Judge Sandler's Top Hits

Speaker: Steve Carey

Governor's Conference on Workers' Compensation

2023

Impairment Rating History

Impairment was first defined in the 1981 law as an anatomic or functional abnormality or loss of bodily function – It was purely a medical determination.

Holton vs. F.H. Stoltze Land & Lumber Company, also in 1981, held that impairment ratings were payable immediately, regardless of any ultimate award.

1987 – PPD awards were split into two separate benefits:

1. Impairment awards
2. Wage supplement benefits

1991 – Montana's current structure for PPD awards was instituted, albeit with different percentages.

1995 – There was another narrowing of PPD benefits:

1. PPD disability benefits were available only if the worker had an impairment and an actual wage loss, but,
2. The Act allowed for payment of the impairment even if there was no wage loss.

2011 – The Legislature adopted the 6th Ed. of the AMA Guides and eliminated compensation for stand-alone Class I impairment ratings.

Constitutional Law, Benefits - Impairment Rating

Hensley v. Montana State Fund

2019 MTWCC 12

Ben A. Snipes, Ross T. Johnson | E. Kiel Duckworth | Matthew J. Murphy | Bradley J. Luck and Tessa A. Keller | Thomas E. Martello

Summary: Upon reaching MMI for her shoulder injury, Petitioner returned to work without an actual wage loss. She received a 4% whole person impairment rating, which is a Class 1 impairment under the AMA Guides, 6th Ed. Respondent did not pay her an impairment award because § 39-71-703(2), MCA (2011), does not provide for the payment of impairment awards if an injured worker's impairment is rated as a Class 1 impairment and the worker suffers no actual wage loss. Because this statute provides that an injured worker with a Class 2, 3, or 4 impairment without a wage loss has a right to an impairment award, Petitioner asserts it is facially unconstitutional under the equal protection clause in Mont. Const. art. II, § 4. Petitioner also asserts that by denying her a remedy for her permanent injury, § 39-71-703(2), MCA (2011), violates her right to due process under Mont. Const. art. II, § 17.

Held: Section 39-71-703(2), MCA (2011), is not facially unconstitutional under the equal protection clause because a claimant with a Class 1 impairment rating is not similarly situated to a claimant with a Class 2, 3, or 4 impairment rating due to the difference in the severity and frequency of their symptoms and functional limitations. And, nevertheless, there is a rational basis for treating these classes differently. This Court does not address Petitioner's due process claim because this Court cannot grant her the remedy she seeks, which is payment of an impairment award.

Class Ranges

Class 1: 1 percent to 15 percent

Class 2: 2 percent to 32 percent

Class 3: 4 percent to 65 percent

Class 4: 10 percent to 100 percent

Notice of Termination of Benefits - Coles Requirements Section 39-71-610 Benefits

National Union Fire Ins. Co. v. Rainey

2021 MTWCC 10

Paul D. Odegaard | Charlie K. Smith

Summary: An insurer appeals an order from the DLI awarding interim benefits under § 39-71-610, MCA. The insurer asserts that the claimant's treating physician gave him a full duty release and contends that it had the right to immediately terminate his TTD benefits without complying with § 39-71-609(2)(a)-(d), MCA, which are commonly called the "Coles criteria."

Held: The DLI correctly awarded interim benefits. As one of the insurer's adjusters noted, the full duty release generated by the treating physician's office was most likely a mistake because it could not be reconciled with the claimant's other medical records, which indicate that his physical restrictions preclude him from returning to his time-of-injury job. Moreover, even if the physician intended to release the claimant to work, a general release to work in some unknown job is insufficient grounds for an insurer to terminate TTD benefits under the first sentence of § 39-71-609(2), MCA. Montana law requires an insurer to have a physician approve a job analysis for an actual job that the claimant is physically able, and vocationally qualified, to perform. Finally, the insurer did not have grounds to terminate the claimant's TTD benefits under the first clause of the second sentence of § 39-71-609(2), MCA, because the Medical Status Form purporting to release him to full duty cannot reasonably be construed as the treating physician's determination that he had reached MMI, had fully recovered, and could return to his time-of-injury job.

Section 39-71-610 Benefits

1. Was liability for the claim accepted?

2. Were benefits paid, especially for a significant time period?

3. Has the claimant demonstrated he will suffer significant financial hardship if interim benefits are not ordered?

4. Has the claimant tendered a strong prima facie case for reinstatement? (The claimant must tender substantial evidence which if believed would entitle him or her to benefits.)

Section 39-71-609(2) Termination of Benefits

(2) Temporary total disability benefits may be terminated on the date that the worker has been released to return to work in some capacity. Unless the claimant is found, at maximum healing, to be without a permanent physical impairment from the injury, the insurer, prior to converting temporary total disability benefits or temporary partial disability benefits to permanent partial disability benefits:

(a) must have a physician's determination that the claimant has reached medical stability;

(b) must have a physician's determination of the claimant's physical restrictions resulting from the industrial injury;

(c) must have a physician's determination, based on the physician's knowledge of the claimant's job analysis prepared by a rehabilitation provider, that the claimant can return to work, with or without restrictions, on the job on which the claimant was injured or on another job for which the claimant is suited by age, education, work experience, and physical condition;

(d) shall give notice to the claimant of the insurer's receipt of the report of the physician's determinations required pursuant to subsections (2)(a) through (2)(c). The notice must be attached to a copy of the report.

Discovery - Work Product Privilege

Raines v. Technology Ins. Co. Inc.

2020 MTWCC 15

Thomas M. Murphy | Kelly M. Wills

Summary: Respondent seeks a protective order, asserting that its attorney's e-mails to the independent insurance agency from which Petitioner procured workers' compensation insurance for his business are protected by the work-product privilege. In the alternative, Respondent asserts that it should not have to produce its attorney's e-mails until after Petitioner's deposition.

Held: Respondent's attorney waived the work-product privilege by voluntarily disclosing his work product to the independent insurance agency. Respondent's attorney did not have a reasonable basis to believe that the independent insurance agency would keep the disclosed material confidential because the independent insurance agency has an overlapping relationship with Petitioner and Respondent. Moreover, because the independent insurance agency does not make any decisions in the adjusting of Petitioner's claim and cannot be liable for Petitioner's benefits, it is a disinterested third-party and does not share a common litigation interest with Respondent. Respondent does not have good cause to delay production of its attorney's e-mails until after Petitioner's deposition.

Sanctions Discovery - Surveillance

Meyer v. Church Mutual Ins. Co.

2021 MTWCC 14

Garry D. Seaman | Geoffrey R. Keller

Summary: Petitioner moves to exclude surveillance videos from evidence and to strike the portions of a physician's testimony regarding the videos because Respondent did not truthfully answer discovery asking about surveillance until after the physician's deposition. Respondent concedes that sanctions are appropriate but asserts that the appropriate sanction is to reopen the physician's deposition at its expense.

Held: This Court granted Petitioner's motion in full. The sanctions that Petitioner seeks are appropriate and proper to remedy the prejudice to her, to punish Respondent for its discovery abuses, and to deter other litigants from engaging in the same or similar discovery abuses. The sanctions are also commensurate to the sanctions this Court has assessed in similar circumstances.

Discovery - Motion to Compel Claims Files

Bowman v. Hartford Accident & Indemnity Co.

2021 MTWCC 9

Sydney E. McKenna and Justin Starin | William O. Bronson

Summary: Petitioner, who sustained an occupational disease in the course of her employment as a workers' compensation claims adjuster, moves to compel Respondent, a Plan II insurer, to produce her former employer's file on her claim. Petitioner asserts that the employer is actively involved in adjusting her claim from an office in Kentucky, in violation of Montana law, which requires that Montana claims be adjusted from an office in Montana. Respondent opposes Petitioner's Motion to Compel and has moved to quash the Subpoena Duces Tecum that Petitioner has served upon her former employer. Respondent argues that Petitioner's former employer has not been actively involved in adjusting her claim; instead, Respondent contends that the employer's role has been that of a payment clerk. Respondent also asks this Court to quash the subpoena to the extent it would require the employer to produce communications protected by the attorney-client and work-product privileges.

Held: Petitioner is entitled to her former employer's entire file because several documents from Respondent's claim file suggest that the employer is actively involved in adjusting Petitioner's claim and supervising and directing the Montana adjusters. Petitioner has the right to conduct discovery into the employer's role in the adjusting of her claim. Moreover, if the Montana adjusters disclosed communications from Respondent's attorney to the employer, then the attorney-client and work-product privileges have been waived under established Montana law.

Statute of Limitations Summary Judgement - Disability

Bryer v. Accident Fund General Ins. Co.

2021 MTWCC 13

Sydney E. McKenna, Justin Starin, and Steven S. Carey | Jon T. Dyre

Summary: Respondent argues that Petitioner filed her Petition for Hearing beyond the statute of limitations in § 39-71-2905(2), MCA, which states, “A petition for a hearing before the workers’ compensation judge must be filed within 2 years after benefits are denied.”

Held: The Court denied Respondent’s summary judgment motion. Section 39-71-602, MCA, states that no statute of limitations in the Workers’ Compensation Act runs “against any injured worker who is mentally incompetent and without a guardian.” Because the statute of limitations in § 39-71-2905(2), MCA, was tolled during the two and a half years that the worker was mentally incompetent and without a guardian, Petitioner timely filed her Petition for Hearing.

Section 39-71-602, MCA

39-71-602: **Statute of limitation not to apply during minority or mental incompetency unless guardian appointed**. No limitation of time as provided in 39-71-601 or in this chapter, known as the Workers' Compensation Act, shall run as against any injured worker who is mentally incompetent and without a guardian or an injured minor under 18 years of age who may be without a parent or guardian. A guardian in either case may be appointed by any court of competent jurisdiction, in which event the period of limitations as provided for in 39-71-601 shall begin to run on the date of appointment of such guardian or when such minor arrives at 18 years of age, whichever date is earlier.

Summary Judgement, Benefits, Penalties, Attorneys' Fees, Claims Files

Bryer v. Accident Fund General Ins. Co.

2022 MTWCC 8

Sydney E. McKenna, Justin Starin, and Steven S. Carey | Jon T. Dyre

Summary: Respondent denied liability for the employee's claim on the grounds that the cause of his cardiopulmonary arrest was unknown.

Held: The employee suffered compensable injuries. Petitioner carried her burden of proving that the employee was knocked over backwards when the safety valve on a gas cylinder burst and that he was knocked unconscious when the back of his head hit the concrete floor. Petitioner also carried her burden of proving that the employee then inhaled argon gas and that the resulting lack of oxygen in his lungs caused him to go into cardiopulmonary arrest, which caused several injuries, including a brain injury. The insurer's denial of liability was unreasonable because it did not conduct an adequate investigation before it denied liability.


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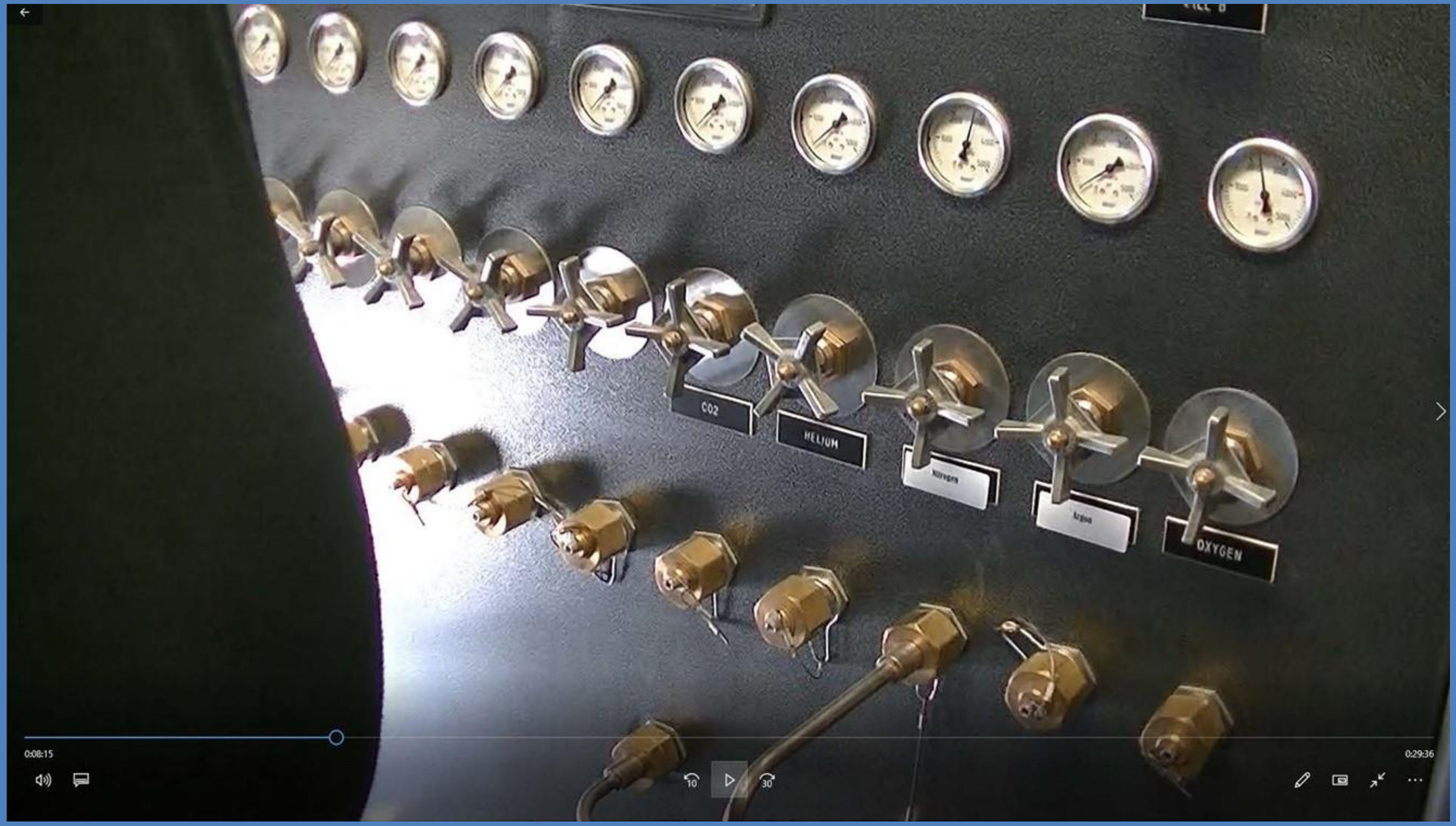
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Penalty Assessed for Unreasonable Claims Handling

1. The adjuster did not follow up on the lead that OSHA was investigating – the information could lead to the discovery of an unsafe condition.
2. The adjuster did not inquire about the safety valve blowing.
3. No witnesses were interviewed.
4. The failure to inform the physician that Johnny had been exposed to a gas was inexplicable.

Insurers have an affirmative duty to investigate and make an impartial evaluation of the evidence.

CLAIM FILE VIOLATIONS:

1. The insurer failed to keep the claim file together and provide it upon request.

Constitutional Law Summary Judgement - Subrogation

Hogan v. Federated Mutual Ins. Co.

2021 MTWCC 6

Lucas J. Foust | Leo S. Ward

Summary: Petitioner moves for summary judgment, asserting that Respondent does not have a right of subrogation against his third-party tort recovery as a matter of law because § 39-71-414, MCA (2017) — the statute governing a workers' compensation insurer's right of subrogation — is unconstitutional and "wholly void." Petitioner interprets § 39-71-414(1), MCA (2017), as allowing an insurer to immediately exercise its right of subrogation against a third-party tort recovery based on the amount of workers' compensation benefits "to be paid" in the future. He argues that this subsection violates his right to due process under Mont. Const. art. II, § 17, because there are too many variables and unknowns for this Court to make a finding of the amount of benefits "to be paid" in the future and because the subsection does not include any procedure by which a claimant could recoup the amount he pays to satisfy the insurer's subrogation lien if the insurer does not ultimately pay that amount of benefits. Petitioner argues that § 39-71-414(6)(a), MCA (2017), is unconstitutional under the second sentence of Mont. Const. art. II, § 16, because it allows a workers' compensation insurer to exercise its right of subrogation before the claimant is made whole. Petitioner also argues that § 39-71-414(6)(a), MCA (2017), violates his right to due process under Mont. Const. art. II, § 17, because it assigns the claimant the burden of proving that the workers' compensation insurer may not exercise its right of subrogation. Respondent asserts that this Court should not address Petitioner's constitutional challenges because they are not ripe and because there is an issue of material fact. In the alternative, Respondent argues that the statute is constitutional.

Held: This Court granted in part and denied in part Petitioner's Motion for Summary Judgment. Petitioner's constitutional challenges are ripe and there is no issue of material fact to the purely legal issues on which Petitioner moved for summary judgment. This Court did not reach the merits of Petitioner's argument that § 39-71-414(1), MCA (2017), is unconstitutional because, as interpreted by the Montana Supreme Court, this subsection does not give a workers' compensation insurer the right to immediately subrogate against a claimant's third-party tort recovery based on the amount of benefits "to be paid" in the future. The Montana Supreme Court has held in many cases that a workers' compensation insurer's right of subrogation is limited by the made whole doctrine, which provides that an insurer cannot exercise its right of subrogation until the claimant has been made whole for his entire loss and any costs of recovery in his third-party tort claim, including attorney fees. This Court ruled that § 39-71-414(6)(a), MCA (2017), is unconstitutional under Mont. Const. art. II, § 16, because its plain language allows an insurer to subrogate before the claimant has been made whole. However, contrary to Petitioner's position, the remedy is not a ruling that Respondent has no right of subrogation as a matter of law. Under established Montana law, Respondent has a right of subrogation under § 39-71-414(1), MCA (2017), and may exercise that right when Petitioner is made whole. This Court did not address the merits of Petitioner's argument that § 39-71-414(6)(a), MCA (2017), is unconstitutional because it assigns him the burden of proof because, having already ruled that this subsection is unconstitutional, this constitutional challenge is now moot.

Section 39-71-414(6)(a), MCA

The insurer is entitled to full subrogation rights under this section, unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages.

Article II, Section 16, Montana Constitution

The second sentence of Mont. Const. art. II, § 16, states:

"No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state."

Last Injurious Exposure - Asbestos

Atchley v. Louisiana Pacific Corporation

2018 MTWCC 17

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

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.

Section 39-72-303(1), MCA

Section 39-72-303(1), MCA, sets forth the last injurious exposure rule for cases in which the claimant is exposed to the hazards of an OD at multiple employers. It states, in relevant part:

> **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.

Atchley followed the *In re: Mitchell* standard: "Potentially causal."

Penalties, Course and Scope

Stevens v. Montana State Fund

2019 MTWCC 15

Thomas C. Bulman | Melissa Quale

Summary: Petitioner fell in the parking lot of the strip mall in which her employer leased a space. Respondent initially denied liability for Petitioner's severe concussion on the grounds that she was not in the course of her employment under the going and coming rule. Respondent relied upon evidence indicating that Petitioner fell before she started working and maintained that the premises rule – which provides that an employee is in the course of her employment when she is on her employer's premises a reasonable time before her shift – did not apply because the parking lot in which Petitioner fell was not part of the employer's premises because the employer leased its space, shared the parking lot with other businesses, and did not maintain it. Petitioner argued that she was in the course of her employment under the premises rule because the parking lot was part of her employer's premises under established Montana law. Alternatively, Petitioner argued that she was within the course of her employment because she had already started working when she fell. After the parties deposed witnesses, Respondent accepted liability on the grounds that the weight of the evidence showed that Petitioner had already started working when she fell. Petitioner now asserts that Respondent's initial denial was unreasonable and that she is therefore entitled to a penalty under § 39-71-2907, MCA.

Held: Respondent's initial denial was reasonable because the law of Montana was not clearly established at the time Respondent denied liability. While the established law of Montana provides that an employer-owned parking lot is part of the employer's premises, there is no case law addressing whether an employer's premises includes a parking lot that it leases, shares with other businesses, and does not maintain. Moreover, at the time Respondent denied liability, there were legitimate issues of material fact as to whether Petitioner fell immediately before or after she began working.

Three Ways in Which an Insurer's Denial Could Be Found Unreasonable

1. When it denies liability on the facts, but there are no legitimate factual disputes.

2. If the insurer denies liability on the law notwithstanding that a Court of competent jurisdiction has already decided the matter.

3. An insurer is unreasonable if it denies liability without conducting an adequate investigation.

Course and Scope, Penalty, Going ang Coming Rule

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

2016 MTWCC 2

Daniel Buckley | Leo Ward, Morgan 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."

Section 39-71-407(a), MCA (2009)

Under the “going and coming” rule, an employee traveling to and from work is not within the course and scope of employment. The two exceptions are set forth in § 39-71-407(3)(a), MCA, as follows:

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 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.

Section 39-71-407(3)(b), MCA (2009)

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.

Summary Judgment - Falls

Dargin v. XL Insurance of America

2020 MTWCC 9

Melinda A. Driscoll | Leo S. Ward

Summary: Respondent moves for summary judgment, asserting that Petitioner's alleged injury did not arise out of her employment. Although there is no direct evidence as to what occurred during the work shift in which Petitioner alleges that she suffered an industrial injury, Respondent asserts that Petitioner must have had an idiopathic fall onto a level surface, which does not arise out of employment under Montana law. Petitioner asserts that there is an issue of fact as to whether she suffered an idiopathic fall or an unexplained fall.

Held: Respondent is not entitled to summary judgment because it did not meet its burden of establishing that there are no issues of material fact. There is an issue of fact as to whether Petitioner suffered an idiopathic fall onto a level surface.

Arising out of Employment

The requirement that an injury arise out of employment is different than the requirement that it arise in the course of employment. The Montana Supreme Court has explained, “The language ‘in the course of employment,’ generally refers to the time, place, and circumstances of an injury in relation to employment.” In contrast, “the words ‘out of’ ” in the phrase “arising out of employment” “point to the cause of the accident and are descriptive of the relationship between the injury and employment.” The Montana Supreme Court has also explained, “In general, if the claimant’s employment is one of the contributing causes which placed him in the path of harm and without which the injury would not have followed, the claimant is entitled to compensation.”

Larson's – Four Categories of Risk

1) Employment risks, which are directly tied to the employment itself;

2) Personal risks, which are personal or private to the particular employee;

3) Neutral risks, which are neither employment related nor personal;

4) Mixed risks, in which a personal cause and an employment cause combine to produce a harm.

Causation

Mize v. Montana State Fund

2020 MTWCC 7

Anthony F. Jackson, Monte D. Beck and Michael G. Black | Thomas E. Martello and Nick Mazanec

Summary: Petitioner seeks death benefits, asserting that her husband's industrial accident six days before his death was the primary cause of his pulmonary embolism. Respondent denied liability, asserting that Petitioner did not meet her burden of proving that her husband suffered an injury by objective medical findings. In the alternative, Respondent argues that decedent's accident was not the primary cause of his pulmonary embolism.

Held: Petitioner is entitled to death benefits. Petitioner proved with objective medical findings and medical causation opinions that her husband's accident was the primary cause of his pulmonary embolism and resulting death, which is, by itself, an injury under the Workers' Compensation Act. However, because Respondent's denial of liability was reasonable, Petitioner is not entitled to attorney fees or a penalty.

Factors in Assessing Medical Opinions

(1) whether the opining physician reviewed the claimant's medical records before reaching his or her conclusions;

(2) in cases where actual examination of a claimant is important, whether the physician physically examined the claimant;

(3) the professed or obvious biases of the physician;

(4) the specific areas of expertise of the physician;

(5) peer reviewed articles authored by the physician, particularly in the subject area in which opinions are rendered;

(6) the physician's standing among peers in the specialized medical area involved in the opinions;

(7) the physician's specific analysis in the case;

(8) the physician's consideration and evaluation of other explanations for the claimant's condition;

(9) the accuracy of the facts upon which the physician's opinions are based; and

(10) medical and scientific literature brought to the Court's attention which tends to support or contradict the physician's conclusions.

Independent Medical Examination, Burden of Proof, Penalties

Floyd v. Zurich American Ins. Co. of IL.

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 to 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, Penalties

Berry v. Mid Century Insurance Company

2020 MTWCC 10

Miva VanEngen | Mark W. Buckwalter

Summary: Respondent accepted liability for Petitioner's lumbar-spine injury, which, based on an MRI, her then-treating physician diagnosed as "discogenic spinal pain." Then, using the false pretense that Petitioner was seeing a "specialist" for treatment, Respondent had Petitioner undergo an IME and then asserted that it was not liable for her lumbar-spine injury on the grounds that Petitioner did not actually suffer a lumbar-spine injury. Thereafter, Petitioner asserted that she suffered a separate hip injury in her industrial accident. After the first day of trial, Respondent re-accepted liability for Petitioner's lumbar-spine injury and accepted liability for her hip injury. Petitioner asserts that she is entitled to a penalty and her attorney fees.

Held: Respondent's denial of liability for Petitioner's lumbar-spine injury from July 22, 2017, to April 24, 2019, was unreasonable. Therefore, Petitioner is entitled to a 20% penalty on the medical benefits paid for her lumbar-spine injury during that period. However, Petitioner did not prove that Respondent unreasonably delayed acceptance of liability for her hip injury. Therefore, she is not entitled to a penalty on the medical benefits for her hip injury. Petitioner is not entitled to her attorney fees because this Court did not adjudicate the dispute over her medical benefits.

Independent Medical Examination, Physicians, MMI

Hagberg v. Ace American Insurance Company

2019 MTWCC 6

R. Russell Plath | Jeffrey B. Smith

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.

Aggravation of Pre-Existing Disease

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.

Section 39-71-116(17), MCA
Section 39-71-116(22), MCA

(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.”

Section 39-71-116(26), MCA

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

Maintaining MMI - *Hiett*

"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.

Prescription Pain Medication

"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.

Termination of Benefits

Russell v. Victory Insurance Co. Inc.

2023 MTWCC 1

Megan L. Miller | Joe C. Maynard

Summary: The parties cross moved for summary judgment on the issue of whether Respondent had grounds to terminate Petitioner's benefits for refusing to attend an appointment with her treating physician. Respondent asserts that Petitioner did not attend an appointment with the occupational medicine physician that it had designated as her treating physician under § 39-71-1101(2), MCA, which states, in relevant part, "Any time after acceptance of liability by an insurer, the insurer may designate or approve a treating physician who agrees to assume the responsibilities of the treating physician." Thus, Respondent argues that it had grounds to terminate Petitioner's benefits under § 39-71-1106(1), MCA, which states that an insurer may terminate benefits if an injured worker unreasonably refuses to cooperate with her treating physician. Inter alia, Petitioner argues that the occupational medicine physician did not become her treating physician under § 39-71-1101(2), MCA, because Respondent had not accepted liability for her claim at the time it attempted to designate him as her treating physician. Thus, Petitioner argues that she was not legally obligated to attend the appointment with the occupational medicine physician and, therefore, that Respondent did not have grounds under § 39-71-1106(1), MCA, to terminate her benefits for refusing to attend the appointment.

Held: Petitioner is entitled to partial summary judgment because Respondent did not have grounds to terminate her benefits under § 39-71-1106(1), MCA. Respondent had not accepted liability at the time it attempted to designate the occupational medicine physician as Petitioner's treating physician, nor at the time of the appointment Petitioner refused to attend. At that time, Respondent was paying benefits under a "reservation of rights," which it asserted allowed it to indefinitely pay benefits without accepting liability. Thus, when Respondent attempted to designate the occupational medicine physician as Petitioner's treating physician, it did not have the right to do so under the plain language of § 39-71-1101(2), MCA, and, therefore, the occupational medicine physician did not become her treating physician. Because the occupational medicine physician was not Petitioner's treating physician, she was under no obligation to attend the appointment Respondent scheduled for her. Therefore, Respondent did not have grounds under § 39-71-1106(1), MCA, to terminate her benefits for refusing to attend the appointment.

Thank you

FOR LISTENING!

Thank you

Judge Sandler