5, 2007, August 14, 2007; Appeals Dismissed by WCC following successful mediation*).

**Summary:** Petitioner filed occupational disease claims for shoulder, arm, and neck conditions and carpal tunnel syndrome which he alleges developed as a result of years of work in the tire industry. Respondent denied liability, arguing that Petitioner knew or should have known about his carpal tunnel syndrome several years ago and that his claim for benefits is therefore untimely. Respondent further argues that Petitioner's arm, shoulder, and neck conditions are not an occupational disease, but rather an industrial injury and that Petitioner's claim is time-barred because he did not file a claim within 30 days of the incident which Respondent alleges caused these conditions.

**Held:** Petitioner's carpal tunnel syndrome claim is timely because he neither knew nor should have known he was suffering from carpal tunnel syndrome as a result of an occupational disease until he was diagnosed by a doctor. Petitioner's arm and shoulder conditions, as well as the cervical spondylosis and degenerative disk disease in his neck are occupational diseases and therefore his claim for benefits regarding those conditions is timely. Petitioner's syrinx is not work-related and therefore Respondent is not liable for this condition. The medical evidence also indicates that Petitioner's disk herniation was more probably than not caused by an industrial accident during the week of August 14, 2005. Therefore, Petitioner's November 14, 2005, claim for his disk herniation is untimely pursuant to § 39-71-603(1), MCA. Accordingly, Respondent is not liable for medical treatment and wage-loss compensation benefits specifically attributable to the herniated disk.

*Shelley v. American Home Assurance Co., 2007 MTWCC 52* (Order Granting Respondent/Insurer's Motion to Dismiss).

**Summary:** Respondent moves for dismissal of the petition in this case because it alleges that Petitioner failed to file a written claim for benefits within a year of when he knew or should have known that he suffered from an occupational disease and therefore Petitioner's claim is untimely pursuant to § 39-71-601, MCA (2005). Petitioner responds that he did not need treatment for his condition until 2005, and therefore the statute of limitations did not begin to run until that point.

**Held:** Respondent's motion is granted. Petitioner filed a district court action in 2001 alleging that he suffered from an asbestos-related condition as a result of his employment with Respondent's insured. However, he did not file an occupational disease claim until January 2006. The fact that Petitioner alleged he did not exhibit symptoms or require

treatment for his condition until December 2005 does not negate the fact that he knew at least as early as the time when he filed the district court action that he suffered from a work-related occupational disease.

***Kilgore v. Transp. Ins. Co., 2008 MTWCC 51*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed To Montana Supreme Court - January 2, 2009; Dismissed by Motion – March 13, 2009*).

**Related Topics:** Penalties.

**Summary:** Petitioner was an employee of the W.R. Grace mine in Libby and was diagnosed with asbestos-related disease. Petitioner petitioned the Court for permanent partial disability benefits in the form of an impairment award in the amount of 45 percent. Petitioner also sought a penalty, costs, and attorney fees. Before trial, the parties stipulated to Petitioner's treating physician's 45 percent impairment rating. Respondent argued, however, that Petitioner's claim was time-barred pursuant to this Court's ruling in *Fleming v. International Paper Co.*

**Held:** Petitioner is entitled to permanent partial disability benefits in the form of a 45 percent impairment rating. After the trial in this matter concluded, the Montana Supreme Court reversed this Court's decision in *Fleming*. The Supreme Court's ruling is dispositive of Respondent's statute of limitations defense in this matter. Respondent's denial of Petitioner's claim was premised upon this Court's ruling in *Fleming*, which was not reversed until after this matter had gone to trial. Respondent's reliance on this Court's decision was reasonable. Therefore, Petitioner is not entitled to attorney fees or a penalty.

***Tinker v. Montana State Fund, 2008 MTWCC 33*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court – September 2, 2008, Cross Appeal Filed by Petitioner – September 11, 2008, Affirmed by Montana Supreme Court – June 24, 2009*).

**Summary:** On July 24, 2007, Petitioner sought medical treatment for hip and knee pain. He related the pain to a slip and fall incident at work which had occurred two or three years earlier, but he did not seek treatment because he believed the injury would heal itself. X-rays revealed that Petitioner had severe degenerative hip disease in his left hip. Petitioner filed claims for an industrial injury and occupational disease. Respondent denied his occupational disease claim since his condition could be attributed to a single incident on a specific date, and declined his industrial injury claim as untimely.

**Held:** Petitioner's claim that he suffered an occupational disease is denied because he never reached MMI from his industrial injury prior to his hip condition allegedly being aggravated by his work. Under § 39-71-601(1), MCA, a claimant must file a claim for benefits within 12 months of the industrial accident. Section 39-71-601(2), MCA, provides that insurers may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of lack of knowledge of disability, latent injury, or equitable estoppel. In the present case, Petitioner did not suffer a disability until he could no longer perform his job duties. Therefore, the time requirement is waived under § 39-71-

601(2)(a), MCA, and his claim is not time-barred.

***Boyd v. Zurich American Ins. Co., 2009 MTWCC 26*** (Order Granting Respondent’s Motion for Summary Judgment) (*Appealed to Montana Supreme Court – September 9, 2009; Affirmed – March 16, 2010 - 2010 MT 52*).

**Summary:** Zurich American Insurance Company moved for summary judgment on the grounds that Petitioner Terry Boyd failed to petition this Court within two years of Zurich’s denial of benefits, as required by § 39-71-2905(2), MCA. Boyd argued that Zurich’s motion should be denied because the statute of limitations should not have commenced running until June 2008, when Boyd obtained the medical evidence needed to support his claim. Boyd contends that the language of § 39-71-2905(2), MCA, implies a tolling of the time limitation until the “dispute arises and is supported by admissible medical evidence.”

**Held:** Zurich’s motion is granted. Section 39-71-2905(2), MCA, unambiguously requires that “[a] petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied.” Although this Court has recognized a tolling of this time limit while the dispute is in mandatory mediation, it has never recognized an “implied tolling” until the claimant obtains medical evidence in support of his claim, and the Court declines to do so now.

***Johnson v. Montana State Fund 2011 MTWCC 22*** (Order Granting Respondent’s Motion for Summary Judgment) (*Appealed to Supreme Court September 20, 2011; Dismissed with Prejudice by Stipulation – January 25, 2012*).

**Summary:** Respondent moved for summary judgment, arguing that Petitioner’s petition was untimely pursuant to § 39-71-2905(2), MCA. Petitioner opposed Respondent’s motion, arguing that Respondent is equitably estopped from claiming it denied Petitioner’s claim and that Respondent could not have effectively denied Petitioner’s claim prior to investigation. Alternatively, Petitioner argues that Respondent’s subsequent denial letter “reset” the statute of limitations.

**Held:** Under § 39-71-2905(2), MCA, a claimant must file his petition for hearing within two years after benefits are denied. Petitioner did not do so, and Respondent’s motion for summary judgment is granted.

***Bell v. Montana State Fund and Montana Contractor Comp Fund, 2011 MTWCC 23*** (Order Denying Montana Contractor Compensation Fund’s Motions to Strike and for Summary Judgment, and Giving Notice of Intent to Grant Summary Judgment to Non-Moving Party).

**Summary:** Respondent Montana Contractor Compensation Fund (MCCF) moved for summary judgment, alleging Petitioner’s Petition for Trial was untimely under § 39-71-2905(2), MCA. MCCF contends that Petitioner’s petition was not filed within two years of MCCF’s denial of benefits. Petitioner argues that MCCF had accepted liability for his claim and that MCCF’s letter which MCCF argues constitutes a denial of benefits, denied only one specific medical bill. Respondent Montana State Fund (State Fund) also opposed Respondent MCCF’s motion for

summary judgment. Respondent MCCF moved to strike State Fund's brief, arguing that State Fund lacks the standing to oppose MCCF's motion because State Fund is not an adverse party.

**Held:** MCCF's motion to strike is denied. State Fund has opposed MCCF's motion for summary judgment. As it pertains to MCCF's motion, therefore, State Fund is adverse. MCCF's motion for summary judgment is denied. Section 39-71-2905(2), MCA, provides: "A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." MCCF accepted liability for Petitioner's claim, but denied treatment for one specific medical bill. MCCF's denial cannot be construed as a denial of benefits and a dispute over liability as to Bell's claim in general. Order Denying Montana Contractor Compensation Fund's Motions to Strike and for Summary Judgment, and giving Notice of Intent to Grant Summary Judgment to Non-Moving Party - Page 2 Regarding the limited issue of whether the statute of limitations has run on Bell's claim exclusive of the treatment for which MCCF specifically denied liability, the Court sees no disputed facts which would preclude summary judgment in Petitioner's favor. Since neither Petitioner nor State Fund have moved for summary judgment on this issue, MCCF will have 10 days to file a supplemental brief as to why summary judgment in favor of Petitioner should not be granted on this issue. Petitioner and State Fund may file reply briefs within 5 days after MCCF's brief.

**Schellinger f/k/a Uffalussy v. St. Patrick Hospital and Health Sciences Center, 2012 MTWCC 10** (Order Denying Respondent's Motion for Summary Judgment and Granting Petitioner's Cross-Motion for Summary Judgment).

**Summary:** Respondent moved for summary judgment regarding Petitioner's request for medical benefits, arguing that because Petitioner had not "used" her benefits for 60 consecutive months, such benefits terminated pursuant to § 39-71-704(1)(e), MCA. Petitioner objected to Respondent's motion and cross-motivated for summary judgment, arguing that Respondent was on notice that medical bills existed for which Petitioner believed Respondent was liable.

**Held:** The statute of repose has not run in this matter, and Petitioner's claims for unpaid medical bills are not barred by § 39-71-704(1)(e), MCA.

**Hardie v. Montana State Fund, 2012 MTWCC 2** (Order Denying Respondent's Motion for Summary Judgment).

**Summary:** Respondent moved for summary judgment, arguing that Petitioner's claim was untimely. Petitioner opposed Respondent's motion, arguing that she filed her claim within the statute of limitations when the tolling during the pendency of mediation is taken into account.

**Held:** Under § 39-71-2905(2), MCA, a claimant must file her petition for hearing within two years after benefits are denied. However, the statute of limitations is tolled during the pendency of mediation. In the present case, Petitioner filed her petition within 25 days of the issuance of the mediator's report pursuant to § 39-71-2411, MCA, and it is therefore timely filed. Respondent's motion for summary judgment is denied.

***Lanman v. Montana Municipal Insurance Authority, 2011 MTWCC 27*** (Order Denying Respondent’s Motion for Summary Judgment).

**Summary:** Respondent moves for summary judgment on the issue of whether Petitioner failed to file his claim within the one-year statute of limitations set forth at § 39-72-403(1), MCA (2003). Respondent argues that Petitioner failed to file his claim within one year from when he knew or reasonably should have known that his condition was related to his employment. Petitioner contends that material facts in dispute preclude summary judgment.

**Held:** Summary judgment is denied. A genuine issue of material fact remains as to whether Petitioner knew or should have known that his asbestos condition was related to his employment more than one year before he filed his claim.

***Mark Dauenhauer v. Montana State Fund, 2012 MTWCC 22*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Within the 60-consecutive month period under the statute of repose, § 39-71-704(1)(e), MCA, Petitioner’s wife contacted Respondent for authorization for her husband to see his surgeon for a follow-up visit. Respondent’s claims examiner denied authorization, believing the request was based solely on Petitioner’s desire to keep his medical benefits open. Without Respondent’s authorization to see a physician, Petitioner had difficulty setting a medical appointment. Petitioner’s family physician eventually faxed a request to Respondent to have Petitioner seen by a neurosurgeon, two days after the statute of repose had run. Respondent continued to deny further medical care on the basis that Petitioner had failed to use his medical benefits for over 60 consecutive months.

**Held:** Seeking authorization for legitimate, reasonably necessary medical treatment causally related to an accepted injury claim within 60 consecutive months of the last treatment constitutes “use” under § 39-71-704(1)(e), MCA. Because Respondent’s claims examiner believed the sole reason Petitioner was requesting authorization for treatment was to extend the 60-month deadline, Respondent acted reasonably in denying and maintaining the denial of medical benefits.

## **STAY AND BOND**

***Harrison v. Liberty Northwest Ins. Corp. and Stillwater Mining Co., 2006 MTWCC 24*** (Order Denying Stay of Execution and Waiver of Supersedeas Bond).

**Summary:** Respondent Stillwater Mining Company was held liable by this Court for Petitioner’s benefits. Stillwater then filed a notice of appeal and has moved for a stay of execution of judgment and a waiver of the bond requirement. At the present time, Petitioner’s benefits are being paid by Liberty Northwest Insurance Corporation under a reservation of rights. Liberty and Petitioner both object to the stay of execution. Petitioner and Liberty further argue that, should the stay be granted, the bond requirement should not be waived.

**Held:** Stillwater's motion is denied. In determining whether to grant a stay of execution, the Court must balance the interests of all the parties involved. In the present case, should Stillwater prevail on appeal, it would be able to obtain restitution from Liberty.

***Sturchio v. Wausau Underwriters Ins. Co., 2007 MTWCC 12*** (Order Denying Stay of Execution of Judgment And Denying Waiver of Supersedeas Bond).

**Summary:** Respondent has appealed the Court's decision regarding Petitioner's weekly TTD benefit rate to the Montana Supreme Court. Respondent now moves this Court for a stay of execution of judgment, and to waive posting of a supersedeas bond. Petitioner does not object to the stay of execution of judgment, but requests that the Court require Respondent to post the supersedeas bond or make a cash deposit.

**Held:** Respondent has provided no evidence to support its argument that the Court should allow it to waive the supersedeas bond requirement. Since a stay of execution of judgment pending appeal may only be had by either presenting a supersedeas bond or by waiver of the bond, Respondent's motion for stay of execution must also be denied.

***Michalak v. Liberty Northwest Ins. Corp., 2007 MTWCC 14B*** (Order Granting Respondent's Motion to Stay and Waiver of Supersedeas Bond).

**Summary:** Respondent moved the Court to stay the judgment in this matter and waive posting of a supersedeas bond. Petitioner opposes staying the judgment, but in the event the Court grants Respondent's motion to stay, Petitioner does not object to waiver of the supersedeas bond.

**Held:** Respondent's motion to stay the judgment is granted. In determining whether to grant a stay of judgment, the Court must balance the interests of all the parties involved. In light of the circumstances in the present case, Petitioner's right to benefits does not outweigh Respondent's right to appeal. Respondent's unopposed motion to waive the supersedeas bond is also granted.

***Evans v. Liberty Northwest Ins. Corp., 2007 MTWCC 32*** (Order Granting Stay of Execution of Judgment and Waiver of Supersedeas Bond).

**Summary:** Respondent has appealed this Court's Findings of Fact, Conclusions of Law and Judgment to the Montana Supreme Court. Respondent now moves this Court for a stay of execution of judgment and to waive posting of a supersedeas bond. Petitioner objects.

**Held:** Although styled as opposition to both the stay of judgment and waiver of the supersedeas bond, Petitioner concedes in his brief that the posting of a supersedeas bond would allay his concerns and allow the Court to issue a stay. Regarding the requirement that Respondent post a bond, Respondent has shown to the satisfaction of the Court that adequate security exists for payment of the judgment. Therefore, the requirement that

Respondent post a supersedeas bond is waived.

***Oksendahl v. Liberty Northwest Ins. Corp., 2007 MTWCC 35*** (Order Granting Stay of Execution of Judgment and Waiver of Supersedeas Bond).

**Summary:** Liberty has appealed this Court's Order Granting Petitioner's Motion for Summary Judgment to the Montana Supreme Court. Liberty now moves this Court for a stay of execution of judgment, and to waive posting of a supersedeas bond. Alternatively, Liberty moves for an order requiring Petitioner to repay any monies paid pursuant to this judgment if this Court's Order is reversed on appeal. Petitioner does not oppose the motion to stay but does oppose the motion to waive the posting of a supersedeas bond.

**Held:** Liberty has shown to the satisfaction of the Court that adequate security exists for payment of the judgment. Therefore, the requirement that Liberty post a supersedeas bond is waived.

***Hopkins v. UEF v. Kilpatrick, 2010 MTWCC 29*** (Order Denying Stay of Execution of Judgment and Denying Waiver of Supersedeas Bond).

**Summary:** Third-Party Respondent moves for a stay of execution of judgment and to waive posting of a supersedeas bond. Petitioner opposes the stay. Respondent/Third-Party Petitioner does not oppose the stay. However, both ask the Court to require Third-Party Respondent to post a supersedeas bond.

**Held:** Third-Party Respondent has provided no evidence to support his request that the Court allow him to waive the supersedeas bond requirement. Since a stay of execution of judgment pending appeal may only be obtained after either presenting a supersedeas bond or by waiver of the bond, Third-Party Respondent's motion for stay of execution is denied.

## SUMMARY JUDGMENT

***Pinnow v. Halverson, Sheehy & Plath, P.C., 2008 MTWCC 31*** (Order Granting Intervenor's Motion for Summary Judgment, Dismissing Intervenor, and Changing Caption).

**Summary:** Intervenor moved for summary judgment on whether the Stipulation for Settlement is valid and enforceable. Respondent concurred with Intervenor's arguments. Petitioner did not file a response to Intervenor's motion.

**Held:** Under ARM 24.5.329(3), any party opposing a motion for summary judgment shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party. Under ARM 24.5.316(4), failure to file briefs may subject the motion to summary ruling. Failure of the adverse party to timely file an answer brief may be deemed an admission that the motion is well-taken. Intervenor's

motion for summary judgment is therefore well-taken.

***Liberty Northwest Ins. Corp. v. Montana State Fund, In re: Mitchell, 2008 MTWCC 10*** (Order Declining Consideration of All Pending Summary Judgment Motions, Pursuant to ARM 24.5.329(1)(B)).

**Summary:** All parties in this matter have filed respective summary judgment motions, with a total of seventeen substantive briefs presented for the Court's consideration in resolving the motions.

**Held:** The Court declines to consider these motions pursuant to ARM 24.5.329(1)(b).

***Emmons v. MHA Workers Comp. Reciprocal, 2008 MTWCC 10*** (Order Denying Petitioner's Motion for Summary Judgment, and Respondent's Cross-Motion for Summary Judgment, Granting Respondent's Motion to Strike Petitioner's Addendum to Her Summary Judgment Brief, and Granting Respondent's Motion to Strike Petitioner's Reply Brief).

**Summary:** Petitioner moved for summary judgment. Respondent cross-motivated for summary judgment, alleging Petitioner failed to provide notice of her injury within thirty days, as required by § 39-71-603(1), MCA. Respondent further moved the Court to strike two of Petitioner's pleadings related to the motions for summary judgment on the grounds that Petitioner's pleadings contained inadmissible information regarding confidential mediation proceedings.

**Held:** Petitioner's motion for summary judgment is denied because Petitioner failed to comply with the requirements of ARM 24.5.329(3). Irrespective of Petitioner's failure to comply with this rule, it is readily apparent from the briefs that Petitioner's claim is not appropriate for summary judgment because there are facts in dispute. Respondent's cross-motion for summary judgment is denied because Petitioner timely provided notice to her employer of her alleged injury in compliance with § 39-71-603(1), MCA. Respondent's motions to strike two of Petitioner's pleadings are granted on the grounds that the substance of Petitioner's pleadings attempted to place confidential mediation information before the Court which is specifically prohibited under § 39-71-2410, MCA. Petitioner has made multiple attempts to introduce information from the confidential mediation proceedings in contravention of § 39-71-2410, MCA. Petitioner is cautioned that any further attempts will result in an order to show cause why sanctions should not be imposed.

***Wombold v. Montana State Fund, 2009 MTWCC 40*** (Order Denying Petitioner's Motion for Summary Judgment and Granting Petitioner the Opportunity to be Heard as to Why Summary Judgment Should Not be Granted in Favor of Respondent).

**Related Topics:** Wages

**Summary:** Petitioner moved the Court for summary judgment, arguing that Respondent incorrectly calculated the average weekly wages of the decedent by including overtime wages at

the rate of pay the decedent was paid for non-overtime work. Respondent responds that § 39-71-123(1), MCA, is clear on its face regarding the inclusion of overtime in average weekly wage calculations and that the statute provides that overtime hours are included, not at the overtime rate, but at the worker's "regular hourly rate" – which Montana State Fund interprets to be the rate at which the employee is paid for non-overtime work.

**Held:** While Petitioner has argued that the statute in question unambiguously supports her interpretation, she urges the Court to interpret the applicable statute differently than it has previously been interpreted by this Court and others. The statute is, at best, ambiguous. Following the rules of statutory construction, the Court has examined the legislative history of the statute. The legislative history makes it clear that Respondent's interpretation of the statute is consistent with the legislature's intent. Therefore, Petitioner's motion for summary judgment is denied. Although Respondent did not file a cross-motion for summary judgment, since this issue is purely an issue of law and no issues of material fact remain, it may be appropriate to grant summary judgment in favor of Respondent. Before entering judgment in favor of the nonmoving party, however, Petitioner must be afforded notice and an opportunity to be heard. Therefore, the Court reserves entering judgment in this matter until such time as Petitioner has had the opportunity to be heard.

***Wombold v. Montana State Fund, 2009 MTWCC 40A*** (Order Granting Summary Judgment in Favor of Respondent).

**Summary:** The Court denied Petitioner's motion for summary judgment in this matter. Although no material facts remained in dispute and the issue before the Court was purely an issue of law, the Court did not grant summary judgment in favor of Respondent because Respondent had not cross-motivated for summary judgment. The Court noted that while generally no formal cross-motion is necessary for a court to enter summary judgment in favor of a nonmoving party, Petitioner must be afforded an opportunity to be heard.

**Held:** Petitioner has informed the Court that she does not object to the Court's entry of summary judgment in favor of Respondent. For the reasons set forth in *Wombold v. Montana State Fund, 2009 MTWCC 40*, the Court concludes that summary judgment in favor of Respondent is appropriate and is therefore granted.

***Hartford Ins. Co. Of the Midwest v. Montana State Fund, In re: Brian McKirdy, 2012 MTWCC 28*** (Order Denying Respondent's Motion for Summary Judgment, and Granting Petitioner's Motion for Summary Judgment in Part).

**Summary:** Respondent moved for summary judgment, arguing that the claimant either suffered an occupational disease while his employer was insured by Petitioner, or alternatively, that he failed to notify Respondent of his industrial injury within 30 days. Petitioner cross-motivated, arguing that the claimant suffered an industrial injury while Respondent insured the claimant's employer, and demanding Respondent reimburse it for benefits paid to the claimant.

**Held:** The undisputed facts demonstrate that the claimant suffered an industrial injury while Respondent was the insurer at risk. However, Respondent's defense to the claimant's claim

cannot be raised in this case because the claimant is not a party. Petitioner is not liable for the claimant's claim. However, Petitioner has not proven that it is entitled to indemnification from Respondent. Respondent's motion for summary judgment is denied. Petitioner's cross-motion for summary judgment is granted in part and denied in part.

***Derrick Goble v. Montana State Fund, 2013 MTWCC 8*** (Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment) (*Appealed to Montana Supreme Court – April 26, 2013*)

**Summary:** Petitioner moves for summary judgment, alleging that since Respondent accepted liability for his injury, he was entitled to additional benefits under § 39-71-703, MCA, notwithstanding his incarceration for more than 30 days. Petitioner further alleges that Respondent's interpretation of § 39-71-744, MCA, in denying him additional permanent partial disability benefits is in error and if not, then the statute is unconstitutional for violating his equal protection and due process rights. Respondent's Cross-Motion for Summary Judgment counters that § 39-71-744, MCA, is plain and unambiguous and is intended to deny disability benefits to an injured worker who is incarcerated for more than 30 days, and that the statute has been previously found to be rationally related to a legitimate governmental purpose.

**Held:** Section 39-71-744, MCA, is plain and unambiguous and is clearly intended to deny disability benefits, including permanent partial disability benefits, to an injured worker during the period of the worker's incarceration of more than 30 days. The Court found previously in Wimberley and McCuin that § 39-71-744, MCA, was constitutional, and the statute is also rationally related to the legislated objectives of the Workers' Compensation Act. Petitioner fails to make a compelling argument that the Court's earlier decisions were wrong and should be revisited.

***Lynn Gerber v. Montana State Fund, 2013 MTWCC 9*** (Or. Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment) (*Appealed to Montana Supreme Court – April 26, 2013*).

**Summary:** Petitioner moves for summary judgment, alleging that since Respondent accepted liability for his injury, he was entitled to additional benefits under § 39-71-703, MCA, notwithstanding his incarceration for more than 30 days. Petitioner further alleges that Respondent's interpretation of § 39-71-744, MCA, in denying him additional permanent partial disability benefits is in error and if not, then the statute is unconstitutional for violating his equal protection and due process rights. Respondent's Cross-Motion for Summary Judgment counters that § 39-71-744, MCA, is plain and unambiguous and is intended to deny disability benefits to any injured worker who is incarcerated for more than 30 days, and that the statute has been previously found to be rationally related to a legitimate governmental purpose.

**Held:** Section 39-71-744, MCA, is plain and unambiguous and is clearly intended to deny disability benefits, including permanent partial disability benefits, to an injured worker during the period of the worker's incarceration of more than 30 days. This Court found previously in Wimberley and McCuin that § 39-71-744, MCA, was constitutional, and the statute is also rationally related to the legislated objectives of the Workers' Compensation Act. Petitioner fails

to make a compelling argument that this Court's earlier decisions were wrong and should be revisited.

***Montana Ins. Guaranty Assoc. v. Montana SIF, 2013 MTWCC 19*** (Order Denying Petitioner's Appeal and Affirming Department Decision).

**Summary:** Petitioner appealed from a Department decision denying it summary judgment on the issue of whether it was entitled to reimbursement from Respondent in a case where an employee who was certified as vocationally handicapped suffered a subsequent injury. The Department held that the employer had failed to fulfill its affirmative duty to comply with § 39-71-906, MCA.

**Held:** Although Petitioner urges this Court to conclude that Respondent had an affirmative duty to contact the employer and request that the employer comply with § 39-71-906, MCA, the language of the statute does not support such a reading. The decision of the Department's hearing officer is affirmed.

#### SUMMARY JUDGMENT / BENEFITS

***Raymond Johnson v. Liberty NW Ins. Corp., 2013 MTWCC 18*** (Order Granting Summary Judgment in Favor of Petitioner).

**Summary:** Upon order of the Court, the parties simultaneously moved for summary judgment on the issue of whether the 5th or 6th Edition of the AMA Guides applies for purposes of calculating Petitioner's impairment rating.

**Held:** The 1999 version of the Workers' Compensation Act applies to Petitioner's OD claim because, under *Grenz*, 278 Mont. 268, 924 P.2d 264 (1996), an OD claimant's last day of work determines which version of the act applies. Under the 1999 statutes, the correct edition of the AMA Guides to apply is that which was "current" on the date the injured worker reached MMI. Since Petitioner reached MMI on April 16, 2001, the 5th Edition applies for his impairment rating. The Court rejected LNW's argument that the 6th Edition should be used because § 39-71-711(1)(b), MCA (2011) is retroactive. Where the 1999 version of the Act, rather than the 2011 version applied to Petitioner's claim, 5th Edition was to be used pursuant to *Drake and Hilbert v. Montana State Fund*, 2011 MTWCC 2. Summary judgment granted in favor of Petitioner.

#### SUMMARY JUDGMENT / CAUSATION

***Kris Keller v. Montana University System Self-Funded Workers' Compensation Program, 2012 MTWCC 30*** (Order Denying Respondent's Motion for Judgment on the Pleadings).

**Summary:** Respondent moved for judgment on the pleadings, arguing that the Petition alleges Petitioner suffered an injury during treatment, precluding Respondent's liability for her injury pursuant to § 39-71-704(1)(d)(iii), MCA.

**Held:** Respondent’s motion is denied. The party moving for judgment on the pleadings must establish that no material issue of fact remains and that the movant is entitled to judgment as a matter of law. Construing the facts alleged in the Petition in a light most favorable to the Petitioner, the Respondent has failed to show that the Petition alleges that an “accident” occurred while Petitioner was being treated for her occupational disease, precluding Respondent’s entitlement to judgment as a matter of law.

***Liberty Insurance Corp. v. Travelers Indemnity Co. of America, In re: Tia Kuran, 2012 MTWCC 32*** (Order Denying Respondent’s Motion for Summary Judgment).

**Summary:** Respondent moves for summary judgment, arguing that, as between two insurers with the same employer, Petitioner is liable for the claimant’s occupational disease since Petitioner provided coverage either at the time of diagnosis of claimant’s neck condition or at the time claimant knew or should have known that her neck complaints were an occupational disease. Petitioner counters that the claim filed with Petitioner was a natural progression of the claim filed with and accepted by Respondent.

**Held:** The cause of Petitioner’s neck complaints remains a disputed issue of fact, precluding summary judgment.

#### **SUMMARY JUDGMENT / NOTICE OF INJURY OR OD**

***Russel Romine v. Northwestern Energy, 2012 MTWCC 35*** (Order Granting in Part and Denying in Part Respondent’s Motion for Summary Judgment).

**Summary:** Respondent moved for summary judgment, arguing that Petitioner’s occupational disease claim is untimely under § 39-71-601(3), MCA, because he knew or should have known that he was suffering from an occupational disease more than one year prior to the filing of his workers’ compensation claim.

**Held:** The undisputed facts demonstrate that Petitioner received a diagnosis and treated for shoulder and back complaints in August 2009 and therefore he should have known he was suffering from an occupational disease at that time. His December 2010 claim was untimely filed for these conditions. However, Petitioner did not receive a diagnosis or treatment for his cervical condition until July 2010; therefore, his occupational disease claim for his cervical condition was timely` filed. The Court granted Respondent’s motion for summary judgment regarding Petitioner’s occupational disease claim for his shoulder and low back, and denied the motion regarding Petitioner’s cervical condition.

***Dianne Dvorak v. Montana State Fund, 2012 MTWCC 36*** (Order Granting Respondent’s Motion for Summary Judgment) (*Appealed to Montana Supreme Court – October 31, 2012; Reversed and Remanded – July 30, 2013*).

**Summary:** Respondent moved for summary judgment, arguing that Petitioner’s occupational disease claim is untimely under § 39-71-601(3), MCA, because she knew or should have known

that she was suffering from an occupational disease more than one year prior to the filing of her workers' compensation claim.

**Held:** The undisputed facts demonstrate that although she may not have had a formal diagnosis, Petitioner understood that her condition was caused by “repetitive motion” in her job duties and she received medical treatment, including prescription medication, for approximately five years before she filed her first report of injury or occupational disease. By the time Petitioner began taking prescription medication to alleviate her symptoms, she knew or should have known that she was suffering from an occupational disease. Her claim is therefore untimely under § 39-71-601(3), MCA, and Respondent is entitled to summary judgment.

## TERMINATION FOR CAUSE

*Stancil v. MHA Workers' Comp. Trust, 2007 MTWCC 51* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Benefits.

**Summary:** Petitioner petitioned the Court for permanent partial disability and rehabilitation benefits. Petitioner was precluded from returning to his time-of-injury job as an ICU nurse and performed transitional work until a nurse recruiter position was developed and subsequently offered to Petitioner. Petitioner was employed in that position for several weeks before he was terminated.

**Held:** Petitioner is not entitled to permanent partial disability and rehabilitation benefits because he did not suffer a wage loss as a result of his injury. The employer properly placed Petitioner in a transitional job. The nurse recruiter position was not specifically created for Petitioner. He was qualified to perform the nurse recruiter responsibilities because of his education, work experience, and personal and professional skills. Petitioner reviewed the job description and applied for the position. Petitioner was discharged from his employment because of behavioral issues, not as a result of his injury. Therefore, the Court concludes that Petitioner did not suffer an actual wage loss as a result of his injury and is not entitled to permanent partial disability or rehabilitation benefits.

*Bagley v. Montana State Fund, 2009 MTWCC 29* (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Benefits, Credibility.

**Summary:** After Petitioner David Bagley suffered an industrial injury to his right arm, his employer assigned him to alternate job duties which consisted of completing coursework for an electrician's apprenticeship. Bagley asserted that he was unable to complete the hours to which his treating physician released him to return to work due to severe pain. Bagley's employer terminated his employment for failing to complete his work hours and

for not reporting to work. Bagley argues he is entitled to temporary total disability benefits and that Respondent Montana State Fund has unreasonably refused to pay his benefits.

**Held:** The facts of this case unambiguously demonstrate that Bagley was terminated from his employment for disciplinary reasons. He refused to work the hours to which he had been released, and he then failed to report to work at all. Although Bagley's treating physicians disagree as to whether Bagley is restricted from using his right hand for writing as part of his job duties, they both agree that he is able to work in a sedentary position. Bagley's former employer made such a position available to him, and had Bagley not been fired for cause, he would have been able to continue in that position. Bagley's request for reinstatement of TTD benefits is denied. Since Bagley is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

## UNINSURED EMPLOYERS' FUND

*Benton v. Uninsured Employers' Fund, 2009 MTWCC 37* (Order Granting Uninsured Employers' Fund's Motion to Dismiss).

**Related Topics:** Statutes of Limitation.

**Summary:** The Uninsured Employers' Fund moved to dismiss Petitioner's petition because it was filed more than 60 days after the date the mediator's report was mailed to the parties and was therefore untimely pursuant to § 39-71-520(2), MCA. Petitioner argued that § 39-71-520(2), MCA, is unconstitutional in that it violates her right to equal protection and is unconstitutionally void for vagueness.

**Held:** The Uninsured Employers' Fund's motion to dismiss is granted. A prerequisite to any equal protection challenge is demonstrating that a classification has been adopted that affects two or more similarly situated classes in an unequal way. The Court identified the two classes involved in this case as (I) injured workers employed by uninsured employers seeking benefits from the UEF, and (II) injured workers employed by insured employers seeking benefits from the employer's insurer. The process for seeking redress for an uninsured worker is distinct in myriad ways from that which an insured worker follows. The distinct process legislatively mandated for insured workers versus uninsured workers leads the Court to conclude that the classes of injured employees at issue in this case are not similarly situated. In *Weidow v. Uninsured Employers' Fund*, this Court determined that §39-71-520(2), MCA, was unconstitutional by its vagueness. Unlike the claimant in *Weidow*, however, it was not necessary for Petitioner to guess at the meaning of the "determination by the department" referenced in the statute since she had rejected both the mediator's recommendation and the UEF's determination. Therefore, her required conduct – i.e., petitioning the Workers' Compensation Court within 60 days – was sufficiently defined. Section 39-71-520(2), MCA, is not unconstitutionally vague as applied to this case.

***Hilbig v. Uninsured Employers' Fund, 2008 MTWCC 43*** (Order Denying The Uninsured Employers' Fund's Motion to Find Summary Judgment Inappropriate and Granting the UEF's Motion for an Extension of Time to Respond).

**Related Topics:** Evidence.

**Summary:** Respondent UEF moved the Court to find summary judgment inappropriate pursuant to ARM 24.5.329(1)(c), or in the alternative to grant the UEF an extension of time to file a response brief. The UEF asserted that it had recently learned of medical evidence which would place a material fact in dispute and would thereby render summary judgment inappropriate in the case.

**Held:** Two days before trial, the parties agreed in a conference call with the Court that the only issue in dispute was whether the UEF could withhold payment of benefits until Petitioner's third-party action was resolved. The UEF conceded during this conference that it had no medical evidence to support its contention that Petitioner was not injured to the extent claimed in the subject accident. Based upon these representations, the Court vacated the trial and directed Petitioner to file a motion for summary judgment to resolve the one legal issue that was in dispute. In light of the procedural history of this case and the representations of counsel which have contributed to this procedural history, it would be manifestly unjust if the Court were to now allow the UEF to interject medical evidence through the back door which would have not been admitted had this matter proceeded to trial as scheduled. The UEF's motion to find summary judgment inappropriate is denied. The UEF has 10 days from the date of this Order in which to respond to Petitioner's summary judgment motion, and must confine its brief only to the evidence which was admitted by stipulation and which would have been relied upon had this matter proceeded to trial as scheduled.

***Raymond v. Uninsured Employers' Fund, 2009 MTWCC 7*** (Order Denying Uninsured Employers' Fund's Motion for Leave to File a Third-Party Petition).

**Summary:** In previous Orders, this Court dismissed the alleged uninsured employers as parties to this litigation because the Uninsured Employers' Fund had not fulfilled the due process requirements of § 39-71-2401, MCA, and the departmental procedure set forth in § 39-71-506, MCA. The Court then denied the UEF's motion for reconsideration. The UEF now moves the Court for leave to file a third-party petition against the alleged uninsured employers.

**Held:** Since the UEF has not demonstrated that it has fulfilled the requirements of §§ 39-71-506, -2401, MCA, its motion for leave to file a third-party petition against the alleged uninsured employers is denied.

***Hopkins v. Uninsured Employers' Fund, 2009 MTWCC 12*** (Order Denying Uninsured Employers' Fund's Motion for Reconsideration and Dismissing Uninsured Employers' Fund's Third-Party Petition for Statutory Indemnity).

**Summary:** The Uninsured Employers' Fund (UEF) moved this Court to reconsider its decision dismissing the alleged uninsured employer from this case *sua sponte*. The UEF argues that the Court misinterpreted the law when it concluded that the alleged uninsured employer was not a proper party to the action. The UEF also filed a third-party petition for statutory indemnity simultaneously with its response to the petition in this matter.

**Held:** The UEF's arguments have not persuaded the Court that the statutory procedures can be circumvented without impinging upon the due process rights of alleged uninsured employers, and its motion for reconsideration is therefore denied. The UEF's third-party petition is dismissed because the UEF has not provided any indication that it complied with the due process requirements of § 39-71-506, MCA.

***Wilson v. Uninsured Employers' Fund, 2009 MTWCC 22*** (Order Denying Uninsured Employers' Fund's Motion for Reconsideration and Granting Leave to File a Third-Party Petition).

**Related Topics:** Jurisdiction.

**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.

***Hilbig v. Uninsured Employers' Fund, 2009 MTWCC 6*** (Order Granting Petitioner's Motion for Summary Judgment).

**Summary:** Petitioner was injured in an automobile accident while within the course and scope of her employment. Her employer was uninsured, and Petitioner filed a claim against the Uninsured Employers' Fund and pursued a third-party action against the driver

of the other vehicle. The UEF has refused to pay Petitioner's benefits until her third-party claim is resolved. Petitioner has moved for summary judgment, arguing that she is entitled to benefits from the UEF because she is statutorily permitted to pursue her remedies concurrently.

**Held:** Petitioner's motion for summary judgment is granted. The Workers' Compensation Act explicitly permits Petitioner to pursue her remedies concurrently, while the UEF has no legal authority for refusing to pay benefits for which it has admitted liability.

***H&D Investments, LLC v. Uninsured Employers' Fund, 2009 MTWCC 1*** (Order Granting Petitioner's Motion for Summary Judgment).

**Summary:** Petitioner contracted with Enzo Construction, Inc. to perform and oversee construction and remodel work on a condominium. During the performance of this work, one of Enzo's employees was injured. Enzo was not carrying workers' compensation insurance at the time and the UEF accepted liability and paid benefits. The UEF then sought reimbursement from Petitioner for the benefits paid. The UEF contends Petitioner is liable for reimbursement either pursuant to § 39-71-405(1), MCA, or § 39-71-405(3), MCA, or under a theory of "equitable reimbursement." Petitioner moves for summary judgment regarding the UEF's claim for reimbursement.

**Held:** Petitioner's motion for summary judgment is granted. Section 39-71-405(1), MCA, provides any insurer who becomes liable for payment of benefits may recover the amount of benefits paid and to be paid and necessary expenses "from the contractor primarily liable." In its response brief, the UEF concedes that Petitioner is *not* the contractor primarily liable. Therefore, the UEF cannot pursue reimbursement from Petitioner under this subsection. The UEF's construction of § 39-71-405(3), MCA, is wholly unsupported by the plain language of the statute itself and does not support a claim for reimbursement against Petitioner. As for the UEF's claim for "equitable reimbursement," while the authority upon which the UEF relies may support a claim for reimbursement against Enzo as the injured worker's employer, it does not support a reimbursement claim against Petitioner.

***Hopkins v. UEF v. Kilpatrick, 2010 MTWCC 9A*** (Order Amending Findings of Fact, Conclusions of Law and Judgment).

**Summary:** The Uninsured Employers' Fund moved for amendment to the Findings of Fact, Conclusions of Law and Judgment to resolve Issue 5, which the Court concluded was moot in light of the resolution of Issues 1 through 4. The final pretrial order listed Issue 5 as "Whether Kilpatrick owed a duty of coverage to Hopkins." The UEF requests the Court amend its Findings of Fact, Conclusions of Law and Judgment "to determine that under Issue 5, Kilpatrick owed a duty of coverage to Hopkins, and to point out that Kilpatrick must indemnify the UEF for all benefits it pays to Hopkins."

**Held:** There is no legal authority for a judicial "point out" as the UEF requests. However, the UEF's motion has merit even if its argument does not. In *Hand v. Uninsured Employers' Fund* – a case the UEF inexplicably failed to cite in its motion or

brief – this Court held that since the UEF’s defense had been raised in the pretrial order contentions, the petitioner could not claim surprise that the Court considered it in reaching its decision. In the present case, the UEF failed to list its claim for indemnification in the disputed issues section of the final pretrial order. However, the UEF set forth its position regarding indemnification in its contentions. Therefore, it is proper to consider the indemnification issue. The uninsured employer’s obligation to indemnify the UEF arises under § 39-71-504(1)(b), MCA. Based on the Court’s previous findings and conclusions, Kilpatrick must indemnify the UEF for any benefits paid or payable by the UEF to Hopkins.

***Wilson v. UEF v. Elk Mountain Motor Sports, Inc., 2010 MTWCC 5*** (Order Granting Uninsured Employers’ Fund’s Motion for Partial Summary Judgment).

**Related Topics:** Procedure

**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.

***Robert Chippewa v. Uninsured Employer’s Fund v. Montana State Fund, 2012 MTWCC 39*** (Order Granting Petitioner’s Motion to Dismiss Counter-Claim and Request for Indemnity and Denying Petitioner’s Motion for Sanctions).

**Summary:** Petitioner moved to dismiss Third-Party Respondent’s counter-claim and request for indemnity. Petitioner also moved for sanctions, arguing that the counterclaim was clearly outside this Court’s jurisdiction. Third-Party Respondent responds that this Court has the jurisdiction to consider his counter-claim and it should therefore not be dismissed nor should the Court order sanctions against him.

**Held:** Petitioner’s motion to dismiss the counter-claim and request for indemnity is granted. The WCC does not have the subject matter jurisdiction to hear the tort claims Third-Party Respondent set forth. Petitioner’s motion for sanctions is denied. While Third-Party Respondent’s counsel could have better familiarized herself with the jurisdictional bounds of this Court, filing the counter-claim and request for indemnity did not rise to a sanctionable level under § 39-71-2914, MCA.

***Ginger Dostal v. Uninsured Employers' Fund, 2012 MTWCC 41*** (Order Granting Petitioner's Motion for Reconsideration and Granting Respondent's Motion to Strike).

**Summary:** Petitioner moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, contending that the Court erred in refusing to grant her relief on an issue presented for determination where the Court had previously orally ruled and indicated that it would set forth the ruling in its written findings of fact, conclusions of law, and judgment. Respondent, while disagreeing with the Court's oral ruling, agreed with Petitioner that the Court should grant reconsideration and set forth its rationale for the oral ruling. Respondent moved to strike Petitioner's reply brief on the grounds that a reply brief is not permitted under ARM 24.5.337.

**Held:** Petitioner's motion for reconsideration is well-taken. The Court overlooked its previous ruling on the issue when it published its Findings of Fact, Conclusions of Law and Judgment, and the parties are entitled to a written order setting forth the Court's rationale. Respondent's motion to strike Petitioner's reply brief is also well taken and is consistent with this Court's previous rulings.

***Olin Jensen v. Uninsured Employers' Fund and Montana State Fund v. Paul Kessler et al., 2013 MTWCC 3*** (Order Denying Third-Party Respondent's Motion for Leave to Re-file Motion for Summary Judgment and Requiring Parties to Stipulate to Agreed Facts or Agreed Record to Facilitate Submission of Matter on Briefs).

**Summary:** Third-Party Respondent Daniel Christianson moved for leave to re-file his motion for summary judgment, after his initial summary judgment motion was denied on grounds that further discovery was warranted. The parties now wish to submit this matter on briefs and stipulated facts regardless of whether Christianson's motion for leave is granted.

**Held:** The parties having contacted the Court and indicated their desire to submit this matter on briefs and stipulated facts, judicial economy dictates that Christianson's motion be denied and this matter now be submitted on briefs for full resolution of all issues, based upon a stipulated record or stipulated facts agreed to by all parties.

#### **UEF / BENEFITS / PENALTIES**

***Ginger Dostal v. Uninsured Employers' Fund, 2012 MTWCC 45*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner and Respondent disagree regarding what amount constitutes a reasonable fee to charge for photocopying certain documents. Respondent has also refused to authorize certain medical treatment, including referral to a specific orthopedist who performed previous surgeries on Petitioner's back; referral to a pain management specialist; and a lumbar spine MRI. Petitioner contends that Respondent has acted unreasonably in the adjustment of her claim, and argues that she should receive her attorney fees and a penalty.

**Held:** Based on the evidence presented, the Court concluded that the parties may reasonably charge each other 10 cents per page plus \$25 per hour of labor for photocopying these documents. Petitioner is entitled to referral to the orthopedist she requested and is also entitled to referral to a pain management specialist. Petitioner is not entitled to a lumbar MRI. Respondent was unreasonable in refusing the referrals and Petitioner is entitled to her attorney fees and a penalty relative to those two issues.

#### **UEF / PENALTIES**

***Ginger Dostal v. Uninsured Employers' Fund, 2012 MTWCC 40*** (Order Granting Respondent's Motion for Reconsideration and Finding Respondent's Refusal to pay Petitioner's Impairment Awards Unreasonable).

**Summary:** Respondent moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, contending that the Court erred in failing to make findings and conclusions consistent with its previous oral ruling regarding Petitioner's entitlement to payment of her impairment awards. Petitioner concurred in Respondent's request and further asked the Court to make findings regarding whether Respondent unreasonably refused to pay her impairment awards.

**Held:** Respondent's motion for reconsideration is well-taken. The Court overlooked its previous ruling regarding Petitioner's impairment awards when it published its Findings of Fact, Conclusions of Law and Judgment, and the parties are entitled to a written order setting forth the Court's rationale. The Court's findings and conclusions regarding its oral ruling are set forth. Furthermore, the Court found Respondent's refusal to pay Petitioner's impairment awards to be unreasonable.

***Ginger Dostal v. Uninsured Employers' Fund, 2012 MTWCC 42*** (Order Granting Petitioner's Request for Penalty and Attorney Fees).

**Summary:** After a trial of the issues, the Court determined that the UEF was unreasonable in adjusting Petitioner's claim. The Court bifurcated the issue of whether the UEF could be held liable for attorney fees and a penalty, pursuant to §§ 39-71-611 and -2907, MCA, respectively.

**Held:** Under the statutes applicable in the present case, the UEF may be found liable for attorney fees and a penalty. Since the Court adjudged the UEF's adjusting to be unreasonable in the present case, the Court concludes Petitioner is entitled to her attorney fees and a penalty against the UEF.

#### **UEF / PROCEDURE**

***William Cleek v. Uninsured Employers' Fund, 2012 MTWCC 31*** (Order Granting Petitioner's Motion to Amend Petition for Hearing).

**Summary:** Petitioner moved to file an amended Petition for Hearing in order to: 1) add Montana State Fund as an additional named party; and 2) add the issue of Respondent's claim for

reimbursement of benefits. Respondent Uninsured Employers' Fund opposed Petitioner's motion on the grounds that the amendments Petitioner seeks to make are time-barred and do not relate back to the original pleading.

**Held:** Motion to amend is granted. Leave to amend a pleading shall be freely given as justice so requires. In this case, the amendments which Petitioner seeks to make to his petition relate back to his original injury. Whether the issues that are the subject of his proposed amendments are time-barred are more properly addressed by way of a dispositive motion rather than denial of a motion to amend.

***Jacobsen Ranch Co. v. Chris Dix and Montana State Fund and Uninsured Employers' Fund, 2012 MTWCC 33*** (Order Granting Montana State Fund's Motion to Dismiss).

**Summary:** Respondent Montana State Fund moved for dismissal or in the alternative, summary judgment, arguing that Petitioner was not entitled to contribution or indemnification from Montana State Fund, which was the insurer on a prior claim brought by the claimant. Montana State Fund argues that because Petitioner is an uninsured employer, it is not entitled to such relief.

**Held:** Petitioner, an uninsured employer, lacks standing to seek indemnification or contribution from a third-party insurer. Montana State Fund's motion to dismiss is granted

## VOCATIONAL REHABILITATION – RETURN TO WORK

***Caldwell v. MaCo Workers' Comp. Trust, 2010 MTWCC 24*** (Order Holding § 39-71-710, MCA, Unconstitutional as it Relates to Rehabilitations Benefits) (*Appealed to Supreme Court - September 3, 2010; Affirmed - July 11, 2011- 2011 MT 162*).

**Related Topics:** Benefits; Constitutional Law.

**Issue:** Does the categorical denial of rehabilitation benefits violate equal protection when the basis for denial turns solely on the claimant's age-based eligibility for Social Security benefits.

**Summary:** Pursuant to § 39-71-710, MCA, the insurer's liability for payment of permanent partial disability benefits, permanent total disability benefits, and rehabilitation benefits terminates when a claimant is considered retired. Petitioner argues that, as it relates to vocational rehabilitation benefits, § 39-71-710, MCA (2005), violates his right to equal protection as guaranteed by Article II, Section 4, of the Montana Constitution.

**Held:** Section 39-71-105(3), MCA, sets forth the public policy for rehabilitation benefits. It provides that an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease. Before an injured worker can qualify for rehabilitation benefits, § 39-71-1006, MCA, requires that a rehabilitation provider certify that the worker has reasonable vocational goals and

reasonable reemployment opportunity. The rehabilitation plan must take into consideration a worker's age, education, training, work history, residual physical capacities, and vocational interests. Since the statute already considers the worker's age, the Court sees no rational basis for automatically terminating rehabilitation benefits upon an injured worker's eligibility for retirement. Therefore, the Court concludes that as it relates to rehabilitation benefits, § 39-71-710, MCA, violates Petitioner's right to equal protection.

***Markovich v. Liberty Northwest, 2007 MTWCC 21*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Benefits.

**Summary:** When Petitioner neared the completion of an 84-week vocational rehabilitation plan which allowed him to get a master's degree, he asked Respondent to pay for additional schooling so he could complete a thesis which would make him eligible for a Ph.D. program. Respondent refused. Petitioner petitioned this Court for additional vocational rehabilitation benefits, additional benefits under § 39-71-703, MCA, additional auxiliary benefits, and attorney fees and a penalty for Respondent's actions from the day of Petitioner's injury until the present.

**Held:** Petitioner has not suffered a wage loss that would entitle him to PPD benefits under § 39-71-703, MCA, because he is now qualified to earn more than he earned at his time of injury employment. Petitioner is not entitled to an additional vocational rehabilitation plan, nor is he entitled to auxiliary benefits for travel in excess of the \$4,000 which Respondent has paid. Petitioner is not entitled to attorney fees or a penalty.

***Burns v. Flathead County, Montana, 2008 MTWCC 37*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner worked as a heavy equipment mechanic for the Flathead County Road and Bridge Department until he was injured in the course and scope of his employment. Before he returned to work, Petitioner's position as a mechanic was eliminated by the department. When the department posted the position of bridge equipment operator, Petitioner requested a hiring preference; however, Respondent did not hire Petitioner for this position. Petitioner petitioned the Court for a determination that he was entitled to a hiring preference pursuant to § 39-71-317, MCA, for the position of bridge equipment operator.

**Held:** Petitioner was not entitled to a hiring preference for the position of bridge equipment operator because the position is not consistent with his vocational abilities.

***Sizemore v. Copper King Hotel and Convention Center, 2008 MTWCC 8*** (Order Granting Respondent's Motion to Dismiss) (*Notice of Appeal Filed by Petitioner - February 20, 2008; Appeal Dismissed with Prejudice - June 17, 2008*).

**Summary:** Respondent moved to dismiss Petitioner's petition in which she requested that

the Court enforce the reemployment preference of § 39-71-317, MCA, against The Cimarron Group, Inc., which now owns the Copper King Hotel and Convention Center. Petitioner was employed at the Copper King Hotel and Convention Center when it was owned by Allegra Partnership, and Allegra Partnership owned the business on the date of Petitioner's industrial injury.

**Held:** Under § 39-71-317(3), MCA, a claimant's reemployment preference lies with her date-of-injury employer. Since Petitioner's place of employment was owned by Allegra Partnership and not The Cimarron Group, Inc., on the date of her injury, her entitlement to a reemployment preference lies with Allegra Partnership and not The Cimarron Group, Inc. Respondent's motion to dismiss is therefore granted.

*Short v. J.H. Kelly Holdings, LLC, 2009 MTWCC 33* (Finding of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner William Short petitioned the Court for a determination of the appropriate labor market for purposes of terminating temporary total disability benefits pursuant to § 39-71-609, MCA. Petitioner was a permanent resident of Shoreline, Washington, at the time he was injured. Petitioner's injury occurred at a temporary work assignment as a millwright in Missoula, Montana. Shortly after Petitioner's injury, he moved to Clark Fork, Idaho. A vocational rehabilitation provider developed several job analyses utilizing the Montana and Shoreline, Washington, labor markets. Petitioner's treating physician approved six of these alternative job analyses, and Respondent J.H.Kelly Holdings, LLC, terminated Petitioner's TTD benefits based on the treating physician's approvals. Petitioner argues that Clark Fork, Idaho, is his labor market because he currently resides and has sought employment there. Petitioner also petitioned the Court for a determination of whether he is permanently totally disabled.

**Held:** In determining the appropriate labor market for purposes of terminating TTD benefits pursuant to § 39-71-609, MCA, the Court employs a fact-driven analysis. In this case, Petitioner permanently resided in Shoreline, Washington, from 1998 through the time of his injury. Petitioner accepted millwright jobs throughout the Pacific Northwest, but returned to Shoreline as his residential base between 2003 and the time of his injury. At the time of his injury, Petitioner worked in Montana only on a temporary basis. After his injury, Petitioner returned to Shoreline, and testified that he would have stayed there for his recovery had he been able to locate a treating physician in that region. Although Petitioner testified that he could not locate a treating physician in Shoreline willing to accept Montana workers' compensation insurance, he also testified that he moved from Shoreline to Clark Fork was because he knew other millwrights living there and envisioned working as a millwright again after recovering from his injury. Based on these factors, Shoreline, Washington is the appropriate labor market for purposes of terminating Petitioner's TTD benefits. Regarding Petitioner's PTD status, Petitioner's treating physician restricted him to medium duty work and a fifty-pound lifting restriction. The treating physician approved six job analyses that complied with the approved restrictions. A vocational rehabilitation provider testified that Petitioner had a reasonable prospect of performing all of these approved jobs. Therefore, Petitioner failed to prove that he is permanently and totally disabled.

## WAGES

*Negethon v. Montana State Fund, 2006 MTWCC 40* (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner was receiving unemployment benefits when he accepted a job as a day laborer. Approximately four hours into his first shift, he suffered an industrial injury. Respondent calculated Petitioner's TTD benefits by basing his average weekly wage on one day's employment. Petitioner disputes this calculation method.

**Held:** Petitioner was hired for a single day's work, and his unemployment benefits are not "wages" for the purposes of calculating his average weekly wage pursuant to § 39-71-123, MCA.

*Sturchio v. Wausau Underwriters Ins. Co., 2007 MTWCC 4* (Decision and Judgment) (Appealed to Supreme Court - February 12, 2007; Affirmed – December 6, 2007).

**Summary:** Petitioner suffered a work-related injury on June 11, 2005. At the time of her injury, Petitioner held five concurrent employments. Petitioner and Respondent disagree as to whether § 39-71-123, MCA, requires the same calculation method to be used in determining the average weekly wage for every concurrent employment, and disagree about the weekly rate of Petitioner's TTD benefits.

**Held:** Petitioner correctly interprets § 39-71-123, MCA, to allow for different calculation methods to be used for each concurrent employment, according to the specific facts of each employment. Using Petitioner's average weekly wage calculations for four of her five employments, and the Court's own calculations for a fifth employment, the Court concludes Petitioner is entitled to a weekly rate of \$318.48 in TTD benefits.

*Hand v. Uninsured Employers' Fund, 2007 MTWCC 33* (Order Concerning Compensation Rate Issue).

**Summary:** Petitioner has been totally disabled due to an occupational disease since January 15, 1993. In the late 1980s, Petitioner's employer gave him twenty-five head of breeding cattle in lieu of future wage increases. Petitioner's employer also provided pasture year round, provided hay in the winter, medical supplies, veterinary services, and breeding bulls for the cattle. Petitioner contends that the offspring of these cattle should be included as wages in determining his total disability rate.

**Held:** The value of the calves born from the twenty-five head of cattle given to Petitioner by his employer in the late 1980s are not wages for the purpose of determining Petitioner's total disability rate. However, the value of the year-round pasture, winter hay, medical supplies, veterinary services, and breeding bulls for the twenty-five head of cattle provided to Petitioner by his employer are wages for the purpose of determining Petitioner's total disability rate. The parties shall calculate the actual value of these services and supplies for the year preceding Petitioner's last day of work and factor that amount into the

calculation for determining Petitioner's total disability rate.

***Montana Municipal Ins. Auth. v. Roche, 2007 MTWCC 47*** (Findings of Fact, Conclusions of Law and Judgment) (*Appealed to Montana Supreme Court – January 15, 2008; Affirmed – June 10, 2009*).

**Summary:** Petitioner alleges that Respondent received a “wage” from a business which he ran as a sole proprietor during the time that Respondent received TTD benefits from Petitioner, and that Respondent did not have Petitioner's consent to do so as required by § 39-71-701, MCA. Respondent denies that he received a “wage” from his business because he asserts that the business is not profitable and does not generate an income.

**Held:** Respondent received a wage from his business because he used business assets for personal use and wrote checks from his business account to pay personal loans. The fact that the business is not profitable according to Respondent's income tax returns has no bearing on whether Respondent himself received a “wage” from the business as that term is defined in § 39-71-123, MCA. Therefore, Respondent was not entitled to the TTD benefits he received and must repay those benefits to Petitioner.

***Cardwell v. Uninsured Employers' Fund, 2008 MTWCC 24*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Attorneys' Fees, Uninsured Employer's Fund.

**Summary:** Petitioner petitioned the Court for benefits as a result of this Court's determination that he suffered an occupational disease while employed by Terry Rackley. At trial, the UEF conceded that Petitioner was entitled to TTD benefits at a rate of \$183.15 per week beginning September 20, 2004, up until at least the date of trial. Petitioner argued that the UEF utilized the incorrect method in calculating his wages because the UEF failed to show good cause why the four pay periods preceding Petitioner's occupational disease were not an adequate representation of Petitioner's average weekly wage. The UEF argued that the preceding year more adequately represented the fluctuation in Petitioner's pay and periods of time that he spent being idle. Additionally, Petitioner requested costs and attorney fees.

**Held:** Petitioner is entitled to TTD benefits at a rate of \$183.15 per week. The UEF demonstrated good cause for utilizing one year's worth of wages to determine Petitioner's average weekly wage. Because Petitioner did not prevail on the issue before the Court, he is not entitled to costs or attorney fees.

***Kramer v. Montana Contractor Comp. Fund, 2008 MTWCC 48*** (Findings of Fact, Conclusions of Law and Judgment).

**Related Topics:** Benefits, Penalties.

**Summary:** Petitioner suffered an industrial injury to his left shoulder, which was ultimately

diagnosed as a rotator cuff tear. Although Respondent initially refused to pay indemnity benefits and for surgical repair of the shoulder, it did so after obtaining a second medical opinion which supported the treating physician's diagnosis. Petitioner maintains that Respondent was unreasonable in its initial denial of indemnity and medical benefits and that it further has incorrectly calculated the rate for Petitioner's temporary total disability benefits.

**Held:** Since the evidence demonstrates that Petitioner's job is not seasonal, his average weekly wage should be calculated using the statutorily-preferred method found in § 39-71-123(3)(a), MCA. Petitioner is entitled to his costs. Respondent's actions in adjusting the claims, while imperfect, were not so unreasonable as to entitle Petitioner to a penalty award or attorney fees.

***Leigh v. Montana State Fund, 2010 MTWCC 37*** (Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Cross-Motion for Summary Judgment) (*Appealed to the Supreme Court – January 1, 2011; Appeal Dismissed – March 24, 2011*).

**Summary:** Petitioner moved for summary judgment, alleging that the insurer incorrectly calculated his average weekly wage by using a twelve-month period under § 39-71-123(3)(b), MCA, which included weeks during which he was laid off from his job as part of the period used for calculating his average weekly wage. Respondent cross-motivated for summary judgment, arguing that it properly calculated Petitioner's average weekly wage under the Workers' Compensation Act and in accordance with applicable case law regarding seasonal employment.

**Held:** Given the seasonal nature of Petitioner's work and his employment history with his employer and the reasonable relationship requirement of § 39-71-105(1), MCA, Respondent correctly calculated Petitioner's average weekly wage by using a one-year period as permitted under § 39-71-123(3)(b), MCA.

***Jody Gunderman v. Montana State Fund, 2012 MTWCC 18*** (Findings of Fact, Conclusions of Law and Judgment).

**Summary:** Petitioner suffered an injury as a seasonal farm worker. He contends that, since he did not work for four pay periods, his average weekly wage should be based on his hourly rate of pay times the number of hours in a week for which he was hired to work under § 39-71-123(3)(a), MCA. Respondent calculated Petitioner's average weekly wage based on Petitioner's four prior pay periods going back more than one year from the date of injury, given Petitioner's long history of seasonal employment with the same employer. The parties request the Court identify the proper method of calculating Petitioner's average weekly wage.

**Held:** As a seasonal farm worker with a long history working for the same employer and the reasonable relationship requirement of § 39-71-105(1), MCA, Petitioner's average weekly wage should be calculated pursuant to § 39-71-123(3)(b), MCA, by compiling his wages earned while working for his time-of-injury employer for a period of one year prior to the date of injury. For purposes of this calculation, Petitioner's wages would include the value of his room and board as

well as the value of a truck that his employer gave him as compensation for his labor. Petitioner's wages should then be divided by the number of weeks in the year prior to his injury that Petitioner worked for his time-of-injury employer and periods of idleness during that year. Excluded from the calculation are periods during which Petitioner worked for another employer since those periods do not constitute "periods of idleness."

***Dennis Marjamaa v. Liberty Northwest Ins. Corp., 2012 MTWCC 23*** (Decision and Judgment).

**Summary:** Petitioner and Respondent disagree regarding the appropriate time period to use for determining Petitioner's average weekly wage. Respondent argues that Petitioner's average weekly wage is appropriately calculated using his previous year of employment, including approximately four months in which he was off work due to a previous industrial injury. Petitioner admits that his employment typically included some periods of idleness, but argues that the time in which he was off work due to his previous injury should be excluded from the average weekly wage calculation.

**Held:** Under § 39-71-105(1), MCA, an injured worker's wage-loss benefits must bear a reasonable relationship to his actual wages lost. Being off work for four months due to an industrial injury is an extraordinary event and does not reflect Petitioner's typical work history with his employer. Petitioner's average weekly wage shall be calculated using the time period he suggests, which Respondent does not dispute includes work hours and periods of idleness which is typical of Petitioner's work history with his employer.

***Phillip Peters v. American Zurich Ins. Co., 2013 MTWCC 16*** (Order Granting in Part and Denying in Part Petitioner's Motion for Partial Summary Judgment on AWW and Order Denying Petitioner's Motion to Amend Petition as Moot).

**Summary:** Petitioner argued that Respondent incorrectly calculated his average weekly wage by not including his annual bonus or vacation pay which he had accrued at the time of his industrial injury. Respondent objected, arguing that Petitioner's bonus had not fallen within four pay periods of his industrial injury and that Petitioner had not shown good cause to have his average weekly wage calculated under § 39-71-123(3)(b), MCA. Respondent further argued that Petitioner's vacation pay was correctly excluded from his average weekly wage under § 39-71-123(2)(c), MCA, and that Petitioner had either waived his right to have his bonus included in his average weekly wage calculation, or he was barred by either estoppel or laches. Petitioner further argued that if § 39-71-123(2)(c), MCA, precludes the inclusion of his vacation pay, then the statute is unconstitutional. Petitioner further contended that Respondent unreasonably refused to include his annual bonus in its calculation of his average weekly wage and that he should therefore be entitled to a penalty.

**Held:** Petitioner has shown good cause to have his average weekly wage calculated under § 39-71-123(3)(b), MCA, and his annual bonus is properly included. Petitioner's vacation pay is excluded from his average weekly wage calculation pursuant to § 39-71-123(2)(c), MCA. Petitioner has not proven that § 39-71-123, MCA, is unconstitutional, nor has Petitioner proven that he is entitled to a penalty under § 39-71-2907, MCA.

## WAGES / BENEFITS

*Phillip Peters v. American Zurich Ins. Co., 2013 MTWCC 17* (Order Granting Respondent's Motion for Partial Summary Judgment and Denying Petitioner's Cross-Motion for Partial Summary Judgment Regarding Retirement Account Contributions, SSDI Offsets and Recoupment, and Recoupment of Overpayment).

**Summary:** Respondent moved for summary judgment on the issues of Petitioner's entitlement to have his employer's 401(k) contributions included in his average weekly wage calculation, an offset and recoupment of past overpayment for Petitioner's son's receipt of auxiliary SSDI benefits, and recoupment of a \$6,048.60 overpayment which Respondent erroneously made to Petitioner. Petitioner cross-motivated for summary judgment on the issues of the offset and recoupment of past overpayment for his son's auxiliary SSDI benefits and the \$6,048.60 overpayment, arguing that Respondent is equitably estopped from claiming an offset of the auxiliary SSDI benefits and from recouping the overpayments.

**Held:** Respondent is entitled to summary judgment in its favor on these issues. Section 39-71-123(2)(b)(i), MCA, clearly bars the inclusion of employer contributions to 401(k) plans in average weekly wage calculations. On the remaining issues, Petitioner did not establish the sixth element of equitable estoppel in that he has not proven that allowing Respondent to recoup the overpayment would change Petitioner's position for the worse.

## APPENDIX A

### APPEALS TO MONTANA SUPREME COURT, STATUS, AND DISPOSTION OF APPEALS

Case Name	WCC No.	WCC Decision and Date	SC Decision	Date
<i>Evans v. Liberty Northwest Ins. Corp.</i>	2006-1580	Findings of Fact, Conclusions of Law, and Judgment - 6/20/07 - 8/14/07 - Appeal Dismissed by WCC following successful mediation	N/A	N/A
<i>Lynn Gerber v. Montana State Fund</i>	2012-2904	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment	PENDING <i>Appealed</i> 4/26/13	
<i>Derrick Goble v. Montana State Fund</i>	2010-2615	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment	PENDING <i>Appealed</i> 04/26/13	
<i>Peterson v. Montana Schools Group Ins. Auth.</i>	2005-1295	Findings of Fact, Conclusions of Law and Judgment - 4/7/06	DISMISSED by Stipulation of the parties	07/26/06
<i>Hedrick v. MACo Workers' Comp. Trust</i>	2004-1213	Findings of Fact, Conclusions of Law and Order	DISMISSED by Stipulation	10/26/06
<i>Popenoe v. Liberty Northwest Ins. Corp.</i>	2005-1490	Order Granting Petitioner's Motion for Summary Judgment - 12/1/06	DISMISSED with Prejudice by Stipulation of the parties	04/26/07
<i>Johnson v. Liberty Mutual Fire Ins. Co.</i>	2004-1054	Findings of Fact, Conclusions of Law and Judgment	DISMISSED with Prejudice by Stipulation of the parties	05/14/07
<i>Harter v. Liberty Northwest</i>	2006-1722	Findings of Fact, Conclusions of Law and Judgment	DISMISSED	05/23/07
<i>Gamble v. Sears</i>	2005-1337	Findings of Fact, Conclusions of Law and Order - 1/30/06	AFFIRMED – 2007 MT 131	06/5/07

<i>Thompson, Lee N.; Sharp, Darin; Bailey, Scott</i>	2004-1089	Order Granting Motions for Summary Judgment - 10/18/05 and Order Amending Order - 10/19/05 and Order Denying Intervenor's Motion for Recon - 4/28/06	Interim Order suspending mandatory mediation 6/7/06  REVERSED - 2007 MT 185	08/17/07
<i>Johnson v. MHA Workers Comp. Trust</i>	2006-1662	Findings of Fact, Conclusions of Law and Judgment - 5/22/07	DISMISSED by Motion	10/19/07
<i>Hinman v. Montana State Fund</i>	2006-1562	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2007 MT 278N	10/30/07
<i>Kessel v. Liberty Northwest</i>	2004-1189	Order Denying Motion for Summary Judgment; Order for Certification	AFFIRMED – 2007 MT 305	11/27/07
<i>Sturchio v. Wausau Underwriters Ins. Co.</i>	2006-1583	Decision and Judgment - 1/30/07  Order Amending Decision and Judgment - 2/7/07	AFFIRMED – 2007 MT 311	12/04/07
<i>Pinnow, Gayle</i>	2004-1190	Order On Cross-Motions for Summary Judgment (Judge Sherlock) - 2/24/06	REVERSED AND REMANDED – 2007 MT 332	12/11/07
<i>Satterlee, et al. v. Lumberman's Mut. Cas., et al.</i>	2003-0840	Order Denying Petitioner's Motion to Allow Discovery and Granting Respondents' Cross-Motion for Partial Summary Judgment - 11/15/06	DISMISSED without Prejudice Re Rule 54(b) Certification - 2007 MT 325	12/11/07
<i>VanBouchaute v. Montana State Fund</i>	2006-1622	Findings of Fact, Conclusions of Law and Judgment - 8/23/07	DISMISSED with Prejudice pursuant to Stipulation for Dismissal	12/12/07
<i>BeVan v. Liberty Northwest Ins. Corp.</i>	2006-1665	Findings of Fact, Conclusions of Law and Judgment - 12/6/06	AFFIRMED – 2007 MT 357	12/21/07
<i>Michalak v. Liberty Northwest</i>	2006-1641	Findings of Fact, Conclusions of Law and Judgment - 3/22/07	AFFIRMED – 2008 MT 3	01/3/08

<i>Wilkes v. Montana State Fund</i>	2006-1526	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment - 2/22/07	AFFIRMED – 2008 MT 29	02/5/08
<i>Driggers v. Liberty Northwest Ins. Corp.</i>	2006-1651	Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Motion for Summary Judgment	DISMISSED by Stipulation of Counsel	03/14/08
<i>Harrison v. Liberty Northwest Ins. Corp. and Stillwater Mining Company</i>	2004-1222	Findings of Fact, Conclusions of Law and Judgment - 5/26/06	AFFIRMED – 2008 MT 102	04/1/08
<i>Oksendahl v. Liberty Northwest Ins. Corp.</i>	2006-1679	Order Granting Petitioner's Motion for Summary Judgment - 6/21/07	AFFIRMED – 2008 MT 132N	04/22/08
<i>Kruzich, Henry v. Old Republic Ins. Co.</i>	2005-1247	Findings of Fact, Conclusions of Law and Judgment - 6/1/06	REVERSED 2008 MT 205	06/10/08
<i>Sizemore v. Copper King Hotel and Convention Center</i>	2007-2003	Order Granting Respondent's Motion to Dismiss	DISMISSED with prejudice	06/17/08
<i>Barnard v. Liberty Northwest Ins. Corp.</i>	2005-1505	Findings of Fact, Conclusions of Law and Judgment - 10/20/06	AFFIRMED - 2008 MT 254	07/22/08
<i>Woodards v. MIGA</i>	2006-1610	Order Granting Respondent's Motion for Summary Judgment, Denying Petitioner's Motion for Summary Judgment, and Granting Respondent's Cross-Motion for Summary Judgment	DISMISSED by Stipulation of Counsel	07/23/08
<i>Stavenjord v. Montana State Fund</i>	2000-0207	Order Denying Respondent's Motion for Reconsideration - 4/24/08 and Order Regarding Identification and Notification of Potential Beneficiaries	REMANDED Pending Approval of Settlement  DISMISSED with Prejudice	08/20/08  11/5/08
<i>Lanes v. Montana State Fund</i>	2006-1638	Findings of Fact, Conclusions of Law and Judgment - 9/10/07	AFFIRMED 2008 MT 306	09/6/08

<i>Hanson v. Cedar Valley Construction &amp; UEF</i>	2007-1945	Findings of Fact, Conclusions of Law and Judgment - 6/25/08	DISMISSED by Stipulation of counsel	09/17/08
<i>Fleming v. International Paper Co., and Liberty Northwest Ins. Corp.</i>	2005-1292	Order Denying the Filing of a Reply Brief and Reconsideration of Order Dismissing International Paper Co. - 12/20/05	REVERSED AND REMANDED – 2008 MT 327	09/23/08
<i>Hagemann v. Montana Contractor Compensation Fund</i>	2007-1983	Findings of Fact, Conclusions of Law and Judgment - 7/10/08	DISMISSED by Motion	09/26/08
<i>Reesor v. Montana State Fund</i>	2002-0676	Order Adopting Order of Special Master - Findings and Conclusions by Special Master on Common Fund Issues	REMANDED Pending Approval of Settlement  DISMISSED with Prejudice	10/1/08  11/5/08
<i>Rau v. Montana State Fund</i>	2006-1633	Findings of Fact, Conclusions of Law and Judgment - 6/4/08	REMANDED for consideration of entry of judgment resulting from settlement; parties to move for dismissal of appeal within 45 days	10/15/08
<i>Siebken v. Liberty Northwest Ins. Co.</i>	2007-1855	Decision and Judgment	AFFIRMED 2008 MT 353	10/21/08
<i>Flynn v. Montana State Fund</i>	2000-0222	Order Determining Status of Final, Settled, Closed, and Inactive Claims	AFFIRMED IN PART; REVERSED IN PART - 2008 MT 394	11/25/08
<i>Fabbi v. Montana Insurance Guaranty Association</i>	2006-1623	Findings of Fact, Conclusions of Law and Judgment	DISMISSED with Prejudice per joint motion	11/26/08

<i>Kratovil v. Liberty Northwest Ins. Corp.</i>	2006-1551	Findings of Fact, Conclusions of Law, and Judgment - 7/17/07 and Order Denying Respondent's Motion for Reconsideration - 9/7/07	AFFIRMED and REMANDED – 2008 MT 443	12/29/08
<i>Aldrich v. Montana State Fund</i>	2006-1536	Decision and Judgment	AFFIRMED 2009 MT 40	02/18/09
<i>Kilgore v. Transportation Ins. Co.</i>	2008-2056	Findings of Fact, Conclusions of Law and Judgment - 12/4/08	DISMISSED by Motion	03/13/09
<i>Dildine v. Liberty Northwest Ins. Corp.</i>	2005-1389	Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment	AFFIRMED 2009 MT 87	03/24/09
<i>Narum v. Liberty Northwest Ins. Corp.</i>	2007-1987	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED 2009 MT 127	04/14/09
<i>Heth v. Montana State Fund</i>	2006-1758	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED 2009 MT 149	05/5/09
<i>Quick v. Montana State Fund</i>	2006-1788	Findings of Fact, Conclusions of Law and Judgment - 6/4/08	AFFIRMED - 2009 MT 162	05/13/09
<i>Montana Municipal Ins. Authority v. Roche</i>	2006-1587	Findings of Fact, Conclusions of Law and Judgment - 11/14/07	AFFIRMED 2009 MT 205N	06/10/09
<i>Russell v. Watkins &amp; Shepard Trucking</i>	2006-1531	Findings of Fact, Conclusions of Law and Judgment - 7/11/08	AFFIRMED and REMANDED for further proceedings - 2009 MT 217	06/24/09
<i>Tinker v. Montana State Fund</i>	2007-2018	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED - 2009 MT 218	06/24/09
<i>Distad v. Montana State Fund</i>	2008-2076	Findings of Fact, Conclusions of Law and Judgment - 3/20/09	DISMISSED with Prejudice	06/26/09
<i>Skiff v. Montana State Fund</i>	2008-2099	Findings of Fact, Conclusions of Law and Judgment - 3/6/09	DISMISSED with Prejudice by Stipulation of counsel	07/20/09

<i>Briese v. MACO Workers' Compensation Trust &amp; J. Briese</i>	2007-1794	Order Denying Richard H. Renn's Motion to Award Attorney Fees	AFFIRMED - 2009 MT 259N	08/4/09
<i>Casiano v. Montana Contractor Compensation Fund</i>	2008-2042	Order Granting Respondent Montana Contractor Compensation Fund's Motion for Summary Judgment - 3/10/09	DISMISSED with Prejudice	08/25/09
<i>Satterlee, et al. V. Lumberman's Mutual Casualty Co., et al.</i>	2003-0840	Order Denying Petitioner's Motion to Allow Discovery and Granting Respondent's Cross-Motion for Partial Summary Judgment and Order Granting Respondent Montana State Fund's Motion for Partial Summary Judgment	AFFIRMED - 2009 MT 368	11/03/09
<i>Liberty NW Ins. Corp. V. Montana State Fund re; G. Mitchell</i>	2007-1827	Findings of Fact, Conclusions of Law and Judgment - 12/23/08	AFFIRMED – 2009 MT 386	11/12/09
<i>Schmill v. Liberty Northwest &amp; Montana State Fund</i>	2001-0300	Order Adopting Order of Special Master	AFFIRMED – 2009 MT 430	12/22/09
<i>Boyd v. Zurich American Ins. Co.</i>	2009-2279	Order Granting Respondent's Motion for Summary Judgment	AFFIRMED - 2010 MT 52	03/16/10
<i>Keller v. Liberty Northwest Ins. Corp</i>	2009-2309	Findings of Fact, Conclusions of Law and Judgment	REVERSED and REMANDED – 2010 MT 279	12/28/10
<i>Weidow v. UEF v. Bradley Howard/ Howard Family 1995 Trust</i>	2007-1863	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2010 MT 292	12/30/10
<i>Chapman v. Twin City Fire Ins. Co.</i>	2010-2531	Findings of Fact, Conclusions of Law and Judgment and Order Denying Motion for Sanctions	DISMISSED with Prejudice	02/15/11
<i>Wright v. ACE American Ins. Co</i>	2009-2210	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2011 MT 43	03/15/11

<i>Hopkins v. UEF v. Kilpatrick</i>	2008-2152	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2011 MT 49	03/22/11
<i>Leigh v. Montana State Fund</i>	2010-2447	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Cross-Motion for Summary Judgment	DISMISSED	03/24/11
<i>Bailey v. Uninsured Employers' Fund and Longhorn Apartment Complex</i>	2010-2582	Order Granting Third-Party Respondent's Motion to Dismiss	DISMISSED with prejudice	04/11/11
<i>Ingle v. Montana State Fund</i>	2009-2398	Findings of Fact, Conclusions of Law and Judgment	DISMISSED	05/26/11
<i>Caldwell v. MaCo Workers' Comp. Trust</i>	2008-2114	Order Holding § 39-71-710, MCA, Unconstitutional as it Relates to Rehabilitations Benefits	AFFIRMED - 2011 MT 162	07/11/11
<i>Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp.</i>	2000-0222	Order Re: Paid in Full	AFFIRMED - 2011 MT 300	11/29/11
<i>Banco v. Liberty Northwest Insurance Corp.,</i>	2006-1544	Order and Judgment on Stipulated Record	AFFIRMED – 2012 MT 3	01/10/12
<i>Johnson v. Montana State Fund</i>	2010-2545	Order Granting Respondent's Motion for Summary Judgment	DISMISSED with Prejudice by Stipulation	01/25/12
<i>Grande v. Montana State Fund</i>	2010-2474	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED - 2012 MT 67	03/20/12
<i>Ford v. Sentry Casualty Company</i>	2010-2503	Findings of Fact, Conclusions of Law and Judgment and Order Resolving Respondent's Motion in Limine	AFFIRMED - 2012 MT 156	07/24/12
<i>Sharon Stewart v. Liberty Northwest Ins. Corp.</i>	2008-2066	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2013 MT 107	04/23/13

<i>O'Mahoney v. Liberty Ins. Corp.</i>	2011-2852	Findings of Fact, Conclusions of Law and Judgment	DISMISSED Pursuant to Stipulation; Judgment vacated and withdrawn pursuant to stipulation of the parties.	06/12/13
<i>Dvorak v. Montana State Fund</i>	2011-2793	Order Granting Respondent's Motion for Summary Judgment	REVERSED and REMANDED – 2013 MT 210	07/30/13
<i>Lasky v. State of Montana</i>	2008-2078	Respondent's Motion to Dismiss	DISMISSED	09//26/08

## APPENDIX B

### STATUS AND DISPOSITION OF WCC CASES APPEALED TO THE MONTANA SUPREME COURT

<b>Affirmed:</b>	<b>35</b>
<b>Reversed:</b>	<b>6</b>
<b>Affirmed in Part – Reversed in Part:</b>	<b>1</b>
<b>Dismissed:</b>	<b>27</b>
<b>Pending:</b>	<b>2</b>
<b>Others:</b>	<b>2</b>