2011 Workers' Compensation Case Law Review

By

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Belton Cases

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

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

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

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

Benefits

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

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

Held: Section 39-71-703, MCA, provides that an injured worker's impairment rating is to be determined by the "latest" edition of the Guides. Section 39-71-711, MCA, provides that an impairment rating is a purely medical determination which must be determined by an impairment evaluator after a claimant has reached maximum healing and must be based on the "current" edition of the Guides. The "latest" or "current" edition of the Guides is the most recent edition in existence on the date an injured worker reaches MMI. In Petitioners' cases, the 6th Edition existed on the date they each reached MMI. Petitioners' motions for summary judgment are denied and Respondent's cross-motions for summary judgment are granted.

Benefits

***Poindexter v. Montana State Fund,* 2010 MTWCC 31** (Findings of Fact, Conclusions of Law and Judgment)

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

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

Benefits

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

Related Topics: Equity – Estoppel & Waiver

Summary: After this Court determined that Petitioner was not entitled to an increased impairment rating because Petitioner failed to establish a causal relationship between her industrial injury and chronic pain, Respondent discontinued payment for Petitioner's pain patches. Petitioner petitioned the Court for an order directing Respondent to resume coverage and payment for this prescription and any other necessary pain medications. Respondent moved for summary judgment, arguing that Petitioner is collaterally estopped from bringing this second cause of action because the issue of causation was resolved in the trial concerning Petitioner's impairment rating.

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

Benefits

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

Related Topics: Maximum Medical Improvement

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

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

Benefits

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

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

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

Benefits

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

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

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

Benefits

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

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

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

Benefits

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

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

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

Burden of Proof

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

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

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

Casual Employment

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

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

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

Causation

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

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

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

Causation

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

Related Topics: Burden of Proof

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

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

Causation

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

Related Topics: Evidence, Burden of Proof

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

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

Causation

***Grande v. Montana State Fund,* 2011 MTWCC 15** (Findings of Fact, Conclusions of Law, and Judgment) – APPEALED TO MT SUPREME COURT

Related Topics: Burden of Proof

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

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

Causation

***Ford v. Sentry Casualty Company,* 2011 MTWCC 19** (Findings of Fact, Conclusions of Law, and Judgment and Order Resolving Respondent's Motion in Limine) - APPEALED TO MT SUPREME COURT

Related Topics: Burden of Proof

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

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

Causation

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

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

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

Constitutional Law

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

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

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

Constitutional Law

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

Related Topics: Attorneys' Fees

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

Held: As applied to the facts of Petitioner's claim, §§ 39-71-604(3), and 50-16-527(5), MCA, are unconstitutional under Article II, Section 10, of the Montana Constitution. Petitioner does not seek to limit Respondent's ability to obtain relevant healthcare information regarding her claim; she seeks only to be advised that the communications with her treating physicians are taking place and to be included in the communications in order to protect her constitutional right of privacy. Petitioner is not entitled to her attorney fees and costs under the private attorney general doctrine. Although she alleges she waived only her right to pursue these claims under § 39-71-611, MCA, the stipulation to which she agreed contains no such limiting language.

Constitutional Law

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

Related Topics: Summary Judgment

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

Held: The employees argued that they had presented evidence demonstrating that the employer intentionally injured them, allowing them to avoid the exclusivity provision. The supreme court found that while the employees averred that the employer intentionally and deliberately exposed one employee to dangerous conditions in the office, and did not respond to his complaints that he was becoming ill, these allegations did not establish that the employer had actual knowledge that requiring the employee to work in his office would result in certain injury. The fact that the subsequent employee had previously raised the same complaints, and then lost consciousness in the office, did raise a genuine issue of material fact as to whether the employer had actual knowledge that requiring the second employee to work in the same office, without investigating or addressing the alleged contamination, was certain to cause him injury. The employees failed to prove beyond a reasonable doubt that Mont. Code Ann. § 39-71-413 was unconstitutional.

Course and Scope

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

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

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

Course and Scope

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

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

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

Hopkins v. UEF v. Kilpatrick

Course and Scope

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

Related Topics: Major Contributing Cause

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

Held: Kilpatrick employed Petitioner at the bear park. Kilpatrick controlled the details of Petitioner's work and paid him cash daily for the services he performed. Petitioner acted in the course and scope of his employment when he was attacked as he entered the bear pen to feed the bears. Petitioner fed the bears at Kilpatrick's request and Kilpatrick benefitted from services Petitioner performed at the bear park. Petitioner's marijuana use was not the major contributing cause of the accident. No evidence was presented regarding Hopkins' level of impairment on the day of the attack. Although Petitioner admitted to smoking marijuana before arriving at work on the morning of the attack, it is difficult for the Court to conclude that the ***major*** contributing cause of the grizzly bear attack was anything other than the grizzly. Petitioner was not attacked when he inexplicably wandered into the grizzly pen while searching for the nearest White Castle. Petitioner was attacked while performing a job Kilpatrick had paid him to do – feeding grizzly bears (which are equal opportunity maulers, regardless of race, creed, ethnicity, or marijuana use).

Course and Scope

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

Related Topics: Uninsured Employers' Fund

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

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

Credibility

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

Related Topics: Maximum Medical Improvement, Benefits

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

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

Credibility

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

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

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

Disability

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

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

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

Equity – Estoppel & Waiver

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

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

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

Evidence

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

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

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

Evidence

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

Summary: Respondent moves to exclude an opinion letter of his treating physician which was elicited by Petitioner. Respondent argues that the letter was based on surveillance videos which were confidential criminal justice information which Petitioner disclosed in violation of the Criminal Justice Information Act. Respondent also moves to preclude the use or further publication or dissemination of the surveillance videos in these proceedings because of Petitioner's alleged violations of the Criminal Justice Information Act. Petitioner argues that the surveillance was properly disclosed. Although Petitioner concedes the surveillance is now confidential criminal justice information, Petitioner argues it did not become confidential criminal justice information until after Respondent's treating physician reviewed the surveillance.

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

Independent Contractors

***Emergency Preparedness Systems, LLC v. Scobie*, 2009 MTWCC 28** (Findings of Fact, Conclusions of Law and Judgment).

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

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

Independent Medical Examinations

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

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

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

Independent Medical Examinations

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

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

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

Independent Medical Examinations

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

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

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

Independent Medical Examinations

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

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

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

Independent Medical Examinations

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

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

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

Jurisdiction

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

Related Topics: Procedure

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

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

Jurisdiction

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

Related Topics: Mediation, Penalties, Attorneys' Fees

Summary: Respondent moves to dismiss Petitioner's Petition for Hearing for lack of subject matter jurisdiction. Respondent contends the mediation requirements have not been fully satisfied because Petitioner did not reject the mediator's recommendation. Alternatively, Respondent moves the Court to dismiss Petitioner's claim for attorney fees and penalty because there is no evidence Respondent acted unreasonably in the adjustment of Petitioner's claim. Respondent contends that Petitioner can move to amend his petition to reinstate his claim for attorney fees and penalty if discovery reveals unreasonable conduct by Respondent.

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

Jurisdiction

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

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

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

ORDER

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

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

Last Injurious Exposure

***Banco v. Liberty Northwest Insurance Corp.*, 2011 MTWCC 13** (Order and Judgement on Stipulated Record) – APPEALED TO MT SUPREME COURT

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

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

Maximum Medical Improvement

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

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

Held: Petitioner is not at MMI. The medical evidence demonstrates that Petitioner is currently unable to perform any job duties due to his medication regimen. He is therefore entitled to TTD benefits and Respondent's motion for reconsideration is denied. Petitioner is entitled to TTD benefits retroactive to the date a physician opined he was unable to work. Petitioner's Application for Taxation of Costs is granted.

Maximum Medical Improvement

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

Related Topics: Benefits

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

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

Maximum Medical Improvement

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

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

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

Notice of Injury

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

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

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

Penalties

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

Related Topics: Benefits, Burden of Proof.

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

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

Pleadings

***Ivie v. MUS Self Funded Workers' Compensation Program,* 2010 MTWCC 15** (Order Granting Respondent's Motion to Strike and Correct Heading)

Related Topics: Procedure

Summary: Petitioner Michael A. Ivie filed a petition in which he identified the Respondents as Intermountain Claims, Inc. and Montana University System Workers' Compensation Program. Montana University System Workers' Compensation Program moved to strike Intermountain from the caption and to correct the heading to identify it by its correct name, MUS Self Funded Workers' Compensation Program. Ivie does not oppose the motion to correct the caption but does oppose the motion to strike Intermountain from the caption. Ivie argues that Intermountain should remain a party to the action because it was responsible for adjusting Ivie's claim.

Held: MUS's motions are granted. Intermountain is a third-party claims administrator MUS contracted to adjust Ivie's claim. MUS is the insurer. Under the Montana Workers' Compensation Act, any potential liability for benefits, penalty, and attorney fees lies with MUS as the insurer. Although the Court may be able to exercise jurisdiction over Intermountain as a respondent in this case, Ivie has presented no reason why the Court should exercise such jurisdiction.

Reopening of Settlements

***Stokes v. Liberty Mutual*, 2009 MTWCC 39** (Findings of Fact, Conclusions of Law and Judgment).

Summary: Petitioner settled his indemnity benefits on an accepted-liability low-back claim in August 2008. Petitioner subsequently required an additional back surgery for which the insurer paid medical benefits. Petitioner argues that his settlement should be reopened because he did not foresee the need for an additional surgery at the time he settled his claim and because he has been unable to obtain employment. Petitioner asserts that he has applied for the positions approved by job analyses submitted to his treating physician, but the actual positions exceed his physical restrictions and he has therefore been ineligible for them.

Held: The Court found no mutual mistake of fact and therefore no grounds exist to support reopening Petitioner's settlement.

Reopening of Settlements

***Drury v. International Paper Co.,* 2010 MTWCC 32** (Order Denying Petitioner's Motions to Enforce Settlement and Granting Petitioner's Alternative Motions for Trial)

Note: This is not a reopening case per se.

Summary: Petitioners agreed to settle their respective claims with Respondent. The agreement was reflected in an e-mail exchange between Petitioners' counsel and Respondent's counsel. The e-mail specifically reserved medical benefits but was silent as to whether the settlement included potential death benefit claims. When Petitioners' counsel forwarded proposed stipulations for judgment to Respondent's counsel which specifically reserved death benefits, Respondent's counsel objected, contending that he had never agreed to reserve death benefits. Petitioners move to enforce the settlements. Respondent argues that the settlement agreements should not be enforced because the parties never reached a meeting of the minds regarding resolution of potential death benefit claims.

Held: Petitioners' motions to enforce the settlements are denied. Petitioners' counsel's e-mail to Respondent's counsel was silent as to the resolution of death benefits. It would be no more reasonable to infer that death benefits were excluded from the settlement, as Petitioners suggest, than to infer that they were included in the settlement, as Respondent believed. There was no meeting of the minds as to this material term. Petitioners' motions for trial are granted.

Statutes of Limitation

Johnson v. Montana State Fund **2011 MTWCC 22** (Order Granting Respondent's Motion for Summary Judgment) – APPEALED TO MT SUPREME COURT

Summary: Respondent moved for summary judgment, arguing that Petitioner's petition was untimely pursuant to § 39-71-2905(2), MCA. Petitioner opposed Respondent's motion, arguing that Respondent is equitably estopped from claiming it denied Petitioner's claim and that Respondent could not have effectively denied Petitioner's claim prior to investigation. Alternatively, Petitioner argues that Respondent's subsequent denial letter "reset" the statute of limitations.

Held: Under § 39-71-2905(2), MCA, a claimant must file his petition for earing within two years after benefits are denied. Petitioner did not do so, and Respondent's motion for summary judgment is granted.

Statutes of Limitation

Bell v. Montana State Fund and Montana Contractor Comp Fund, **2011 MTWCC 23** (Order Denying Montana Contractor Compensation Fund's Motions to Strike and for Summary Judgment, and Giving Notice of Intent to Grant Summary Judgment to Non-Moving Party)

Summary: Respondent Montana Contractor Compensation Fund (MCCF) moved for summary judgment, alleging Petitioner's Petition for Trial was untimely under § 39-71-2905(2), MCA. MCCF contends that Petitioner's petition was not filed within two years

of MCCF's denial of benefits. Petitioner argues that MCCF had accepted liability for his claim and that MCCF's letter which MCCF argues constitutes a denial of benefits, denied only one specific medical bill. Respondent Montana State Fund (State Fund) also opposed Respondent MCCF's motion for summary judgment. Respondent MCCF moved to strike State Fund's brief, arguing that State Fund lacks the standing to oppose MCCF's motion because State Fund is not an adverse party.

Held: MCCF's motion to strike is denied. State Fund has opposed MCCF's motion for summary judgment. As it pertains to MCCF's motion, therefore, State Fund is adverse. MCCF's motion for summary judgment is denied. Section 39-71-2905(2), MCA, provides: "A petition for hearing before the workers' compensation judge must be filed within 2 years after benefits are denied." MCCF accepted liability for Petitioner's claim, but denied treatment for one specific medical bill. MCCF's denial cannot be construed as a denial of benefits and a dispute over liability as to Bell's claim in general. Order Denying Montana Contractor Compensation Fund's Motions to Strike and for Summary

Judgment, and giving Notice of Intent to Grant Summary Judgment to Non-Moving Party - Page 2 Regarding the limited issue of whether the statute of limitations has run on Bell's claim exclusive of the treatment for which MCCF specifically denied liability, the Court sees no disputed facts which would preclude summary judgment in Petitioner's favor. Since neither Petitioner nor State Fund have moved for summary judgment on this issue, MCCF will have 10 days to file a supplemental brief as to why summary judgment in favor of Petitioner should not be granted on this issue. Petitioner and State Fund may file reply briefs within 5 days after MCCF's brief.

Summary Judgment

***Wombold v. Montana State Fund,* 2009 MTWCC 40** (Order Denying Petitioner's Motion for Summary Judgment and Granting Petitioner the Opportunity to be Heard as to Why Summary Judgment Should Not be Granted in Favor of Respondent)

Related Topics: Wages

Summary: Petitioner moved the Court for summary judgment, arguing that Respondent incorrectly calculated the average weekly wages of the decedent by including overtime wages at the rate of pay the decedent was paid for non-overtime work. Respondent responds that § 39-71-123(1), MCA, is clear on its face regarding the inclusion of overtime in average weekly wage calculations and that the statute provides that overtime hours are included, not at the overtime rate, but at the worker's "regular hourly rate" – which Montana State Fund interprets to be the rate at which the employee is paid for non-overtime work.

Held: While Petitioner has argued that the statute in question unambiguously supports her interpretation, she urges the Court to interpret the applicable statute differently than it has previously been interpreted by this Court and others. The statute is, at best, ambiguous. Following the rules of statutory construction, the Court has examined the legislative history of the statute. The legislative history makes it clear that Respondent's interpretation of the statute is consistent with the legislature's intent. Therefore, Petitioner's motion for summary judgment is denied. Although Respondent did not file a cross-motion for summary judgment, since this issue is purely an issue of law and no issues of material fact remain, it may be appropriate to grant summary judgment in favor of Respondent. Before entering judgment in favor of the nonmoving party, however, Petitioner must be afforded notice and an opportunity to be heard. Therefore, the Court reserves entering judgment in this matter until such time as Petitioner has had the opportunity to be heard.

Summary Judgment

***Wombold v. Montana State Fund,* 2009 MTWCC 40A** (Order Granting Summary Judgment in Favor of Respondent)

Summary: The Court denied Petitioner's motion for summary judgment in this matter. Although no material facts remained in dispute and the issue before the Court was purely an issue of law, the Court did not grant summary judgment in favor of Respondent because Respondent had not cross-motioned for summary judgment. The Court noted that while generally no formal cross-motion is necessary for a court to enter summary judgment in favor of a nonmoving party, Petitioner must be afforded an opportunity to be heard.

Held: Petitioner has informed the Court that she does not object to the Court's entry of summary judgment in favor of Respondent. For the reasons set forth in *Wombold v. Montana State Fund*, 2009 MTWCC 40, the Court concludes that summary judgment in favor of Respondent is appropriate and is therefore granted.

Vocational Rehabilitation – Return to Work

***Caldwell v. MaCo Workers' Comp. Trust*, 2010 MTWCC** (Order Holding § 39-71-710, MCA, Unconstitutional as it Relates to Rehabilitations Benefits) (Appealed to MSC September 3, 2010)

Related Topics: Benefits; Constitutional Law.

Summary: Pursuant to § 39-71-710, MCA, the insurer's liability for payment of permanent partial disability benefits, permanent total disability benefits, and rehabilitation benefits terminates when a claimant is considered retired. Petitioner argues that, as it relates to vocational rehabilitation benefits, § 39-71-710, MCA (2005), violates his right to equal protection as guaranteed by Article II, Section 4, of the Montana Constitution.

Held: Section 39-71-105(3), MCA, sets forth the public policy for rehabilitation benefits. It provides that an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease. Before an injured worker can qualify for rehabilitation benefits, § 39-71-1006, MCA, requires that a rehabilitation provider certify that the worker has reasonable vocational goals and reasonable reemployment opportunity. The rehabilitation plan must take into consideration a worker's age, education, training, work history, residual physical capacities, and vocational interests. Since the statute already considers the worker's age, the Court sees no rational basis for automatically terminating rehabilitation benefits upon an injured worker's eligibility for retirement. Therefore, the Court concludes that as it relates to rehabilitation benefits, § 39-71-710, MCA, violates Petitioner's right to equal protection.

Wages

***Leigh v. Montana State Fund,* 2010 MTWCC 37** (Order Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Cross-Motion for Summary Judgment) (*Appealed to the Supreme Court – January 1, 2011; Appeal Dismissed – March 24, 2011*)

Summary: Petitioner moved for summary judgment, alleging that the insurer incorrectly calculated his average weekly wage by using a twelve-month period under § 39-71- 123(3)(b), MCA, which included weeks during which he was laid off from his job as part of the period used for calculating his average weekly wage. Respondent cross-motioned for summary judgment, arguing that it properly calculated Petitioner's average weekly wage under the Workers' Compensation Act and in accordance with applicable case law regarding seasonal employment.

Held: Given the seasonal nature of Petitioner's work and his employment history with his employer and the reasonable relationship requirement of § 39-71-105(1), MCA, Respondent correctly calculated Petitioner's average weekly wage by using a one-year period as permitted under § 39-71-123(3)(b), MCA.