CASE LAW REVIEW

Montana Workers' Compensation Court Decisions

2017 - 2019

PRESENTED BY STEVEN S. CAREY, ESQ.

Steve is a native Montanan and a graduate of the University of Montana. He has been practicing law since 1984 and has considerable knowledge of the Montana Workers' Compensation system from the claimants ' and insurers' perspective.

WORKERS' COMPENSATION BEGINNINGS

Workers' Compensation dates back as far as 2050 B.C. There are findings that the Law of Ur and the Code of Hammurabi provided monetary compensation for injuries to workers. Ancient Greece, Roman, Arab and Chinese laws also indicate their use of precise payment schedules for the loss of a body part.

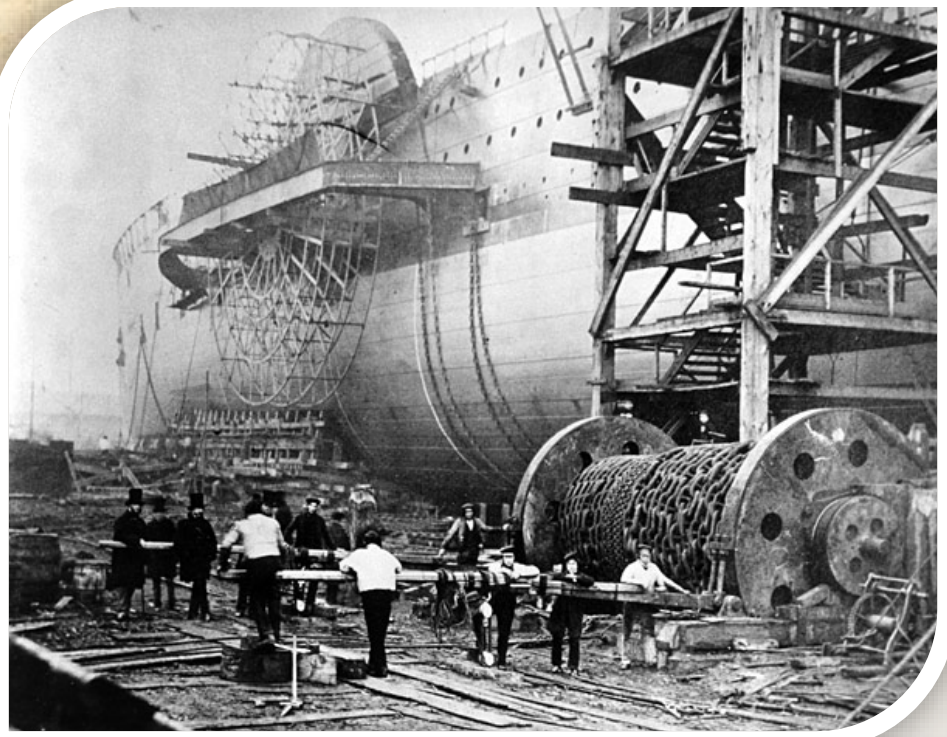
WORKERS' COMPENSATION BEGINNINGS

The first modern models of insurance for injured workers were introduced in Europe beginning in 1871 with the Employers' Liability Law by Prussian Chancellor Otto von Bismarck. This law was limited to specific industries such as mining, railroads, and certain factories. In 1884, the Workers' Accident Insurance was enacted by the Iron Chancellor, followed by the Public Pension Insurance. This new insurance allowed a stipend for workers incapacitated due to illnesses not related to their jobs or to those who were not able to work because of disabilities.

WORKERS' COMPENSATION BEGINNINGS

Other European countries soon followed the models of Prussian workers' compensation with their own workers' compensation programs:

- 1887 - Austria
- 1894 - Norway
- 1895 - Finland
- 1897 - United Kingdom (replacing their existing Employer's Liability Act of 1880)



WORKERS' COMPENSATION BEGINNINGS

The United States joined the workers' compensation revolution after seeing Europe's progress:

- 1902 - Maryland
- 1908 - Massachusetts
- 1909 - Montana
- 1910 – New York

Unfortunately, these four laws were constitutionally challenged as violating "due process."

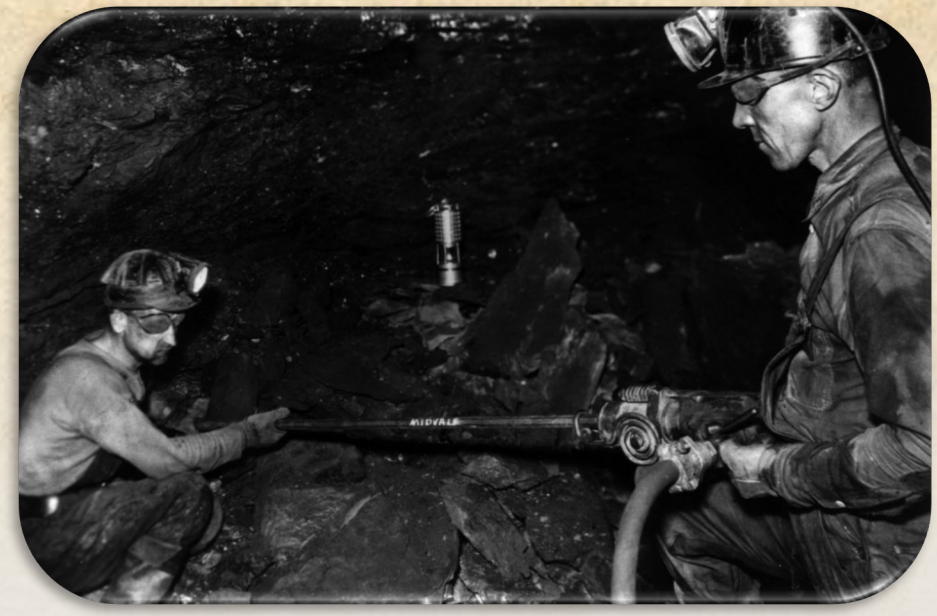
WORKERS' COMPENSATION BEGINNINGS

In 1908, the Federal Employers Liability Act ("FELA") was signed into law by President Theodore Roosevelt. FELA was designed with railroad workers and interstate commerce in mind. FELA is still in effect today.

WORKERS' COMPENSATION BEGINNINGS

After President Roosevelt's enactment of FELA, Wisconsin pass the first state level workers' compensation law that would survive legal challenges. By 1911, nine more states adopted similar laws and by the end of 1920, 42 states, along with Hawaii and Alaska, had enacted workers' compensation statutes. The last state to implement their workers' compensation law was Mississippi in 1948.

MONTANA WORKERS' COMPENSATION



Montana was one of the first states to recognize the need for a workers' compensation statute. In 1909, the Montana Legislature enacted the State Accident Insurance and Total Permanent Disability Fund. This statute only covered coal miners and required both the employer and the worker to contribute to the fund. If a worker became injured under this statute, the worker could choose to either draw from the fund or to sue at common law. The worker could not do both, however.

The Montana Supreme Court declared the 1909 statute unconstitutional as it required the employers to contribute to the Fund, but also left them open to be sued if the worker decided to pursue that remedy.

MONTANA WORKERS' COMPENSATION

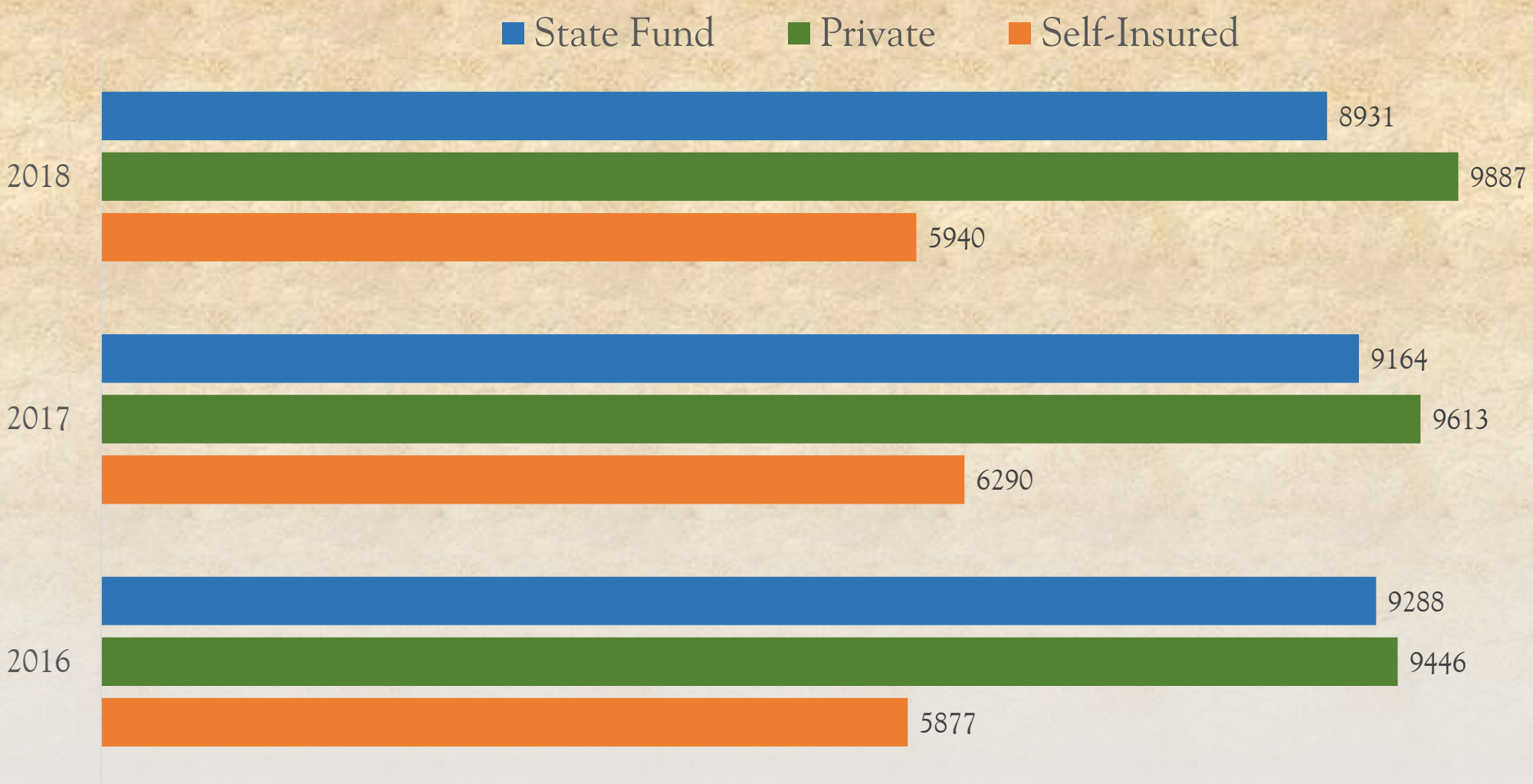
The Montana Legislature enacted a more comprehensive Workers' Compensation Act in 1915 and was the foundation for the current Act.

In the adoption of the 1972 Montana Constitution, the Industrial Accident Board was established within the Montana Department of Labor and Industry. The Board was designated to run both the Workers' Compensation Insurance Fund and to adjudicate claims. This posed several issues including conflicts of interest, denial and approval of injury awards not based on the facts, improper recordkeeping and procedures, as well as other disputes.

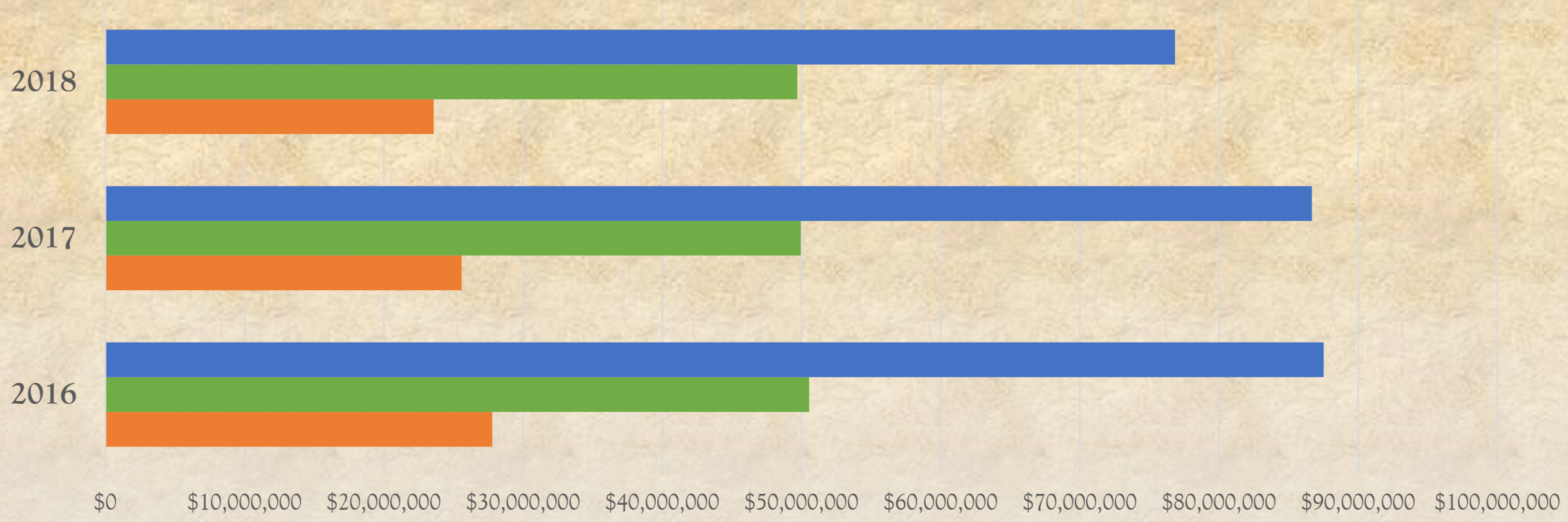
MONTANA WORKERS' COMPENSATION

In 1975, the Legislature passed a bill to create the Montana Workers' Compensation Court. This allowed the separation of the administration and adjudication of the Act. William E. Hunt, of Chester, was appointed as the first judge of the newly formed Workers' Compensation Court. Judge Hunt served until 1981 and was known as the "Flying Judge" as he was frequently traveling all over Montana for hearings.

REPORTED CLAIMS

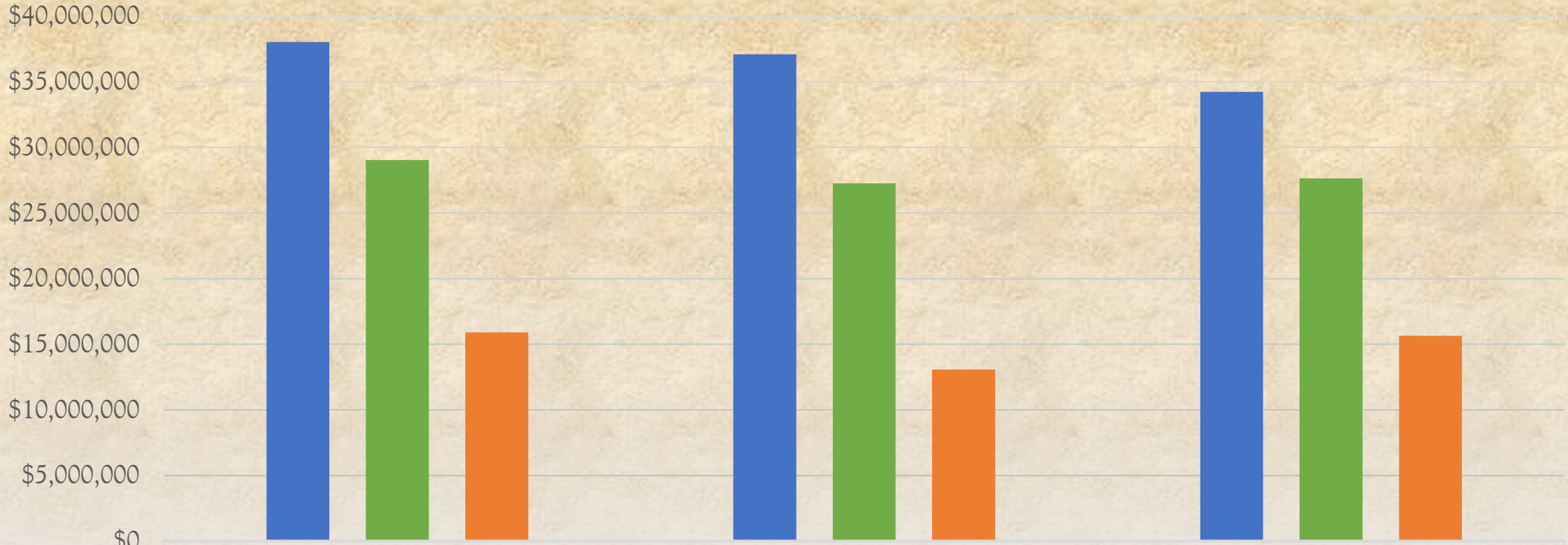


MEDICAL BENEFITS PAID



	2016	2017	2018
State Fund	$87,508,830	$86,668,666	$76,828,629
Private	$50,545,478	$49,952,263	$49,701,714
Self-Insured	$27,789,036	$25,584,995	$23,573,900

INDEMNITY BENEFITS PAID



	2016	2017	2018
State Fund	$38,030,286	$37,104,146	$34,236,230
Private	$29,033,680	$27,254,595	$27,643,554
Self-Insured	$15,896,874	$13,065,687	$15,638,904

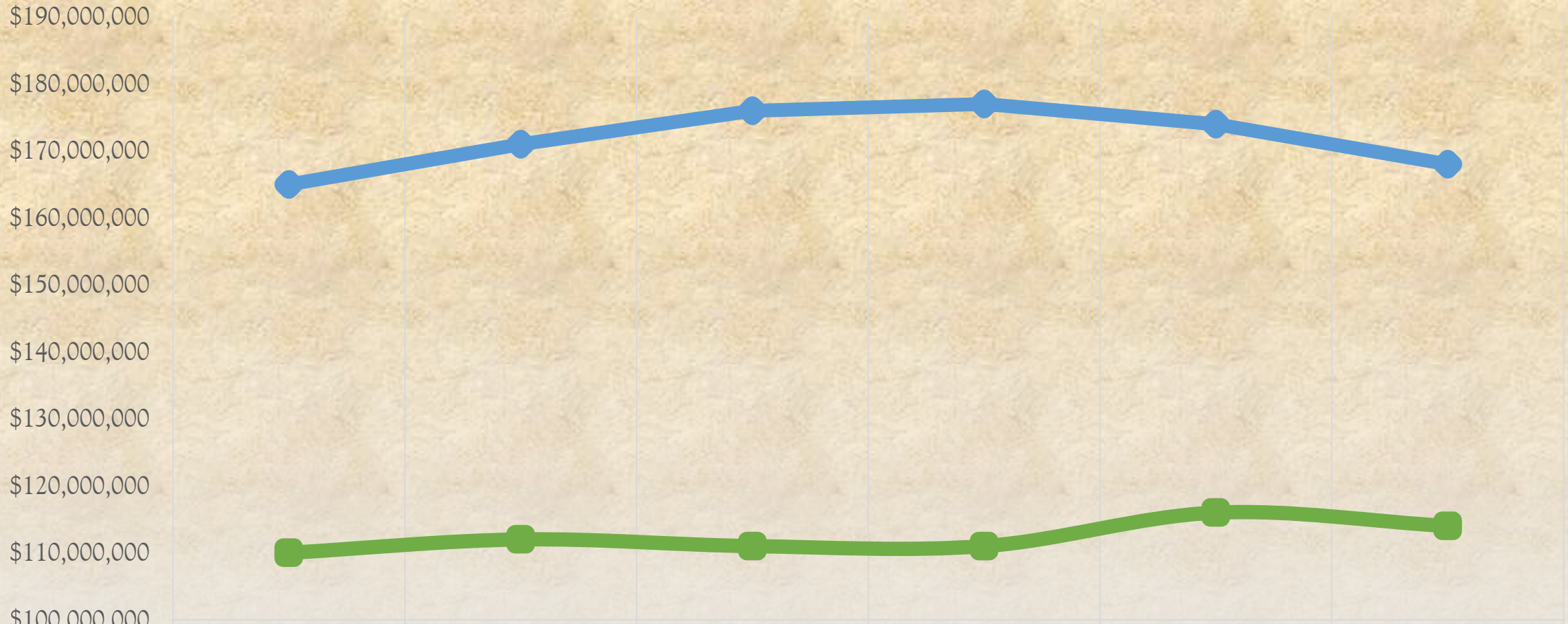
TOTAL BENEFITS PAID

	Self-Insured	Private	State Fund	Total Only includes those with known plan type)
2016	$46,229,132	$85,888,105	$127,886,286	$260,003,523
2017	$41,629,655	$83,457,376	$127,261,658	$252,348,689
2018	$43,145,443	$83,486,747	$113,127,622	$239,759,812

ALL SETTLEMENTS BY PLAN TYPE

	2016		2017		2018	
	Settled Amount	Count	Settled Amount	Count	Settled Amount	Count
Self-Insured	$11,938,879	241	$4,966,058	159	$5,872,772	142
Private	$19,600,762	543	$16,049,214	508	$12,514,079	455
State Fund	$38,574,057	1,024	$36,530,513	1,014	$30,791,407	822
TOTALS	**$70,113,698**	**1,808**	**$57,545,785**	**1,681**	**$49,178,258**	**1,419**

PREMIUM MARKET SHARES



	2013	2014	2015	2016	2017	2018
State Fund	$165,000,000	$171,000,000	$176,000,000	$177,000,000	$174,000,000	$168,000,000
Private	$110,000,000	$112,000,000	$111,000,000	$111,000,000	$116,000,000	$114,000,000

MONTANA WORKERS' COMPENSATION COURT

NEISINGER v. NEW HAMPSHIRE INS. CO.

2018 MTWCC 9

APPEALED TO MONTANA SUPREME COURT –

ORDER REVERSING IN PART AND AFFIRMING IN PART
ORDER DIRECTING A MEDICAL EXAMINATION

Summary: Claimant appeals an Order from the DLI directing him to attend a § 39-71-605, MCA, examination with a psychiatrist and an orthopedist. Claimant asserts that the DLI did not have jurisdiction to order him to attend an IME. Claimant also asserts that Insurer, which has not authorized him to see a treating psychiatrist or psychologist, is "stacking its deck" with "hired guns," and that Insurer does not have good cause for multiple IMEs. Insurer asserts that the DLI correctly ordered the examination with the psychiatrist because one of Claimant's treating physicians referred him to a psychiatrist or psychologist. Insurer also asserts that the DLI correctly ordered the examination with the orthopedist because Claimant's condition has changed.

NEISINGER v. NEW HAMPSHIRE INS. CO.

Held: The DLI's order is reversed in part and affirmed in part. The DLI had jurisdiction. However, Insurer does not currently have good cause for an IME with the psychiatrist. Because of the potential for bias, an insurer may not force a claimant to attend an IME with a psychiatrist of its choosing, who will provide no treatment. To balance a claimant's rights with an insurer's rights, the insurer must first authorize a treating psychiatrist or psychologist. Insurer has good cause for an IME with the orthopedist because Claimant's condition has arguably changed, the previous IME was two years ago, and Claimant's treating physicians can comment on the IME physician's opinions.

WARD v. VICTORY INSURANCE CO.

2019 MTWCC 11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner asserts that he has CRPS in his left ankle as a result of an industrial accident. Petitioner relies on his current treating physician who, like many other medical providers who examined him, observed some of the objective signs of CRPS per the Budapest criteria, which are included in the Montana Utilization and Treatment Guidelines. Respondent denied liability, relying on the opinions of the physicians who examined him under § 39-71-605, MCA, and one of his treating physicians, who opined that Petitioner does not have CRPS. The psychiatrist who examined Petitioner under § 39-71-605, MCA, concluded that Petitioner has Somatic Symptom Disorder, a psychological condition.

Held: Petitioner proved by a preponderance of the evidence that he suffers from CRPS and that it was caused by an industrial accident. This Court gives greater weight to Petitioner's current treating physician's diagnosis of CRPS under the criteria in the Montana Utilization and Treatment Guidelines primarily because his opinion was supported by the other medical evidence in this case while the opinions of the physicians who examined Petitioner under § 39-71-605, MCA, and the treating physician who agreed with them, were not.

MORRISH v. AMTRUST INS. CO. OF KANSAS

2018 MTWCC 8

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner has had a long history of low-back pain and sciatica, which, as it worsened, caused him to miss work. Starting in 2012, Petitioner and his chiropractor discussed that his work was causing his low-back pain and sciatica. In April 2015, after sending him for x-rays, Petitioner's chiropractor diagnosed him with degenerative disc disease at L5-S1 and L4-5, for which Petitioner continued to treat. In July 2016, Petitioner suffered acute low-back pain when he reached down to pick something up at his home; he has been unable to go back to work since. In August 2016, Petitioner's medical doctor told him the major cause of his low-back and radiating pain was likely his work as a mechanic. Petitioner filed an OD claim several days later, which Respondent denied. Respondent argues Petitioner does not have a compensable OD. Alternatively, Respondent argues Petitioner's claim is untimely because he did not file his claim for more than a year after his chiropractor diagnosed him with degenerative disc disease at L5-S1 and L4-5. Petitioner contends he has a compensable OD because his job duties were the major contributing cause of his degenerative disc disease. He further contends his claim is timely because he could only have known his degenerative disc disease was caused by his work when his medical doctor told him, and he filed his claim several days later.

Statute of Limitations
Notice of Injury (OD)

Patrick T. Fox
Kelly M. Wills, Shea A.B. Sammons

MORRISH v. AMTRUST INS. CO. OF KANSAS

Held: The issue of whether Petitioner has a compensable OD is moot, because even assuming that he does, Petitioner failed to timely file his claim pursuant to § 39-71-601(3), MCA. Petitioner knew his degenerative disc disease was caused by his work in April 2015 because: Petitioner's chiropractor told him as early as 2012 that Petitioner's work was causing his low-back problems; he treated continuously, and missed or was taken off work, for those problems through 2015 and beyond; and in April 2015, x-rays revealed degenerative disc disease in his lumbar spine. Notwithstanding, Petitioner filed his OD claim in August 2016, outside the one-year statute of limitations.

LUNDAY v. LIBERTY NORTHWEST

2017 MTWCC 20

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moves for summary judgment on the grounds that Petitioner does not have sufficient evidence to prove that his workplace exposure to grain dust caused his lung condition, nor sufficient evidence to prove that his work caused his hernias.

Held: The Court denied Respondent's motion. Petitioner met his burden of establishing there is an issue of material fact as to his lung condition by introducing medical evidence that his workplace exposure to grain dust caused his lung condition. An inference can be made from one of the records Respondent attached to its brief that one of Petitioner's medical providers is of the opinion that Petitioner's work caused his hernias. Thus, Respondent has not met its burden of establishing that there are no issues of material fact. Therefore, Respondent is not entitled to summary judgment.

CARLSON v. MONTANA STATE FUND

2019 MTWCC 8

ORDER DENYING RESPONDENT'S MOTION TO COMPEL ATTENDANCE AT AN INDEPENDENT MEDICAL EXAMINATION AND ORDER DENYING RESPONDENT'S REQUEST TO VACATE THE SCHEDULING ORDER

Summary: Respondent has not scheduled an examination under § 39-71-605, MCA, nor identified the physician who will conduct the examination should it be scheduled. However, Respondent seeks an order compelling Petitioner to attend such an examination whenever it schedules it. Respondent also requests this Court to vacate the current Scheduling Order so it has more time to schedule the examination.

Held: This Court denies Respondent's Motion to Compel. The plain language of § 39-71-605(1)(b), MCA, provides that this Court must set forth the time and place of the examination. Moreover, this Court has previously held that the insurer must notify the claimant of the identity of the examiner, the examiner's area of expertise, and the nature of the examination so the claimant can intelligently assess whether to object to the examination. Thus, this Court cannot issue a general order compelling a claimant to attend an examination when the information about the proposed examination is unknown. This Court also denies Respondent's request to vacate the current Scheduling Order because it has not set forth good cause to do so.

HEFFERNAN v. SAFETY NATIONAL CASUALTY CORP.

2017 MTWCC 18

ORDER AFFIRMING IN PART AND MODIFYING IN PART DEPARTMENT OF LABOR AND INDUSTRY'S AMENDED ORDER DIRECTING MEDICAL EXAMINATION

Summary: Claimant appeals an Amended Order Directing Medical Examination, in which the DLI ordered her to attend a panel IME. Claimant argues that the DLI erred because: (1) it declined her request to allow her to make an audio recording of the history portion of her examination; (2) it did not require the IME provider to send a copy of its report directly to her, despite the provider's policy not to do so being in violation of § 39-71-605(2), MCA; and (3) it directed her to attend a panel IME, which she contends is three IMEs, without good cause for "multiple" IMEs.

Held: The Amended Order Directing Medical Examination is affirmed in part and modified in part. The DLI correctly determined that claimant did not have good cause to make an audio recording of the history portion of her examination. The DLI also correctly determined that good cause exists for a panel IME, which is not "multiple" IMEs. However, Claimant is correct that she has a statutory right to a copy of the IME report directly from the IME provider. Thus, the DLI's order is modified to require the IME provider to provide its report directly to Claimant at the same time it provides it to the Insurer. The Insurer is ordered to file a written declaration from the IME provider that the provider will provide its report directly to Claimant.

LEYS v. LIBERTY MUTUAL INSURANCE

2019 MTWCC 10

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner claims she suffered carpal tunnel and postconcussive syndromes following a 2008 industrial motor vehicle accident. Respondent accepted liability for the accident and paid TTD benefits until June 23, 2015, at which time it denied that Petitioner had postconcussive syndrome as a result of her motor vehicle accident. Petitioner's carpal tunnel syndrome recurred in late 2015, but Respondent refused to reinstate TTD benefits. Petitioner argues that Respondent remains liable for her carpal tunnel syndrome and that she is entitled to PTD and/or TTD benefits because her accident-related conditions have rendered her unable to work. Respondent disputes its continued liability for Petitioner's carpal tunnel syndrome and denies she is entitled to any further wage loss benefits.

Held: Respondent is no longer liable for Petitioner's carpal tunnel syndrome because the medical opinions tying the recurrence to her 2008 industrial motor vehicle accident were based on misinformation and Respondent's initial acceptance of liability for that condition was based on a mutual mistake of fact. Petitioner is not entitled to TTD or PTD benefits for postconcussive syndrome because her treating physician's opinions were unreliable and, therefore, she did not meet her burden of proving that she suffered from postconcussive syndrome from 2015-present as a result of her 2008 industrial motor vehicle accident.

PATE v. MONTANA STATE FUND

2019 MTWCC 2

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner asserts that he injured his shoulder in an industrial accident in which a rung on a ladder broke, causing him to fall down and backwards, partially into a crawlspace. Respondent denied liability, at first because Petitioner's medical providers did not identify any objective medical evidence of a shoulder injury. Respondent then relied on the opinion of its IME physician, who determined that while there is objective medical evidence of a shoulder injury or disease, there is no mechanism of a shoulder injury and that the time between the accident and the onset of Petitioner's shoulder pain is too great to support a causal relationship.

Held: Petitioner injured his left shoulder in his industrial accident. Respondent's IME physician failed to take an accurate history and, as a result, did not understand that the Petitioner used his arms to arrest his backwards fall. Respondent's IME physician also did not understand that Petitioner reported shoulder pain immediately after his fall and suffered shoulder pain again within two weeks of his fall. Thus, this Court gave more weight to the evidence from the orthopedist treating Petitioner's shoulder, which is sufficient to prove on a more-probable-than-not basis that Petitioner injured his shoulder in the fall.

WCC'S CONCLUSION

It has long been the law of Montana that employers take their workers as they find him, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates, or aggravates an underlying condition is compensable. "The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury."

Weatherwax v. State Comp. Ins. Fund, 2000 MTWCC 15, ¶ 40 (citations omitted).

YORK v. MACO WORKERS COMP TRUST

2019 MTWCC 1

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered a compensable right shoulder injury in 2007. In 2013, her treating physician, an orthopedic surgeon, diagnosed her with a torn rotator cuff and labrum in her left shoulder and opined that her left shoulder condition is an overuse syndrome caused by her inability to fully use her right shoulder for many years. Petitioner seeks medical benefits and TTD or PTD benefits. Respondent denied liability for Petitioner's left shoulder condition, relying on its IME physician, who opined that while Petitioner's left shoulder condition is degenerative, it likely cannot be attributed to compensatory overuse alone.

Held: Respondent is liable for Petitioner's left shoulder condition because it is an overuse syndrome caused by her inability to fully use her right shoulder after her compensable injury. This Court gives greater weight to Petitioner's treating physician because he has greater credentials to opine as to the cause of a shoulder condition. Respondent is liable for medical benefits. However, Respondent is not currently liable for TTD benefits because Petitioner has not suffered a total wage loss as a result of her injury, including her left shoulder condition, because she was released to return to work but has voluntarily refused to return. Respondent is not currently liable for PTD benefits because Petitioner is not at MMI and because there is insufficient evidence to find that she does not have a reasonable prospect of performing regular employment.

WCC'S CONCLUSION

It is well settled that an insurer that is "liable for a work-related injury is also liable for 'a subsequent injury . . . if it is the direct and natural result of a compensable primary injury, and not the result of an independent intervening cause.'"

Romero v. Liberty Mut. Fire Ins. Co., 2001 MTWCC 5, ¶ 56, *aff'd* 2001 MT 303N, 308 Mont. 394, 43 P.3d 983 (quoting *Rightnour v. Kare-Mor, Inc.*, 225 Mont. 187, 189, 732 P.2d 829, 831 (1987).

In other words, "when the sequelae of an industrial injury causes an injury or disease to another body part, the insurer is liable for the injury or disease to the other body part.

Suzor v. Int'l Paper Co., 2017 MTWCC 17, ¶ 23.

ROBINSON v. MONTANA STATE FUND

2018 MTWCC 7

ORDER AND JUDGMENT GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO PETITIONER'S OFFSET CLAIM, DENYING PETITIONER'S CROSS MOTION FOR SUMMARY JUDGMENT AS TO PETITIONER'S OFFSET CLAIM, AND DISMISSING PETITIONER'S DUE PROCESS CLAIM FOR LACK OF SUBJECT MATTER JURISDICTION

Summary: Respondent moved for summary judgment on Petitioner's two causes of action. First, Respondent argues it can take the Social Security offset from Petitioner's PTD benefits under § 39-71-702(4), MCA, because Petitioner is receiving PTD benefits and SSDI benefits because of her two industrial injuries. Second, Respondent argues it did not violate Petitioner's due process rights when it took the offset and began recouping an alleged overpayment before she had the opportunity for a hearing. Petitioner cross-moved for summary judgment. First, she argues that Respondent cannot take the offset because the statute states that the insurer can take the offset only when SSDI benefits are awarded "because of the injury," which Petitioner interprets as applying only when the claimant has one industrial injury. Second, Petitioner argues that Respondent violated her right to due process by taking the offset and recouping an overpayment before she had the opportunity for a hearing and that she is entitled to "such damages as are just for the violation of her right to due process."

ROBINSON v. STATE COMPENSATION MUTUAL INSURANCE FUND
2019 MT 259

Summary: Respondent moved for summary judgment on Petitioner's two causes of action. First, Respondent argues it can take the Social Security offset from Petitioner's PTD benefits under § 39-71-702(4), MCA, because Petitioner is receiving PTD benefits and SSDI benefits because of her two industrial injuries. Second, Respondent argues it did not violate Petitioner's due process rights when it took the offset and began recouping an alleged overpayment before she had the opportunity for a hearing. Petitioner cross-moved for summary judgment. First, she argues that Respondent cannot take the offset because the statute states that the insurer can take the offset only when SSDI benefits are awarded "because of the injury," which Petitioner interprets as applying only when the claimant has one industrial injury. Second, Petitioner argues that Respondent violated her right to due process by taking the offset and recouping an overpayment before she had the opportunity for a hearing and that she is entitled to "such damages as are just for the violation of her right to due process."

WCC Held: Respondent is entitled to summary judgment on Petitioner's offset claim. Section 39-71-702(4), MCA, covers situations in which a claimant is receiving PTD benefits and SSDI benefits because of two industrial injuries under the rule of statutory construction providing that the "singular includes the plural." This interpretation also upholds the legislative intent of the offset statute. Petitioner's due process claim, in which the only remedy she seeks is damages, is dismissed because this Court does not have subject matter jurisdiction over tort claims.

SC Held: **Affirmed.**

HAGBERG v. ACE AMERICAN INSURANCE COMPANY

2019 MTWCC 6

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent argues it is entitled to summary judgment because the IME physician's opinion that Petitioner's pain is unrelated to his industrial accident should control as he is the medical professional with greater expertise. Respondent alternatively argues that the pain medications prescribed by Petitioner's treating physician constitute palliative or maintenance care rendering it outside the scope of its liability. Petitioner asserts he is entitled to summary judgment because his treating physician's opinion that Petitioner's pain stems from his industrial injury carries more weight than the IME physician's opinion, and because his prescription pain medication constitutes primary medical services.

Held: Respondent's Motion for Summary Judgment is denied, and Petitioner's Motion for Summary Judgment is granted. The physicians have equal credentials to opine as to the cause of Petitioner's current back pain, but this Court gives more weight to the opinions of Petitioner's treating physician because his opinion is based upon better evidence. Moreover, this Court determines that Petitioner's prescription pain medications constitute primary medical services because they are necessary to sustain him at MMI and are therefore not palliative or maintenance care.

WCC'S CONCLUSION

It has long been the law of Montana that employers take their workers as they find him, with all their underlying ailments, and that a traumatic event or unusual strain which lights up, accelerates, or aggravates an underlying condition is compensable. "The rule is that when preexisting diseases are aggravated by an injury and disabilities result, such disabilities are to be treated and considered as the result of the injury."

Weatherwax v. State Comp. Ins. Fund, 2000 MTWCC 15, ¶ 40.

MONTANA CODE ANNOTATED 39-71-116

(17) **Maintenance care** is defined as "treatment designed to provide the optimum state of health while minimizing recurrence of the clinical status."

. . . .

(22) **Palliative care** is defined as "treatment designed to reduce or ease symptoms without curing the underlying cause of the symptoms."

MONTANA CODE ANNOTATED 39-71-116(26)

The WCA defines **Primary Medical Services** as "treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability."

WCC'S CONCLUSION

"Achieving" a level of tolerable pain or a relatively healthy mental attitude in the face of a chronic condition, however, is not such a discrete "end." Rather it is an ongoing process. Temporary freedom from pain is meaningless if eight hours later intolerable pain and depression have returned. Reaching a level of tolerable physical and mental health after a chronic injury can be "achieved" only when it can be sustained.

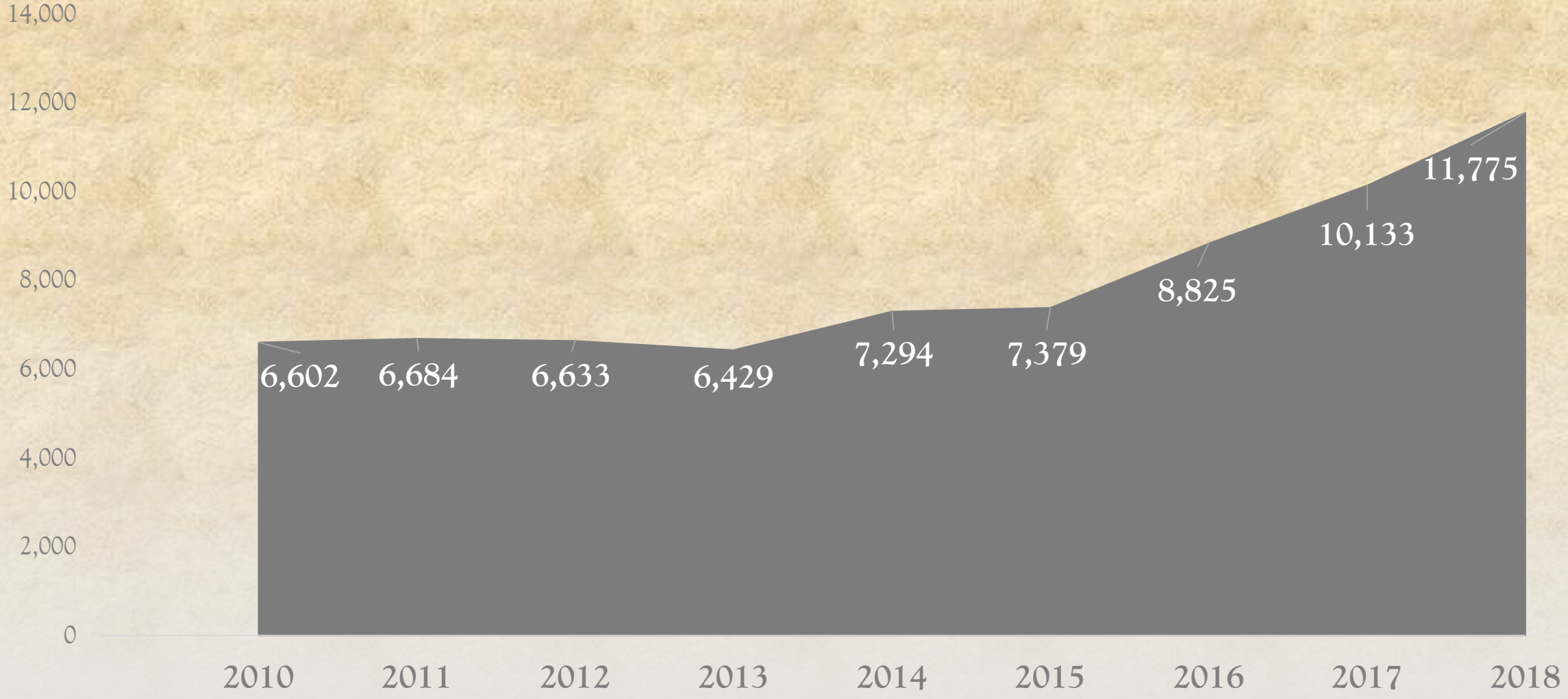
> *Hiett v. Missoula County Public Schools*, 2003 MT 213, ¶ 33, 317 Mont. 95, ¶ 33, 75 P.3d 341, ¶ 33.

WCC'S CONCLUSION

These categories of care come into play only after one has "achieved" medical stability as we interpret the phrase here. More to the point, the ability to avoid a relapse through proper primary care is not the Cadillac of treatments - it is not an "optimum" state of affairs, nor is it care which will reduce symptoms below that level already reached with appropriate medication.

> *Hiett v. Missoula County Public Schools*, 2003 MT 213, ¶ 33, 317 Mont. 95, ¶ 33, 75 P.3d 341, ¶ 33.

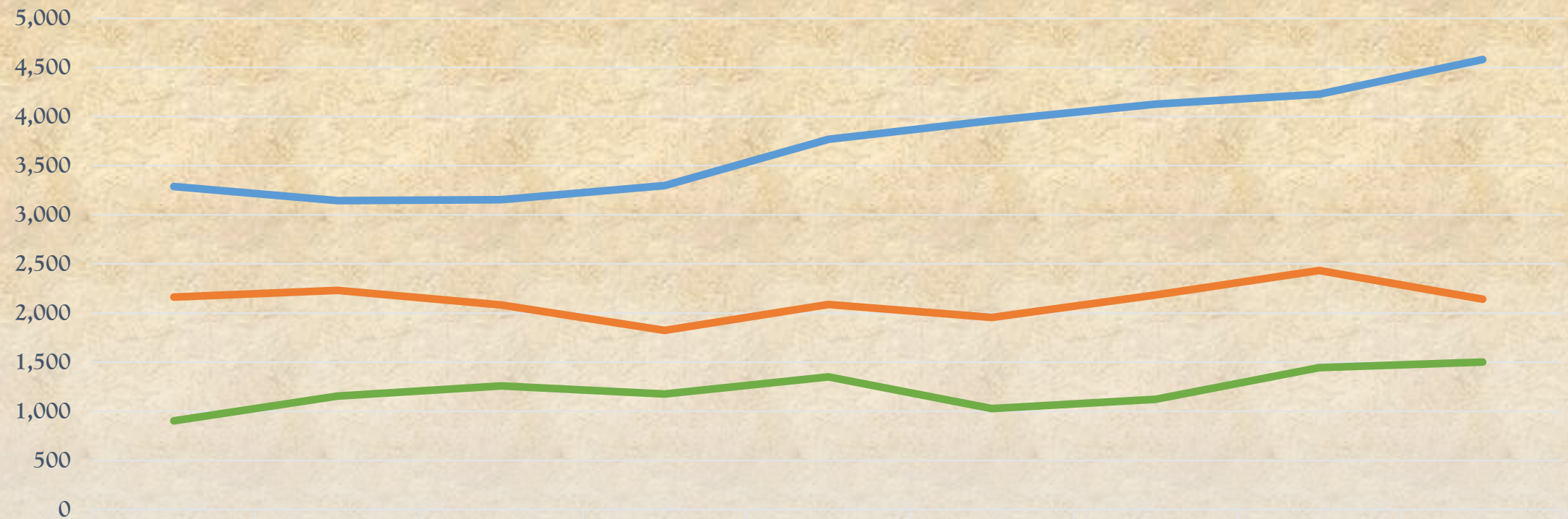
INSURER DENIAL OF CLAIMS



INSURER DENIAL OF CLAIMS

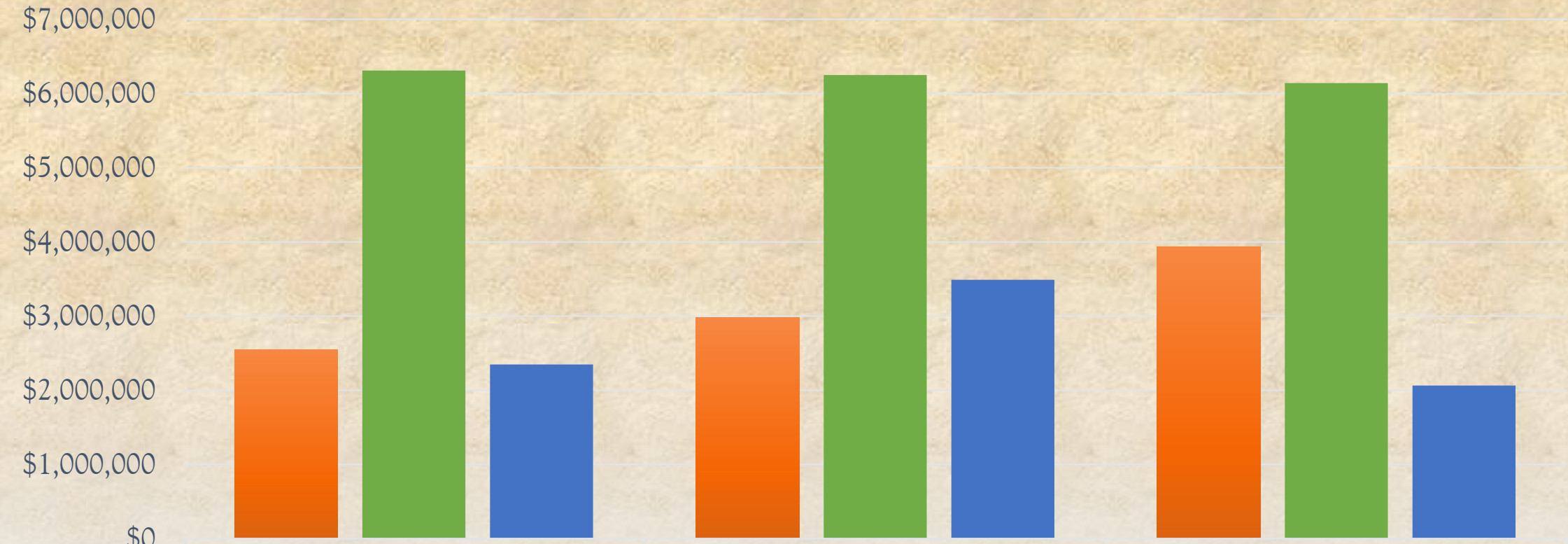
REASON FOR CLAIM DENIAL		2010	2011	2012	2013	2014	2015	2016	2017	2018
Coverage Issue	No coverage	32	59	69	60	73	59	55	59	75
	405 - Independent Contractor Issue			1	1	2	6	1	4	4
	Stress - not compensable	20	6	10	15	15	31	14	26	21
	Pre-existing Condition					4	36	72	71	63
	Condition is covered under a prior claim					8	21	20	25	5
Definition of Injury	Does not meet definition of injury	285	384	304	223	217	241	402	278	117
	Does not meet definition of Occupational Disease	43	61	37	53	48	70	112	92	90
Missing/Insufficient Info	Incomplete/missing info necessary to accept liability		1	3	10	96	634	1,076	524	232
	Signed Release						19	72	509	387
	Recorded Statement					2	8	40	323	272
Notice/ Filing Requirements	No Signed FROI has been received	214	188	182	203	241	448	456	733	1,082
	No 30-day notice to employer	134	112	117	126	135	144	178	160	111
	Did not file within 12 months		1	2	2	19	84	70	95	44
Not in Course & Scope	Not in course and scope of employment	450	581	522	389	479	549	572	646	430
	Coming & Going							3		
No Objective Medical	No objective medical findings	4,684	4,750	5,135	5,104	5,618	4,719	5,185	5,592	7,146
Miscellaneous	Duplicate Claim				1	5	22	32	47	40
	Claimant does not wish to file claim					6	20	23	19	27
	Non-Cooperation in Investigation					66	108	225	314	65
	Other	740	541	251	242	260	160	217	616	1,564
Total		**6,602**	**6,684**	**6,633**	**6,429**	**7,294**	**7,379**	**8,825**	**10,133**	**11,775**

INSURER DENIALS BY PLAN



	2010	2011	2012	2013	2014	2015	2016	2017	2018
Self Insured	2,162	2,231	2,084	1,823	2,088	1,956	2,185	2,434	2,141
Private	904	1,155	1,258	1,177	1,350	1,028	1,123	1,445	1,501
State Fund	3,288	3,144	3,154	3,297	3,768	3,959	4,126	4,226	4,581

INSURER MISCELLANEOUS PAYMENTS



	2016	2017	2018
Self-Insured	$2,543,238	$2,978,963	$3,932,647
Private	$6,308,952	$6,250,528	$6,141,482
State Fund	$2,347,170	$3,488,846	$2,062,763

OBJECTIVE MEDICAL FINDINGS

Section 39-71-116(22), MCA, defines "[o]bjective medical findings" as:

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

OBJECTIVE MEDICAL FINDINGS: SIGNS

Signs measured in a clinical setting:

- High or low blood pressure
- Rapid heart rate
- Fever
- Bleeding
- Bruising
- Swelling
- Scaring
- Hearing a heart murmur
- Smelling alcohol on patient's breath
- Feeling a subcutaneous mass

Additional Testing:

- Diagnostic tests
- MRIs
- X-rays
- spec scans
- thermography
- lab testing
- functionality assessments
- psychological testing

OBJECTIVE MEDICAL FINDINGS: FINDINGS

Essentially, observations made during medical evaluations that are not under the patient's control are objective findings. Clinical Findings as Referenced in this Statute can include:

- Diminished lumbar extension
- Loss of lumbar lordosis
- Forward flexed gait
- Radiculopathy noted with motory, sensory, and/or reflex abnormalities
- Asymmetric muscle strength or reflexes
- Pain on walking
- Basically, depending on what the diagnosis is, there are numerous clinical findings that can substantiate it.

OBJECTIVE MEDICAL FINDINGS: WCC DECISIONS

Vonfeldt v. Costco, 2015 MTWCC 20. Petitioner was entitled to acceptance of liability for a myofascial pain syndrome when the physicians identified trigger points defined as "a band of isolated muscle spasms" and decreased range of motion.

Koch v. Employers Insurance Group, 2012 MTWCC 14. Even though the IME physician believed Petitioner was embellishing or exaggerating her pain, no amount of purported embellishment could cause the objective medical finding of a herniated disc to appear on an MRI.

OBJECTIVE MEDICAL FINDINGS: WCC DECISIONS

Cornelius v. Lumbermen's Underwriting Alliance, 2012 MTWCC 13. Here, "global motion deficits" and decreased sensation in one leg constituted objective medical findings.

Wilson v. Uninsured Employers Fund, 2010 MTWCC 33. WCC concluded observations of tenderness over the SI joint, abnormal posture, and limited range of motion were objective medical findings. Supported the finding of PTD.

OBJECTIVE MEDICAL FINDINGS: WCC DECISIONS

Fleming v. MSGIA, 2010 MTWCC 13. WCC found objective medical findings where the Petitioner's physician noted decreased range of motion following the injury, increased pain medication following the injury, and a different description of the pain the patient experienced prior to the accident. Additionally, the Petitioner's symptoms correlated with her post-injury SPECT scan.

Brown v. Hartford Insurance Co., 2009 MTWCC 38. WCC found objective medical findings when the physician found medical evidence that the Petitioner suffered from a bilateral strain or overuse condition.

OBJECTIVE MEDICAL FINDINGS: WCC DECISIONS

Healy v. Liberty Northwest, 2007 MTWCC 43. WCC rejected an IME doctor's opinion that there was no objective medical findings when there was an MRI that revealed a bulging disc at L4-5 and herniation of L3-4 which had been disregarded by the physician for unknown reasons.

Credit General v. United Staffing, 2000 MTWCC 48. WCC condemns the use of argumentative and slanted introductory letters to IME physicians.

HEATH v. MONTANA STATE FUND

2019 MTWCC 4

ORDER GRANTING RESPONDENT SUMMARY JUDGMENT ON PETITIONER'S REQUEST FOR RELIEF FROM THIS COURT'S ORDER AND JUDGMENT DISMISSING WITH PREJUDICE DATED MARCH 10, 2014

Summary: During litigation in 2014, Petitioner and Respondent settled Petitioner's bilateral shoulder injury claim via a Stipulation for Entry of Judgment, which expressly states that this Court would enter a judgment and dismiss the case with prejudice. Petitioner now asserts that he and Respondent were operating under a mutual mistake of fact and asks this Court to set aside their settlement agreement. Respondent moves for summary judgment, asserting that Petitioner's request for relief from this Court's Order and Judgment Dismissing with Prejudice is time-barred under M.R.Civ.P. 60(b)(1) and (c)(1), which provide that a party seeking relief from a judgment or order on the ground of mistake must file for relief "no more than a year after the entry of the judgment or order." Petitioner asserts that Rule 60 does not apply because this Court did not enter an actual judgment; rather, Petitioner asserts that this Court merely approved a settlement agreement. Petitioner thus argues that contract law applies, under which he asserts his Petition for Hearing is timely. In the alternative, Petitioner argues that if Rule 60 applies, his 2018 Petition for Hearing is timely under Rule 60(b)(4), which applies when a judgment is void, and under Rule 60(b)(6), which provides that a party can obtain relief for any other reason that justifies relief. Petitioner also asserts that he may proceed under Rule 60(d)(1), which provides that Rule 60 "does not limit a court's power to . . . entertain an independent action to relieve a party from a judgment, order, or proceeding . . . ."

Summary Judgment | Statute of Limitations
Reopening of Settlements

Andrew J. Utick, Andrea J. Utick Fox
Nick Mazanec

HEATH v. MONTANA STATE FUND

2019 MTWCC 4

Held: Respondent is granted summary judgment on Petitioner's request for relief from this Court's Order and Judgment Dismissing with Prejudice. The Workers' Compensation Act grants this Court the power to enter judgments. The Montana Supreme Court has held that Rule 60 applies when a party seeks relief from a judgment of this Court. Rule 60(b)(1) and (c)(1) state that a party seeking relief from a judgment based on mistake must file for relief "no more than a year after the entry of the judgment or order." Because Petitioner did not file for relief within one year after this Court entered its Order and Judgment Dismissing with Prejudice, which is an actual judgment, and because Rule 60(b)(4) and (6), and (d)(1) do not provide him with avenues for relief under Montana law, Petitioner's request for relief is time-barred.

SIMPSON v. MMIA

2018 MTWCC 12

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment, arguing that Petitioner's claim for medical benefits is time-barred under the two-year statute of limitations at § 39-71-2905(2), MCA. In the alternative, Respondent asserts that Petitioner's medical benefits terminated under § 39-71-704(1)(f), MCA (2005), because he did not use them for 60 consecutive months. Petitioner moved for summary judgment, arguing that his claim is timely, and that there was not a 60-month period of time in which he did not use his medical benefits.

Held: This Court granted summary judgment for Respondent. Petitioner's claim is time-barred under the two-year statute of limitations in § 39-71-2905(2), MCA. Respondent denied liability for all further medical treatment on Petitioner's right knee in 2009, but Petitioner did not petition this Court to decide the dispute until 2017, approximately six years after the statute of limitations ran.

HIDEAWAY BUILDERS, LLC v. RASMUSSEN, UEF

2019 MTWCC 9

ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENTS

Summary: The UEF determined that Claimant was an employee of Petitioner. Petitioner filed this case to appeal the UEF's determination. Claimant moved to dismiss, asserting that Petitioner filed this case after the 60-day statute of limitations in § 39-71-520(2)(b) and (c), MCA, ran. The UEF joined Claimant's motion. Petitioner initially conceded that it filed its Petition for Hearing a day late but argued that this Court should invoke the doctrine of equitable tolling and rule that it was timely. Intervenor argued that the Petition for Hearing was timely, asserting that under this Court's procedural rules, 3 days are added to the statute of limitations because the mediator mailed her Report and Recommendation. For the first time at the hearing, Petitioner argued that its Petition for Hearing was timely under this Court's procedural rules.

Held: The Court converted the motion and granted summary judgment in favor of Respondents because the Petitioner's Petition for Hearing is time barred and the UEF's determination is final. This Court's rules of procedure state that filing occurs "upon receipt by the court." This Court did not receive the Petition for Hearing until after the limitations period had run. The Montana Supreme Court and this Court have ruled that, as a matter of law, 3 days for mailing are not to be added to the statutes of limitations in § 39-71-520, MCA. The doctrine of equitable tolling does not apply because the current version of § 39-71-520, MCA, is not ambiguous, and this is simply a case of neglect.

CRABTREE v. DLI and UEF

2017 MTWCC 19

ORDER AFFIRMING PENALTY UNDER § 39-71-504(1)(a), MCA

Summary: Employer Appellant appeals from a decision of agency Appellee ordering him to pay to the Uninsured Employers' Fund a penalty under § 39-71-504(1)(a), MCA, in the amount of $28,259.82. Appellant argues the penalty is not supported by sufficient evidence in the record.

Held: There is sufficient evidence in the record to support Appellee's imposition of a $28,259.82 penalty under § 39-71-504(1)(a), MCA. Appellee's final agency order imposing the penalty is affirmed.

CLARK v. ARCH INSURANCE COMPANY

2018 MTWCC 18

ORDER AFFIRMING DEPARTMENT OF LABOR & INDUSTRY'S ORDER GRANTING INTERIM BENEFITS

Summary: Appellant appeals from a Department order granting Appellee's petition for interim TTD benefits under § 39-71-610, MCA.

Held: The Department's order is affirmed. Appellant did not demonstrate that the Department erred in awarding interim benefits, and Appellee presented substantial evidence to establish a prima facie case for interim TTD benefits.

MONTANA CODE ANNOTATED § 39-71-610

Four factors determine entitlement to interim benefits: (1) Was liability accepted for the claim? (2) Were benefits paid, especially for a significant time period? (3) Has the claimant demonstrated that he will suffer significant financial hardship if interim benefits are not ordered? (4) Has the claimant tendered a strong prima facie case for reinstatement of the benefits he seeks?

WEBSTER v. LIBERTY NORTHWEST INS. CO.

2018 MTWCC 18

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING IN PART AND DENYING IN PART PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner petitioned this Court for a ruling that his attorney earned fees on the reopening of his medical benefits and that Respondent unreasonably refuses to honor his attorney's Lockhart lien. On the latter basis, Petitioner requests a penalty and attorney fees. Respondent moves for summary judgment on the basis that a claimant's attorney cannot obtain fees by doing the work pursuant to which medical benefits that were terminated by operation of law were reopened; rather, Respondent asserts that a claimant's attorney is entitled to fees only when an insurer denies liability for the medical benefits and the claimant thereafter obtains the medical benefits due to his attorney's efforts. Respondent also argues that Petitioner's attorney did not do enough legal work to earn attorney fees. Petitioner cross-moves for summary judgment on the relief requested in his Petition for Hearing.

[1] *Respondent's original motion is entitled Respondent's Motion to Dismiss and Alternately [sic] Motion for Summary Judgment and Brief. This Court previously denied Respondent's Motion to Dismiss in an unpublished Order, Docket Item No. 28.*

WEBSTER v. LIBERTY NORTHWEST INS. CO.

2018 MTWCC 18

Held: Respondent's Motion for Summary Judgment is denied, and Petitioner's Cross-Motion for Summary Judgment is granted in part and denied in part. An insurer's denial of liability is not a condition precedent to a Lockhart lien; the relevant inquiry is whether the attorney did the work that resulted in the additional medical benefits. And here, Petitioner is receiving two years of additional medical benefits entirely due to his attorney's efforts, which were far more than "initiating a process." Petitioner's attorney obtained the evidence necessary to reopen Petitioner's medical benefits and then successfully petitioned the Department to reopen his medical benefits. However, Respondent's legal argument with respect to there being a condition precedent to a Lockhart lien is not unreasonable because this is an issue of first impression and there is a conflict within the Department of Labor & Industry's Attorney Retainer Agreement, and within its rule governing attorney fees. Thus, Respondent is not liable for a penalty or Petitioner's attorney fees.

MONTANA CODE ANNOTATED § 39-71-717

Subsections (3) and (7) state that to reopen medical benefits, a claimant must petition the Department, triggering an analysis by the medical review panel, or, if both parties agree, the Department's medical director, to decide by a preponderance of the evidence whether to reopen the claimant's medical benefits.

Subsection (6) provides that the worker or insurer may submit additional evidence.

Subsection (9) provides that a party who disagrees with the medical review panel's decision may petition this Court to resolve the dispute, and that the medical review panel's decision is presumed to be correct and can be overcome only by clear and convincing evidence.

SELLEY v. ACUITY INSURANCE CO., VICTORY INSURANCE CO. INC.

2018 MTWCC 4

ORDER DECLINING TO CONSIDER PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moves for partial summary judgment on his penalty claim against the second insurer, arguing that its refusal to authorize an MRI is unreasonable under the Belton rule, which provides that when two insurers deny liability for a claim, and assert that the other is liable, the second insurer has a duty to pay benefits under a reservation of rights until the claim is resolved. The parties have submitted nearly 300 pages of exhibits, the majority of which are medical records, in support of their positions.

Held: Although insurers have a duty to investigate claims, which includes obtaining diagnostic tests, this Court declines to consider Petitioner's partial summary judgment motion under ARM 24.5.329(1)(b), because judicial economy will be not served by deciding the penalty claim against the second insurer before trial.

RICHARDSON v. INDEMNITY INS. CO. OF N. AMERICA

2018 MTWCC 10 *(Order Denying Petitioner's Motion for Partial Summary Judgment as to Notice)*
2018 MTWCC 16 *(Order Denying Petitioner's Motion for Partial Summary Judgment as to Claim Filing and Granting Respondent's Cross-motion for Summary Judgment)*

APPEALED TO MONTANA SUPREME COURT OCTOBER 18, 2019, DECIDED JULY 16, 2019
2019 MT 160 (DA 18-0594)

Summary: Petitioner, a security guard at a hospital, asserts that he suffered an injury to his nose after helping his supervisor detain a patient in 2006. Respondent has denied liability, asserting, inter alia, that Petitioner did not timely submit a claim under § 39-71-601, MCA, which requires a claimant to submit a written claim within 12 months of the date of his accident, although in cases involving lack of knowledge of disability, latent injury, or equitable estoppel, the time limitation can be extended up to 36 months from the date of the accident. Petitioner moves for partial summary judgment, arguing that his employer's Daily Activity Report from the day of the incident constitutes his written claim. In the alternative, Petitioner argues that the First Report of Injury or Occupational Disease he filed nearly four years after the incident constitutes a timely claim because he lacked knowledge of his disability and because Respondent is equitably estopped from maintaining a statute of limitations defense. Respondent cross-moves for summary judgment, contending that the employer's Daily Activity Report does not constitute a claim because Petitioner's entry did not indicate that he sustained an injury. Respondent also argues that even if Petitioner were entitled to the waiver for cases involving lack of knowledge of disability or equitable estoppel, Petitioner filed his First Report of Injury or Occupational Disease beyond the 36-month absolute deadline, which Respondent asserts is a statute of repose.

RICHARDSON v. INDEMNITY INS. CO. OF N. AMERICA

2018 MTWCC 16

WCC Held: Petitioner's Motion for Partial Summary Judgment as to Claim Filing is denied. Respondent's Cross-Motion for Summary Judgment is granted. Petitioner's entry in his employer's Daily Activity Report did not indicate that he was injured; thus, it did not contain sufficient information to inform his employer or Respondent of the nature and basis of a potential workers' compensation claim and does not constitute a claim under § 39-71-601, MCA. And, even if Petitioner were entitled to the statutory waiver of the 12-month limitations period, he submitted his First Report of Injury or Occupational Disease beyond the 36-month absolute deadline for submitting a claim. Petitioner's claim is time-barred.

SC Held: **Affirmed.**

MONTANA CODE ANNOTATED § 39-71-601(2)

(2) The insurer may waive the time requirement up to an additional 24 months upon a reasonable showing by the claimant of:

(a) lack of knowledge of disability;

(b) latent injury; or

(c) equitable estoppel.

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

BEGGER v. MONTANA HEALTH NETWORK WC INS. TRUST

2019 MTWCC 7

ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment and Petitioner filed a cross-motion for summary judgment on the issue of whether Petitioner notified her employer of her accident and resulting injury within the 30-day period required by § 39-71-603, MCA. Respondent argues that Petitioner's claim is time-barred because she missed the notice deadline by 10 days and did not have a "latent injury" sufficient to toll the statute because she knew, within 30 days of her accident, that she had suffered an injury and would require medical treatment. Petitioner argues that although she had pain, she had previously experienced like symptoms and they always went away with time. She contends that the notice period began running the day she first scheduled a medical appointment, and that the notice she gave her employer 24 days later was timely.

Held: Both parties' motions for summary judgment are denied. Under the latent injury doctrine, "An employee who has a reasonable belief at the time of an accident that he has suffered no injury which will require treatment or is otherwise compensable, is not barred from recovery under § 603 because he learns otherwise beyond the 30-day period." Whether the 30-day notice requirement may be equitably tolled here depends on whether it was reasonable for Petitioner to believe she did not suffer an injury which would require treatment until 30 days prior to giving her employer notice. Because reasonableness is a question of fact, summary judgment on this issue is not appropriate.

WCC'S CONCLUSION

Under the latent injury doctrine, "An employee who has a reasonable belief at the time of an accident that he has suffered no injury which will require treatment or is otherwise compensable, is not barred from recovery under § 603 because he learns otherwise beyond the 30-day period."

Killebrew v. Larson Cattle Co., 254 Mont. 513, 521, 839 P.2d 1260, 1265 (1992).

HEICHEL v. LIBERTY MUTUAL INSURANCE

2018 MTWCC 6

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner asserts she injured her neck and shoulder in an industrial accident and told her manager of the accident and injury later that shift. Petitioner also asserts she told two other managers of her accident and injury within 30 days. The managers deny that Petitioner told them she suffered an industrial injury. Two of the managers testified that Petitioner initially said she was injured in a fall at her home.

Held: After weighing the evidence, this Court finds that Petitioner did not give her employer notice of her alleged industrial accident and injury within 30 days. Therefore, Petitioner's claim is not compensable under § 39-71-603(1), MCA.

McCRARY v. LIBERTY MUTUAL FIRE INSURANCE CO.

2018 MTWCC 5

APPEALED TO MONTANA SUPREME COURT – MARCH 30, 2018

DECISION ON STIPULATED FACTS AND JUDGMENT

Summary: Petitioner suffered an industrial injury to his low back in 1977. His PTD rate for this injury is $174, which would be payable for his lifetime under the 1977 WCA. Petitioner subsequently worked in a "sheltered" position with his time-of-injury employer and suffered an industrial injury to his knee in 1983. His PTD rate for this injury is $277, which would be payable until his receipt of Social Security retirement under the 1983 WCA. He returned to work, but his time-of-injury employer went out of business in 1996, and he has not worked since. From 1997 to 2009, Petitioner: asserted that the combination of his back and knee injuries rendered him permanently totally disabled; demanded PTD benefits under his 1983 claim at the rate of $277; acknowledged that such benefits would terminate on his receipt of Social Security retirement benefits; obtained PTD benefits at the $277 rate; obtained attorney fees calculated on a percentage of the PTD benefits he received; and then, after a dispute arose over periods in which Respondent had not paid PTD benefits, obtained a judgment from this Court pursuant to which Respondent was legally obligated to pay PTD at the $277 rate and attorney fees calculated on the amount of PTD benefits awarded. Petitioner and Respondent stipulate that Respondent "has not paid any benefit to which [Petitioner] is not entitled." However, Petitioner now argues that his back injury was the "actual cause" of his permanent total disability and, therefore, that Respondent should have paid him PTD benefits under his 1977 claim, and that he is now entitled to PTD benefits under his 1977 claim. Respondent argues that Petitioner is estopped from claiming, and waived his asserted right to, PTD benefits for his 1977 claim.

McCRARY v. LIBERTY MUTUAL FIRE INSURANCE CO.

Held: Petitioner waived his claimed right to PTD benefits under his 1977 claim. Petitioner arguably had the right to PTD benefits under his 1977 claim because he thereafter worked in a sheltered job, which is not to be considered when determining whether a claimant is PTD. However, by his express declarations and his course of conduct, Petitioner intentionally and voluntarily acted inconsistently with his asserted right to PTD benefits under his 1977 claim. And, although the parties have agreed that if Petitioner prevails, Respondent would be entitled to a credit in the amount of what would then be deemed an overpayment of PTD benefits, prejudice to Respondent would result if Petitioner was now allowed to obtain PTD benefits under his 1977 claim because Petitioner has not agreed to reimburse Respondent for the attorney fees calculated on the higher rate, nor to provide any compensation to Respondent for the time-value-of money.

ESTABLISHING WAIVER

To establish waiver, the party asserting it must prove:

(1) That the other party knew of the existing right;

(2) That the other party acted inconsistently with that right; and

(3) That the party asserting waiver would suffer prejudice.

GRIFFIN v. ASSOCIATED LOGGERS EXCHANGE

2018 MTWCC 11

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: After returning to work after an industrial injury, Petitioner, who had previously been warned about arguing with coworkers, was in a fight with a coworker. Petitioner's employer terminated him from his employment pursuant to a clause in its Employee Handbook providing that fighting could result in discipline up to immediate termination. Petitioner disputes that he instigated the fight, and argues he is entitled to TTD benefits retroactive to the date of his termination. Petitioner also challenges Respondent's calculated TTD benefit rate and its denial of liability for a September 29, 2015, medical bill.

Held: This court ruled in Respondent's favor. Petitioner is not entitled to TTD retroactive to the date of his termination because he was terminated for disciplinary reasons as he could not get along with his coworkers and instigated a fight, for which the Employee Handbook authorized immediate dismissal. Petitioner is not entitled to additional TTD for the time he was unable to work because Respondent correctly calculated his TTD rate. Petitioner is not entitled to reimbursement for the September 29, 2015, medical bill, because Petitioner scheduled the appointment on his own and did not receive any primary or secondary medical services; rather, it was a consultation with the physician to discuss his concerns about the appropriateness of his medical care and Respondent's adjusting of his claim.

MONTANA CODE ANNOTATED § 39-71-701(4)

If the treating physician releases a worker to return to the same, a modified, or an alternative position that the individual is able and qualified to perform with the same employer at an equivalent or higher wage than the individual received at the time of injury, the worker is no longer eligible for temporary total disability benefits even though the worker has not reached maximum healing. A worker requalifies for temporary total disability benefits if the modified or alternative position is no longer available to the worker for any reason except for the worker's incarceration as provided for in 39-71-744, resignation, **or termination for disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment and if the worker continues to be temporarily totally disabled, as defined in 39-71-116.**

MONTANA CODE ANNOTATED § 39-71-123:

Defines "wages," in relevant part, as follows:

> (1) "Wages" means all remuneration paid for services performed by an employee for an employer, or income provided for in subsection (1)(d). Wages include the cash value of all remuneration paid in any medium other than cash. The term includes but is not limited to:
>
> . . . .
>
> (e) board, lodging, rent, or housing if it constitutes a part of the employee's remuneration and is based on its actual value;
>
> . . . .
>
> (2) The term "wages" does not include any of the following:
>
> (a) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, and other expenses, as set forth in department rules.

ADMINISTRATIVE RULES OF MONTANA 24.29.720

PAYMENTS THAT ARE NOT WAGES--EMPLOYEE EXPENSES

(1) Effective January 1, 1993, payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred in the course and scope of employment are not wages if all of the following are met:

(a) the amount of each employee's reimbursement is entered separately in the employer's records;

(b) the employee could reasonably be expected to incur the expenses while traveling on the business of the employer;

(c) the reimbursement is not based on a percentage of the employee's wages nor is it deducted from wages; and

(d) the reimbursement does not replace the customary wage for the occupation.

(2) Reimbursement for expenses may be based on any of the following methods that apply:

. . . .

(b) for meals and lodging, at a flat rate no greater than the amount allowed to employees of the state of Montana pursuant to 2-18-501(1)(b) and (2) (b), MCA for meals, and 2-18-501(5), MCA for lodging, unless, through documentation, the employer can substantiate a higher rate.

DAVIS v. LIBERTY INSURANCE CORPORATION

2017 MTWCC 21

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner settled his indemnity benefits with insurer on a disputed liability basis, and reserved his future medical benefits. Thereafter, insurer declined to authorize a referral for Petitioner to see his surgeon, citing the five-year medical closure rule in § 39-71-704(1)(f)(i), MCA. Petitioner contends that he is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA, because he is permanently totally disabled.

Held: Where the vocational rehabilitation expert was unable to point to any suitable jobs for Petitioner, and given Petitioner's older age, modest education, limited transferable skills, near-constant and high levels of pain, poor prognosis, and co-existing health conditions, Petitioner has met his burden of proving that he does not have a reasonable prospect of physically performing regular employment. Because he is permanently totally disabled, Petitioner is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA.

DAVIS v. LIBERTY INSURANCE CORPORATION

2017 MTWCC 21

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner settled his indemnity benefits with insurer on a disputed liability basis, and reserved his future medical benefits. Thereafter, insurer declined to authorize a referral for Petitioner to see his surgeon, citing the five-year medical closure rule in § 39-71-704(1)(f)(i), MCA. Petitioner contends that he is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA, because he is permanently totally disabled.

Held: Where the vocational rehabilitation expert was unable to point to any suitable jobs for Petitioner, and given Petitioner's older age, modest education, limited transferable skills, near-constant and high levels of pain, poor prognosis, and co-existing health conditions, Petitioner has met his burden of proving that he does not have a reasonable prospect of physically performing regular employment. Because he is permanently totally disabled, Petitioner is entitled to ongoing medical benefits pursuant to § 39-71-704(1)(f)(ii), MCA.

MELLINGER v. MONTANA STATE FUND

2018 MTWCC 13

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment, asserting that Petitioner's medical benefits terminated under the 60-month rule at § 39-71-704(1)(f), MCA (2005), and that it is not liable for a surgery to remove a bone spur, because Petitioner put off the surgery for more than 60 months and did not otherwise use his medical benefits during that time. Petitioner argues that Respondent is liable for the surgery because it falls under the prosthesis exception to the 60-month rule. Petitioner also argues he used his medical benefits and satisfied the 60-month rule because Respondent authorized the surgery while his medical benefits were open. Finally, Petitioner argues that Respondent's authorization of his surgery constitutes an enforceable contract.

Held: This Court granted summary judgment for Respondent. First, the prosthesis exception does not apply because regardless of whether Petitioner's special shoes and boots, brace, and orthopedic screws are prostheses, the surgery to remove a bone spur is not a surgery to repair, replace, or monitor a prosthesis. Second, Petitioner's medical benefits terminated because he put off the surgery for more than 60 months and did not otherwise use his medical benefits. Finally, Respondent did not contractually agree that Petitioner could have the surgery beyond the 60-month limitation.

WESTRE v. LIBERTY NORTHWEST INS. CO.

2018 MTWCC 17

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Respondent moved for summary judgment, asserting that Petitioner's medical benefits terminated under the 60-month rule at § 39-71-704(1)(f), MCA (2005). It is undisputed that Petitioner saw his treating physician within the 60-month period, but his physician's office made a mistake and did not bill Respondent for the appointment within the 60-month period. Because Petitioner's physician did not send Respondent the bill, Respondent asserts that the appointment does not constitute use of medical benefits. Petitioner moved for summary judgment, arguing that he used his medical benefits within the 60-month period by obtaining treatment from his physician, and that he cannot suffer a consequence because of his physician's office's mistake in failing to bill Respondent for the appointment.

Held: Respondent's Motion for Summary Judgment is denied, and Petitioner's Motion for Summary Judgment is granted. Petitioner used his medical benefits within the 60-month period when he saw his treating physician for treatment. As a matter of law, the physician's office had the duty to bill Respondent, and Petitioner cannot suffer a consequence because of his physician's office's mistake in failing to bill Respondent.

HEICHEL v. LIBERTY MUTUAL INSURANCE

2018 MTWCC 3

ORDER DENYING PETITIONER'S MOTION IN LIMINE

Summary: Petitioner moves for an order excluding her employer's former store manager's written statements - which recount that Petitioner stated she injured her shoulder when she tripped over her dogs - from evidence as inadmissible hearsay. Petitioner also asserts that the written statements are inadmissible because Respondent did not make the employer's former store manager available for a deposition or subpoena her after she told Respondent's attorney that she would not appear without a subpoena.

Held: Petitioner's Motion in Limine is denied. This Court reserves ruling on whether the written statements are admissible under the hearsay exception for present sense impressions, M.R.Evid. 803(1), until trial, at which time Respondent will have the opportunity to lay the required foundation. Moreover, because the store manager no longer worked for Petitioner's employer, Respondent had no duty to produce the former store manager for a deposition and no duty to subpoena the store manager to a deposition Petitioner had scheduled.

Kraig W. Moore
Morgan M. Weber

MONTANA RULES OF EVIDENCE:

M.R.Evid. 801(d) states, in relevant part:

Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony . . . ; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity . . . .

KUNZ v. ELECTRIC INSURANCE COMPANY

2018 MTWCC 2

APPEALED TO MONTANA SUPREME COURT – MARCH 12, 2018

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner, a Montana resident, was hired in Montana, but traveled to work at power plants throughout the United States, and one in Europe, for four to six months out of each year. Petitioner's employer had not assigned him to any of its Montana jobs. After Petitioner was injured on a job in Texas, the person who handled claims for his employer reported his claim to its insurer as a Montana claim, filled out a Montana First Report of Injury and Occupational Disease and put it in his claims file, and told Petitioner he did not need to file a claim in Texas. Notwithstanding, Respondent denied liability on the grounds that Petitioner's employment was not covered by the Montana Workers' Compensation Act's extraterritorial statute, § 39-71-402(1)(a), MCA, and on the grounds that it was not estopped from denying Petitioner's claim because it is a Plan No. 2 insurer and the employer's employees could not bind it.

Held: Petitioner's claim falls under the Montana Workers' Compensation Act's extraterritorial statute, § 39-71-402(1)(a), MCA. Petitioner was a Montana employee who temporarily left Montana incidental to his employment and was injured in the course of his employment. Respondent is therefore liable for his claim.

MONTANA CODE ANNOTATED § 39-71-402

In the absence of [a reciprocal agreement with the state in which the worker was working], if a worker employed in this state who is subject to the provisions of this chapter temporarily leaves this state incidental to that employment and receives an injury arising out of and in the course of employment, the provisions of this chapter apply to the worker as though the worker were injured within this state.

TG v. MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

2018 MTWCC 1

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Summary: While Petitioner was working as an aide at a high school, a special needs student hit her, and then hit and pinched her two days later, leaving bruises. Petitioner did not seek nor require medical treatment for her bruises, although, after they resolved, she reported increased neck and arm pain to her medical providers. The attacks caused PTSD, and aggravated her preexisting anxiety, depression, and pseudoseizures, resulting in her inability to work. Petitioner asserts that she suffered compensable physical injuries, and compensable physical-mental injuries in the attacks.

Held: Respondent is entitled to summary judgment on Petitioner's claims. Petitioner did not suffer compensable physical injuries in the attacks. Although she had bruising, she neither sought nor required medical treatment for her bruises, which resolved without any resulting disability. While Petitioner's treating physician for her fibromyalgia diagnosed increased neck and arm pain as a result of the attacks, his diagnosis was based entirely on Petitioner's subjective complaints of pain and was not substantiated by objective medical findings. Petitioner did not suffer compensable psychological injuries in the attacks. Petitioner's anxiety, depression, and PTSD are mental-mental conditions, and her pseudoseizures are a mental-physical condition. Neither mental-mental nor mental physical conditions are compensable under the Workers' Compensation Act.

MONTANA CODE ANNOTATED § 39-71-116(22)

Objective medical findings:

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

BRIGHT v. MONTANA STATE FUND

2018 MTWCC 19

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner suffered a back injury in 1994 while working at DPHHS. He retired from DPHHS in 2009, but continued his second job at a retail store, where he was frequently required to lift up to 40 pounds and occasionally required to lift up to 100 pounds. His back pain worsened, but Respondent denied further liability for his condition in 2014, relying on Petitioner's treating physician's opinion that his low back was aggravated by lifting at the retail store. Petitioner resigned from the retail store in 2015, claiming that he could no longer work, in part, because of his back condition. Petitioner seeks TTD or PTD benefits from the date he resigned, asserting that his back condition is a natural progression of his 1994 injury. Respondent asserts that it is not liable for TTD or PTD benefits because, inter alia, Petitioner's work at the retail store aggravated his low-back condition and he has not returned to baseline.

Held: Respondent is not liable for TTD or PTD benefits. Petitioner's asserted inability to work is not the result of a natural progression of his 1994 injury; rather, his work at the retail store aggravated his back condition and he has not returned to baseline.

AMUNDSEN v. ALBERTSONS COMPANIES, LLC

2019 MTWCC 3

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner worked at a grocery store that is located in a strip mall with a large parking lot shared by the mall's tenants. On his 15-minute break, Petitioner went to his car, which he had parked near one of the grocery store's cart corrals. While walking back to the store toward the end of his break, he fell and suffered an injury. Respondent denied liability on the grounds that Petitioner's injury did not arise out of and in the course of his employment, asserting that the parking lot was not part of the employer's worksite.

Held: The area of the parking lot where Petitioner sustained his injury was part of his employer's worksite, as the grocery store's employees regularly work in that part of the parking lot. Therefore, Petitioner's injury arose out of and within the course of his employment.

MONTANA CODE ANNOTATED 39-71-407(2)(a)

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 . . .

ASBESTOS CLAIMS

ATCHLEY v. LOUISIANA PACIFIC CORP.

2018 MTWCC 17

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: Petitioner seeks death benefits from Respondent, contending that her husband died from asbestos-related disease and that his last injurious exposure to Libby asbestos occurred in the course of his 9-year employment at Respondent's lumbermill, which was located approximately 2 miles outside of Libby. Respondent denied Petitioner's claim, contending that the decedent was not exposed to an injurious amount of Libby asbestos while working at its mill and did not develop asbestos-related disease as a result of working at its lumbermill.

Held: The decedent had an OD and was exposed to Libby asbestos in amounts greater than the Libby background level during his 9 years of employment at Respondent's lumbermill. Under the potentially causal standard of In re Mitchell, he suffered his last injurious exposure to asbestos at Respondent's lumbermill. The decedent's OD caused his death, and Respondent is therefore liable for death benefits.

Jon L. Heberling, Laurie Wallace, Dustin Leftridge, Ethan Welder
Todd A. Hammer, Benjamin J. Hammer

MONTANA CODE ANNOTATED § 39-72-303(1)

Which employer liable. (1) Where compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.

ROSLING (MCMILLAN) v. ASSOCIATED LOGGERS EXCHANGE

2019 MTWCC 5

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Summary: The decedent was exposed to Libby asbestos for most of his life and diagnosed with asbestos-related disease almost seven years before working for Respondent's insured. However, his condition was stable and he continued to work as a logger. After beginning to work for Respondent's insured, where he suffered a significant exposure to Libby asbestos, decedent's ARD significantly and rapidly worsened and he ultimately had to quit his job because he could no longer physically perform it. Prior to his death, he filed an OD claim, contending that his ARD was an OD and that he was last injuriously exposed to the hazard of his OD while employed at Respondent's insured. Respondent asserts that Petitioner did not timely file his claim. In the alternative, Respondent asserts that Petitioner's employment for its insured did not cause his OD.

Held: The decedent timely filed his claim. The decedent's ARD was an OD because his exposure to Libby asbestos during his lifetime of employment was the major contributing cause of his ARD and because his exposure while working for Respondent's insured was the major contributing cause of the rapid acceleration of his ARD, which resulted in his inability to work. Respondent is liable for Petitioner's OD because it was the insurer at risk at the time decedent was last injuriously exposed to Libby asbestos. Thus, Respondent is liable for OD benefits.

HUTT v. MARYLAND CASUALTY COMPANY

MT EIGHTH JUDICIAL DISTRICT DDV-18-175
MONTANA ASBESTOS CLAIMS COURT AC-17-694 – DECIDED 01/13/2019

BARNES, BRATTEN, FLORES, ET AL v. BNSF

MONTANA ASBESTOS CLAIMS COURT AC-17-694
MONTANA SUPREME COURT OP 19-0085; OP 19-0088

NATIONAL INDEMNITY COMPANY v. STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT XDDV 2012-140
MONTANA SUPREME COURT

MONTANA SUPREME COURT DECISIONS

MOREAU v. TRANSPORTATION INSURANCE COMPANY

2018 MT 1

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

WCC 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.

SC Held: **Affirmed.**

Allan M. McGarvey, Ethan Welder, Laurie Wallace
Todd A. Hammer
Bradley J. Luck, Jeffrey B. Smith

MONTANA STATE FUND v. LIBERTY NORTHWEST INS. CORP. v. WIARD
2018 MT 188

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

WCC 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.

SC Held: **Reversed.**

MONTANA CODE ANNOTATED § 39-71-407:

What the Supreme Court looked at here was whether § 39-71-407(13) or (14), MCA, applied. These provisions state:

> (13) When compensation is payable for an occupational disease, the only employer liable is the employer in whose employment the employee was last injuriously exposed to the hazard of the disease.
>
> (14) 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

2018 MT 54

Summary: 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.

WCC 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.

SC Held: **Reversed and Remanded.**

RESOURCES

- A Brief History of Workers' Compensation by Gregory P. Guyton (Iowa Orthopaedic Journal, Vo. 19: 106-110 (1999))
- The Montana Workers' Compensation Act and the Applicability of the Exclusive Remedy Rule by Eddye McClure, Staff Attorney, February 2000.
- Workers' Compensation History: The Great Tradeoff! by Christopher J. Boggs (March 19, 2015)
- Wikipedia
- U.S. Department of Labor – Bureau of Labor Statistics
- Montana Department of Labor and Industry

CASE LAW REVIEW