CASE LAW REVIEW

Workers' Compensation Court Decisions
2015 – 2017
By
Steven S. Carey, Esq.

DISCOVERY

T.B. v. Montana State Fund

2015 MTWCC 18

Eric Rasmusson | Charles G. Adams

- Summary: Respondent moved to compel Petitioner to produce posts from her Facebook page, including posts she designated as "private." Petitioner objected on the grounds of privacy and on the basis that some of her posts might be privileged.

- Held: Respondent's motion to compel is granted because its request for production is reasonably calculated to obtain evidence relevant to the issues in this case, including evidence tending to prove or disprove Petitioner's claim that her injury and occupational disease make it difficult for her to engage in physical activities, including typing and using a computer.

Discovery

BURDEN OF PROOF

Wommack v. Nat'l Farmers Union Prop. & Casualty Co., et al

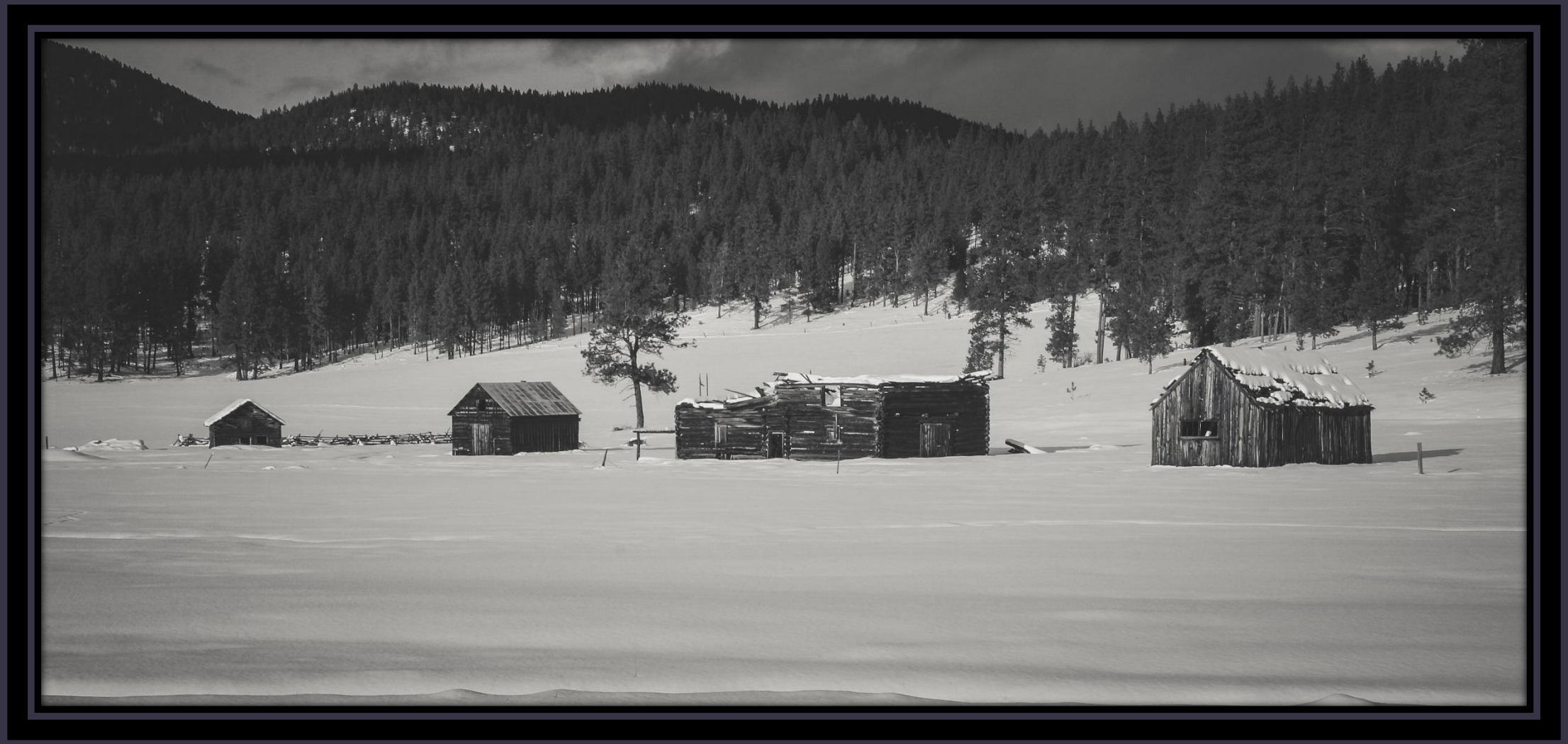
2017 MTWCC 8

Ben A. Snipes | Joe C. Maynard | Charles G. Adams |
Melissa Quale & Thomas E. Martello | Kelly M. Wills | Michael P. Heringer

- Summary: Petitioner developed an OD from exposure to asbestos at the refinery where he worked. For most of his career, Petitioner worked within the refinery, but in the years before his retirement, he worked as an asphalt salesman based in an office across the street. The insurers at risk during Petitioner's time in the refinery maintain that he continued to be exposed to asbestos after changing jobs and his last injurious exposure occurred when he worked as a salesman. The insurer at risk during Petitioner's time as a salesman argues that Petitioner's last injurious exposure occurred when he worked fulltime in the refinery.

- Held: Although Petitioner's most significant exposure to asbestos occurred prior to accepting the sales position, he continued to experience exposure to asbestos until he retired. Since Petitioner continued to be exposed to the same type and kind of conditions which caused his OD, under In re Mitchell's "potentially causal" standard, Petitioner's last injurious exposure occurred when he worked as an asphalt salesman, and the insurer at risk at that time is therefore liable.

Burden of Proof | Major Contributing Cause | Last Injurious Exposure



Montana State Fund v. Liberty NW Ins. Corp. and Wiard

2017 MTWCC 9

Stephanie A. Hollar | Michael P. Heringer | Garry D. Seaman

- Summary: Respondent accepted liability for Claimant's 2011 bilateral carpal tunnel syndrome. Claimant changed positions and her symptoms essentially went away. In 2014, Claimant experienced an acute exacerbation of her chronic left carpal tunnel syndrome while working for the same employer, which by then, was insured by Petitioner. Petitioner paid Claimant benefits under a reservation of rights and filed a Petition for Hearing seeking indemnification from Respondent. The parties have cross-moved for summary judgment on the issue of liability for Claimant's 2014 condition

- Held: In 2014, after reaching MMI for her 2011 condition, Claimant was required to work longer hours and extra shifts while Petitioner was the at-risk insurer. This exposure materially or substantially contributed to, and significantly aggravated, Claimant's preexisting carpal tunnel syndrome. Therefore, Petitioner is liable for Claimant's 2014 condition and is not entitled to indemnification from Respondent.

Appealed to the Montana Supreme Court on August 30, 2017

Burden of Proof | Causation

§ 39-71-407(8), MCA

§ 39-71-407(8), MCA, states:

> If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, **the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible** for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

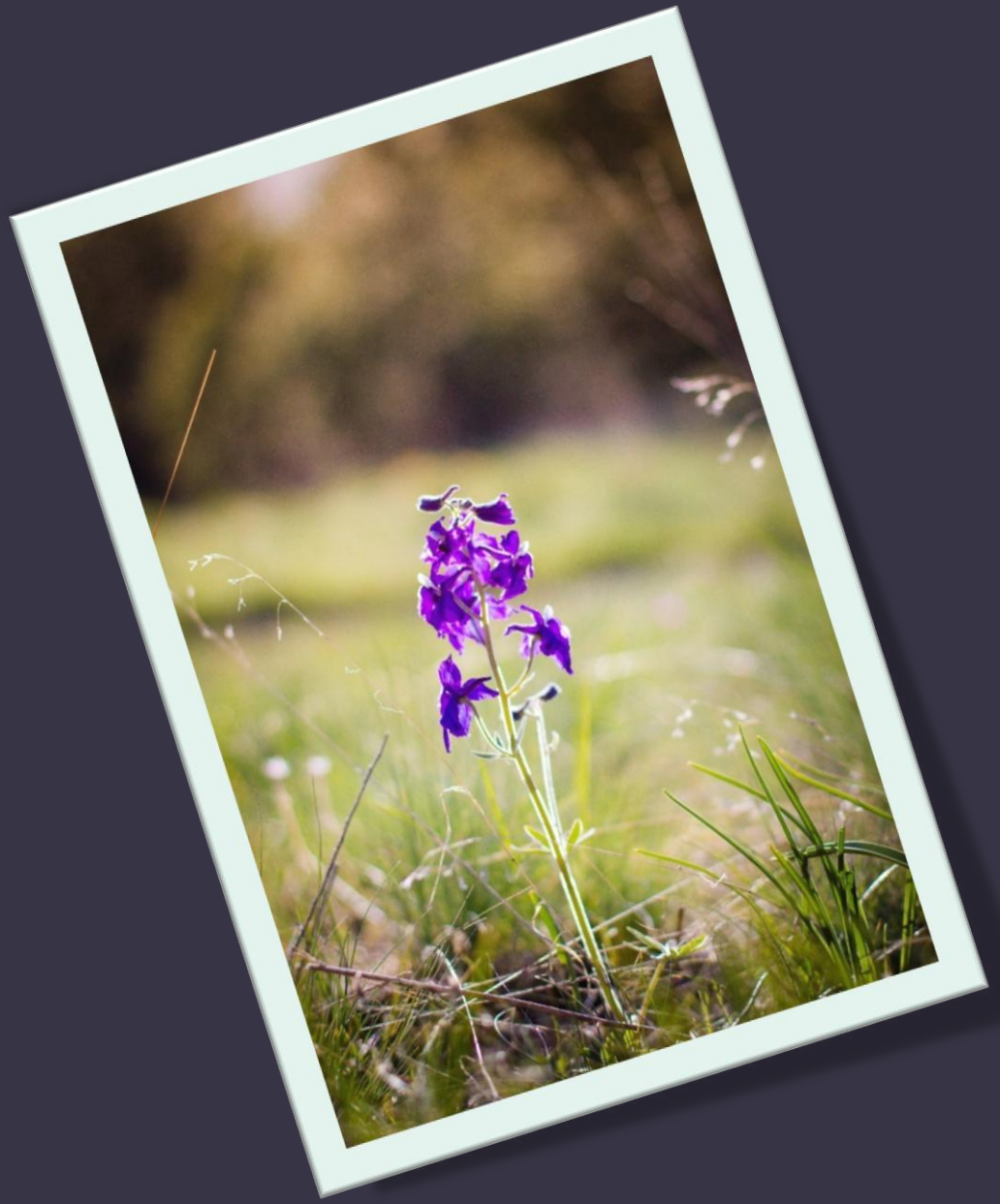
§ 39-71-407(14), MCA

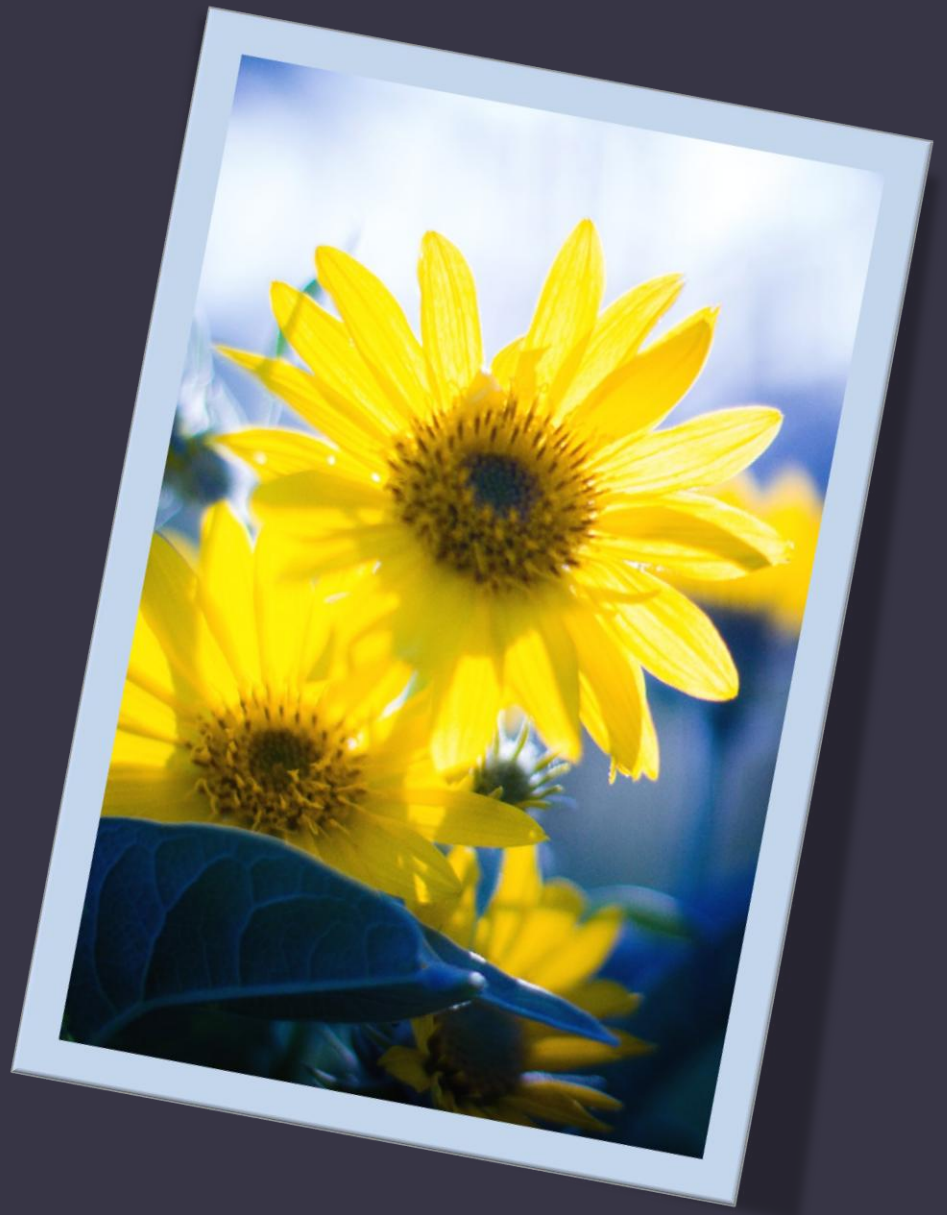
§ 39-71-407(14), MCA, states:

When there is more than one insurer and only one employer at the time that the employee was injuriously exposed to the hazard of the disease, **the liability rests with the insurer providing coverage at the earlier of:**

(a) the time that the occupational disease was first diagnosed by a health care provider; or

(b) **the time that the employee knew or should have known** that the condition was the result of an occupational disease.





Murphy v. Westrock Company

2017 MTWCC 2

Rex Palmer | Larry W. Jones

- Summary: Respondent moves for summary judgment on Petitioner's PPD and rehabilitation claims on the following grounds: its independent medical examiner, a medical doctor, opined that Petitioner has no medically determined physical restrictions as a result of his injury; and Petitioner's chiropractor, although offering a contrary opinion, may not create an issue of material fact because, under the 1991 statute, a chiropractor can provide neither the required "medically determined" physical restriction nor "physician's" certification. Therefore, Respondent contends it is entitled to judgment as a matter of law on Petitioner's claims.

- Held: Although Petitioner's chiropractor offered an opinion contrary to Respondent's medical doctor, he may not create an issue of material fact because, under the 1991 statute, a chiropractor can provide neither the required "medically determined" physical restriction nor "physician's" certification. Therefore, Respondent is entitled to judgment as a matter of law on Petitioner's claims for PPD and rehabilitation benefits.

Appealed to Montana Supreme Court on March 21, 2017

Burden of Proof / Physicians

Suzor v. International Paper Co.

2017 MTWCC 17

Rex Palmer | Leo S. Ward

- Summary: Petitioner alleges that the injuries to her knees, for which Respondent previously accepted liability, caused one of her knees to give way while she was inside her home, which, in turn, caused her to fall and break her right wrist. She seeks medical benefits for her broken wrist. Respondent denied liability for her broken wrist, relying on claimant's medical record which states she fell because she slipped on ice.

- Held: Respondent is not liable for claimant's right-wrist fracture because Petitioner failed to prove that her fall occurred as a result of her knee instability. Petitioner's testimony did not convince this Court that her medical record was incorrect.

Burden of Proof | Credibility

Kirk v. Montana Contractor Compensation Fund

2016 MTWCC 9

Norman L. Newhall | Oliver H. Goe

- Summary: Respondent moves for summary judgment, arguing that Petitioner does not have sufficient evidence to prove he suffered an industrial injury on May 15, 2015. Petitioner opposes the motion on the grounds that there are material issues of fact.

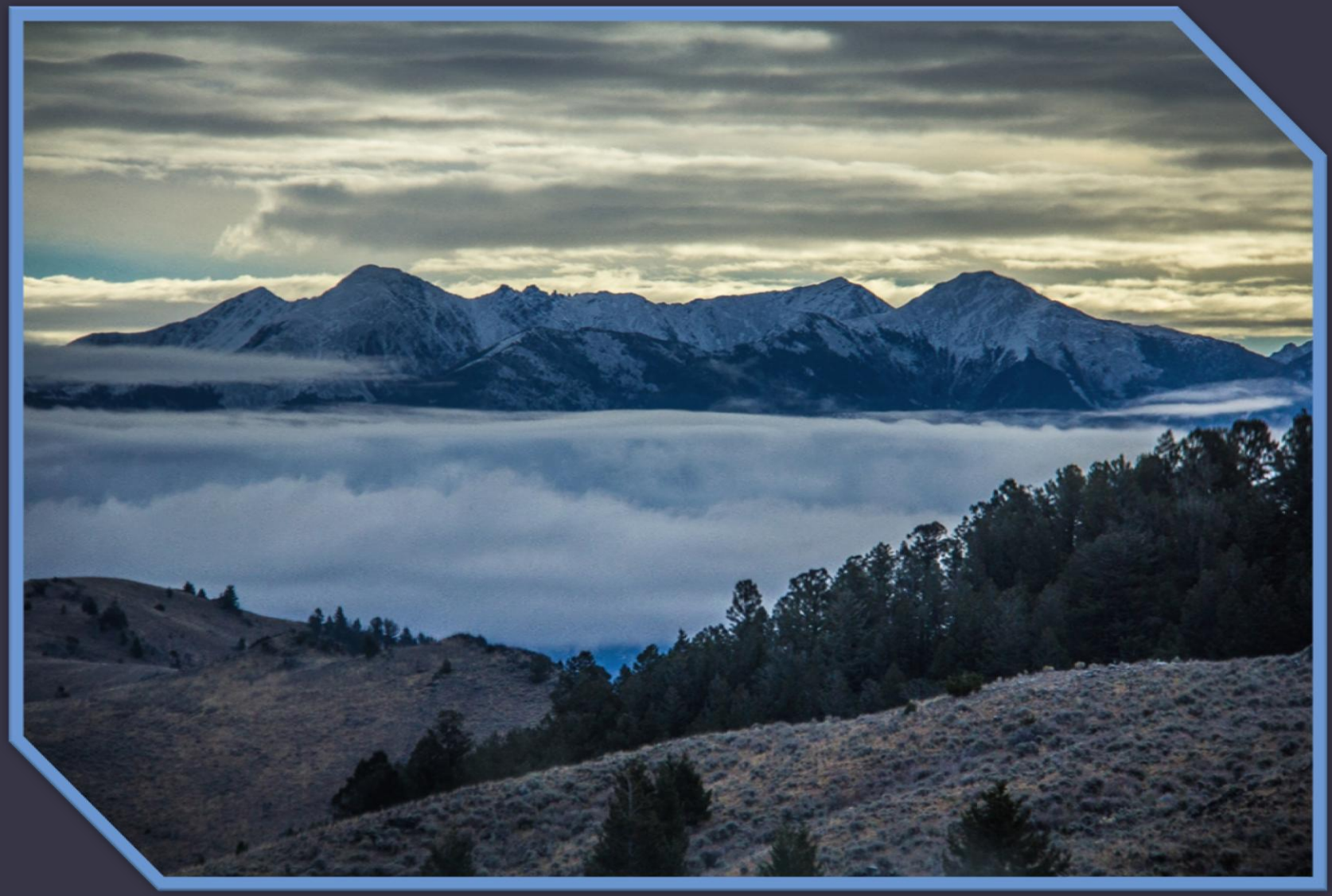
- Held: Respondent's motion for summary judgment is denied because Petitioner presents a genuine issue of material fact as to whether he incurred a work-related lumbar sprain/strain on May 15, 2015.

Burden of Proof / Causation / Summary Judgment

§ 39-71-116(22), MCA

§ 39-71-116(22), MCA, defines "Objective Medical Findings" as:

> medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.



McNamara v. MHA Workers' Compensation Reciprocal

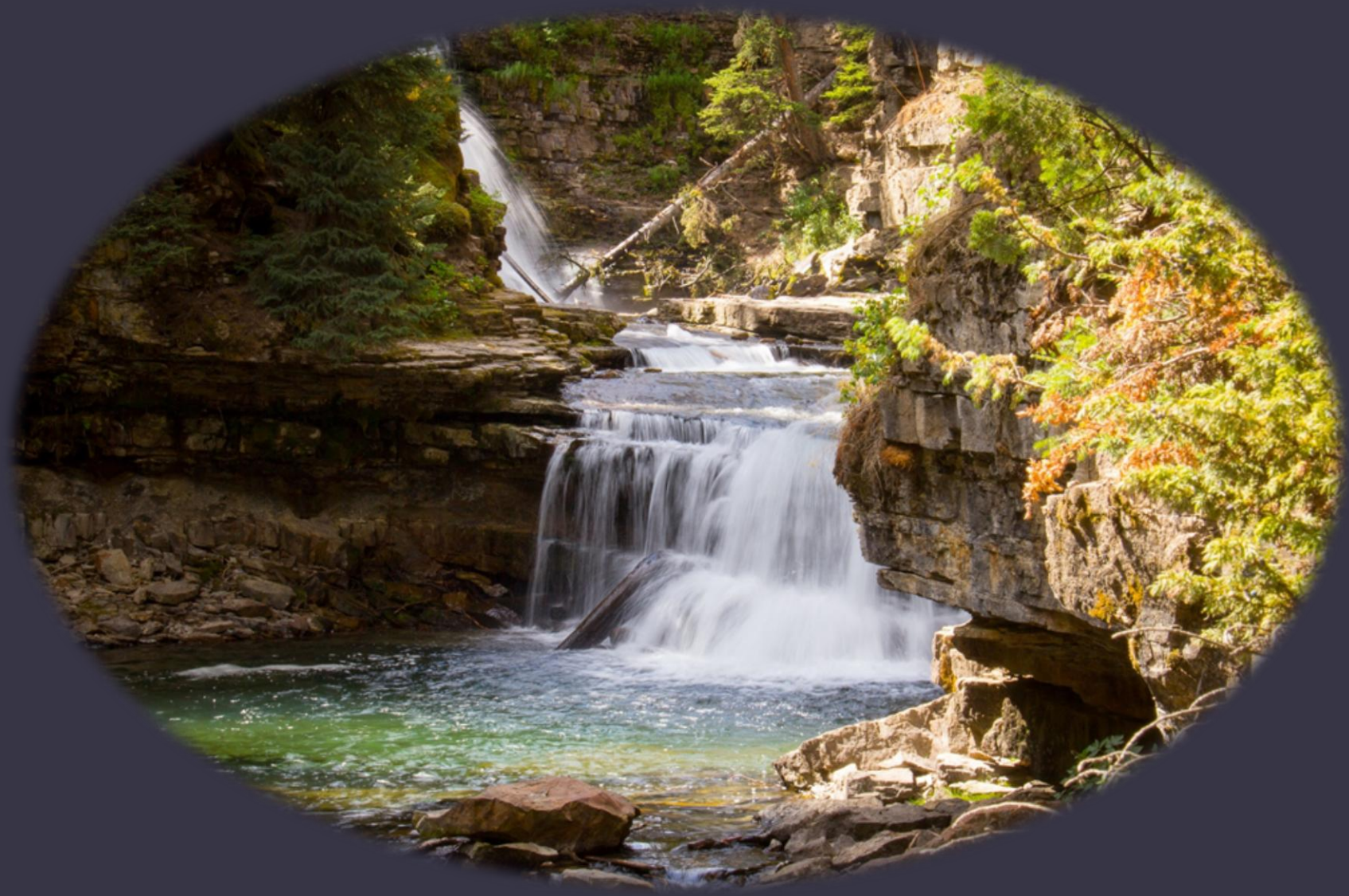
2016 MTWCC 5

Howard Toole | G. Andrew Adamek

- Summary: Petitioner claims that a 2013 injury aggravated her preexisting knee condition, resulting in her need for a total knee replacement. In the alternative, she claims her need for a total knee replacement was caused by an occupational disease resulting from years working as a CNA.

- Held: Respondent is not liable for Petitioner's total knee replacement. Petitioner's treating physician testified that she did not require any treatment for her 2013 injury and that her work was not the leading cause of her knee condition and need for a total knee replacement. Instead, the treating physician opined the surgery was the inevitable consequence of an earlier injury.

Burden of Proof | Causation



Carlock v. Liberty NW Ins. Corp., et al.

2015 MTWCC 19

Laurie Wallace, Ethan Welder, Dustin Leftridge | Michael Heringer | Norman Grosfield | Oliver Goe, Morgan Weber

- Summary: In this last injurious exposure case, the insurer for the second of three employers moved for summary judgment relying entirely on Petitioner's interrogatory answer that he suffered a "significant asbestos exposure" when the insurer for the third employer was at risk.

- Held: The insurer that moved for summary judgment failed to meet its burden that there are no issues of material fact or demonstrate that it is entitled to judgment as a matter of law. Since medical causation requires expert opinion or testimony, Petitioner's conclusory statement that he suffered a "significant asbestos exposure" when he worked for the third employer does not, by itself, establish that his claimed exposure was of the type and kind which could have caused his alleged occupational disease.

Burden of Proof / Last Injurious Exposure

Vonfeldt v. Costco Wholesale Corp.

2015 MTWCC 20

Michael Bliven | Ronald Atwood

- Summary: Petitioner claimed an occupational disease to her wrists, arms, shoulders, and neck as a result of repetitive heavy lifting. Respondent accepted liability for her bilateral tenosynovitis, which caused the pain in her forearms and wrists. Respondent also accepted liability for her myofascial pain syndrome, which caused the pain in her upper back, shoulders, neck, and arms, but only as a temporary aggravation of a preexisting condition. Respondent maintains that it is no longer liable for Petitioner's myofascial pain syndrome on the grounds that she returned to her baseline.

- Held: Petitioner's myofascial pain syndrome is compensable as an occupational disease. Petitioner's treating physician and the IME panel agree that she has myofascial pain syndrome and that her work aggravated it. Petitioner's treating physician opined that her work was the leading cause of her myofascial pain syndrome. Although the IME panel anticipated that Petitioner's condition would subside when she changed to a less physically-demanding position, she has not returned to her baseline, which was having no pain in her upper back, shoulders, neck, and arms.

Burden of Proof | Major Contributing Cause

INDEPENDENT MEDICAL EXAMINATION

Ross v. Victory Insurance Co., Inc.

2017 MTWCC 14

Thomas J. Murphy | Dave P. Whisenhand and Adrianna Potts

- Summary: Claimant appeals an Order Directing Medical Examination, in which the DLI ordered her to attend a second IME with the insurer's chosen psychologist for the purpose of obtaining a neuropsychological evaluation to determine if she is a candidate for a spinal cord stimulator.

- Held: The Order Directing Medical Examination is reversed. The Workers' Compensation Act does not allow an insurer to designate a psychologist to be both its independent medical examiner under § 39-71-605, MCA, and the consulting psychologist for claimant's treating physician under § 39-71-1101, MCA. At this time, the insurer has not established good cause for a second IME with its designated psychologist because claimant has not first undergone an evaluation with the treating physician's chosen psychologist.

Independent Medical Examination

Summers v. Liberty Northwest Ins. Corp.

2017 MTWCC 5

Eric Rasmussen | Kelly M. Wills

- Summary: Petitioner moves this Court to declare that Respondent is not entitled to an IME in this matter on the grounds that a medical records review which Respondent obtained constitutes an "IME" under § 39-71-605, MCA, and that Respondent has no good cause to obtain a second IME. Respondent objects to Petitioner's motion, contending that a records review is not an "IME" under the statute and arguing that it has good cause for an IME where there is a dispute as to the work-relatedness of Petitioner's carpal tunnel syndrome.

- Held: Petitioner's motion is denied. This Court has previously ruled that a medical records review is not an IME, and the language of § 39-71-605, MCA, clearly contemplates a physical examination. Where causation is disputed, Respondent desires the IME for the purpose of obtaining a causation opinion, and Respondent has not previously obtained an IME, Respondent has demonstrated good cause.

Independent Medical Examination

Floyd v. Zurich American Ins. Co. of Illinois

2017 MTWCC 4

Paul E. Toennis | Charles G. Adams

- Summary: Petitioner claims that he is not at MMI from his December 2014 injury, and that he is entitled TTD and medical benefits from the time Respondent terminated them. Petitioner further claims that he is entitled to reasonable costs, attorney fees, and a penalty. Although Respondent accepted liability for Petitioner's injury, Respondent argues that Petitioner's current complaints are not a result of the incident at work, Petitioner has achieved MMI, and Respondent is no longer liable for benefits. Respondent also contends that its conduct has been reasonable because Petitioner's presentation has been unique.

- Held: Petitioner proved by a preponderance of the evidence that he suffered a compensable injury and that he has not reached MMI. Petitioner is entitled to TTD and medical benefits from the time Respondent terminated them, and, as the prevailing party, Petitioner is entitled to reasonable costs. Respondent's actions in terminating Petitioner's benefits were unreasonable because it disregarded the treating physician's opinions and seized upon the IME physician's opinions despite their obvious faults. Respondent's actions in failing to reinstate Petitioner's benefits after the IME physician's deposition were unreasonable because the IME physician testified on a more-probable-than-not basis that Petitioner's injury was compensable. Therefore, Petitioner is entitled to attorney fees and a penalty.

Independent Medical Examination | Burden of Proof | Penalties

MacGillivray v. Montana State Fund

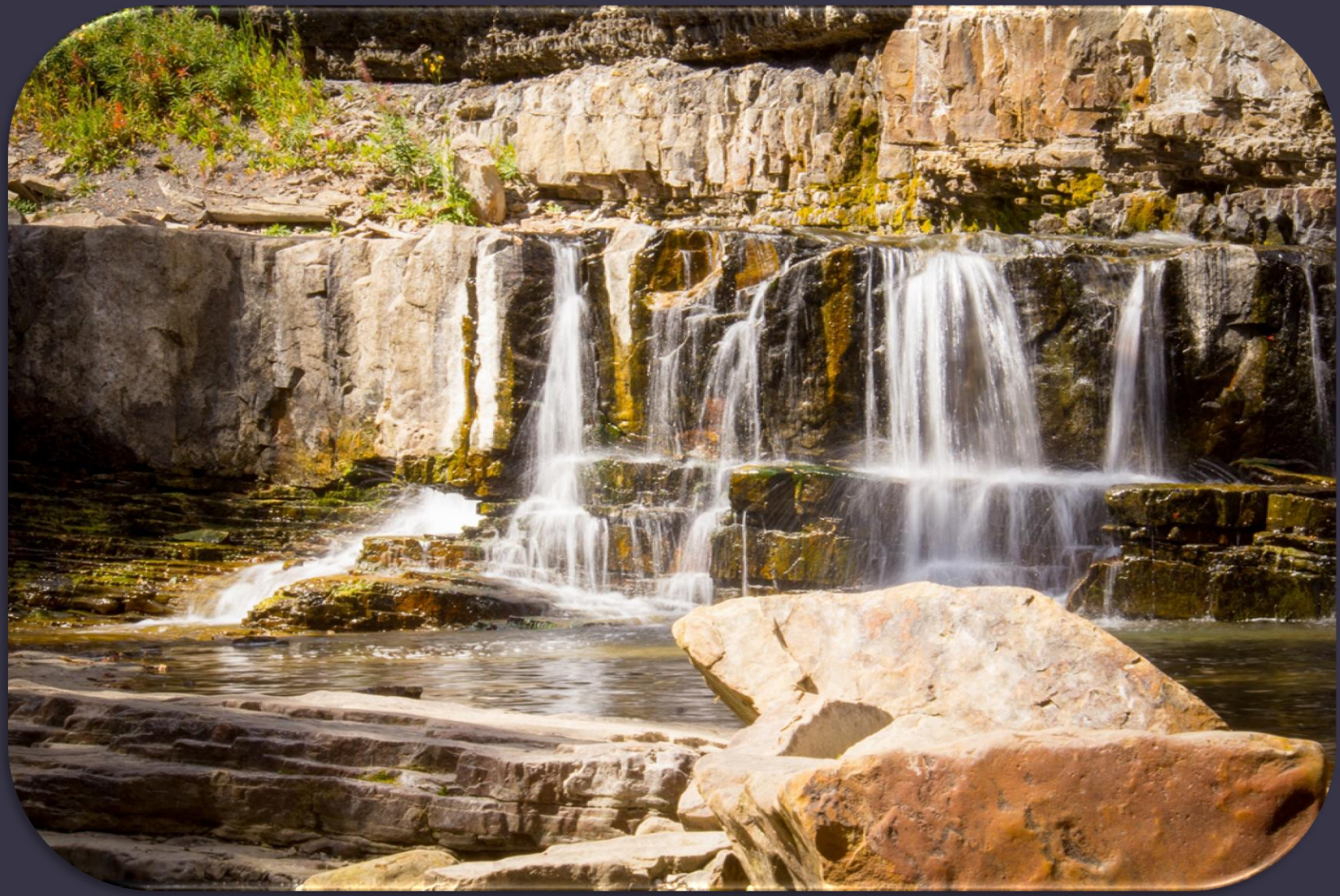
2016 MTWCC 13

Matthew J. Murphy | Leanora O. Coles

- Summary: Petitioner appeals DLI's Order Directing Medical Examination. Inter alia, Petitioner argues that this Court should reverse the order because the Workers' Compensation Court has exclusive jurisdiction to decide issues relating to her claim, and § 39-71-605, MCA, does not provide for multiple IMEs on a denied liability claim. Respondent argues a change in the treating physician's medical opinion and Petitioner's new assertion that she is PTD justify a second IME.

- Held: DLI did not exceed its statutory authority by ruling on Respondent's motion to compel attendance at an IME; its exercise of jurisdiction was lawful under § 39-71-605(2), MCA. However, it committed reversible error because the first IME physician addressed causation, the treating physician has not changed his opinion, and no evidence indicates Petitioner's condition has changed.

Independent Medical Examination



Barnhart v. Liberty Northwest Ins. Co.

2016 MTWCC 12

Garry D. Seaman | Michael P. Heringer

- Summary: Petitioner, who has an extensive history of neck injuries, claimed a work-related neck injury in November 2011. Respondent accepted liability and paid benefits. Petitioner and Respondent settled his claim, reserving medical benefits. However, Respondent then ceased paying medical benefits after an IME examiner opined that Petitioner suffered no injury in the work-related incident. Petitioner thereafter petitioned this Court for reinstatement of his medical benefits.

- Held: Petitioner's industrial accident permanently aggravated his pre-existing neck condition and, therefore, Respondent remains liable for medical benefits. Although Petitioner has reached MMI, he is entitled to reasonable medical services under § 39-71-704, MCA, and Respondent is liable for those primary medical services Petitioner needs to sustain MMI.

Independent Medical Examination | Benefits

855 Front Street – P.O. Box 4759 – Helena, MT 59604-4759
Customer Service 800-332-6102 or 406-495-5000
Fax 406-495-5020 – TDD/TTY 406-495-5030
Fraud Hotline 888-682-7463 (888-MT-CRIME)
www.montanastatefund.com

MONTANA STATE FUND

September 26, 2017

LARRY STAYNER
2831 FT MISSOULA RD #232
MISSOULA MT 59804

RE:

Dear Dr. Stayner:

Montana State Fund appreciates your care of

Enclosed is a panel Independent Medical Evaluation (IME) by Dr. Vincent, Dr. Wilson & Dr. Rotar. After reviewing the report will you please comment on the questions listed?

Do you **agree** with Dr. Vincent's, Dr. Wilson's and Dr. Rotar's conclusions? (for each item please elaborate if you disagree or wish to add comment).

Claim Related Diagnosis	Yes	No
Unrelated Diagnosis	Yes	No
Pain Generator Identity	Yes	No
Medication Suggestions	Yes	No
Treatment Suggestions	Yes	No

If you do not agree, please provide objective medical findings to support your opinion.

Montana State Fund looks forward to your anticipated timely response. Any additional observations and/or recommendations would be helpful and appreciated.

Thank you for your time and consideration. ***You may bill for this report under code MT001.***

If you do not respond within 30 days, after (October 26, 2017), we will process this as acceptance of the recommendations and base future authorizations accordingly.

Sincerely,

New Hampshire Ins. Co. v. Matejovsky

2016 MTWCC 8

Lucas A. Wallace | Thomas M. Murphy

- Summary: The insurer appeals that portion of the DLI's Order Directing Medical Examination which allows the claimant to videotape an IME. The insurer argues that this Court should reverse the DLI because it does not have authority to impose protective measures on an IME or because there was insufficient evidence for the DLI to order that the claimant be allowed to videotape the IME. The insurer also argues this Court should allow it to suspend the claimant's benefits until she attends the IME.

- Held: To the extent that the DLI's Order Directing Medical Examination allows Matejovsky to videotape the IME, the order is reversed. Under § 39-71-605(2), MCA, the DLI may set conditions on IMEs and order protective measures when necessary. However, the claimant did not present sufficient evidence to allow her to videotape the examination. The insurer may not suspend the claimant's benefits because she did not unreasonably fail to attend the IME.

Independent Medical Examination

CREDIBILITY

Warburton v. Liberty Northwest Ins. Co.

2016 MTWCC 1

Thomas J. Murphy | Kelly Wills

- Summary: Petitioner tripped and fell during her work shift at a department store. She sought medical treatment approximately 1½ months later and subsequently claimed that she suffered an injury in the industrial accident. Respondent denied the claim, arguing that Petitioner's medical problems predated the industrial accident.

- Held: This Court did not find Petitioner credible and concluded that she did not suffer an injury as a result of her industrial accident.

Credibility | Burden of Proof | Physicians

Rutecki v. First Liberty Insurance Corporation

2016 MTWCC 6

Garry D. Seaman | Kelly M. Wills

- Summary: Petitioner contends she is entitled to PPD and vocational rehabilitation benefits because she suffered an actual wage loss as a result of her industrial injury. Respondent argues Petitioner has not proven that she suffered an actual wage loss and, consequently, that she is not entitled to PPD or vocational rehabilitation benefits.

- Held: Petitioner has not proven she suffered an actual wage loss as a result of her industrial injury. Medical providers have approved alternative jobs which pay as much as her time-of-injury position. She is therefore not entitled to PPD or vocational rehabilitation benefits.

Credibility | Burden of Proof | Physicians

Guymon v. Montana State Fund

2016 MTWCC 7

John Guymon | Melissa Quale

- Summary: Petitioner claims he suffered a compensable injury when his employer "body blocked" him while he was operating a jumping jack at work. Respondent counters that Petitioner failed to prove that it is more probable than not that he suffered a compensable injury at work.

- Held: The evidence does not support Petitioner's contention that he suffered a compensable injury at work.

Credibility | Physicians

Car Werks, LLC v. UEF v. Gawronski

2015 MTWCC 21

Terry Wallace | Joseph Nevin | Bradley Jones, Thomas Bulman

- Summary: An uninsured employer contests the Uninsured Employers' Fund's acceptance of liability for an injury claim on the grounds that the employee's injuries were not suffered in a car accident in the course of employment but were actually suffered in an earlier motorcycle accident.

- Held: The uninsured employer has not met its burden of proving that the employee's injuries were related to an earlier motorcycle accident. This Court did not find the uninsured employer's evidence credible. Moreover, there is sufficient credible evidence and objective medical findings to support the employee's claim for benefits. The uninsured employer is legally obligated to indemnify the Uninsured Employers' Fund for all benefits paid or payable to the employee for his workers' compensation claim.

Credibility / Uninsured Employers Fund | Burden of Proof

Seymour v. Uninsured Employers Fund

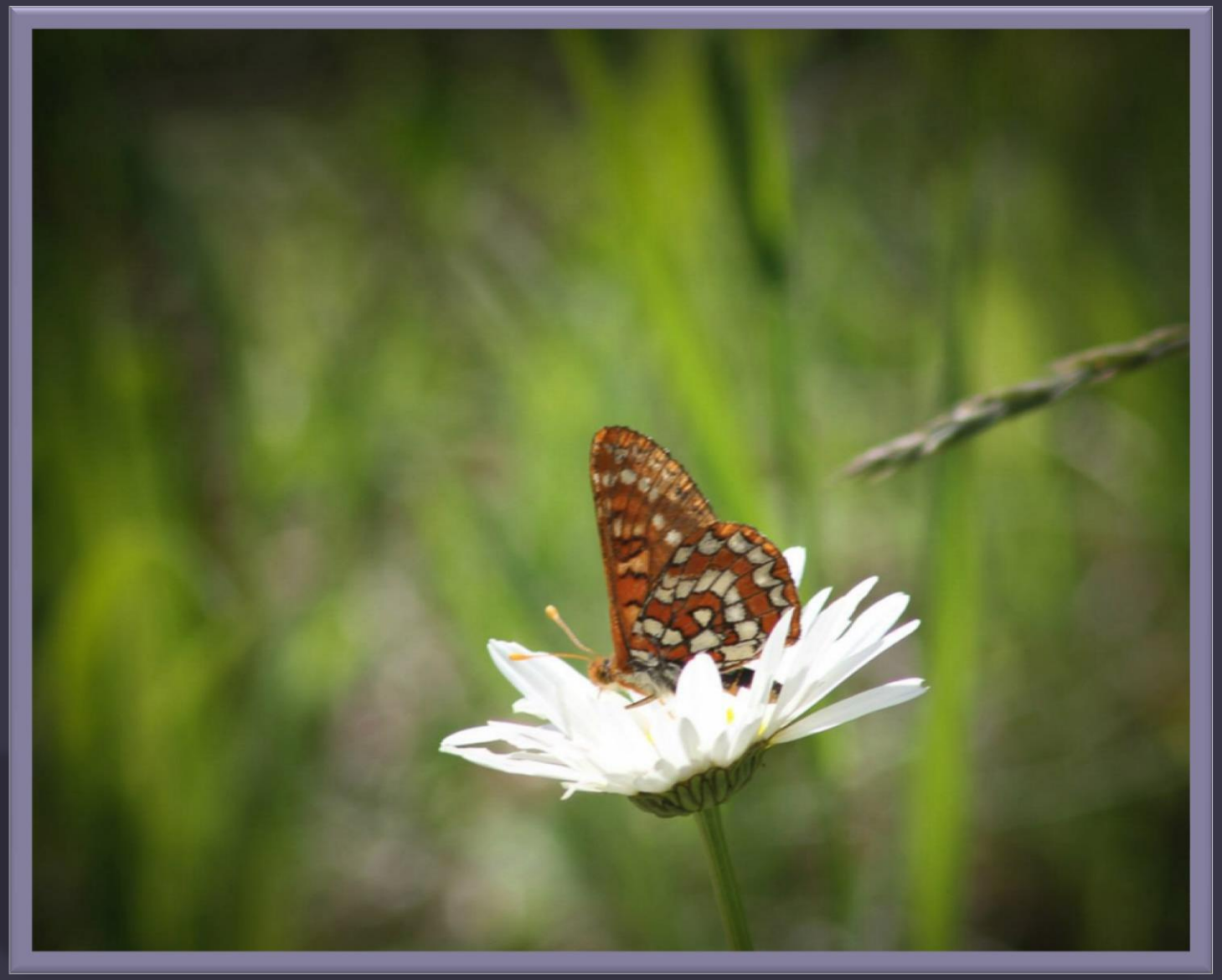
2017 MTWCC 1

Charla K. Tadlock | Joseph Nevin | Jamie N. Bedwell

- Summary: Petitioner suffered an injury when he fell from a roof on which he claims to have been working. Respondent / Third Party Petitioner denies that Petitioner was an employee and that he was in the course of his employment at the time of his injury. However, if this Court determines otherwise, Respondent/Third Party Petitioner seeks indemnification from Third Party Respondent as an uninsured employer for all benefits paid or payable to Petitioner. Third Party Respondent denies employing Petitioner, either directly or indirectly. However, if this Court determines otherwise, Third Party Respondent contends that Petitioner fell from the roof because of his use of alcohol or non-prescription drugs.

- Held: At the time of Petitioner's injury, Petitioner was employed by Third Party Respondent and in the course of his employment. Petitioner's alleged use of alcohol or non-prescription drugs was not the major contributing cause of his accident, and therefore, Petitioner is entitled to benefits under the WCA. Third Party Respondent shall indemnify Respondent / Third Party Petitioner for all benefits paid or payable to Petitioner. Petitioner is entitled to his costs against Respondent / Third-Party Petitioner.

Credibility | Uninsured Employers Fund



STATUTE OF LIMITATIONS

Smith v. Montana State Fund

2017 MTWCC 13

John C. Doubek | Thomas E. Martello

- Summary: Respondent moves for summary judgment, arguing: (1) that Petitioner's claim for TTD or PTD benefits is time-barred; (2) that, in the alternative, she does not have sufficient evidence to prove that she is totally disabled as a result of her claim-related injuries; and (3) that her medical benefits are closed because Petitioner did not use them for 60 consecutive months. Petitioner opposes the motion on the grounds: (1) that she filed her Petition for Hearing within the statute of limitations; (2) that her head and neck problems are a result of claim-related injuries and have deteriorated to the point that she is now unable to work; and (3) that her medical benefits remain open because Petitioner received treatment during the relevant 60-month period.

- Held: Respondent's motion for summary judgment is granted because Petitioner's claim for TTD or PTD benefits is time-barred under the two-year statute of limitations set forth in § 39-71-2905(2), MCA. Because the issue of Petitioner's entitlement to TTD or PTD benefits is disposed of on statute of limitations grounds, this Court does not reach whether there is an issue of material fact as to her substantive entitlement to those benefits. Further, because Petitioner has neither asserted a claim for medical benefits in her Petition for Hearing, nor mediated that issue, this Court currently lacks jurisdiction to consider whether her medical benefits are closed.

Statute of Limitations

§ 39-71-2905(2), MCA

§ 39-71-2905(2), MCA, states:

(2) A petition for a hearing before the workers' compensation judge must be filed within 2 years after benefits are denied.

REOPENING OF SETTLEMENTS

Handy v. Montana State Fund

2016 MTWCC 15

Michah R. Handy | Melissa Quale

- Summary: Petitioner sought rescission of his settlement, arguing: (1) he did not understand he was fully settling his claim because he did not read the settlement agreement; (2) he could not have understood the settlement agreement if he had read it; (3) he was under economic duress; and (4) the settlement is unconscionable. Respondent maintains that Petitioner's claim is time-barred and that he has not met his burden of proof.

- Held: Petitioner's claim is not time-barred. However, Petitioner has presented no viable grounds on which to rescind the settlement. Therefore, the settlement agreement remains in effect.

Reopening of Settlements | Statute of Limitations

Hartung v. Montana State Fund

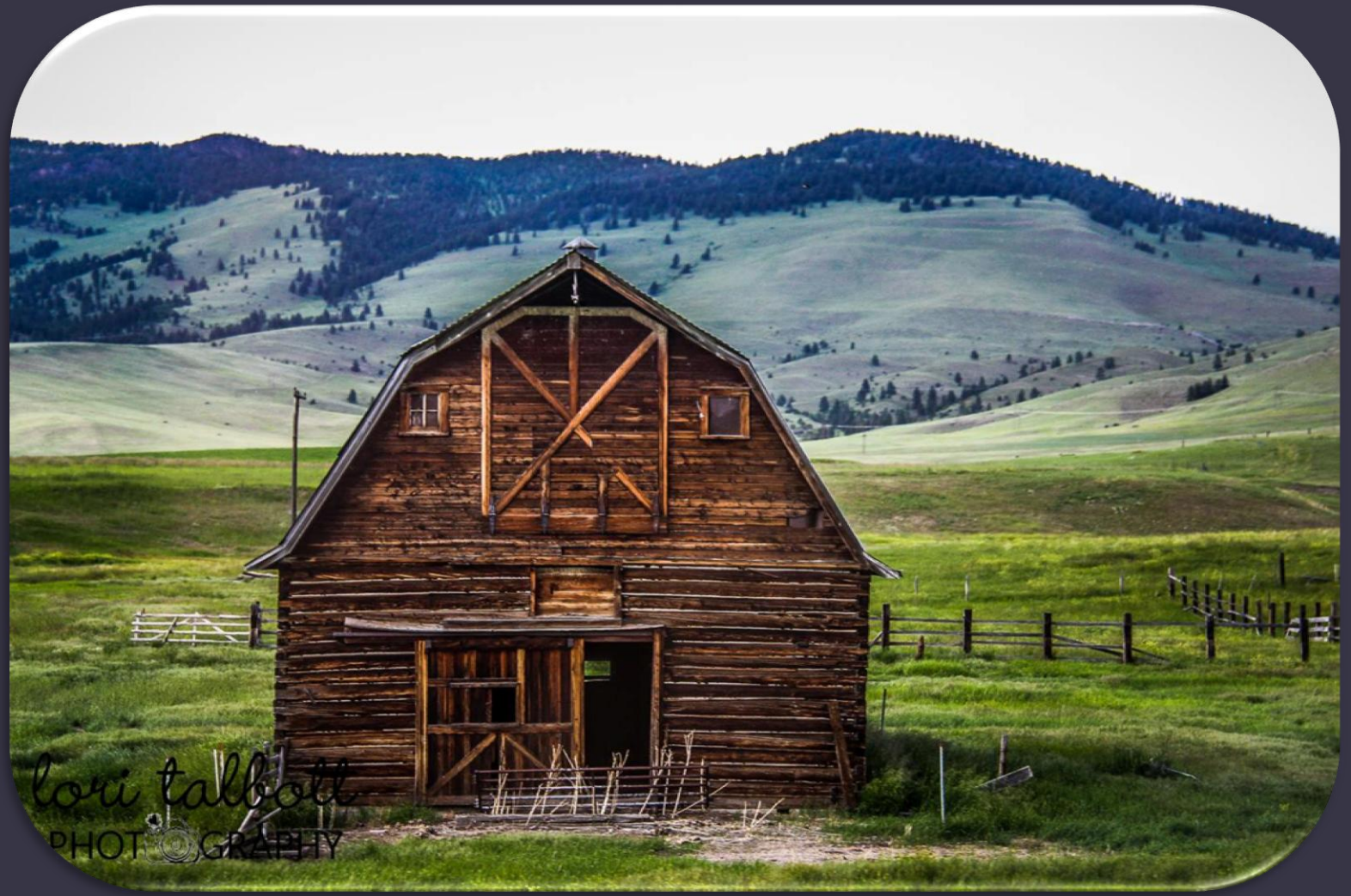
2016 MTWCC 3

Laurie Wallace | Thomas E. Martello

- Summary: Petitioner maintains that the settlement of his workers' compensation claim should be reopened or rescinded because he lacked the mental capacity to consent to the settlement or because his consent to settle was obtained through undue influence. Respondent counters that the facts of the case do not show any undue influence exerted on Petitioner to settle his claim, and the fact that Petitioner has entered into two marriages, a dissolution of marriage, and two attorney retainer agreements with his current legal counsel is evidence of his capacity to contract. Respondent also points out that Petitioner does not have a guardian or a conservator appointed to help him manage his affairs, and he has never been adjudicated incompetent.

- Held: Petitioner has failed to prove he lacked the mental capacity to understand the terms of the Petition for Settlement and has failed to prove that Respondent exerted undue influence over him. He is not entitled to reopen or rescind the settlement on the grounds asserted.

Reopening of Settlements


lori talbott
PHOTOGRAPHY

JURISDICTION

Davis v. Liberty Insurance Corp.

2017 MTWCC 11

Thomas J. Muphy | Larry W. Jones | Quinlan L. O'Connor

- Summary: Respondent moved to dismiss Petitioner's claim that he is permanently totally disabled and therefore has the right to medical benefits under § 39-71-704(1)(f)(ii), MCA (2011). Respondent contends that this Court does not have jurisdiction because Petitioner has not gone through the administrative process to reopen his medical benefits. In the alternative, Respondent alleges that Petitioner settled the issue of whether he is permanently totally disabled, and must reopen his settlement before he can argue he is permanently totally disabled.
- Held: This Court denied Respondent's motion. Under the plain and unambiguous language of § 39-71-704(1)(f)(ii), MCA, a permanently totally disabled claimant's medical benefits do not terminate 60 months from his date of injury, and a permanently totally disabled claimant is not required to petition the DLI to "reopen" his medical benefits. Moreover, Petitioner is not attempting to reopen his settlement agreement. He did not settle the issue of whether he is permanently totally disabled; he settled his claimed right to PTD benefits on a compromise basis, thereby leaving the issue of whether he is permanently totally disabled "uncertain" and "undetermined." And, the settlement agreement states that his medical benefits remained open "to the extent such benefits are allowed under the Workers' Compensation Act." This includes the contractual right to medical benefits under § 39-71-704(1)(f)(ii), MCA.

Jurisdiction / Benefits

Davis v. Liberty Insurance Corp.

2017 MTWCC 10

Thomas J. Muphy | Larry W. Jones | Quinlan L. O'Connor

- Summary: Respondent moved to amend its Response to Petition for Hearing to assert affirmative defenses based on its contention that the compromise settlement of Petitioner's wage-loss benefits precludes him from asserting that he is permanently totally disabled. Respondent maintains that Petitioner's medical benefits terminated under the 60-month limitation of medical benefits in § 39-71-704(1)(f)(i), MCA (2011), and that Petitioner does not have the right to ongoing medical benefits under § 39-71-704(1)(f)(ii), MCA, (2011) which provides that the 60-month limitation "does not apply to a worker who is permanently totally disabled as a result of a compensable injury."

- Held: This Court denied Respondent's Motion to Amend because its proffered affirmative defenses are not legally tenable defenses. As a matter of law, the issues settled via a compromise settlement remain "uncertain or undetermined." Thus, Petitioner may litigate the issue of whether he is permanently totally disabled under the definition at § 39-71-116(28), MCA (2011), for purposes of establishing his right to medical benefits under § 39-71-704(1)(f)(ii), MCA (2011), notwithstanding the compromise settlement of his asserted right to PTD benefits under § 39-71-702, MCA (2011). Moreover, Petitioner expressly reserved medical benefits "to the extent allowed under the Workers' Compensation Act," which includes the contractual right to maintain that he is permanently totally disabled for purposes of medical benefits under § 39-71-704(1)(f)(ii), MCA (2011).

Procedure

Hall v. New Hampshire Ins. Co.

2016 MTWCC 10

John C. Doubek | Kelly M. Wills

- Summary: Respondent moved to dismiss the Petition for Hearing, arguing that this Court lacks jurisdiction because Petitioner filed his petition in this Court prior to the issuance of the mediator's Report and Recommendation. Petitioner objected to Respondent's motion, arguing that he could cure any jurisdictional defect because the mediator had issued a Report and Recommendation after Respondent filed its motion to dismiss, and alternatively arguing that he could file his Petition for Hearing because more than 10 working days had passed since the mediation conference, in accordance with ARM 24.28.108(2).

- Held: This Court granted Respondent's motion to dismiss. A supplemental pleading cannot cure this jurisdictional defect because it would defeat the purpose of the mediation statutes. Furthermore, since the parties agreed that they pended the mediation to allow them to submit additional evidence for the mediator's consideration, Petitioner failed to prove precisely when the case was no longer in a pending status and that more than 10 working days had passed since the mediation conference.

Jurisdiction | Mediation

COURSE & SCOPE

Stephens v. MACo

2016 MTWCC 16

Thomas A. Mackay | William Dean Blackaby

- Summary: Petitioner, an EMT with an ambulance service, suffered an injury while running an obstacle course at a health fair. Although her employer did not pay Petitioner to attend, Petitioner contended that her employer required or requested her attendance and that her supervisor directed her to compete on the obstacle course. Respondent argues that Petitioner was participating in a recreational or social activity not within the course of her employment at the time of her accident and injury.

- Held: Petitioner's employer did not require her to attend the health fair. Although Petitioner's employer asked her to assume duties for the activity so that her presence was not wholly voluntary, her employer did not "request" her presence at the activity, as that term is defined in § 39-71-407(2)(b), MCA, because her injury did not occur in the performance of the duties her employer asked her to assume. Although Petitioner contended that her supervisor directed her to participate in the obstacle course on which she was injured, this Court did not find that portion of her testimony credible. Since Petitioner's accident did not occur within the course of the duties her employer asked her to assume, her injury did not occur within the course of her employment under § 39-71-407(2)(b), MCA.

Appealed to Montana Supreme Court on November 15, 2016

Course and Scope | Credibility

Holtz v. Indemnity Ins. Co. of N. America

2016 MTWCC 4

Thomas J. Murphy | Jeffrey B. Smith

- Summary: Petitioner, a flight attendant, was injured in a motorcycle accident which occurred approximately 40 miles from her hotel during a paid layover in Cincinnati, Ohio. Respondent denied liability for her injuries and moved for summary judgment on the grounds that her injuries did not arise out of or occur within the course of her employment.

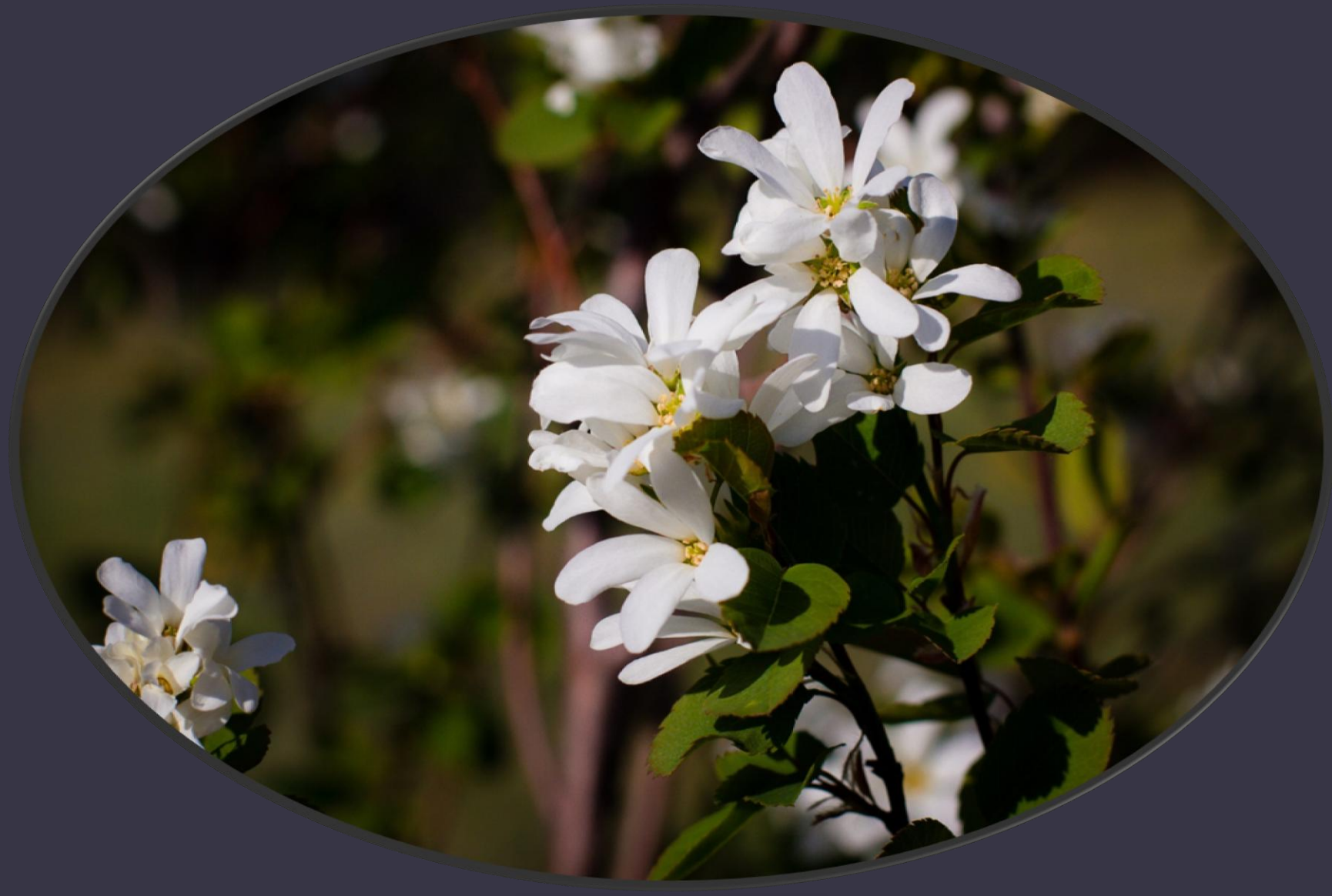
- Held: This Court granted Respondent's motion for summary judgment because Petitioner's injuries did not arise out of or within the course of her employment under § 39-71-407(2)(a), MCA (2013).

Course and Scope

§ 39-71-407(2)(a), MCA

§ 39-71-407(2)(a), MCA, states:

> An injury does not arise out of and in the course of employment when the employee is:
>
> > (a) on a paid or unpaid break, is not at a worksite of the employer, and is not performing any specific tasks for the employer during the break.



Greer, et al. v. Liberty Northwest Ins. Corp.

2016 MTWCC 2

Daniel Buckley | Leo S. Ward and Morgan M. Weber

- Summary: Petitioners sought benefits after the decedent suffered a motor vehicle accident while traveling from Bozeman to Ekalaka for the start of his workweek at a construction jobsite. In addition to his wages, the decedent's employer paid him $60 per diem for each full day worked. Respondent denied liability, arguing that the decedent was not in the course and scope of his employment and therefore not entitled to benefits under § 39-71-407(3), MCA.

- Held: The decedent received reimbursement for travel costs from the employer in the form of a per diem and his employment necessitated his travel. Therefore, his death arose out of and within the course of his employment under the travel allowance exception to the going and coming rule, as codified in § 39-71-407(3)(a)(i), MCA. The decedent was not excluded from coverage under § 39-71-407(3)(b), MCA, because the employer did not make the payment under the terms of a written document that designated the payment as an "incentive to work at a particular jobsite."

Course and Scope | Penalty | Going and Coming Rule

§ 39-71-407(3)(a), MCA (2009)

§ 39-71-407(3)(a), MCA, states:

> An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
>
> > (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
> >
> > (ii) the travel is required by the employer as part of the employee's job duties.

§ 39-71-407(3)(b), MCA (2009)

§ 39-71-407(3)(b), MCA, states:

> A payment made to an employee under a collective bargaining agreement, personnel policy manual, or employee handbook or any other document provided to the employee that is not wages but is designated as an incentive to work at a particular jobsite is not a reimbursement for the costs of travel, gas, oil, or lodging, and the employee is not covered under this chapter while traveling.

UNINSURED EMPLOYERS' FUND

Reule v. Brock, Albrecht and UEF

2017 MTWCC 3

Eric Edward Nord | R. Russell Plath | Quinlan L. O'Connor

- Summary: The UEF moves for partial summary judgment on the grounds that there are no disputes of material fact and, as a matter of law, Petitioner is liable to reimburse the UEF for all the workers' compensation benefits it has paid or will pay on Petitioner's behalf. The UEF maintains Petitioner is liable as a statutory employer under § 39-71-405, MCA, which is Montana's "contractor-under" statute. Petitioner opposes the UEF's motion, and cross moves for partial summary judgment, arguing § 39-71-405(2), MCA, does not apply because Respondent Brock was an independent contractor, or if Petitioner is made liable by § 39-71-405(2), MCA, that statute is unconstitutional.

- Held: There are no disputes of material fact; as a matter of law, Petitioner is liable as a statutory employer under §§ 39-71-405(2), and -504(1)(b), MCA, to reimburse the UEF for all the workers' compensation benefits it has paid or will pay on Petitioner's behalf; and Petitioner's constitutional challenge fails. Therefore, the UEF is entitled to judgment as a matter of law on the issue of Petitioner's liability.

Appealed to the Montana Supreme Court on May 23, 2017

Uninsured Employers' Fund | Independent Contractors

SUBSTANCE ABUSE

Devers v. Montana State Fund

2017 MTWCC 12

Paul W. Adam, Hayley Kemmick | Stephanie A. Hollar

- Summary: Petitioner contends that he suffered a compensable injury because, although he drank before his accident, alcohol was not the major contributing cause of his accident, and his employers knew about his drinking and did not make a genuine attempt to stop it. Petitioner further claims his injury arose out of and in the course of his employment under the premises rule and the bunkhouse rule because he was a residential employee and on-call at all times. Respondent argues that given his lack of credibility and extent of intoxication, Petitioner's use of alcohol was the major contributing cause of his accident. Respondent further argues that although Petitioner's employers knew about his use of alcohol, their efforts to stop it were sufficient. Finally, Respondent contends that credible evidence shows that Petitioner's injury did not arise out of and in the course of his employment.

- Held: Respondent met its burden of proving that Petitioner's use of alcohol was the major contributing cause of his accident. Moreover, Petitioner's employer knew about and attempted to stop it. Therefore, Petitioner's claim for benefits is barred under § 39-71-407(5), MCA, and this Court declines to address whether Petitioner's injury arose out of and in the course of his employment.

Substance Abuse | Burden of Proof | Credibility | Major Contributing Cause

§ 39-71-407(5), MCA

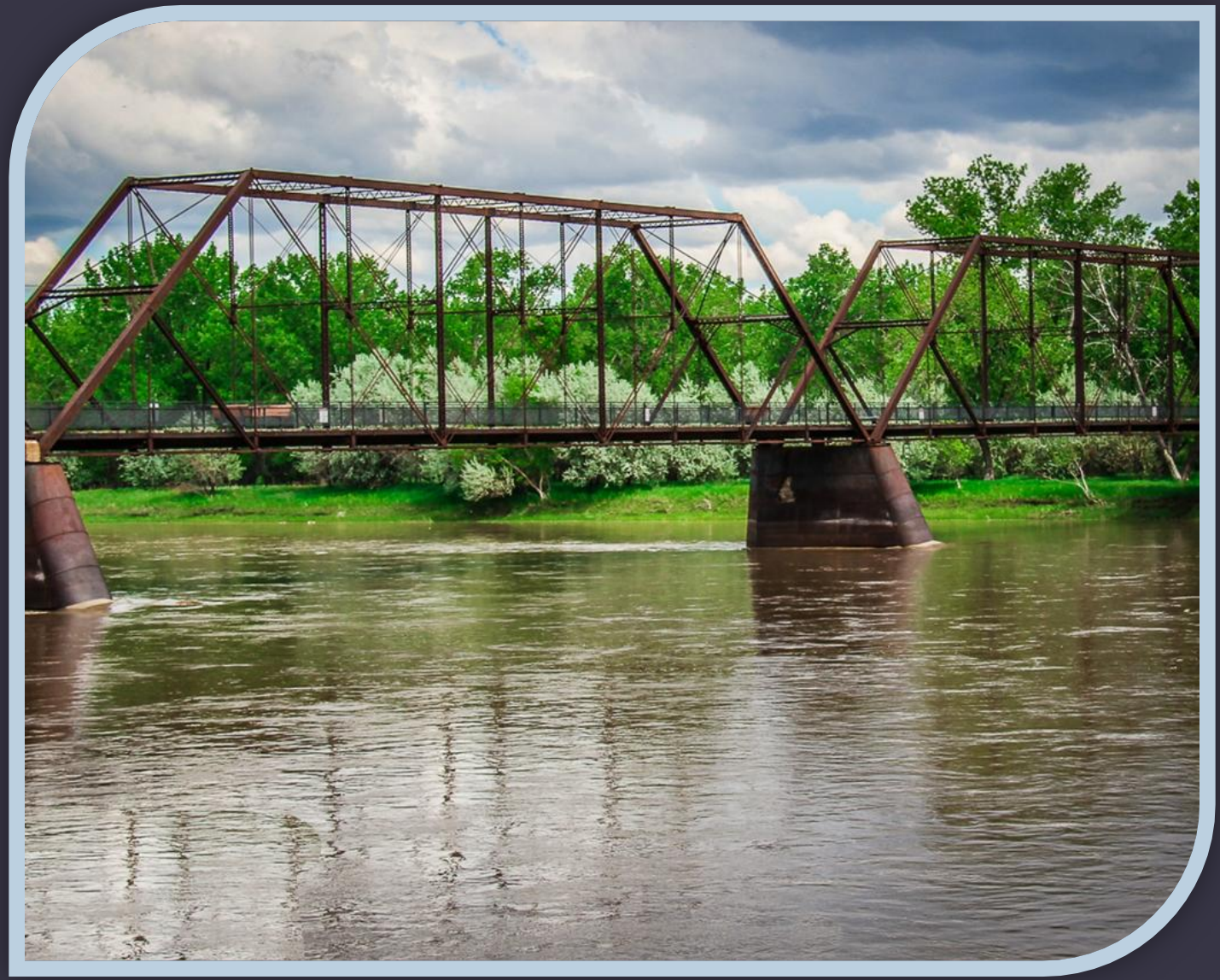
§ 39-71-407(5), MCA, states:

> Except as provided in subsection (6), an employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident.

§ 39-71-407(7), MCA

§ 39-71-407(7), MCA, states:

> The provisions of subsection (5) do not apply if the employer had knowledge of and failed to attempt to stop the employee's use of alcohol or drugs not prescribed by a physician. This subsection (7) does not apply to the use of marijuana for a debilitating medical condition because marijuana is not a prescribed drug.



BENEFITS

Ferrel v. Montana State Fund

2017 MTWCC 6

Jonathan McDonald, James G. Hunt | Greg E. Overturf

- Summary: Petitioner and Respondent move for summary judgment on stipulated facts on three issues: (1) At the time Respondent terminated Petitioner's PTD benefits, was Petitioner receiving benefits "from a system that is an alternative to social security retirement" within the meaning of § 39-71-710(1), MCA? (2) If Petitioner was receiving benefits "from a system that is an alternative to social security retirement," is State Fund's termination of Ferrel's PTD benefits barred by the equitable defense(s) of estoppel and/or laches? (3) If State Fund's termination of Ferrel's PTD benefits is not barred by estoppel and/or laches, is § 39-71-710(1), MCA, constitutional?

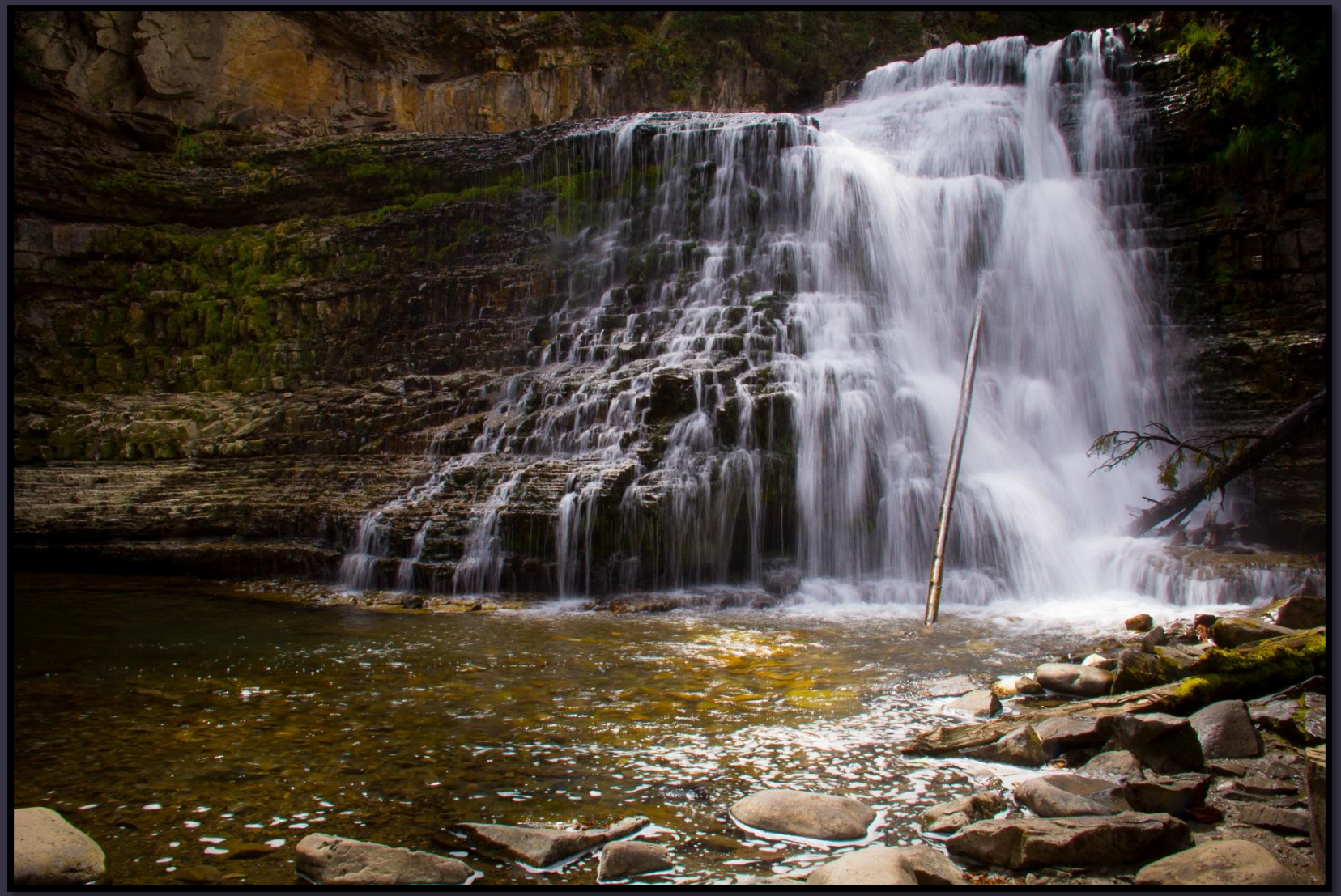
- Held: Because Petitioner's receipt of retirement benefits from the Montana Highway Patrol Officers' Retirement System does not preclude her from receiving them from Social Security when she is age-eligible, and she is not collecting retirement benefits from the Montana Highway Patrol Officers' Retirement System instead of collecting them from Social Security, Petitioner was not receiving benefits "from a system that is an alternative to social security retirement" within the meaning of § 39-71-710(1), MCA. Thus, Respondent incorrectly determined that Petitioner was "retired," and is liable for her PTD benefits from the time it terminated those benefits.

Benefits

§ 39-71-710(1), MCA

§ 39-71-710(1), MCA, states:

> **Termination of benefits upon retirement.** (1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or **is receiving** full social security retirement benefits or **retirement benefits from a system that is an alternative to social security retirement**, the claimant is considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.



Moreau v. Transportation Insurance Co.

2017 MTWCC 7

Jon L. Heberling, Dustin Leftridge, Allan M. McCarvey, Laurie Wallace, Ethan Welder | Todd A. Hammer

- Summary: Respondent accepted liability for the decedent's occupational disease, and paid certain medical benefits. However, another entity had already paid some of the medical bills for which Respondent would have been liable under § 39-71-704, MCA. Petitioner contends that since that entity does not want to be reimbursed, Respondent should pay the amount of those medical bills to Petitioner. Respondent moved for summary judgment, contending that it is not liable to Petitioner since the decedent received the medical services to which he was entitled. Petitioner cross-moved for summary judgment

- Held: Under controlling case law, Respondent is entitled to summary judgment. It is not liable to pay Petitioner the value of the decedent's medical bills which were paid by an entity that is not seeking reimbursement from Petitioner. Furthermore, this Court does not have jurisdiction to decide whether Respondent must reimburse another entity that is not a party to this case for paying the decedent's medical bills.

Appealed to the Montana Supreme Court on May 30, 2017

Benefits

§ 39-71-610 BENEFITS

Brickman v. Air Tech Heating & Cooling, Inc.

2016 MTWCC 11

Norman L. Newhall | Leanora O. Coles

- Summary: Claimant appeals the order by the DLI denying his request for interim TTD benefits under § 39-71-610, MCA. The DLI denied Claimant's request on the grounds that he continued to receive biweekly compensation benefits because his biweekly compensation benefits were not terminated; rather, his benefits were converted from TTD benefits to PPD benefits.

- Held: Claimant does not qualify for interim TTD benefits under § 39-71-610, MCA, because he continues to receive biweekly compensation benefits.

Appealed to Montana Supreme Court on August 11, 2016

§ 39-71-610 Benefits

§ 39-71-610, MCA

§ 39-71-610, MCA states:

> Termination of benefits by insurer -- department order to pay disputed benefits prior to hearing or mediation -- limitation on order -- right of reimbursement. If an insurer terminates biweekly compensation benefits and the termination of compensation benefits is disputed by the claimant, the department may, upon written request, order an insurer to pay additional biweekly compensation benefits prior to a hearing before the workers' compensation court or prior to mediation, but the biweekly compensation benefits may not be ordered to be paid under this section for a period exceeding 49 days or for any period subsequent to the date of the hearing or mediation. A party may appeal this order to the workers' compensation court. A proceeding in the workers' compensation court brought pursuant to this section is a new proceeding and is not subject to mediation. If after a hearing before the workers' compensation court it is held that the insurer was not liable for the compensation payments ordered by the department, the insurer has the right to be reimbursed for the payments by the claimant.

Larson v. Liberty Northwest Ins. Corp.

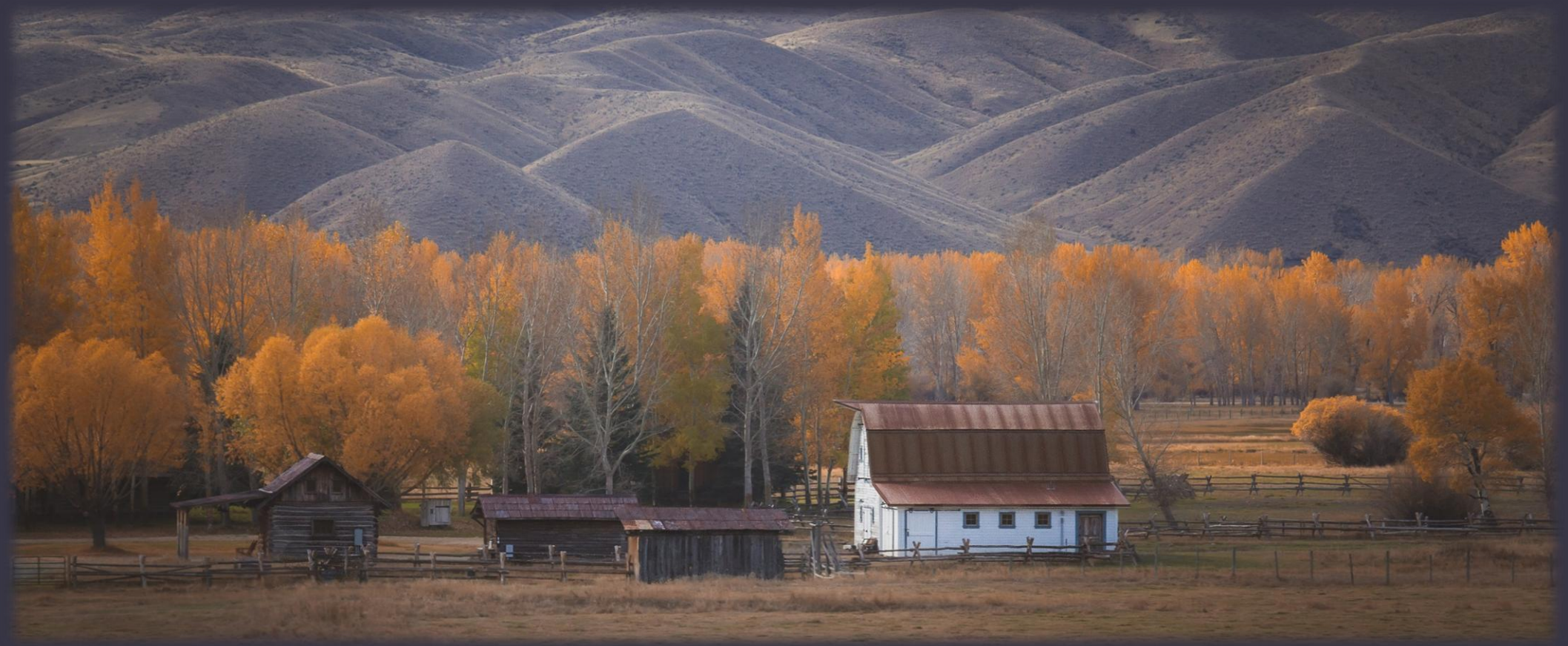
2017 MTWCC 15

Eric Rasmussen | Morgan M. Weber

- Summary: Appellant appeals from a Department order denying his petition for interim benefits under § 39-71-610, MCA. Appellee argues this Court should affirm because Appellant has not tendered a strong prima facie case for reinstatement of his TTD benefits.

- Held: The Department's order is affirmed. Appellant did not tender a strong prima facie case for reinstatement of his TTD benefits. He declined the temporary work assignment his time-of-injury employer offered to him and did not introduce sufficient evidence to prove that the job exceeded his restrictions, or that his employer would not have actually accommodated his restrictions. His claim that Appellee would not have paid him TPD benefits is unsupported, and had that occurred, he could have sought resolution in this Court instead of declining work.

§ 39-71-610 Benefits



WAGES

Hegg v. Montana State Fund

2016 MTWCC 14

Lucas J. Foust | Thomas E. Martello and Amanda Krissovich

- Summary: Petitioner became a beneficiary when her husband died from an occupational disease. Her husband worked sporadically and, during the year prior to his death, his average weekly wage was $79.71. Thus, Respondent moved for summary judgment on the grounds that it correctly calculated Petitioner's benefit rate to be $79.71 under § 39-71-721(2), MCA, which states, in relevant part, "The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death." Petitioner argues that this statute is ambiguous and that her benefit rate is $354, which was 50% of the state's average weekly wage for her husband's date of death. Alternatively, Petitioner argues that if her rate is $79.71, then § 39-71-721(2), MCA, violates her right to substantive due process under Article II, § 17 of the Montana Constitution, and is therefore insufficient to uphold the quid pro quo on which the Workers' Compensation Act is based. She argues that the remedy for this alleged constitutional violation is for this Court to increase her benefit rate to $354, an amount she argues is sufficient to uphold the quid pro quo.

- Held: This Court granted Respondent's motion, and denied in part Petitioner's cross-motion for summary judgment because Respondent correctly calculated Petitioner's rate under the plain language of § 39-71-721(2), MCA. This Court declined to rule on Petitioner's constitutional challenge, and denied that part of Petitioner's cross-motion for summary judgment, because this Court cannot grant her the relief she seeks.

Wages / Benefits

§ 39-71-721(2), MCA

§ 39-71-721(2), MCA, states:

> (2) To beneficiaries as defined in 39-71-116(4)(a) through (4)(d), weekly compensation benefits for an injury causing death are 66 2/3% of the decedent's wages. The maximum weekly compensation benefit may not exceed the state's average weekly wage at the time of injury. **The minimum weekly compensation benefit is 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time of death.**

LUMP SUM

Jimenez v. Liberty NW Ins. Corp, Emp. Relations Div.

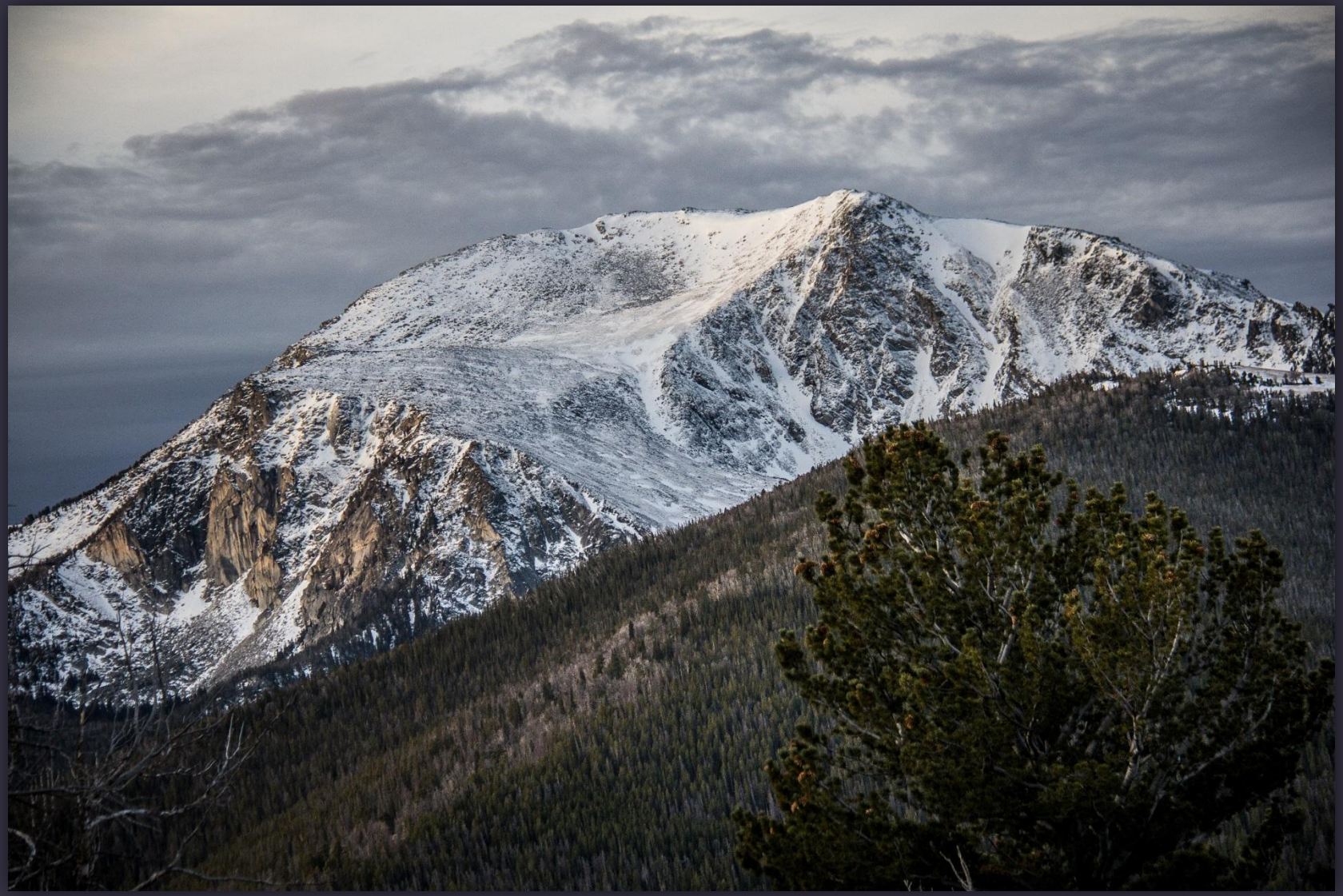
2016 MTWCC 17

Sydney E. McKenna and Justin Starin | Mary K. Starin | Leo S. Ward |Judy Bovington and Quinlan O'Connor

- Summary: Respondent moved to dismiss Petitioner's Petition for Hearing, wherein Petitioner asks this Court to award him a lump sum of his PTD, medical, and domiciliary care benefits, the total of which is approximately $3.5 million. Respondent argued that the Workers' Compensation Act does not allow for a lump-sum conversion of medical and domiciliary care benefits on a claimant's demand, and Petitioner failed to adequately plead the statutory requirements for a lump-sum conversion of PTD benefits.

- Held: The Workers' Compensation Act does not allow this Court to grant Petitioner a lump-sum conversion of his medical and domiciliary care benefits on his demand and those claims are dismissed. However, Petitioner sufficiently pleaded his demand for a lump-sum conversion of his PTD benefits, which the Workers' Compensation Act allows under certain circumstances. Respondent's Motion to Dismiss is therefore granted in part and denied in part.

Lump Sum



ATTORNEY'S FEES

Sikkema v. Liberty Northwest Insurance Co.

2017 MTWCC 16

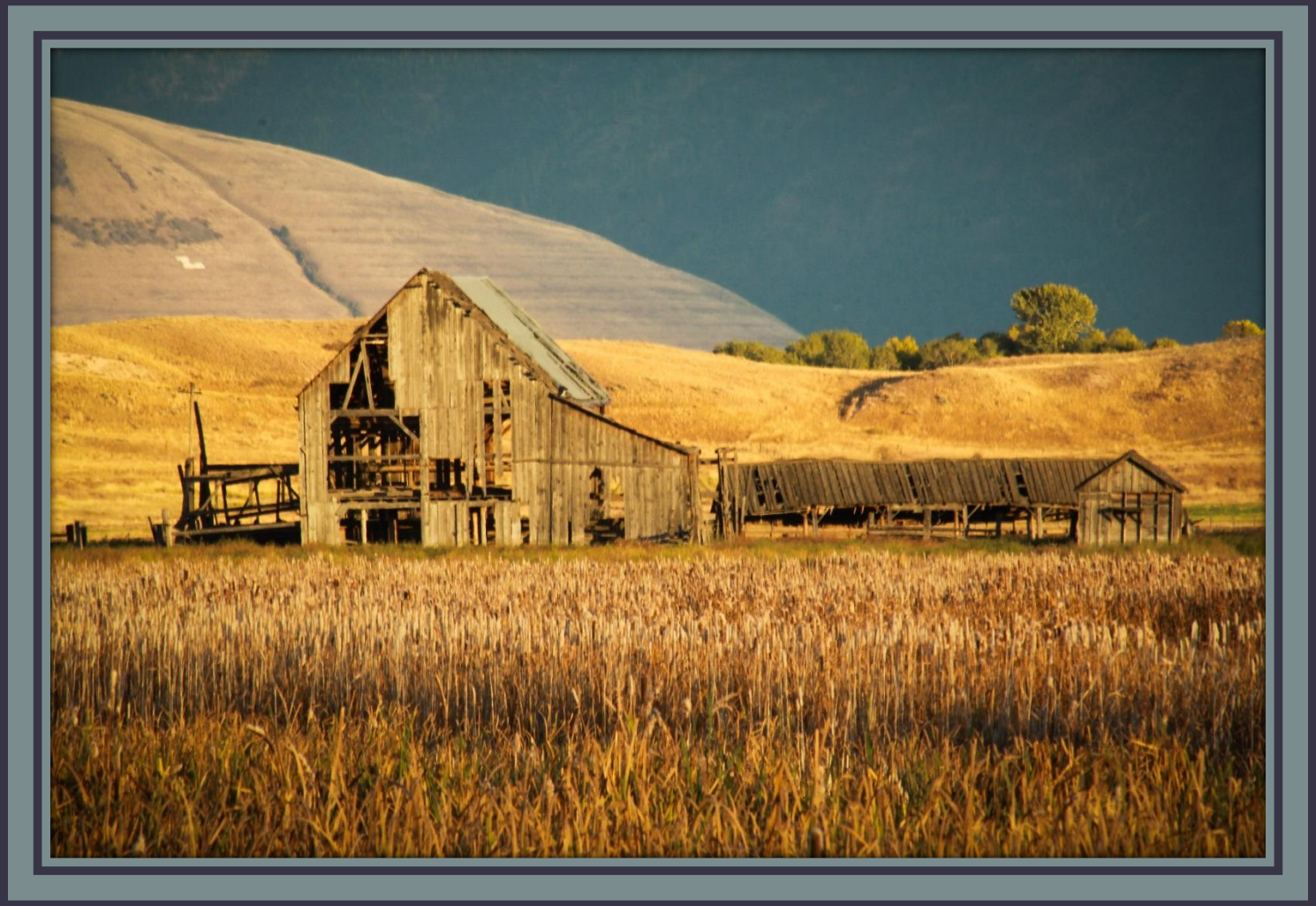
Chris J. Ragar | Larry W. Jones

- Summary: Petitioner seeks a 20% increase in the amount of benefits under § 39-71-2907, MCA, and her attorney fees under §§ 39-71-611 and -612, MCA, for Respondent's alleged unreasonable delay in authorizing a surgery. Respondent moves for partial summary judgment. It argues that Petitioner cannot recover her attorney fees on her medical benefits under §§ 39-71-611 or -612, MCA — which generally provide that this Court can award attorney fees if it adjudicates a dispute over compensation and the insurer's denial or delay was unreasonable — because it authorized the surgery prior to adjudication, and further argues that this Court cannot award attorney fees on the 20% increase because this increase is a "penalty" and not "compensation." Petitioner objects to the summary judgment motion, arguing that the statutes do not preclude her from recovering attorney fees on her claim for a 20% increase in the full amount of benefits due under § 39-71-2907, MCA — which Petitioner argues is not a penalty, but rather additional compensation.

- Held: Respondent is entitled to summary judgment on Petitioner's claim for attorney fees. This Court cannot award attorney fees on Petitioner's medical benefits because Respondent authorized the surgery before this Court adjudicated the dispute. Nor can this Court award attorney fees if Petitioner obtains a 20% increase in her benefits because case law from the Montana Supreme Court and this Court establishes that the 20% increase under § 39-71-2907, MCA, is a penalty, not compensation.

Attorney's Fees / Penalty

MONTANA SUPREME COURT DECISIONS



Newlon v. Tech American, Inc.

2015 MT 317 (DA 15-0013 (2012-2947))

Larry W. Jones | Margaret Dufrechou

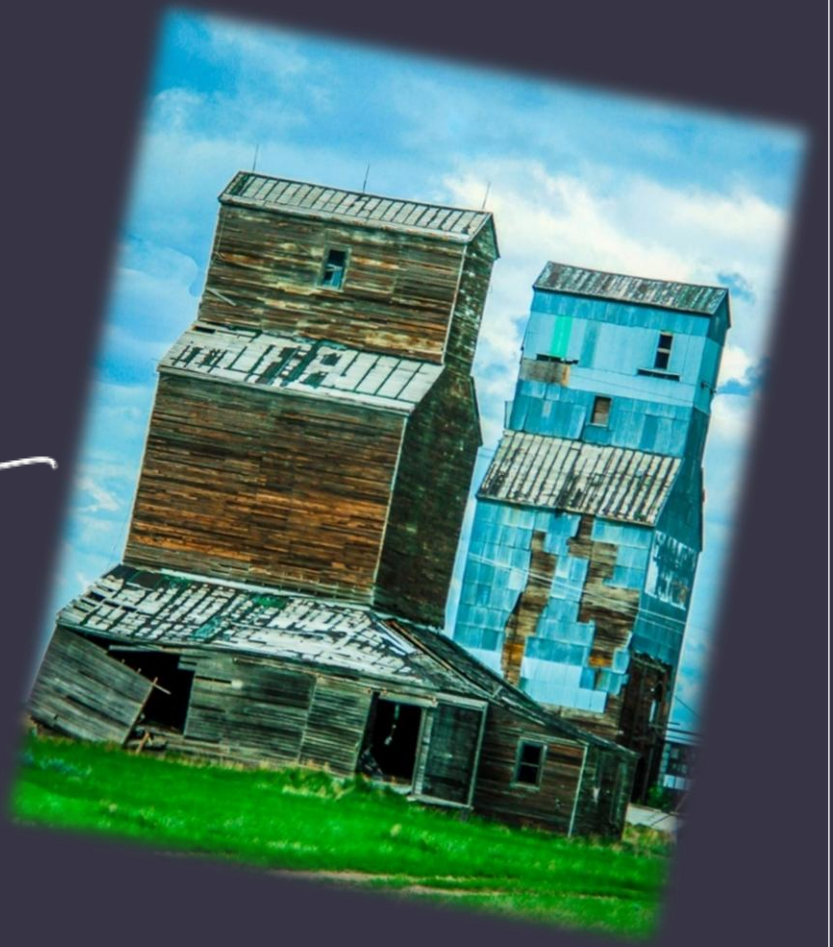
- Summary: Respondent/Appellant, Teck American, Inc., appealed the WCC's Findings of Fact, Conclusion of Law, and Judgment finding that Petitioner/Appellee, Nick Newlon, was entitled to lifetime medical benefits for work-related injuries to his back and left knee, that Newlon's claim was not barred due to a superseding intervening cause, that Teck was estopped from asserting the 60-month time bar under § 39-71-704(1)(d), MCA (1991), and that Newlon's claim was not barred by a statute of limitations or statute of repose.

- Held: The findings of the WCC are affirmed. Workers' compensation settlements have consistently been construed as lawful and enforceable contracts. Section 28-2-102, MCA, sets forth four elements that must exist for a valid contract to be formed. The WCC's findings of fact confirm that all four elements were met in this case. The 60-month rule at § 39-71-704(1)(d), MCA (1991), does not prevent an employee and employer from contracting around its provisions. A promise of lifetime care is not an illegal objective that invalidates the contract. While the MSC reached its conclusion on different grounds than the WCC, it found the result is the same that Teck cannot deny Newlon the medical benefits it contractually agreed to provide.

Benefits

Photos by

lori talbott
photography



CASE LAW REVIEW