CLF carey law firm, P.C.

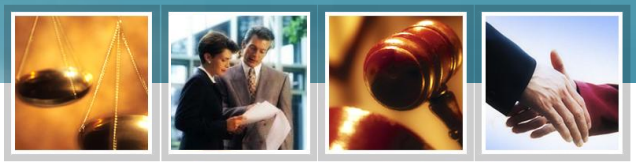
Workers' Compensation Case Law Review

September 2011 – August 2013

by Steven S. Carey

BENEFITS

Benefits (Social Security Offset)



MACo Workers' Compensation Trust v. Klinkam

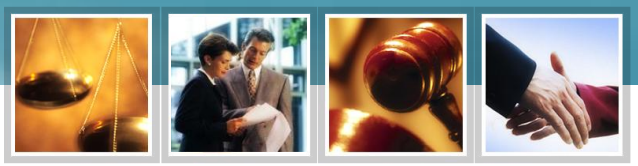
2011 MTWCC 26

Findings of Fact, Conclusions of Law and Judgment

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.

Benefits

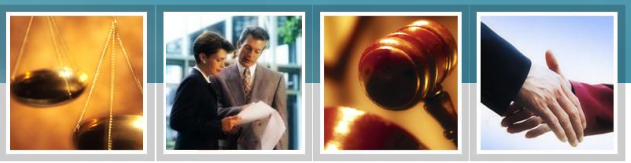


- *Mary B. Klinkam v. MACo Workers' Compensation Trust*
- 2012 MTWCC 25
- Order Denying Petitioner's Request for Benefits under § 39-71-610, MCA

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."

Benefits

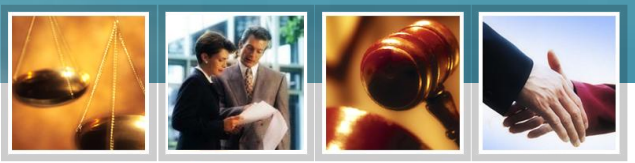


Marlon Clapham v. Twin City Fire Ins. Co.
2012 MTWCC 27
Order Granting Partial Summary Judgment in Favor of Petitioner

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.

Benefits



Kim Trevino v. Montana State Fund

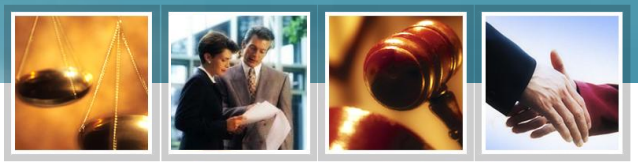
2013 MTWCC 1

Order Granting Respondent's Motion for Summary Judgment

(Reconsideration Granted – 03/29/13)

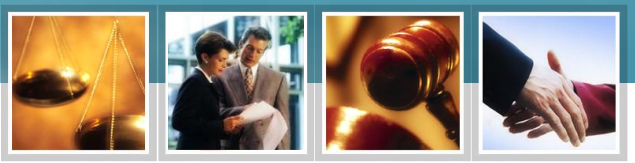
Summary: Respondent moved for summary judgment on Petitioner's claim of entitlement to permanent partial disability and vocational rehabilitation benefits, arguing that Petitioner was at maximum medical improvement and released to return to her time-of-injury employment and that Petitioner believes she 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.



KEEP
CALM
AND
GET BACK
TO WORK

Benefits / MMI



Suzanne O'Mahoney v. Liberty Ins. Corp.

2013 MTWCC 6

Findings of Fact, Conclusions of Law and Judgment

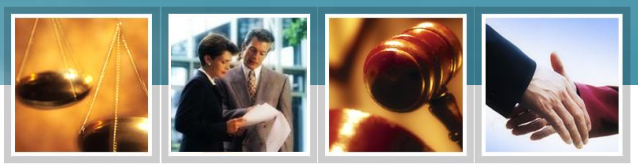
Appealed to Montana Supreme Court – 04/03/13; Appeal Dismissed Pursuant to Stipulation – 06/12/13

(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



Hartford Fire Ins. Co. v. Hostetter

2013 MTWCC 14

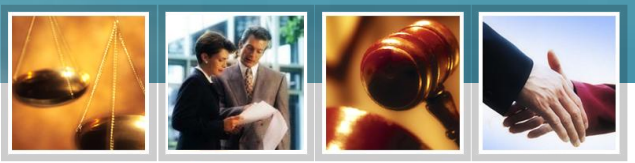
Order Denying Petitioner's Appeal of Dept. Order Granting Interim Benefits to Respondent under § 39-71-610, MCA

Summary: Petitioner appealed from a Department order granting interim benefits to Respondent under § 39-71-610, MCA, arguing that Respondent had neither demonstrated financial hardship nor presented a strong prima facie case which are required for him to be entitled to such benefits. Respondent objected to Petitioner's appeal, arguing that he is entitled to interim benefits and that he has proven the necessary factors to prove such entitlement.

Held: Respondent has met the four factors this Court considers in determining whether a claimant is entitled to interim benefits under § 39-71-610, MCA. Therefore, Petitioner's appeal is denied and the Department's order granting interim benefits is affirmed.

BENEFITS / PENALTIES

Benefits/Penalties



Sharon Stewart v. Liberty Northwest Ins. Corp.

2012 MTWCC 11

Findings of Fact, Conclusions of Law and Judgment

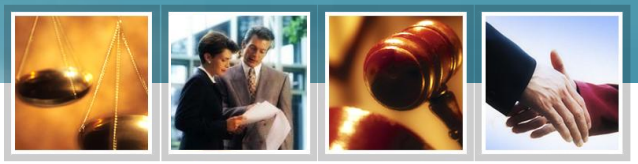
(Appealed to MSC -04/30/12; Cross-appealed to MSC – 05/14/12; Affirmed – 04/23/13)

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

Burden of Proof



Erving, Dawn v. Hartford Accident & Indemnity Company

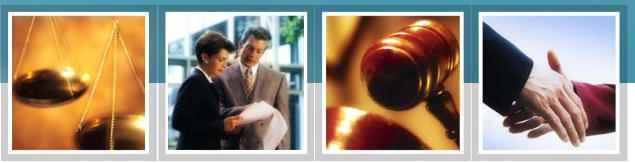
2012 MTWCC 4

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.

Burden of Proof



Peterson, Dennis v. Uninsured Employers Fund/Uninsured Employers Fund v. Ramona McDunn d/b/a McDunn's Riverview Mini Storage

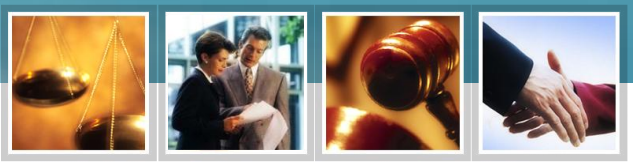
2012 MTWCC 7

Findings of Fact, Conclusions of Law and Judgment

Summary: Petitioner contends that he suffered 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.

Burden of Proof

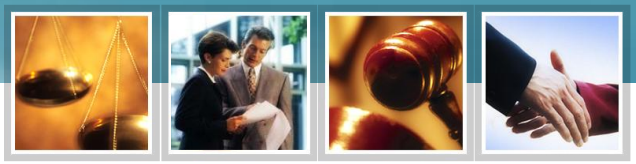


Holmes, Jerry v. Safeway, Inc.
2012 MTWCC 8
Findings of Fact, Conclusions of Law and Judgment

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.

Burden of Proof



Louann Koch v. Employers' Ins. Group

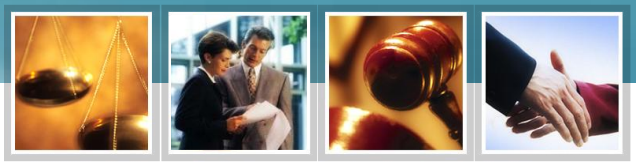
2012 MTWCC 14

Findings of Fact, Conclusion 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.

Burden of Proof

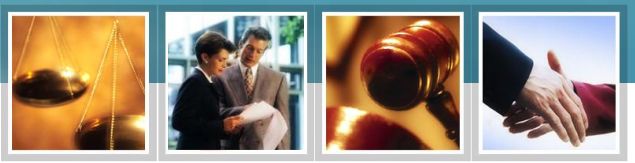


Kelly Taylor v. Montana State Fund
2012 MTWCC 17
Findings of Fact, Conclusions of Law and Judgment

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.

Burden of Proof



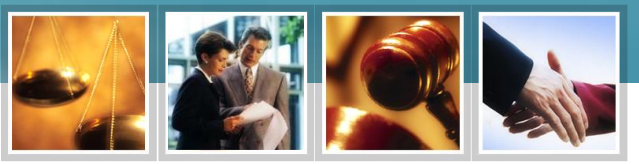
Marlon Clapham v. Twin City Fire Ins. Co.

2012 MTWCC 34

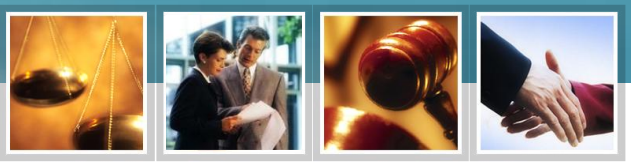
Order Resolving Respondent's Motion in Limine and Findings of Fact, Conclusions of Law and Judgment

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.



Burden of Proof



Wendy Tuttle v. First Liberty Ins. Corp.

2012 MTWCC 37

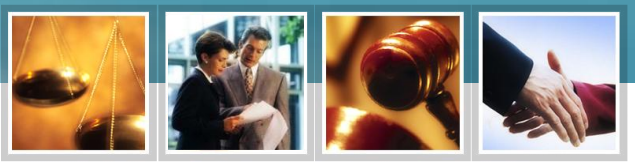
Findings of Fact, Conclusions of Law and Judgment

Appealed to MSC 11/19/12 – 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.

Burden of Proof



Travis Gary v. Montana State Fund

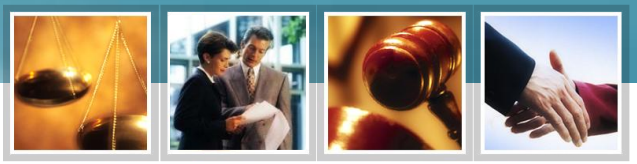
2012 MTWCC 38

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.

BURDEN OF PROOF



Jeffrey L. Drivdahl v. Zurich American Ins. Co. et al.

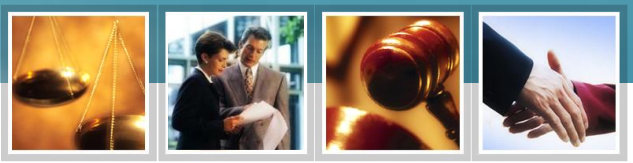
2012 MTWCC 43

Findings of Fact, Conclusion 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.

Burden of Proof



Shawna Hardie v. Montana State Fund

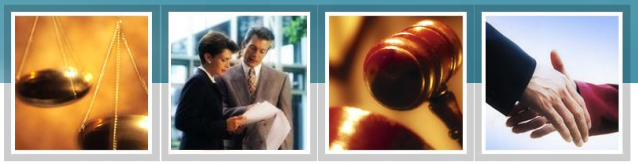
2012 MTWCC 44

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.

Burden of Proof



Vanessa Gaudette v. Montana State Fund

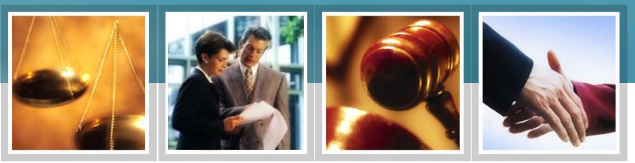
2013 MTWCC 7

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.

Burden of Proof



Stormy L. Langston v. MACO Workers' Compensation Trust

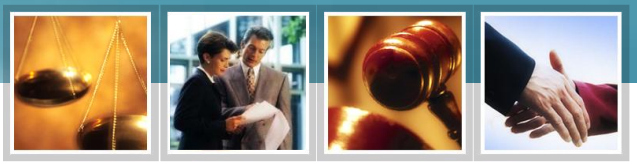
2013 MTWCC 15

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.

Burden of Proof



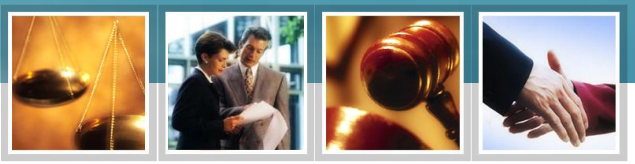
Ted Benson v. Uninsured Employer's Fund v. McCormick Sunset Guest Ranch

2013 MTWCC 22

Findings of Fact, Conclusions of Law and Judgment

Summary: Petitioner claims a bite from a tick carrying Rocky Mountain spotted fever infected him with the disease while employed as a hunting guide. Employer and Respondent dispute the claim on the basis that Petitioner did not contract the disease and that if he did, he cannot prove that he became infected while at work.

Held: Petitioner has failed to prove by a preponderance of the evidence that he is entitled to the benefits he seeks.



Workers' Compensation

What my employer thinks I do

What my co-workers think about my workers' comp claim

What the private eye outside my house think I am doing

What my child thinks I do.

...In sickness or health...

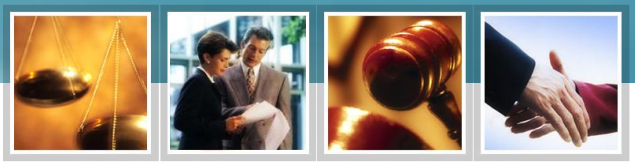
What my wife thinks about my injury

What I am actually doing during my workers' comp claim

Brought to you by Comp7777.com

CAUSATION/PENALTIES

Causation



Bjorgum, Christopher v. Montana State Fund

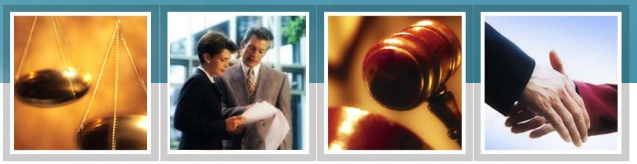
2011 MTWCC 29

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 motor vehicle accident. 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.

Causation/Penalties



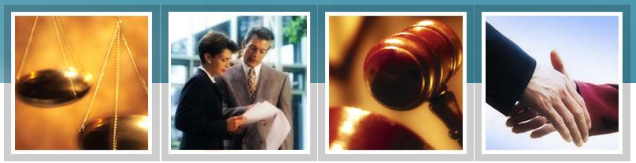
Christian Cornelius v. Lumbermen's Underwriting Alliance et al.
2012 MTWCC 13
Findings of Fact, Conclusions of Law and Judgment

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.

CONSTITUTIONAL LAW

Constitutional Law



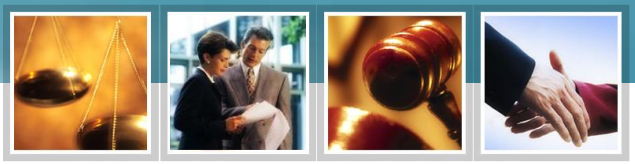
Tina Malcomson v. Liberty Northwest
2013 MTWCC 21
Findings of Fact, Conclusions of Law and Judgment

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."

COURSE AND SCOPE

Course and Scope



McCollom, Rick v. Montana State Fund

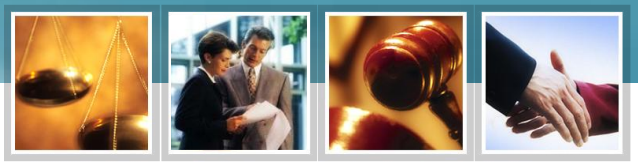
2012 MTWCC 6

Findings of Fact, Conclusions of Law and Judgment

Summary: Petitioner suffered severe 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.

Course and Scope



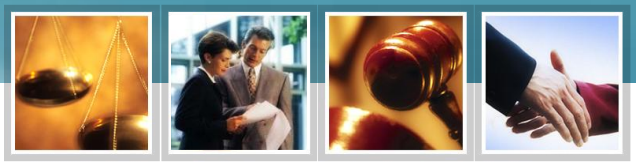
John Erhard v. Liberty Northwest Ins. Corp.
2012 MTWCC 26
Findings of Fact, Conclusions of Law and Judgment

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.

DISCOVERY

Discovery (Work-Product Reserves)



Salazar, Juan v. Montana State Fund

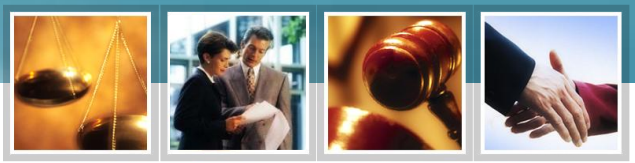
2011 MTWCC 28

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 contain 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.

Discovery (Motion to Reopen Record Post-Trial)

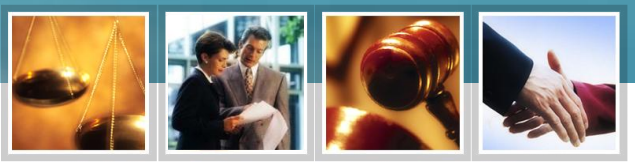


Karen Monroe v. MACO Workers Comp. Trust
2013 MTWCC 23
Order Denying Respondent's Motion to Allow Additional Evidence

Summary: Respondent moved to reopen the record post-trial to allow the submission of additional evidence pertaining to Petitioner's prior occupational disease claim, arguing that Petitioner and her counsel wrongfully withheld information about the claim during discovery. Petitioner responds that she provided information regarding the claim during discovery, that Respondent failed to move to compel disclosure of more information about the claim prior to trial, and the fact Respondent phoned post-trial the Montana Department of Labor and Industry Employment Relations Division to learn details of the settlement of the earlier claim is proof it could have done so at any time prior to trial.

Held: Petitioner specifically identified the previous occupational disease claim in discovery and even produced the claim form to Respondent. Although Petitioner objected to providing additional information regarding any claim settlements, which Respondent contends was without a legitimate basis, the manner of determining the legitimacy of Petitioner's objection would have been in a motion to compel. This Court has previously held that when an opposing party objects to written discovery, the party propounding discovery must move to compel. A party cannot sit on his or her hands and then seek to exclude evidence because it was not identified in response to discovery. Similarly, Respondent's failure to move to compel additional information regarding Petitioner's settlement does not provide a basis to reopen a case after the close of evidence. Respondent's motion to reopen the record and add additional evidence is denied.

Discovery



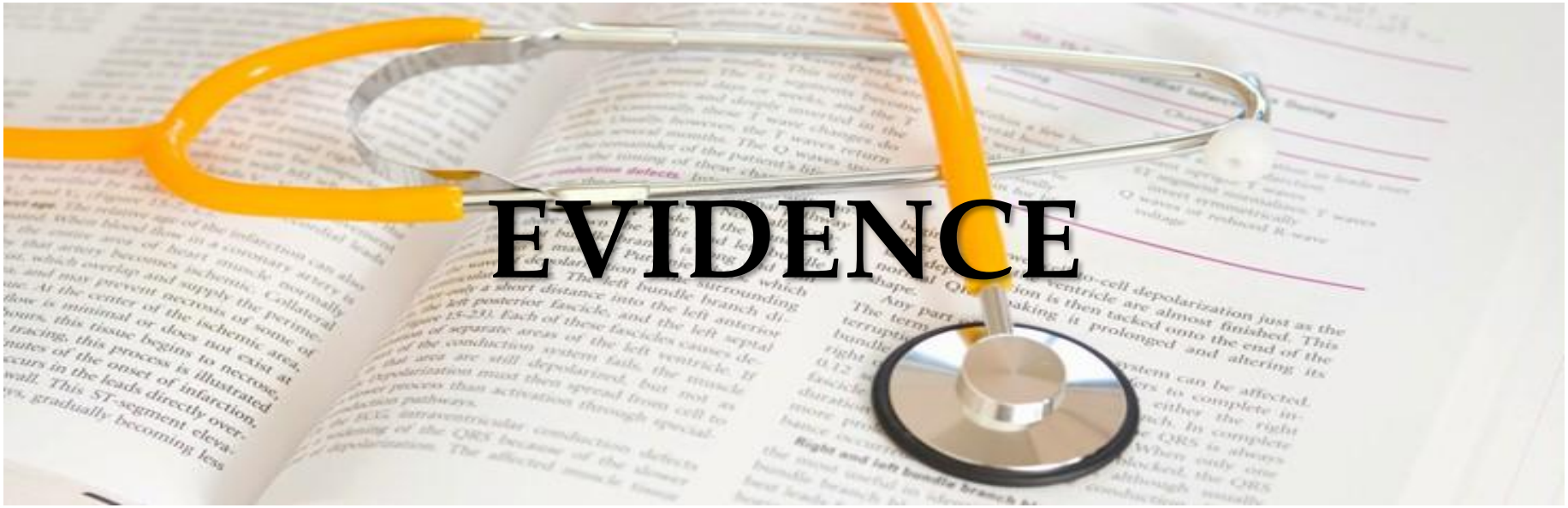
Rod Overholt v. Liberty Northwest Ins.

2013 MTWCC 5

Order Denying Petitioner's Motion to Exclude Evidence and Limit Discovery and Ordering Respondent to Produce Audio Recording of Statement

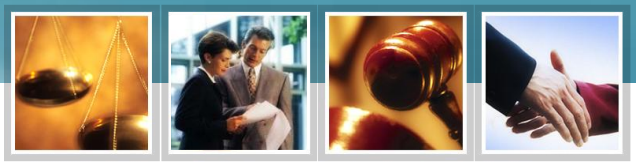
Summary: Petitioner moved to prohibit Respondent from pursuing discovery concerning any previous injuries, medical records, and employment information, arguing that since Respondent had denied liability because Petitioner's industrial injury occurred in North Dakota, the discovery information Respondent 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.



EVIDENCE

Evidence



Estate of Richard Hirth v. Montana State Fund

2012 MTWCC 47

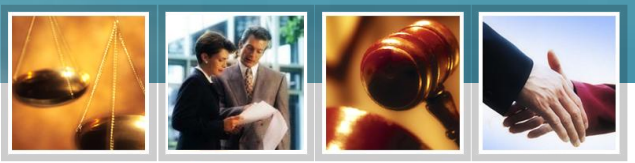
Order Denying Petitioner's Motion to Exclude Certain Reports and Testimony

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.

INDEPENDENT CONTRACTORS

Independent Contractors



McCone County v. State of Montana, WC Regulation Bureau, Independent Contractor Central Unit

2012 MTWCC 19

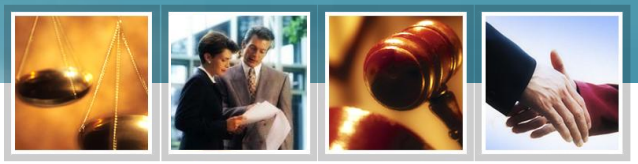
Order Denying Petitioner's Motion for Summary Judgment and Granting Summary Judgment in Favor of Respondent

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

Independent Medical Examinations



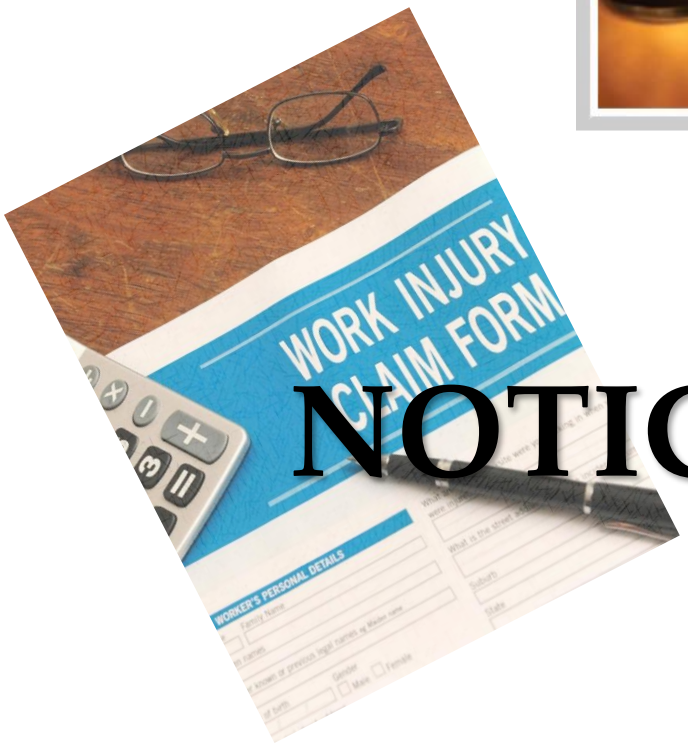
Loren Chapman v. Smurfit-Stone Container Enterprises, Inc.

2013 MTWCC 12

Order Affirming DOL/ERD's Order Directing Medical Examination

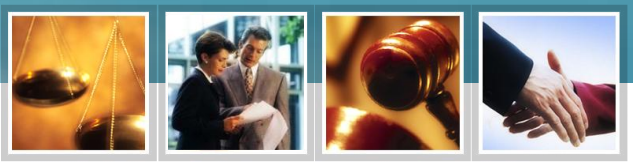
Summary: Petitioner appeals an order of the Department of Labor & Industry, Employment Relations Division directing a medical examination, requiring Petitioner to submit to a two-day psychiatric evaluation by William Stratford, M.D. Petitioner argues that this independent medical evaluation is neither 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.



NOTICE OF INJURY

Notice of Injury



Delong, Todd v. Montana State Fund

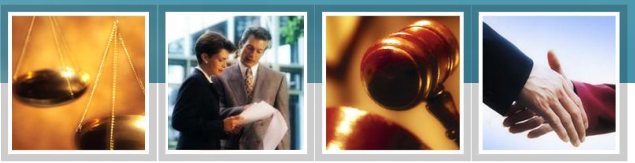
2012 MTWCC 3

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.

Notice of Injury



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

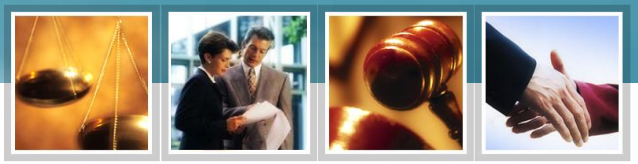
Summary: In 2009, Petitioner sought medical treatment for hip pain and learned that his condition was likely attributable to two industrial accidents which occurred in the fall or winter of 2006. Although no one has located a contemporaneous incident report, Petitioner contends that he reported both 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

Notice of Termination of Benefits Coles Requirements



Dostal, Ginger v. Uninsured Employers Fund

2012 MTWCC 5

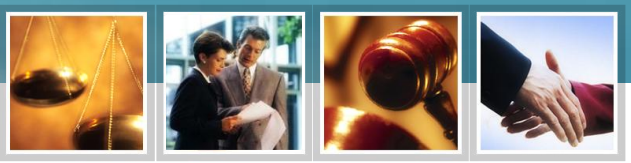
Findings of Fact, Conclusions of Law and Judgment

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 ill hear oral argument on the issue of whether Respondent can be ordered to pay Petitioner's attorney fees and a penalty.

PROCEDURE

Procedure



In re: Dorothy Cissel v. Employers Compensation Ins. Co. et al.

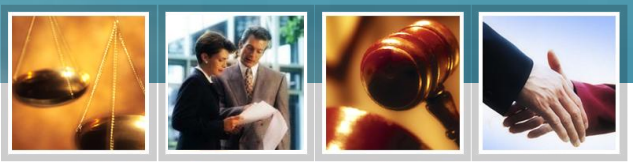
2012 MTWCC 12

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.

Procedure



Troy Baker v. Fireman's Fund Ins. Co.
2012 MTWCC 15
Order Certifying Prior Decision as Final

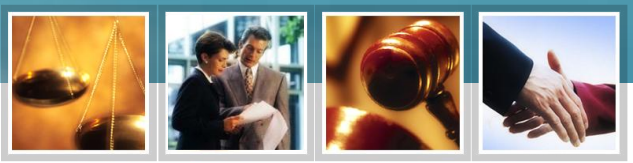
The Findings of Fact, Conclusions of Law and Judgment filed March 22, 2012, was not certified as final due to the outstanding issue of Petitioner Troy Baker's entitlement to attorney fees and costs, which was to be determined after the parties had conferred to determine when Respondent Fireman's Fund 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 rom the Findings of Fact, Conclusions of Law and Judgment filed March 22, 2012.

Procedure



Michele Baldwin v. Old Republic Ins. Co.

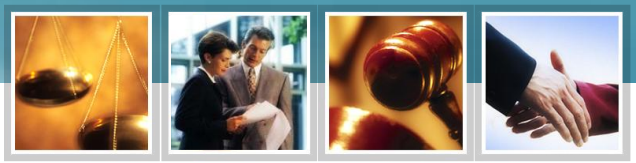
2012 MTWCC 20

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.

Procedure



Lynn Gerber v. Montana State Fund

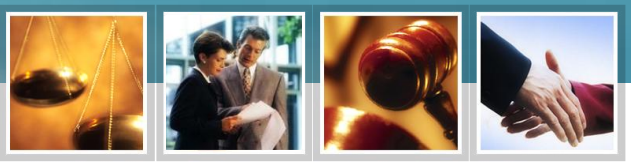
2012 MTWCC 21

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.

Procedure



Robert Morse v. Liberty Northwest Ins. Corp.

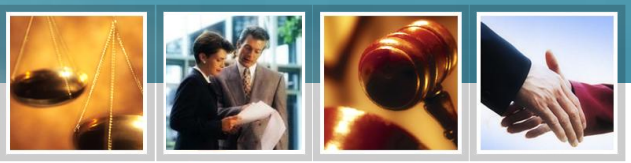
2012 MTWCC 24

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.

Procedure



Christian Cornelius v. Lumbermen's Underwriting Alliance

2012 MTWCC 29

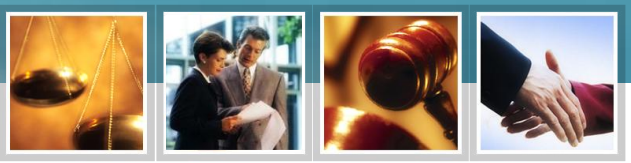
Order Denying Respondent's Motions for a New Trial, Amendment to Findings of Fact and Conclusions of Law, and for Reconsideration

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.

JUSTICE

Procedure



Michael D. Mackey v. ACE American Ins. Co.

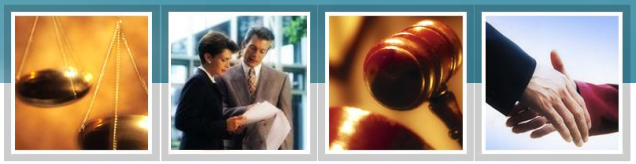
2012 MTWCC 46

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.

Procedure



Estate of Richard Hirth v. Montana State Fund

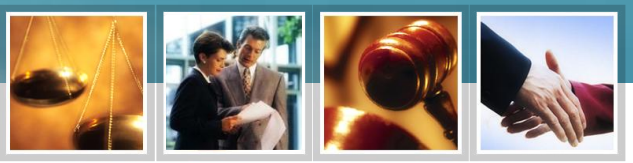
2013 MTWCC 2

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.

Procedure



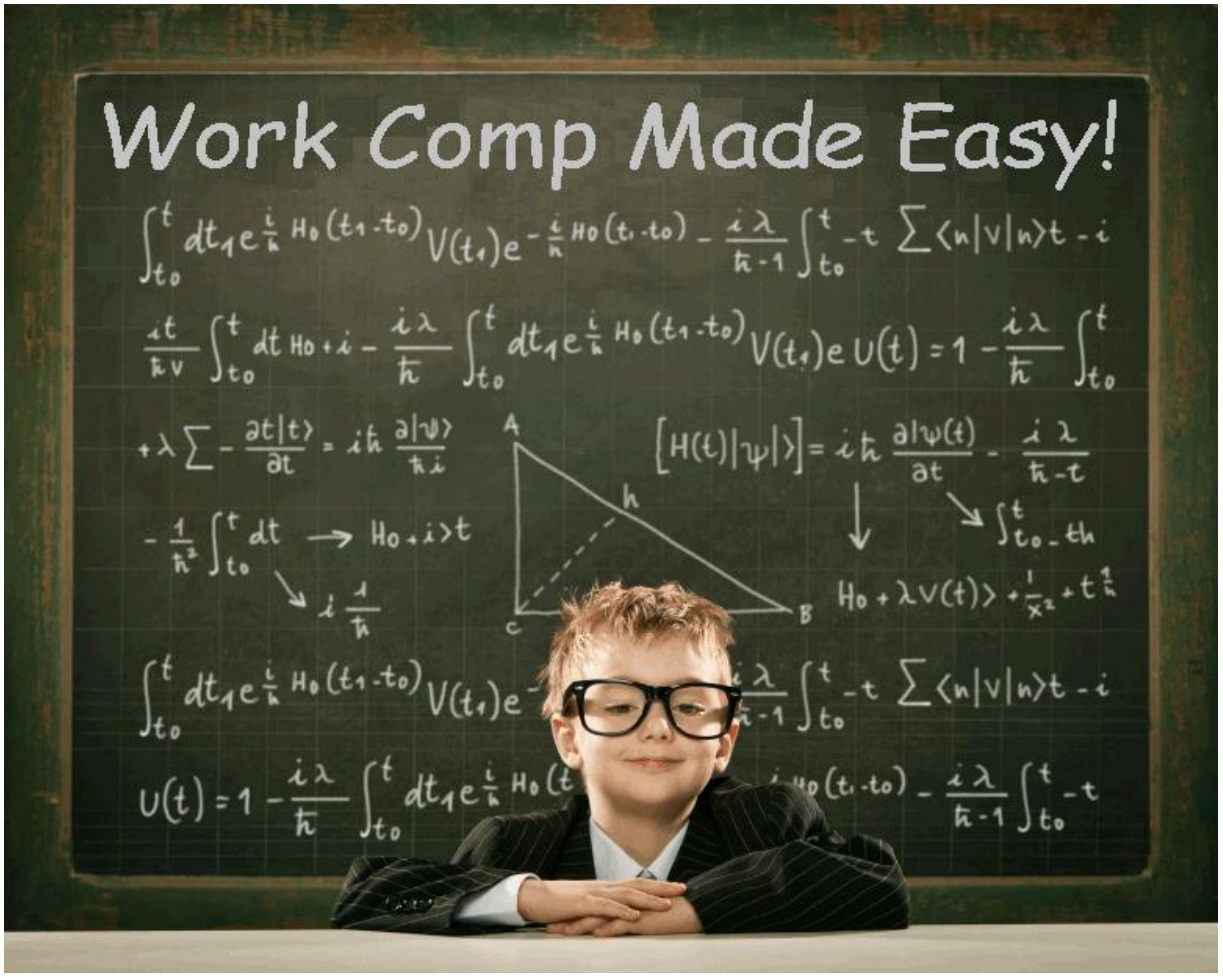
Hartford Ins. Co. of the Midwest v. Montana State Fund, In re: Brian McKirdy

2013 MTWCC 4

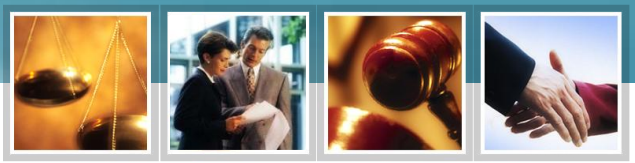
Order Granting Petitioner's Motion for Reconsideration

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.


Work Comp Made Easy!

Procedure



Kim Trevino v. Montana State Fund

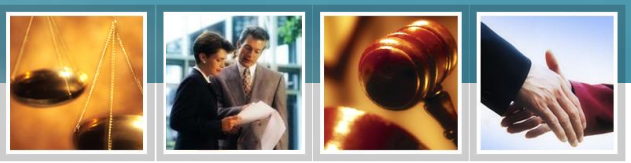
2013 MTWCC 10

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.

Procedure



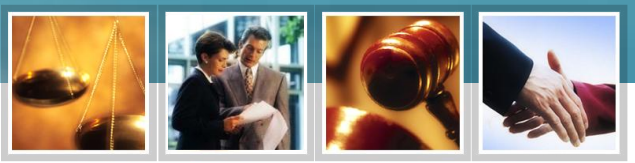
Peter Nease v. Montana Contractor Compensation Fund
2013 MTWCC 20
Order Denying Petitioner's Motion in Limine and Objection to Medical Records

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

Reopening of Settlements



McGlinchey, Katherine v. Montana State Fund

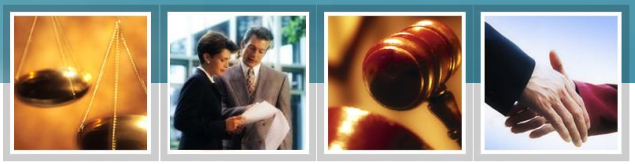
2011 MTWCC 30

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.

Reopening of Settlements



Pearson, Paul Scott v. Montana Insurance Guarantee Association

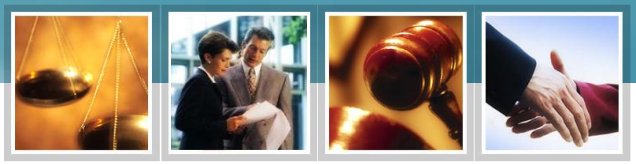
2012 MTWCC 1

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.

Reopening of Settlements



Baker, Troy v. Fireman's Fund Ins. Co.

2012 MTWCC 9

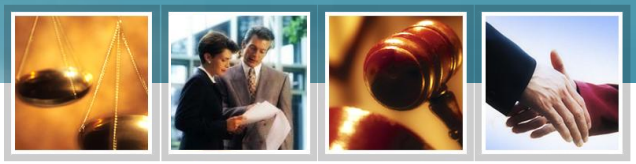
Findings of Fact, Conclusions of Law and Judgment

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.

SETTLEMENT

Reopening of Settlements



Tom Griffin v. Liberty Northwest Ins. Corp.

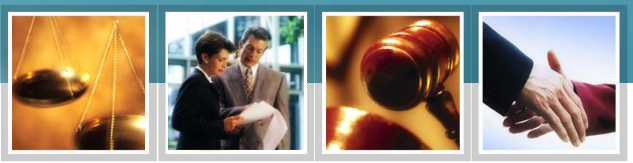
2013 MTWCC 11

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.

Reopening of Settlements



Paul Bond v. Associated Loggers Exchange

2013 MTWCC 13

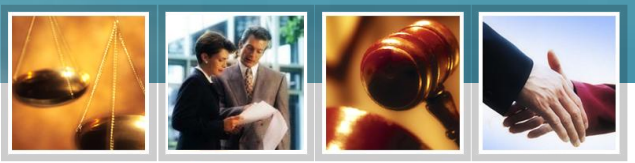
Findings of Fact, Conclusions of Law and Judgment

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.

STATUTES OF LIMITATIONS/REPOSE

Statutes of Limitations



Lanman, Robert v. Montana Municipal Insurance Authority

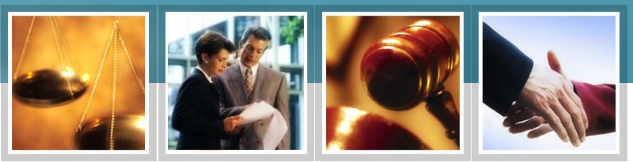
2011 MTWCC 27

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.

Statutes of Limitations



Hardie, Shawna v. Montana State Fund

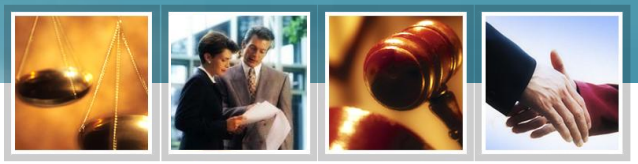
2012 MTWCC 2

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.

Statutes of Limitations



Schellinger, Ann f/k/a Uffalussy, Ann v. St. Patrick Hospital and Health Sciences Center

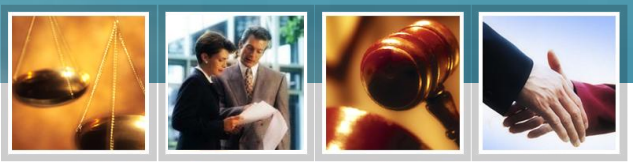
2012 MTWCC 10

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-motioned 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.

Statute of Limitations/Repose



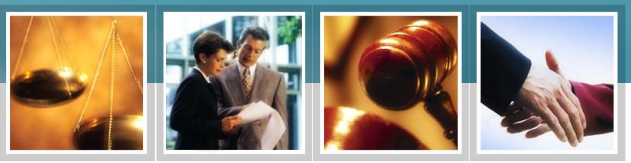
Mark Dauenhauer v. Montana State Fund
2012 MTWCC 22
Findings of Fact, Conclusions of Law and Judgment

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.

SUMMARY JUDGMENT

Summary Judgment



Hartford Ins. Co. of the Midwest v. Montana State Fund, In re: Brian McKirdy

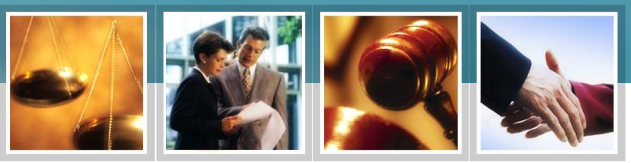
2012 MTWCC 28

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-motioned, 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.

Summary Judgment



Derrick Goble v. Montana State Fund

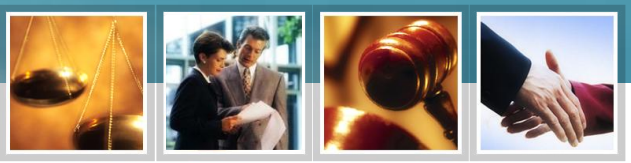
2013 MTWCC 8

Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment (Appealed to Montana Supreme Court – 04/26/13)

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.

Summary Judgment



Lynn Gerber v. Montana State Fund

2013 MTWCC 9

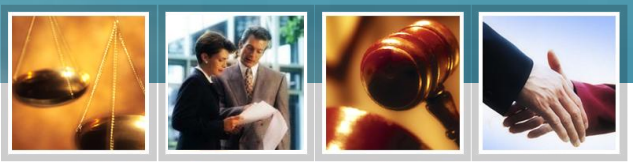
Or. Denying Pet'r.'s Mot. for Summ. Judg. & Granting Resp't.'s Mot. for Summ. Judg.

(Appealed to Montana Supreme Court – 04/26/13)

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.

Summary Judgment



Montana Ins. Guaranty Assoc. v. Montana SIF

2013 MTWCC 19

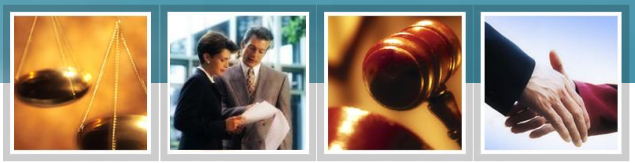
Order Denying Petitioner's Appeal and Affirming Department Decision

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

Summary Judgment / Benefits

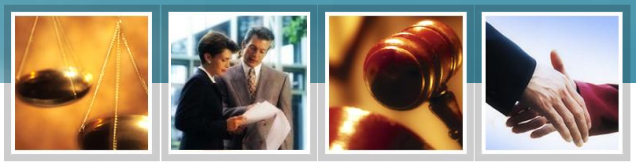


Raymond Johnson v. Liberty NW Ins. Corp.
2013 MTWCC 18
Order Granting Summary Judgment in Favor of Petitioner

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 / Benefits / Impairment



Marlene Torgerson v. Transportation Ins. Co.

2013 MTWCC 24

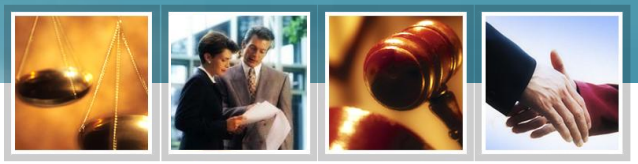
Order Denying Respondent's Motion for Summary Judgment, and Granting Petitioner's Cross-Motion for Summary Judgment

Summary: Respondent moved for summary judgment, arguing that it is not liable for payment of an impairment award to a claimant who died from unrelated causes after reaching MMI but prior to a physician issuing an impairment rating for his occupational disease. Petitioner filed a cross-motion for summary judgment, arguing that the claimant's right to this benefit accrued at the time he reached MMI and that it is therefore payable to his estate.

Held: Under the applicable case law, a claimant's right to an impairment award accrues at the time the claimant reaches MMI, even though a physician must subsequently issue an impairment rating in order to determine the precise value of the entitlement. In the present case, the claimant's right to an impairment award accrued when he reached MMI, even though the claimant died prior to the issuance of an impairment rating. Therefore, his estate is entitled to receive payment of the impairment award from Respondent.

SUMMARY JUDGMENT/CAUSATION

Summary Judgment/Causation



Kris Keller v. Montana University System Self Funded Workers' Compensation Program

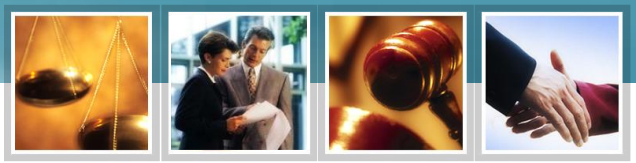
2012 MTWCC 30

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.

Summary Judgment/Causation



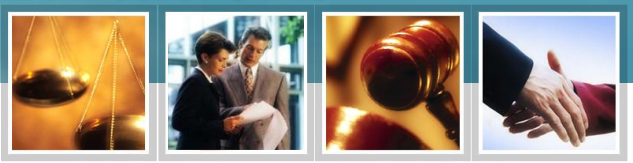
Liberty Insurance Corp. v. Travelers Indemnity Co. of America, In re: Tia Kuran
2012 MTWCC 32
Order Denying Respondent's Motion for Summary Judgment

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

Summary Judgment/Notice of Injury or OD / Statute of Limitations



Russell Romine v. Northwestern Energy

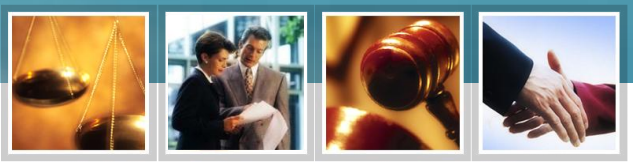
2012 MTWCC 35

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.

Summary Judgment/Notice of Injury or OD



Dianne Dvorak v. Montana State Fund

2012 MTWCC 36

Order Granting Respondent's Motion for Summary Judgment

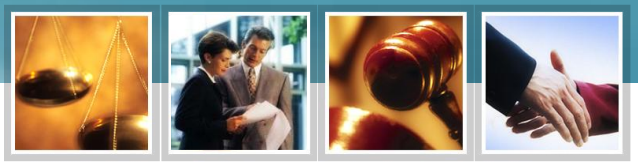
Appealed to Montana Supreme Court 10/31/12; Reversed and Remanded – 7/30/13

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.

UNINSURED EMPLOYERS' FUND

Uninsured Employers' Fund



Robert Chippewa v. Uninsured Employers' Fund v. Montana State Fund

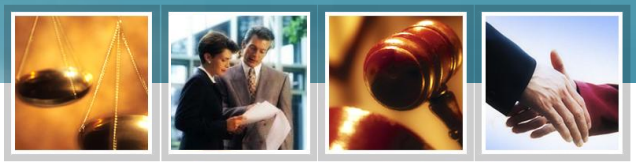
2012 MTWCC 39

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.

Uninsured Employers' Fund

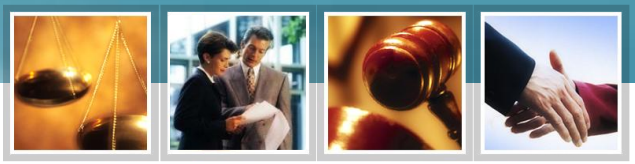


Ginger Dostal v. Uninsured Employers' Fund
2012 MTWCC 41
Order Granting Petitioner's Motion for Reconsideration and Granting Respondent's Motion to Strike

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.

Uninsured Employers' Fund



Olin Jensen v. Uninsured Employers' Fund and Montana State Fund v. Paul Kessler et al.

2013 MTWCC 3

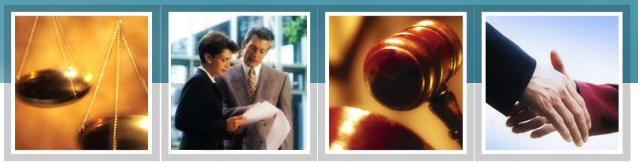
Order Denying Third-Party Respondent's Motion for Leave to Re-file Motion for Summary Judgment and Requiring Parties to Stipulate to Agreed Facts or Agreed Record to Facilitate Submission of Matter on Briefs

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

UEF/Benefits/Penalties



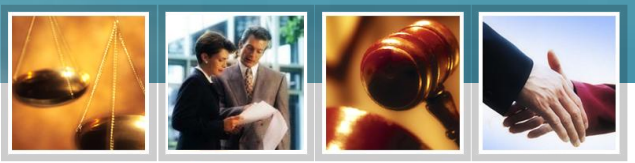
Ginger Dostal v. Uninsured Employers' Fund
2012 MTWCC 45
Findings of Fact, Conclusions of Law and Judgment

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

UEF/Penalties



Ginger Dostal v. Uninsured Employers' Fund

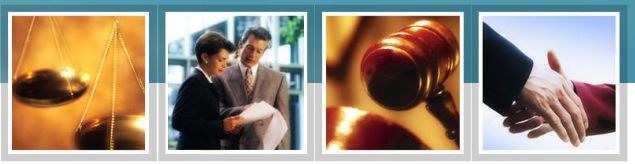
2012 MTWCC 40

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.

UEF/Penalties



Ginger Dostal v. Uninsured Employers' Fund

2012 MTWCC 42

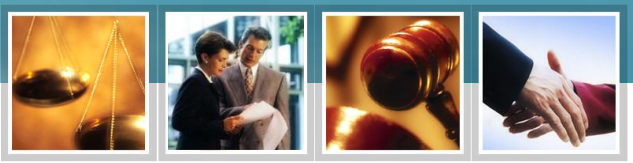
Order Granting Petitioner's Request for Penalty and Attorney Fees

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

UEF/Procedure



William Cleek v. Uninsured Employers' Fund

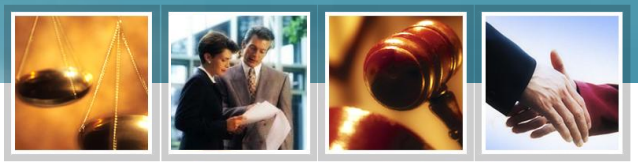
2012 MTWCC 31

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.

UEF/Procedure



Jacobsen Ranch Co. v. Chris Dix and Montana State Fund and Uninsured Employers' Fund

2012 MTWCC 33

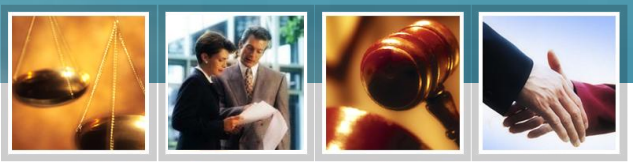
Order Granting Montana State Fund's Motion to Dismiss

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.

WAGES

Wages

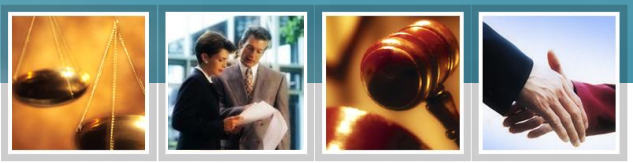


Jody Gunderman v. Montana State Fund
2012 MTWCC 18
Findings of Fact, Conclusions of Law and Judgment

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."

Wages

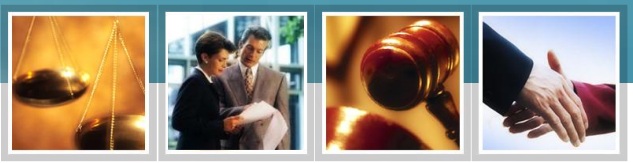


Dennis Marjamaa v. Liberty Northwest Ins. Corp.
2012 MTWCC 23
Decision and Judgment

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.

Wages



Phillip Peters v. American Zurich Ins. Co.

2013 MTWCC 16

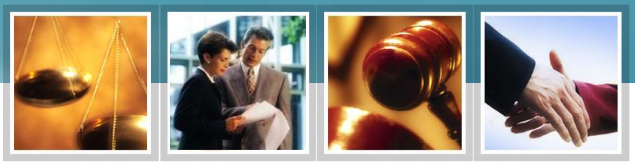
Order Granting in Part and Denying in Part Petitioner's Motion for Partial Summary Judgment on AWW and Order Denying Petitioner's Motion to Amend Petition as Moot

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

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-motioned 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.

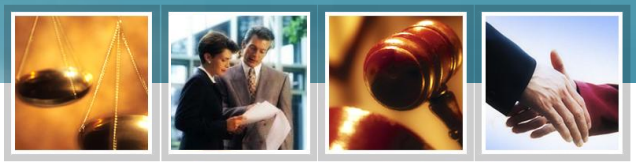
Held: Respondent is entitled to summary judgment in its favor on these issues. Section 39-71-123(2)(b)(i), MCA, clearly bars the inclusion of employer contributions to 401(k) plans in average weekly wage calculations. On the remaining issues, Petitioner did not establish the sixth element of equitable estoppel in that he has not proven that allowing Respondent to recoup the overpayment would change Petitioner's position for the worse.

MONTANA SUPREME COURT

MONTANA SUPREME COURT

BENEFITS/PENALTIES

Montana Supreme Court Benefits/Penalties



Sharon Stewart v. Liberty Northwest Ins. Corp.
2013 MT 107
Opinion of the Court

Summary: Liberty Northwest appeals the WCC's order determining that Sharon Stewart is entitled to continued payment for her pain medication. Stewart cross-appeals the WCC's determination that she is not entitled to attorney's fees or a statutory penalty.

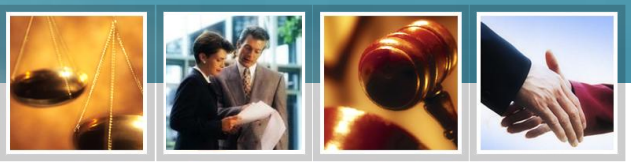
Held: The WCC's determination that Liberty Northwest remains liable for Stewart's pain medication for symptoms relating to pain from initial work-relating injury is affirmed. Liberty's argument that collateral estoppel should apply is rejected where WCC's prior determination that increased pain in knee was not related to initial injury was based on § 39-71-711, MCA, regarding impairment ratings, and claim regarding ongoing payment of medical benefits was based on § 39-71-704, MCA.

WCC also affirmed on issues of a penalty and attorney's fees where MSC agreed it was reasonable for Liberty to rely on WCC's prior determination that Stewart's chronic knee pain was not causally related to her industrial injury, for purposes of addressing claim for increased impairment rating, and MSC generally afford WCC "high level of deference" to WCC's factual findings on "reasonableness" questions, which are a "question of fact."

MONTANA SUPREME COURT

BURDEN OF PROOF

Montana Supreme Court
Burden of Proof



Richard Ford v. Sentry Casualty Co.
2012 MT 156
Opinion of the Court

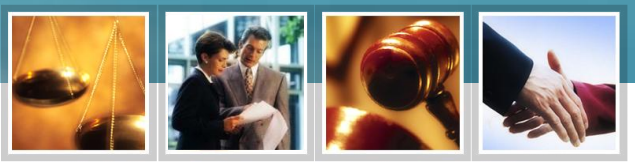
Summary: Petitioner and Appellant appealed the WCC's determination that: (1) work-related injury did not cause or aggravate his preexisting cervical disc condition; (2) that he was at MMI for industrial injury and not entitled to ongoing TTD benefits; and (3) that Sentry was not liable for costs, a penalty, or attorney's fees.

Held: Under 2007 version of WCA and sections 39-71-407(1), (2)(a), and -119, Ford did not meet burden of proving it was "medically more probable than not" that injury that occurred at work caused or aggravated the cervical spine condition for which treating and IME physicians recommended surgery. WCC properly applied "more probable than not" standard in it analysis despite references to physicians' opinions termed in "reasonable degree of medical certainty." Ford's treating physicians (Dr. Ross and Dr. Schubert), and IME physician diagnosed cervical strain relative to industrial injury and opined it was "medically possible" that injury aggravated preexisting cervical spine condition or caused cervical discs to herniate. The psychological evaluator (Dr. McElhinny) opined that Ford had a somatoform pain disorder fueled by depression, that Ford was prone to "manipulative behaviors," and that only "objective medical findings" should be used when prescribing treatment for Ford. Only second IME physician opined "within a reasonable degree of medical certainty" that industrial accident caused the discs at C5-6 and C6-7 to bulge significantly enough to compress and impinge Ford's spinal cord. WCC properly afforded other physicians' opinions more weight where Dr. Gary opined there was no objective evidence of a "true radiculopathy" and Dr. Moseley apparently did not consider Dr. McElhinny's psychological evaluation. Opinion of Dr. Ross that Ford could be released "to regular and unrestricted duties" as of May 17, 2010, and that Ford had a "0% whole person impairment rating under 6th Edition of *Guides*, was unrefuted and Ford thus not entitled to ongoing TTD benefits." Penalty, costs, and attorney's fees properly denied by WCC.

MONTANA SUPREME COURT

COMMON FUND

Montana Supreme Court Common Fund



Robert Flynn and Carl Miller v. Montana State Fund and Liberty Northwest Ins. Corp.,

2011 MT 300

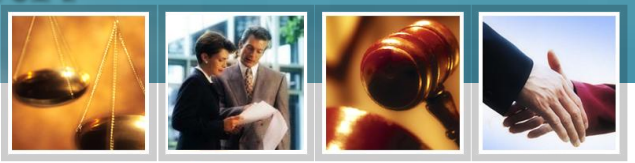
Summary: Flynn and Miller appealed the Workers' Compensation Court order defining "paid in full" as used in the definition of "settled" workers' compensation claims, for the purposes of determining the retroactive application of judicial decisions. Flynn initially filed a petition alleging the Montana State Fund should pay a proportionate share of the attorney fees he incurred to recover Social Security disability benefits. Applying the common fund doctrine, the Supreme Court agreed. Flynn's attorney then sought common fund attorney fees from claimants who benefited from the decision. The question then became when a claim was final or settled with regard to the retroactive effect of a decision.

Held: The Montana Supreme Court affirmed the Workers' Compensation Court decision as to what "paid in full" meant. According to the WCC order, a "settled" claim for purposes of retroactivity is either (1) a department-approved or court-ordered settlement agreement, or (2) a claim in which the claimant received all applicable benefits prior to a new judicial decision and has not received subsequent benefits.

MONTANA SUPREME COURT

DISCOVERY / BAD FAITH

Montana Supreme Court Discovery/Bad Faith



American Zurich Insurance Company v. Montana Thirteenth Judicial District Court, Yellowstone County, and Honorable Gregory R. Todd, District Court Judge

2012 MT 61

Opinion and Order on Writ of Supervisory Control

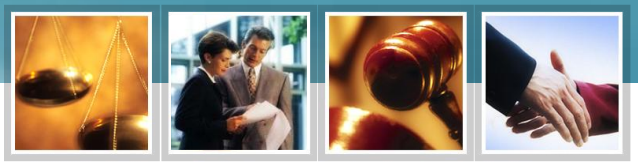
Summary: In a bad faith case following a workers' compensation settlement, the injured worker, Phillip Peters, served a subpoena on the employer, Roscoe Steel, for its entire file. Roscoe and its insurer, Zurich, resisted the subpoena. They resisted the subpoena because it included an opinion letter from the defense attorney in the underlying case. Judge Todd held it had to be provided.

Held: While an employer and insurer share certain legal interests in a workers' compensation claim, the insurer's duty to compensate the employee cannot be delegated to the employer, nor can the employer veto or influence any settlement between the insurer and the employee. When the adjuster provided the attorney letter to the employer, the attorney-client privilege was waived.

MONTANA SUPREME COURT

EVIDENCE

Montana Supreme Court Evidence



Montana State Fund v. Randall Simms

2012 MT 22

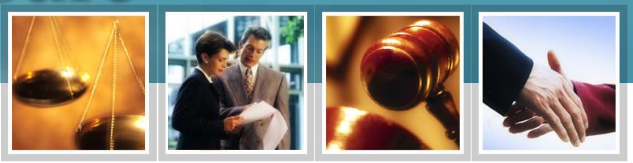
Summary: This was an original proceeding in the Montana Supreme Court wherein Simms objected to an order from the First Judicial District Court of Lewis and Clark County that granted Montana State Fund's petition to disseminate video footage taken of him in public places. MSF has a specific unit that is deemed a confidential criminal justice agency to investigate fraud. The special investigative unit investigated Simms. MSF sent videos to the treating physician, who found the activity on the videos to be inconsistent with the information provided by Simms. Simms moved to dismiss MSF's petition to the District Court to use and disseminate the videos.

Held: The District Court granted MSF's petition releasing the videos to itself and authorizing MSF to use the video footage in the ongoing Workers' Compensation Court proceeding. There was no ruling as to whether the videos would be admitted in the WCC proceedings, leaving that up to Judge Shea. The Montana Supreme Court affirmed the District Court holding that Simms' individual privacy rights did not clearly exceed the merits of public disclosure. Whether the surveillance and information gathering implicates constitutional rights was left for another day.

MONTANA SUPREME COURT

LAST INJURIOUS EXPOSURE

Montana Supreme Court
Last Injurious Exposure



Edna Banco v. Liberty Northwest Insurance Corporation

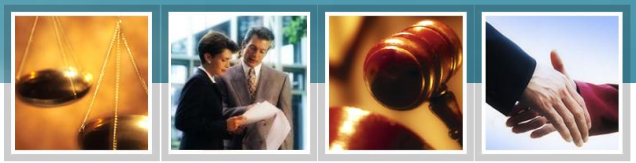
2012 MT 3

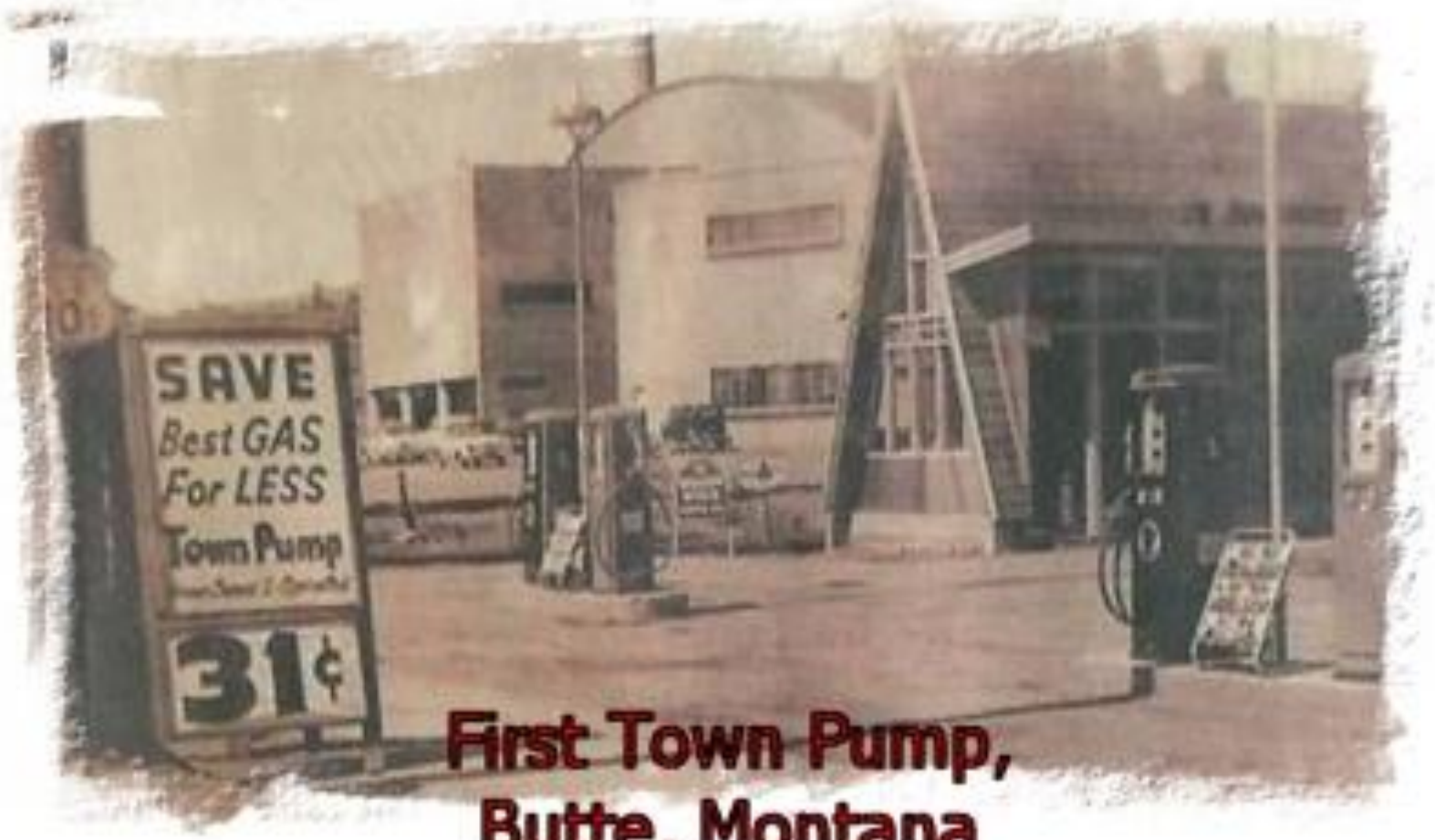
Summary: Banco worked concurrently at 4B's Restaurant and the Child Development Center at Malmstrom Air Force Base (CDC). Liberty insured the 4B's and the CDC was insured under the Federal Workers' Compensation system. Between the two jobs, Banco worked 55-60 hours per week for more than 20 years. She quit her job at 4B's and filed an occupational disease claim about five weeks later. She was working full-time at CDC at the time. Liberty denied Banco's claim.

Held: The Montana Supreme Court affirmed the Workers' Compensation Court decision that the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease. Reiterating its decision from *In Re: Mitchell*, where an employee works for multiple consecutive employers which may have contributed to a claimant's OD, the claimant must meet a "potentially causal" standard in order to recover. There is no requirement that the last employment be a "substantial contributing cause" of the condition.

MONTANA SUPREME COURT

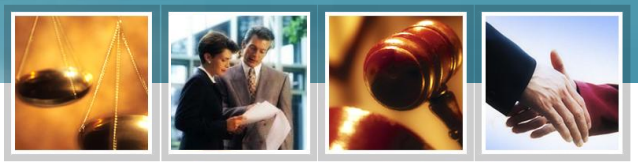
MAJOR CONTRIBUTING CAUSE





First Town Pump,
Butte, Montana

Montana Supreme Court
Major Contributing Cause



Montana State Fund v. Clarence Grande

2012 MT 67

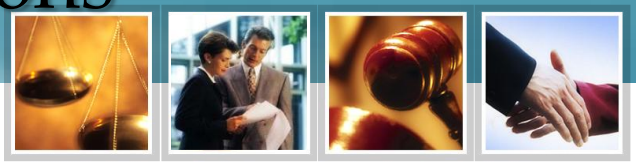
Summary: Grande had to leave his job as a truck driver due to arthritic conditions in his hands. He filed an occupational disease claim that was denied by the Montana State Fund. The Insurer argued that an aggravation of an underlying arthritic condition was not compensable. MSF argued that the statutes do not provide for compensability of an aggravation to an occupational disease, only to injuries. Grande countered that a cause may be a leading cause when compared to all other causes, so long as it is the most contributory of the causes as opposed to being 51% of the total.

Held: The Montana Supreme Court affirmed the Workers' Compensation Court decision and rejected MSF's argument that aggravations of occupational diseases are not compensable. It further rejected the State Fund's position that only occupational factors can be considered in determining whether a condition meets the definition of an occupational disease. Pre-existing conditions can still be considered.

MONTANA SUPREME COURT

STATUTES OF LIMITATIONS

Montana Supreme Court Statutes of Limitations



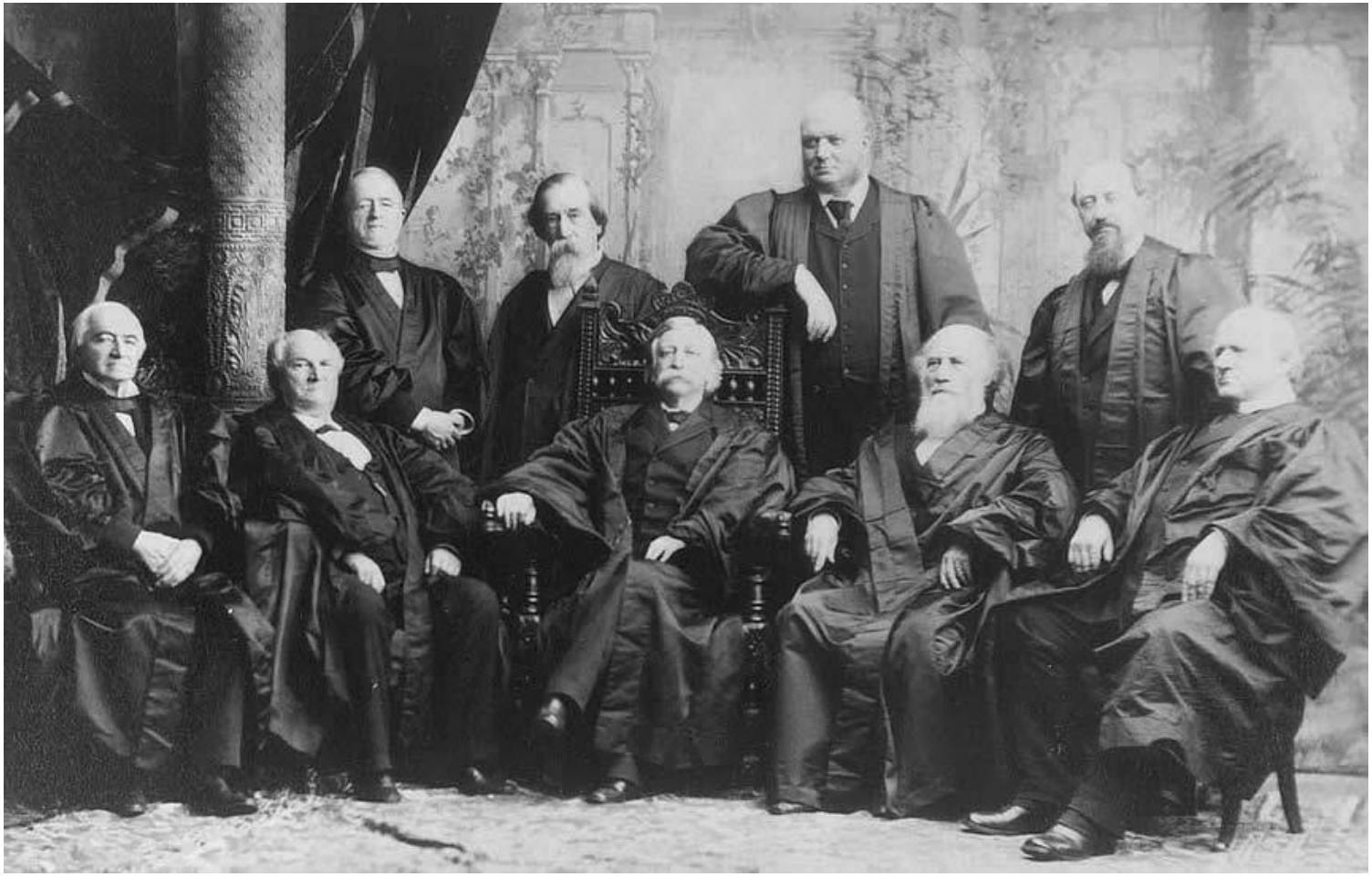
Dianne Dvorak v. Montana State Fund
2013 MT 210
Opinion of the Court

Summary: Dvorak appealed the WCC's grant of summary judgment to Montana State Fund on the issue of whether Dvorak filed her OD claim with one-year of the date she "knew or should have known" she was suffering from an OD.

Held: MSC reversed the WCC's grant of summary judgment and remanded for a new trial on of issue of when Dvorak knew or should have know she was suffering from an occupational disease. Medical evidence indicated that while Dvorak suffered a work-related "injury" to her upper back and shoulder in February 2006, there was no associated impairment and the conditions resolved with osteopathic manipulations and medication. The State Fund argued that because Dvorak thereafter continued to take pain medication for upper back and shoulder pain, which she experienced while working as a sandwich maker, the WCC was correct in concluding Dvorak "knew or should have known she was suffering from an occupational disease" as early as 2006.

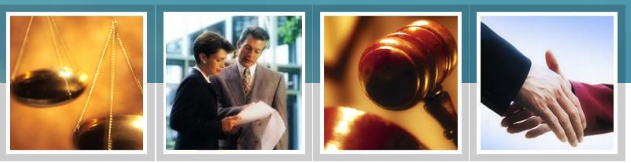
However, the MSC noted that Dvorak's treating physician did not identify a specific pathological condition until December 2010, and told Dvorak for the first time in March or April 2011 that she had an "occupational disease" and should consider filing a workers' compensation claim. The MSC further noted that the practical implication of the MCC's ruling "could be that any worker in Montana who suffers pain at the end of a workday for which she seeks a prescription will be required to file a benefits claim, even if she has every intention of continuing to work and no intention of seeking occupational disease benefits, simply in order to preserve a possible claim that may or may not ripen in the future."

Based on evidence that Dvorak's doctor did not conclude she had an OD until Mark or April 2011, MSC concluded there was a material question of fact as to when Dvorak, "who is not trained in medicine," should have known she was suffering from an OD.



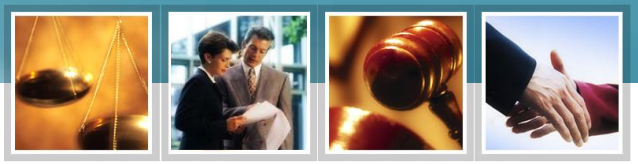
THE SHEA ERA

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



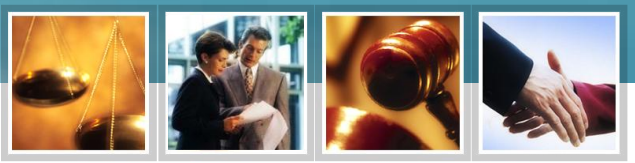
Case Name	WCC No.	WCC Decision and Date	SC Decision	Date
Evans v. Liberty Northwest Ins. Corp.	2006-1580	Findings of Fact, Conclusions of Law, and Judgment - 6/20/07 - 8/14/07 - Appeal Dismissed by WCC following successful mediation	N/A	N/A
Lynn Gerber v. Montana State Fund	2012-2904	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment	PENDING Appealed 4/26/13	
Derrick Goble v. Montana State Fund	2010-2615	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment	PENDING Appealed 04/26/13	
Peterson v. Montana Schools Group Ins. Auth.	2005-1295	Findings of Fact, Conclusions of Law and Judgment - 4/7/06	DISMISSED by Stipulation of the parties	07/26/06
Hedrick v. MACo Workers' Comp. Trust	2004-1213	Findings of Fact, Conclusions of Law and Order	DISMISSED by Stipulation	10/26/06
Popenoe v. Liberty Northwest Ins. Corp.	2005-1490	Order Granting Petitioner's Motion for Summary Judgment - 12/1/06	DISMISSED with Prejudice by Stipulation of the parties	04/26/07
Johnson v. Liberty Mutual Fire Ins. Co.	2004-1054	Findings of Fact, Conclusions of Law and Judgment	DISMISSED with Prejudice by Stipulation of the parties	05/14/07

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



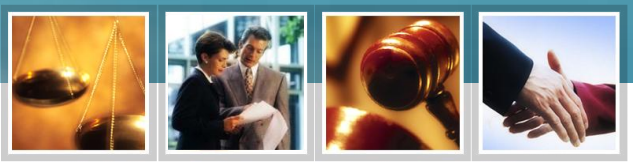
Harter v. Liberty Northwest	2006-1722	Findings of Fact, Conclusions of Law and Judgment	DISMISSED	05/23/07
Gamble v. Sears	2005-1337	Findings of Fact, Conclusions of Law and Order - 1/30/06	AFFIRMED – 2007 MT 131	06/5/07
Thompson, Lee N.; Sharp, Darin; Bailey, Scott	2004-1089	Order Granting Motions for 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
Johnson v. MHA Workers Comp. Trust	2006-1662	Findings of Fact, Conclusions of Law and Judgment - 5/22/07	DISMISSED by Motion	10/19/07
Hinman v. Montana State Fund	2006-1562	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2007 MT 278N	10/30/07
Kessel v. Liberty Northwest	2004-1189	Order Denying Motion for Summary Judgment; Order for Certification	AFFIRMED – 2007 MT 305	11/27/07
Sturchio v. Wausau Underwriters Ins. Co.	2006-1583	Decision and Judgment - 1/30/07 Order Amending Decision and Judgment - 2/7/07	AFFIRMED – 2007 MT 311	12/04/07

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



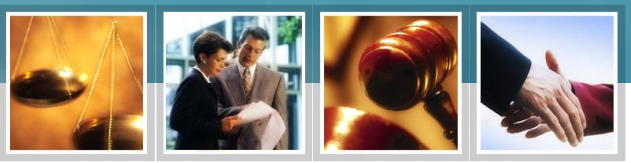
Pinnow, Gayle	2004-1190	Order On Cross-Motions for Summary Judgment (Judge Sherlock) - 2/24/06	REVERSED AND REMANDED – 2007 MT 332	12/11/07
Satterlee, et al. v. Lumberman's Mut. Cas., et al.	2003-0840	Order Denying Petitioner's Motion to Allow Discovery and Granting Respondents' Cross-Motion for Partial Summary Judgment - 11/15/06	DISMISSED without Prejudice Re Rule 54(b) Certification - 2007 MT 325	12/11/07
VanBouchaute v. Montana State Fund	2006-1622	Findings of Fact, Conclusions of Law and Judgment - 8/23/07	DISMISSED with Prejudice pursuant to Stipulation for Dismissal	12/12/07
BeVan v. Liberty Northwest Ins. Corp.	2006-1665	Findings of Fact, Conclusions of Law and Judgment - 12/6/06	AFFIRMED – 2007 MT 357	12/21/07
Michalak v. Liberty Northwest	2006-1641	Findings of Fact, Conclusions of Law and Judgment - 3/22/07	AFFIRMED – 2008 MT 3	01/3/08
Wilkes v. Montana State Fund	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
Driggers v. Liberty Northwest Ins. Corp.	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

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



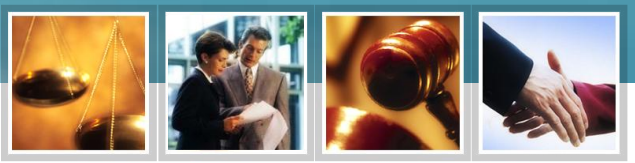
Harrison v. Liberty Northwest Ins. Corp. and Stillwater Mining Company	2004-1222	Findings of Fact, Conclusions of Law and Judgment - 5/26/06	AFFIRMED – 2008 MT 102	04/1/08
Oksendahl v. Liberty Northwest Ins. Corp.	2006-1679	Order Granting Petitioner's Motion for Summary Judgment - 6/21/07	AFFIRMED – 2008 MT 132N	04/22/08
Kruzich, Henry v. Old Republic Ins. Co.	2005-1247	Findings of Fact, Conclusions of Law and Judgment - 6/1/06	REVERSED 2008 MT 205	06/10/08
Sizemore v. Copper King Hotel and Convention Center	2007-2003	Order Granting Respondent's Motion to Dismiss	DISMISSED with prejudice	06/17/08
Barnard v. Liberty Northwest Ins. Corp.	2005-1505	Findings of Fact, Conclusions of Law and Judgment - 10/20/06	AFFIRMED - 2008 MT 254	07/22/08
Woodards v. MIGA	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

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



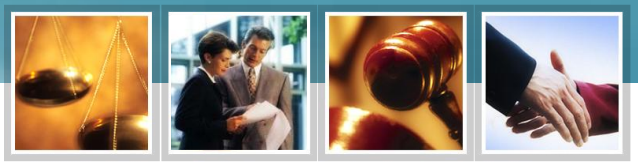
Stavenjord v. Montana State Fund	2000-0207	Order Denying Respondent's Motion for Reconsideration - 4/24/08 and Order Regarding Identification and Notification of Potential Beneficiaries	REMANDED Pending Approval of Settlement DISMISSED with Prejudice	08/20/08 11/5/08
Lanes v. Montana State Fund	2006-1638	Findings of Fact, Conclusions of Law and Judgment - 9/10/07	AFFIRMED 2008 MT 306	09/6/08
Hanson v. Cedar Valley Construction & UEF	2007-1945	Findings of Fact, Conclusions of Law and Judgment - 6/25/08	DISMISSED by Stipulation of counsel	09/17/08
Fleming v. International Paper Co., and Liberty Northwest Ins. Corp.	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
Hagemann v. Montana Contractor Compensation Fund	2007-1983	Findings of Fact, Conclusions of Law and Judgment - 7/10/08	DISMISSED by Motion	09/26/08
Reesor v. Montana State Fund	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

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



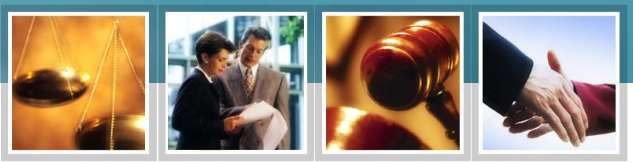
Rau v. Montana State Fund	2006-1633	Findings of Fact, Conclusions of Law and Judgment - 6/4/08	REMANDED for consideration of entry of judgment resulting from settlement; parties to move for dismissal of appeal within 45 days	10/15/08
Siebken v. Liberty Northwest Ins. Co.	2007-1855	Decision and Judgment	AFFIRMED 2008 MT 353	10/21/08
Flynn v. Montana State Fund	2000-0222	Order Determining Status of Final, Settled , Closed, and Inactive Claims	AFFIRMED IN PART; REVERSED IN PART - 2008 MT 394	11/25/08
Fabbi v. Montana Insurance Guaranty Association	2006-1623	Findings of Fact, Conclusions of Law and Judgment	DISMISSED with Prejudice per joint motion	11/26/08
Kratovil v. Liberty Northwest Ins. Corp.	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
Aldrich v. Montana State Fund	2006-1536	Decision and Judgment	AFFIRMED 2009 MT 40	02/18/09
Kilgore v. Transportation Ins. Co.	2008-2056	Findings of Fact, Conclusions of Law and Judgment - 12/4/08	DISMISSED by Motion	03/13/09

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



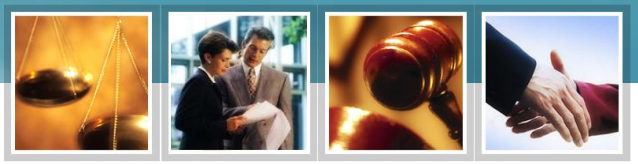
Dildine v. Liberty Northwest Ins. Corp.	2005-1389	Order Granting Petitioner's Motion for Summary Judgment and Denying Respondent's Cross-Motion for Summary Judgment	AFFIRMED 2009 MT 87	03/24/09
Narum v. Liberty Northwest Ins. Corp.	2007-1987	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED 2009 MT 127	04/14/09
Heth v. Montana State Fund	2006-1758	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED 2009 MT 149	05/5/09
Quick v. Montana State Fund	2006-1788	Findings of Fact, Conclusions of Law and Judgment - 6/4/08	AFFIRMED - 2009 MT 162	05/13/09
Montana Municipal Ins. Authority v. Roche	2006-1587	Findings of Fact, Conclusions of Law and Judgment - 11/14/07	AFFIRMED 2009 MT 205N	06/10/09
Russell v. Watkins & Shepard Trucking	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
Tinker v. Montana State Fund	2007-2018	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED - 2009 MT 218	06/24/09
Distad v. Montana State Fund	2008-2076	Findings of Fact, Conclusions of Law and Judgment - 3/20/09	DISMISSED with Prejudice	06/26/09

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



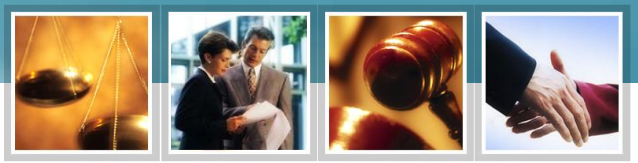
Skiff v. Montana State Fund	2008-2099	Findings of Fact, Conclusions of Law and Judgment - 3/6/09	DISMISSED with Prejudice by Stipulation of counsel	07/20/09
Briese v. MACO Workers' Compensation Trust & J. Briese	2007-1794	Order Denying Richard H. Renn's Motion to Award Attorney Fees	AFFIRMED - 2009 MT 259N	08/4/09
Casiano v. Montana Contractor Compensation Fund	2008-2042	Order Granting Respondent Montana Contractor Compensation Fund's Motion for Summary Judgment - 3/10/09	DISMISSED with Prejudice	08/25/09
Satterlee, et al. V. Lumberman's Mutual Casualty Co., et al.	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
Liberty NW Ins. Corp. V. Montana State Fund re; G. Mitchell	2007-1827	Findings of Fact, Conclusions of Law and Judgment - 12/23/08	AFFIRMED – 2009 MT 386	11/12/09
Schmill v. Liberty Northwest & Montana State Fund	2001-0300	Order Adopting Order of Special Master	AFFIRMED – 2009 MT 430	12/22/09

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



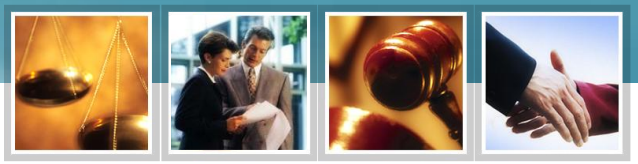
Boyd v. Zurich American Ins. Co.	2009-2279	Order Granting Respondent's Motion for Summary Judgment	AFFIRMED - 2010 MT 52	03/16/10
Keller v. Liberty Northwest Ins. Corp	2009-2309	Findings of Fact, Conclusions of Law and Judgment	REVERSED and REMANDED – 2010 MT 279	12/28/10
Weidow v. UEF v. Bradley Howard/ Howard Family 1995 Trust	2007-1863	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2010 MT 292	12/30/10
Chapman v. Twin City Fire Ins. Co.	2010-2531	Findings of Fact, Conclusions of Law and Judgment and Order Denying Motion for Sanctions	DISMISSED with Prejudice	02/15/11
Wright v. ACE American Ins. Co	2009-2210	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2011 MT 43	03/15/11
Hopkins v. UEF v. Kilpatrick	2008-2152	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2011 MT 49	03/22/11
Leigh v. Montana State Fund	2010-2447	Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Cross-Motion for Summary Judgment	DISMISSED	03/24/11

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



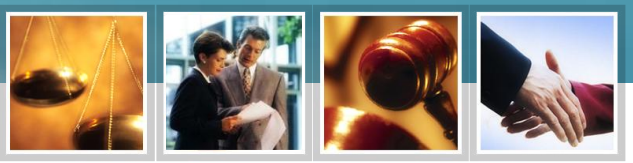
Bailey v. Uninsured Employers' Fund and Longhorn Apartment Complex	2010-2582	Order Granting Third-Party Respondent's Motion to Dismiss	DISMISSED with prejudice	04/11/11
Ingle v. Montana State Fund	2009-2398	Findings of Fact, Conclusions of Law and Judgment	DISMISSED	05/26/11
Caldwell v. MaCo Workers' Comp. Trust	2008-2114	Order Holding § 39-71-710, MCA, Unconstitutional as it Relates to Rehabilitations Benefits	AFFIRMED - 2011 MT 162	07/11/11
Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp.	2000-0222	Order Re: Paid in Full	AFFIRMED - 2011 MT 300	11/29/11
Banco v. Liberty Northwest Insurance Corp.,	2006-1544	Order and Judgment on Stipulated Record	AFFIRMED – 2012 MT 3	01/10/12
Johnson v. Montana State Fund	2010-2545	Order Granting Respondent's Motion for Summary Judgment	DISMISSED with Prejudice by Stipulation	01/25/12

Appeals to Montana Supreme Court, Status, and Dispostion of Appeals



Grande v. Montana State Fund	2010-2474	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED - 2012 MT 67	03/20/12
Ford v. Sentry Casualty Company	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
Sharon Stewart v. Liberty Northwest Ins. Corp.	2008-2066	Findings of Fact, Conclusions of Law and Judgment	AFFIRMED – 2013 MT 107	04/23/13
O'Mahoney v. Liberty Ins. Corp.	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
Dvorak v. Montana State Fund	2011-2793	Order Granting Respondent's Motion for Summary Judgment	REVERSED and REMANDED – 2013 MT 210	07/30/13
Lasky v. State of Montana	2008-2078	Respondent's Motion to Dismiss	DISMISSED	09//26/08

Status and Disposition of WCC Cases Appealed to the Montana Supreme Court



Affirmed:	**35**
Reversed:	**6**
Affirmed in Part – Reversed in Part:	**1**
Dismissed:	**27**
Pending:	**2**
Others:	**2**

Copyright © 2013

The information in this presentation is for general information purposes only. The information in this presentation is not intended to create, and receipt or viewing of this information does not constitute, an attorney-client relationship. Nothing on this or associated pages, documents, comments, answers, emails, or other communications should be taken as legal advice for any individual case or situation.