FAIR CLAIM
WORK COMP ATTORNEYS

EXHIBIT 4
DATE 1/11/13
HB 130

OUR FILE Legislation

January 11, 2013

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

Norman L. Newhall
Richard J. Martin
J. Kim Schulke
Stacy Tempel-St. John
Michele Reinhart Levine

Office Manager:
Tammy Turner

Paralegal Staff:
Dan Bennett
Brenda Bedenbender
Megan Miller
Keely Neuman
Wendy Fisher

120 – 1st Avenue North
P.O. Box 2629
Great Falls, MT 59403
(406) 453-4500
1-800-732-2451
(Montana Only)
Fax (406) 454-8000
www.FairClaimLawyers.com

Mr. Chairman Tom Berry
Members of the Montana House Business and Labor Committee

Re: Opposition to House Bill 130

Dear Chairman Berry and Member of the Committee:

I am an attorney with the law firm of Linnell, Newhall, Martin & Schulke, also known as FairClaim, in Great Falls. We represent injured workers in workers' compensation claims.

Our firm opposes House Bill 130 for two reasons. First, Section 9 of the Bill attempts to retroactively amend the Workers' Comp Act back 20 years to 1993. Second, it attempts to eliminate an award of attorney fees and penalties against the Uninsured Employers' Fund ("UEF") when it unreasonably denies benefits to an injured worker.

Improper Retroactive Application

To the extent these proposed retroactive amendments affect substantive rights of injured workers it is improper. The Montana Supreme Court, in ***C. Loney Concrete Construction, Inc. v. Employment Relations Division UEF***, 1998 MT 230, ¶ 18, 291 Mont. 41, 964 P.2d 777, in addressing application of a retroactive workers' compensation statute held:

> We have said that an inappropriate retroactive application of the law 'takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already passed.'" ...[w]e do not apply law retroactively if it will cause a different legal effect on a transaction than that under the law when the transaction occurred.

The Department has said these are merely procedural amendments that do not affect substantive rights. If that is the case then the statute should not need to be retroactive.

In particular, the proposed amendment contained in Section 3 of the Bill, which would amend §39-71-505, MCA, provides in (2)(e) and (i) that the provisions of the Work Comp Act that allow attorney fees and penalties (§§39-71-611,- 612 and- 2907) to

be awarded to an injured worker and against the insurer when the insurer has been unreasonable, would NOT apply to the UEF.

The right to obtain attorney fees and penalties are substantive rights that cannot be taken away by retroactive legislative amendment. Such action does not comply with the ***Loney*** case cited above.

Unwarranted Elimination of Attorney Fees and Penalties against the UEF

This Bill is being proposed because of a case I handled against the UEF before the Workers' Compensation Court. The case was *Ginger Dostal v. UEF.* We had two separate trials, each over different issues. After several days of testimony, the Workers' Compensation Court found that the UEF had acted unreasonably in adjusting Ms. Dostal's claim and awarded her all of the benefits she sought, plus attorney fees and a 20% penalty due to the UEF's repeated unreasonable denial of the injured worker's benefits including necessary medical treatment, travel to medical appointments, and denial of an impairment award for the worker's permanent physical impairment.

I want to describe for you some of the egregious conduct of the UEF's adjuster. First, some background about the case is necessary. Ginger Dostal worked as a roofer. In May of 1993, she lost her balance and fell off a roof, injuring several body parts including her neck, low back and ankles. Because her employer was uninsured, she filed a claim with the UEF. She received medical treatment over the years. She went back to work at another job but the injuries from this fall kept progressing. Her neck and ankle injuries were assessed in 2003 and it was determined that she had sustained permanent impairment to those body parts from the roofing accident and the doctor said her impairments for those conditions were 4%. An impairment finding is supposed to result in a payment to the injured worker but the UEF simply didn't pay it. At that time Ms. Dostal was not represented by counsel and she did not understand that she was to receive the payment for her permanent physical impairment.

Seven years later she hired our firm and we requested payment of the impairment awards. The UEF's adjuster refused to pay it claiming that Ms. Dostal could not receive the impairment award at the same time she was receiving temporary total disability benefits. The UEF based its argument on old cases and old statutes that were not even in effect at the time of Dostal's 1993 injury. Keep in mind that in workers compensation, the law in effect at the time of the injury controls the case. So, the UEF was relying upon the wrong law. The Workers' Comp Judge characterized the UEF's position as "wholly devoid of merit." The Court went on to state:

¶ 19 In addition to arguing that it was entitled to refuse to pay Dostal her impairment awards by relying on cases which interpreted previous versions of the applicable statute which conveniently omitted the very language which permitted the payment of an impairment award in cases such as Dostal's, the UEF argues that it was justified in refusing to pay Dostal's impairment awards because it believed that she may have returned to work while continuing to receive TTD benefits, thus potentially entitling the UEF to recoup an overpayment. However, Dostal received her impairment ratings in 2003; the UEF did not suspect that she may have returned to work until sometime in 2009 or 2010. The UEF has put forth no evidence to suggest that it possesses the powers of prognostication which allowed it to foretell that a justification for denying payment of an impairment award would manifest itself five years later. The UEF cannot refuse to pay otherwise payable benefits on the grounds that at some point in the future, a justifiable reason for refusing to pay those benefits may arise.

¶ 20 Since the UEF has offered no reasonable explanation for its refusal to pay Dostal's impairment awards for her right fibular fracture and cervical spine at the time Dr. Rosen made his assessment, I find the UEF's refusal to pay those awards to be unreasonable.

Another benefit that the Court found the UEF unreasonably refused was travel pay for Ms. Dostal's medical appointments. Ms. Dostal lives in Stanford where there was no medical care of the type she initially needed. Her orthopedic surgeon was in Billings. The UEF adjuster first told her they didn't pay travel, despite the fact that the statutes specifically provide for travel expenses. Later the adjuster changed her mind and offered various reasons why she could not pay it.

In his decision the Work Comp Judge stated: "the UEF's justification for its denial has been a moving target. I have found none of the UEF's arguments persuasive." The Court went on to discuss that the primary reason the UEF refused to pay travel was that it was again applying the wrong year of the Work Comp Act to the case. He ruled that applying the wrong year of the Act is not a reasonable error and the unreasonableness of the UEF's decision is not erased by its subsequent search for alternate justifications for the denial.

The UEF also refused to allow Ms. Dostal to see a pain management specialist. After undergoing a back surgery she began treating with Nurse Practitioner Rosemary Youderian in Stanford. When Ms. Dostal's pain continued Nurse Youderian recommended that she see a pain specialist but the UEF would not approve that.

Nurse Youderian continued to make pain management referrals in her medical notes, which were faxed to and reviewed by the UEF adjuster. The UEF adjuster said she did not approve the referral because Nurse Youderian did not fill out a request for authorization form. The UEF does not have such a form to provide, nor did the adjuster ever tell Nurse Youderian that she would not authorize the referral because the proper form was not submitted. The adjuster simply ignored the medical records. The UEF adjuster admitted there is no statute, administrative rule or written policy at the Department of Labor that requires a form to request for authorization for medical treatment. She

admitted that although she knew Nurse Youderian wanted to have Ms. Dostal seen by a pain management specialist, because a request for authorization form was not submitted she ignored the many requests contained in the medical record. Nurse Youderian testified she felt she had "hit a brick wall."

The UEF adjuster then admitted that there were some occasions where she approved a referral that was NOT on a special form, but she could not articulate why she approved those referrals and not others.

The Work Comp Judge stated: "It is patently absurd that, apparently, several of Nurse Youderian's requests for referral went unheeded because Youderian did not know that she was supposed to create a "Request for Authorization" form in addition to requesting the referral within the body of her treatment notes." The Court further noted that the UEF presented no plausible basis for denying the referral requested.

When the UEF adjuster acts in this way to deny medical treatment and other benefits in an accepted claim, such conduct is unreasonable. Sanctions in the form of attorney fees and penalties should be available to the Court to impose on the UEF. Otherwise, the UEF's power goes unchecked.

We acknowledge and appreciate that the Department has put into place some measures to curb the unreasonable actions of its adjuster. But such actions will not necessarily correct all of the poor adjusting. There is no accountability to anyone outside the Department. Further, insurance companies also have these types of measures in place and their conduct is still deemed to be unreasonable from time to time. Insurers are subject to attorney fees and penalties in those cases and the UEF should similarly be held accountable.

The Department contends that the UEF is a safety net for workers who are injured while working for an uninsured employer and the Fund should not be depleted by the payment of attorney fees and penalties. In fact, when the UEF is allowed to deny benefits without reason, it is not acting as a safety net but rather as an arbitrary tribunal with no check on its power. Further, penalty and fees are rarely awarded and then only in particularly egregious cases, so preserving this sanction against the UEF will not deplete the Fund.

My final point is that allowing attorney fees and penalties to be awarded against an insurance company but not against the UEF is a denial of equal protection under the law and such proposed legislation is therefore unconstitutional.

No legitimate governmental interest can be served by allowing the UEF to treat claimants unreasonably. There must be some check on the UEF's conduct. If this Bill is passed, then there would be no check on the UEF's unreasonable claims handling practices.

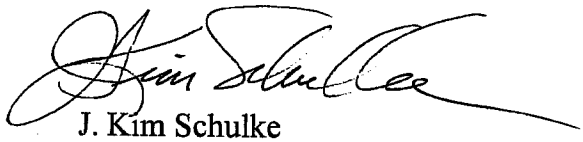
The only justification for providing that the UEF is not subject to fees and penalties is that it will preserve the Fund. This is not sufficient justification. As stated, if the UEF is unreasonably denying

benefits, it is not acting as a safety net for employees of uninsured employers. Further, in ***Henry v. State Fund***, 1999 MT 126, ¶40, the Montana Supreme Court held that cost-control along cannot justify disparate treatment that violates an individual's right to equal protection. Discrimination, that is, offering benefit to some while excluding others for any arbitrary reason, will always result in lower costs. The Court further held: "We do not allow discrimination merely for the sake of fiscal health." ***Id.***

Thus, there is no legitimate governmental interest in precluding penalty and fees against the UEF when it engages in egregious claims adjusting against injured workers. To the extent that House Bill 130 allows that, the proposed statutes are an unconstitutional denial of equal protection to injured workers of uninsured employers.

I have provided the Committee with copies of the relevant decisions of the Workers' Compensation Court in the Dostal case. I apologize for not making the trip to Helena this morning but the winter storm prevented safe travel. I am certainly available to answer any questions by phone or email. Thank you for your consideration of the foregoing.

Sincerely,



J. Kim Schulke
kschulke@lnms.net
(406) 454-5804

JKS/

MCA 39-71-611

39-71-611. Costs and attorney fees payable on denial of claim or termination of benefits later found compensable— barring of attorney fees under common fund and other doctrines

(1) The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
(a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
(b) the claim is later adjudged compensable by the workers' compensation court; and
(c) in the case of attorney fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.
(2) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.
(3) Attorney fees may be awarded only under the provisions of subsection (1) and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity.

Credits
Enacted by Laws 1973, ch. 477, § 2. Amended by Laws 1974, ch. 173, § 2; Revised Code of Montana 1947, 92-616(part); amended by Laws 1979, ch. 63, § 2; amended by Laws 1987, ch. 464, § 16; amended by Laws 2003, ch. 464, § 2.

MCA 39-71-612

39-71-612. Costs and attorney fees that may be assessed against insurer by workers' compensation judge— barring of attorney fees under common fund or other doctrines

(1) If an insurer pays or submits a written offer of payment of compensation under this chapter but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, reasonable attorney fees and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.
(2) An award of attorney fees under subsection (1) may be made only if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.
(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.
(4) Attorney fees may be awarded only under the provisions of subsections (1) and (2) and may not be awarded under the common fund doctrine or any other action or doctrine in law or equity.

Credits
Enacted 92-618 by Laws 1975, ch. 187, § 1; Revised Code of Montana 1947, 92-618. Amended by Laws 1985, ch. 575, § 1; amended by Laws 1987, ch. 464, § 17; amended by Laws 2003, ch. 464, § 3; amended by Laws 2005, ch. 416, § 25.

MCA 39-71-2907

39-71-2907. Increase in award for unreasonable delay or refusal to pay

(1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:
(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or
(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.
(2) The question of unreasonable delay or refusal shall be determined by the workers' compensation judge, and such a finding constitutes good cause to rescind, alter, or amend any order, decision, or award previously made in the cause for the purpose of making the increase provided herein.
(3) A finding of unreasonableness under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18.

Credits
Enacted 92-849 by Laws 1975, ch. 537, § 3; Revised Code of Montana 1947, 92-849. Amended by Laws 1979, ch. 63, § 5; amended by Laws 1987, ch. 464, § 61; amended by Laws 1991, ch. 174, § 1.

RECEIVED
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S Y C N A P
Date

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 40

WCC No. 2010-2598

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

FILED
NOV - 5 2012
OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION AND FINDING RESPONDENT'S REFUSAL TO PAY PETITIONER'S IMPAIRMENT AWARDS UNREASONABLE

Summary: Respondent moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, contending that the Court erred in failing to make findings and conclusions consistent with its previous oral ruling regarding Petitioner's entitlement to payment of her impairment awards. Petitioner concurred in Respondent's request and further asked the Court to make findings regarding whether Respondent unreasonably refused to pay her impairment awards.

Held: Respondent's motion for reconsideration is well-taken. The Court overlooked its previous ruling regarding Petitioner's impairment awards when it published its Findings of Fact, Conclusions of Law and Judgment, and the parties are entitled to a written order setting forth the Court's rationale. The Court's findings and conclusions regarding its oral ruling are set forth. Furthermore, the Court found Respondent's refusal to pay Petitioner's impairment awards to be unreasonable.

¶ 1 On February 16, 2012, I entered my Findings of Fact, Conclusions of Law and Judgment in this matter.[1] On February 24, 2012, Respondent Uninsured Employers' Fund (UEF) moved for reconsideration. The UEF noted that in my Conclusions of Law, I did not make findings of fact and conclusions of law setting forth my reasoning for a previous oral ruling I made in which I held that Petitioner Ginger Dostal was entitled to payment for impairment ratings she received for a right fibular fracture (3%) and cervical

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[1] *Dostal v. Uninsured Employers' Fund*, 2012 MTWCC 5.

DOCKET ITEM NO 97

spine (1%).[2] In moving for reconsideration, the UEF draws the Court's attention to an earlier proceeding in which I granted Dostal summary judgment on the issue of payment of these impairment awards.[3] The UEF notes that while I reiterated the ruling in my conclusions of law, I did not set forth any findings or rationale for the holding. The UEF asks that I make findings and provide my rationale for the ruling in order to maintain a clean record.[4]

¶ 2 Dostal responded to the UEF's motion for reconsideration, stating that she agrees that the Court should have included its rationale for awarding her payment of her impairment awards in the decision.[5] Dostal summarized my April 12, 2011, oral ruling as follows:

> [T]he Court held that Petitioner was entitled to impairment awards for the right fibula fracture and cervical spine injury since it is uncontroverted that she was at MMI as of January 21, 2003, when Dr. Rosen determined the impairments. The Court reasoned that, despite UEF's argument to the contrary, § 39-71-737, MCA (1991)[,] allows impairment awards to be paid concurrently with other classes of benefits. The Court reserved ruling upon whether the UEF was required to ***pay*** the impairments until it determined whether Petitioner had been overpaid TTD benefits.[6]

¶ 3 Dostal further asks the Court to find that the UEF was unreasonable when it refused to pay her impairment awards in 2003. Dostal notes that the issue regarding an alleged overpayment of her TTD benefits did not arise until 2010 – approximately seven years after the UEF refused to pay her impairment awards.[7]

¶ 4 I advised the parties that I intended to grant the UEF's motion for reconsideration but reserve ruling on the reasonableness issue until I heard oral argument on the issue

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[2] Uninsured Employers' Fund's Motion for Reconsideration Regarding Payment of Impairment Awards (Motion for Reconsideration), Docket Item No. 91, at 2. Except as otherwise noted, all references to impairment ratings or impairment awards within this Order refer to Dostal's 3% impairment rating for a right fibular fracture and 1% impairment rating for her cervical condition.

[3] Motion for Reconsideration at 2; *See* Minute Book Hearing No. 4263, Docket Item No. 64.

[4] Motion for Reconsideration at 2.

[5] Petitioner's Memorandum Regarding UEF's Motion for Reconsideration (Petitioner's Memorandum), Docket Item No. 93.

[6] Petitioner's Memorandum at 1-2. (Emphasis in original.)

[7] Petitioner's Memorandum at 2.

of the UEF's liability for penalties and attorneys' fees.[8] Having heard those arguments, I will address the reasonableness issue within this Order.

Dostal's Entitlement to Impairment Awards

¶ 5 In her Petition for Trial, Dostal contended that on January 21, 2003, Dr. Bill Rosen assigned her a 3% impairment rating for her right fibular fracture and 1% for her cervical spine, but the UEF has not paid these impairment awards.[9]

¶ 6 The UEF admitted in part and denied in part Dostal's contention, alleging that the correct date of the report containing the impairment ratings at issue was January 6, 2003, and further stating:

> The UEF also contends that the full panel report assessed a 5% impairment for the lumbar spine, 3% impairment rating for the right fibular fracture, and a 1% impairment rating for the cervical spine in addition to impairments previously assessed, leaving a whole person impairment of 12%.
>
> . . . [T]he UEF denies that none of Petitioner's 12% impairment has ever been paid and contends that the UEF has paid Petitioner PPD for her 5% impairment for the lumbar spine and 3% impairment of her left ankle (sic). The UEF further contends that at the time of the January 2003 IME assessment, Petitioner was not at MMI for her low back and was receiving TTD, and therefore, the UEF could not tender payment for the remaining impairments of 3% for right fibular fracture and 1% for the cervical spine. The UEF also contends now that Petitioner has reached MMI, but owes the UEF an overpayment, payment of the remaining 4% impairment is not due until the court determines the overpayment based on Petitioner's actual return to work date.[10]

¶ 7 On January 10, 2011, Dostal moved for partial summary judgment on three issues, including her entitlement to payment of her impairment awards.[11] Noting the UEF's response to her petition, noted above, Dostal further set forth pertinent discovery responses as follows:

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[8] E-Mail Correspondence From Court to Counsel, Docket Item No. 95.

[9] Petition for Trial, Docket Item No. 1, at 3.

[10] Uninsured Employers' Fund's Response to Petition for Hearing, Docket Item No. 4, ¶¶ 12-13.

[11] Petitioner's Motion for Partial Summary Judgment and Memorandum in Support (Opening Brief), Docket Item No. 25.

DISCOVERY REQUEST NO. 112: State the factual and legal basis for your failure or refusal to pay at any time prior to 2010, the 1% impairment issued on or about January 21, 2003, by Dr. Bill Rosen relating to Petitioner's cervical spine.

UEF Supplemental Response: At the time of the January 21, 2003[,] impairment evaluation, Petitioner was not at MMI for all conditions related to her industrial injury and therefore, under section 39-71-703, MCA (1991)[,] she was not yet entitled to compensation for permanent partial disability.

DISCOVERY REQUEST NO. 113: State the factual and legal basis for your failure or refusal to pay at any time prior to 2010, the 3% impairment issued on or about January 21, 2003, by Dr. Bill Rosen relating to Petitioner's right fibular fracture.

UEF Supplemental Response: At the time of the January 21, 2003[,] impairment evaluation Petitioner was not at MMI for all conditions related to her industrial injury and therefore, under section 39-71-703, MCA (1991)[,] she was not yet entitled to compensation for permanent partial disability.[12]

¶ 8 Dostal asserts that the UEF has provided her with two separate justifications for its failure to pay her the two impairment awards at issue: first, that it could not pay her impairment awards because she was not at maximum medical improvement (MMI) for her low back and was receiving TTD benefits; and second, because she had returned to work and therefore owed the UEF some unknown amount of overpayment. With respect to the first justification, Dostal argues that the UEF's argument is unfounded because payment of her impairment awards concomitant with receiving TTD benefits was permitted under the applicable statute. Dostal cites to § 39-71-737, MCA (1991), which provides:

> Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period ***except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits***, and wage supplement and partial rehabilitation benefits may be paid concurrently.[13]

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[12] Opening Brief at 4.

[13] Emphasis added.

¶ 9 Dostal argues that the clear language of the statute obviates the UEF's contention that it could not pay her these impairment awards prior to her low back reaching MMI.[14] As to the UEF's second justification, Dostal points out that her impairment awards were payable in 2003, and the UEF did not come to believe that she may have been working until several years later, thus this was clearly not a justification for refusing to pay the impairment awards at the time Dr. Rosen assigned her the ratings. Dostal further argues that nothing in the Workers' Compensation Act (WCA) would have allowed the UEF to withhold an impairment award because it believed it overpaid other benefits. To the contrary, Dostal argues, § 39-71-743, MCA (1991), provides that payments under the WCA shall not "be held liable in any way for debts" except for a few specific instances not applicable here.[15]

¶ 10 The UEF responded to Dostal's motion for partial summary judgment and cross-motioned on the same issues.[16] The UEF argued that Dostal's motion for partial summary judgment on her entitlement to payment of her impairment awards should be denied because material facts regarding this issue remain in dispute.[17] In particular, the UEF disagreed with Dostal's statement that she had not returned to work.[18] The UEF further contended:

> The UEF disputes that section 39-71-737, MCA (1991)[,] supports that Petitioner was entitled to payment of an impairment award while concurrently receiving temporary total disability benefits. The UEF further disputes that section 39-71-743, MCA (1991)[,] supports that Petitioner is entitled to payment of an impairment award when there is a dispute as to whether Petitioner owes the UEF an overpayment.[19]

¶ 11 For purposes of resolving the issue of Dostal's entitlement to payment of her impairment awards for which she received a rating in 2003, it is immaterial whether she may or may not have returned to work several years later. Therefore, this disputed fact does not preclude summary judgment on this issue. As to the UEF's argument that facts are in dispute because the UEF and Dostal disagree as to the applicability of

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[14] Opening Brief at 6.

[15] Opening Brief at 6-7.

[16] Response to Petitioner's Motion for Partial Summary Judgment and Uninsured Employers' Fund's Cross Motion for Partial Summary Judgment and Brief in Support Thereof (Response Brief), Docket Item No. 28.

[17] Response Brief at 5.

[18] Response Brief at 2.

[19] Response Brief at 2.

certain statutes, the application of a statute is by definition a legal – not a factual – dispute; it is therefore not a bar to summary disposition of this issue.

¶ 12 The UEF argues that Dostal was not entitled to payment of her impairment awards at the time Dr. Rosen assigned ratings for her right fibula and cervical spine because she was not at MMI from her industrial injury. However, as I noted at the time of my oral ruling, the UEF presented no evidence to controvert Dr. Rosen's report in which he stated that Dostal was at MMI and assessed her impairment ratings for her right fibular fracture and cervical spine injury.[20] With no evidence to support its statement, I find the UEF has no basis for this allegation.

¶ 13 The UEF disagrees with Dostal's contention that § 39-71-737, MCA (1991), permits the payment of these impairment awards while Dostal continued to receive TTD benefits.[21] In support of its position, the UEF cites *Dosen v. E. Butte Copper Mining Co.*, in which the Montana Supreme Court specified that "classes of disability" under the statute consisted of temporary total, temporary partial, permanent total, and permanent partial disabilities, and held that benefits for these disabilities could not run concurrently under the applicable statutes.[22] The UEF alleges that while *Dosen* "is old, it has not been overturned," and therefore the UEF argues that this Court should rely on *Dosen* and deny Dostal's request for payment of her impairment awards while she continues to receive TTD benefits for other injuries.[23] The UEF further argues that in *Grimshaw v. L. Peter Larson Co.*, the Montana Supreme Court held that § 39-71-737, MCA, prevents the concurrent payment of benefits under Part 7 of the WCA,[24] and that *Grimshaw* likewise supports its position.[25]

¶ 14 *Dosen* interpreted Section 2919, 1925 Mont. Laws 210, which states, in pertinent part:

> Compensation other than medical, surgical, hospital and burial benefits provided shall run consecutively and not concurrently and payment shall not be made for two classes of disability over the same period.

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[20] *See* Minute Book Hearing No. 4263.

[21] Response Brief at 5-6.

[22] *Dosen*, 78 Mont. 579, 600-602, 254 P. 880, 886-87 (1927) (*overruled on other grounds by Small v. Combustion Eng'g*, 209 Mont. 387, 681 P.2d 1081 (1984)).

[23] Response Brief at 5-6.

[24] *Grimshaw*, 213 Mont. 291, 691 P.2d 805 (1984).

[25] Response Brief at 5-6.

¶ 15 *Grimshaw* interpreted § 39-71-737, MCA (1979), which states: "Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period."

¶ 16 Dostal's claim, however, falls under § 39-71-737, MCA (1991), which states:

> Compensation shall run consecutively and not concurrently, and payment shall not be made for two classes of disability over the same period ***except that impairment awards and auxiliary rehabilitation benefits may be paid concurrently with other classes of benefits, and wage supplement and partial rehabilitation benefits may be paid concurrently.***[26]

¶ 17 The UEF's argument that *Dosen* and *Grimshaw* – which interpret a predecessor to, and a previous version of, § 39-71-737, MCA, respectively – should control the present case when the statute at issue was amended to permit exactly the situation here is wholly devoid of merit. I therefore conclude Dostal is entitled to payment of her impairment awards, consistent with my ruling in 2012 MTWCC 5.[27]

Whether the UEF's Refusal to Pay Dostal's Impairment Awards Was Unreasonable

¶ 18 While I have concluded the UEF is liable for payment of the impairment awards Dostal received for her right fibular fracture and cervical spine, Dostal further asks the Court to find that the UEF's refusal to pay the awards was unreasonable.

¶ 19 In addition to arguing that it was entitled to refuse to pay Dostal her impairment awards by relying on cases which interpreted previous versions of the applicable statute which conveniently omitted the very language which permitted the payment of an impairment award in cases such as Dostal's, the UEF argues that it was justified in refusing to pay Dostal's impairment awards because it believed that she may have returned to work while continuing to receive TTD benefits, thus potentially entitling the UEF to recoup an overpayment. However, Dostal received her impairment ratings in 2003; the UEF did not suspect that she may have returned to work until sometime in 2009 or 2010. The UEF has put forth no evidence to suggest that it possesses the powers of prognostication which allowed it to foretell that a justification for denying payment of an impairment award would manifest itself five years later. The UEF cannot

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[26] Emphasis added.

[27] I resolved the issue of Dostal's alleged overpayment of TTD benefits in that decision, ¶ 51-57, and therefore do not address the parties' arguments regarding § 39-71-743, MCA.

refuse to pay otherwise payable benefits on the grounds that at some point in the future, a justifiable reason for refusing to pay those benefits may arise.

¶ 20 Since the UEF has offered no reasonable explanation for its refusal to pay Dostal's impairment awards for her right fibular fracture and cervical spine at the time Dr. Rosen made his assessment, I find the UEF's refusal to pay those awards to be unreasonable.

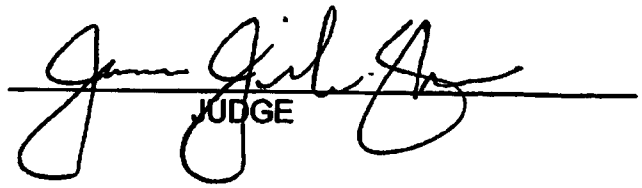
JUDGMENT

¶ 21 Respondent's motion for reconsideration is **GRANTED**.

¶ 22 Respondent's refusal to pay Petitioner's impairment awards was unreasonable.

DATED in Helena, Montana, this 5th day of November, 2012.

(SEAL)



JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: February 28, 2012

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Date

D026-01
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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 41

WCC No. 2010-2598

GINGER DOSTAL

Petitioner

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

FILED
NOV - 5 2012
OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION AND GRANTING RESPONDENT'S MOTION TO STRIKE

Summary: Petitioner moved for reconsideration of the Court's Findings of Fact, Conclusions of Law and Judgment, contending that the Court erred in refusing to grant her relief on an issue presented for determination where the Court had previously orally ruled and indicated that it would set forth the ruling in its written findings of fact, conclusions of law, and judgment. Respondent, while disagreeing with the Court's oral ruling, agreed with Petitioner that the Court should grant reconsideration and set forth its rationale for the oral ruling. Respondent moved to strike Petitioner's reply brief on the grounds that a reply brief is not permitted under ARM 24.5.337.

Held: Petitioner's motion for reconsideration is well-taken. The Court overlooked its previous ruling on the issue when it published its Findings of Fact, Conclusions of Law and Judgment, and the parties are entitled to a written order setting forth the Court's rationale. Respondent's motion to strike Petitioner's reply brief is also well taken and is consistent with this Court's previous rulings.

¶ 1 On February 16, 2012, I entered my Findings of Fact, Conclusions of Law and Judgment in this matter.[1] On February 24, 2012, Petitioner Ginger Dostal moved for reconsideration. Dostal noted that in my Conclusions of Law, I refused to consider her argument that Respondent Uninsured Employers' Fund (UEF) unreasonably denied reimbursement of certain travel expenses on the grounds that Dostal's entitlement to

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[1] *Dostal v. Uninsured Employers' Fund*, 2012 MTWCC 5.

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reimbursement of travel expenses was not before the Court.[2] In moving for reconsideration, Dostal draws the Court's attention to an earlier proceeding in which I granted Dostal summary judgment on the issue of travel reimbursement.[3]

¶ 2 The UEF responded to Dostal's motion for reconsideration, stating that while it disagrees with the Court's previous grant of summary judgment, it nonetheless agrees with Dostal's position that the Court should have included its rationale in the decision.[4] The UEF further contends that insufficient evidence supports a finding that the UEF acted unreasonably regarding travel pay. The UEF argues that it followed the applicable statute and administrative rule when it determined that Dostal was not entitled to travel pay reimbursement.

¶ 3 Dostal filed a reply brief on February 28, 2012.[5] The UEF moved to strike this brief, arguing that this Court has previously held that ARM 24.5.337 does not allow for the filing of a reply brief.[6] The UEF's motion to strike is well-taken and I therefore do not consider Dostal's reply brief in resolving her motion for reconsideration.

¶ 4 On April 12, 2011, I orally ruled that Dostal was entitled to the travel expenses she claimed.[7] The issue remains as to whether the UEF's denial of certain travel expenses is unreasonable as Dostal contends. In this Order, I will first set forth my rationale for my oral ruling granting Dostal's request for travel expenses and I will then address whether the UEF's denial of these expenses was reasonable.

Dostal's Entitlement to Reimbursement of Travel Expenses

¶ 5 In her Petition for Trial, Dostal represented that on March 15, 2010, she submitted a demand for travel expenses to the UEF which the UEF had not paid. The dates of travel ranged from August 5, 2004, through February 1, 2010, and the total

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[2] *Dostal*, ¶ 59.

[3] Petitioner's Motion for Reconsideration Regarding Travel Pay Issues and Memorandum in Support, Docket Item No. 89 (*citing* Minute Book Hearing No. 4263, Docket Item No. 64).

[4] Uninsured Employers' Fund's Response to Petitioner's Motion for Reconsideration, Docket Item No. 90.

[5] Petitioner's Reply Memorandum in Support of Motion for Reconsideration Regarding Travel Pay Issues, Docket Item No. 92.

[6] Uninsured Employers' Fund's Rule 12(f) Motion to Strike Petitioner's Reply Memorandum in Support of Petitioner's Motion for Reconsideration Re: Travel Pay, Docket Item No. 94 (*citing Fleming v. Int'l Paper Co.*, 2005 MTWCC 57, ¶ 2).

[7] Minute Book Hearing No. 4263.

claimed amounted to $2,796.25.[8] Dostal contended that the UEF's refusal to pay these travel expenses was unreasonable.[9] She asked the Court to order the UEF to pay these benefits and to conclude that she is entitled to her costs, attorney fees, and a penalty against the UEF.[10]

¶ 6 The UEF admitted that it denied Dostal's March 15, 2010, demand for reimbursement of travel expenses. The UEF contended that on April 22, 2010, a Department mediator issued an order dismissing Dostal's complaint, and that Dostal failed to timely appeal the order within the statutory time period of § 39-71-520(2), MCA.[11] The UEF contended that this Court lacks subject matter jurisdiction over the issue of travel expense reimbursement since Dostal neither appealed the mediator determination of January 2, 2009, nor the mediator's order of dismissal of April 22, 2010, within 60 days as required by § 39-71-520(2), MCA.[12]

¶ 7 On November 26, 2010, the UEF filed a motion for partial summary judgment.[13] On November 30, 2010, the UEF filed an amended motion for partial summary judgment.[14] Pertinent to the present Order, the UEF sought summary judgment on the issue of Dostal's entitlement to travel expense reimbursement. The UEF argued that Dostal's failure to timely appeal the determination and order of dismissal of the mediator pursuant to § 39-71-520(2), MCA, made the UEF's denial final.[15] The UEF conceded that § 39-71-520, MCA, did not exist at the time of Dostal's injury. However, the UEF argued that § 39-71-520, MCA, is nonetheless applicable because the statute is procedural.[16].

¶ 8 Dostal responded that the UEF is mistaken in relying on the current version of § 39-71-520, MCA. Relying on *Fleming v. Int'l Paper Co.*,[17] Dostal argues that the 1991

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[8] Petition for Trial, Docket Item No. 1, at 6.

[9] Petition for Trial at 6-7.

[10] Petition for Trial at 8.

[11] Uninsured Employers' Fund's Response to Petition for Hearing, Docket Item No. 4, ¶¶ 27, 28.

[12] *Id.* ¶ 41.

[13] Uninsured Employers' Fund's Motion for Partial Summary Judgment and Brief in Support Thereof, Docket Item No. 5.

[14] Uninsured Employers' Fund's Amended Motion for Partial Summary Judgment and Brief in Support Thereof (Summary Judgment), Docket Item No. 7. (Submitted per Order of the Court for failure to include page numbers and footers in initial submission.)

[15] Summary Judgment at 3.

[16] Summary Judgment at 3-4.

[17] *Fleming*, 2008 MT 327, ¶¶ 26, 28, 346 Mont. 141, 194 P.3d 77.

statutes apply to her claim because that law was in effect at the time of her industrial injury.[18]

¶ 9 On December 22, 2010, I denied the UEF's motion for partial summary judgment. In that Order, I held that *Fleming* "is unambiguous, and [is] unambiguously applicable to the present case."[19]

¶ 10 On January 10, 2011, Dostal moved for partial summary judgment. Among other issues, Dostal sought summary judgment in her favor on the travel pay issue.[20] Dostal contended that the UEF based its denial of her travel expenses request on the grounds that it should not have to pay travel expenses "when comparable medical treatment was available 'near where Petitioner resided at the time.'"[21] Dostal argued that the 1991 workers' compensation statutes do not contain any provision which would allow the UEF to deny reimbursement of these travel expenses.[22] Dostal argues that the statute applicable to her claim is § 39-71-704(1)(c), MCA (1991), which states, in pertinent part:

> (c) The insurer shall reimburse a worker for reasonable travel expenses incurred in travel to a medical provider for treatment of an injury pursuant to rules adopted by the department. . . .

¶ 11 Dostal argues that while later versions of § 39-71-704(1), MCA, provide that travel expenses are not allowed for travel outside the community in which the worker resides if comparable medical treatment is available within the community, the 1991 version of the statute does not contain this exception.[23] Dostal notes that in response to her discovery request that the UEF state the factual and legal bases for its failure to pay her travel expenses, the UEF responded that it denied these expenses because, "it was unreasonable to pay when comparable medical treatment was available near where Petitioner resided at the time. See Section 39-71-704(1)(c), MCA (1991)."[24] However, although the UEF claimed in its discovery response that it was relying on the 1991

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[18] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[19] *Dostal v. Uninsured Employers' Fund*, 2010 MTWCC 38, ¶ 21.

[20] Petitioner's Motion for Partial Summary Judgment and Memorandum in Support (Opening Brief), Docket Item No. 25.

[21] Opening Brief at 5.

[22] *Id.*

[23] Opening Brief at 6.

[24] Opening Brief at 2-3.

version of the statute, Dostal posits that the UEF must be relying on an inapplicable later version of the statute.[25]

¶ 12 The UEF denies that its only basis for denying Dostal's claim for travel expenses was because comparable medical treatment was available near where Dostal resided at the time. The UEF asserted that it also denied payment because Dostal did not timely request reimbursement as provided for in ARM 24.29.1409(2)(e),[26] which states:

> (2) For claims arising during the period July 1, 1989, through June 30, 1993, . . .
>
> . . . .
>
> (e) [c]laims for reimbursement of travel expenses must be submitted within 90 days of the date the expenses are incurred, on a form furnished by the insurer. Claims for reimbursement that are not submitted within 90 days may be denied by the insurer.

¶ 13 The UEF argues that under ARM 24.29.1409(2)(e), it properly denied Dostal's claims for travel reimbursement except for her claim of travel expenses for July 13, 2007, as that claim was timely made within 90 days of occurrence.[27] However, the UEF further argues that it correctly denied all the travel expenses at issue because § 39-71-704(1)(c), MCA (1991), provides that an insurer need only reimburse a worker for "reasonable" travel expenses, and that it was neither reasonable for Dostal to submit these expenses more than 90 days from the date they were incurred, nor were the expenses reasonable because comparable medical treatment was available to Dostal within the community in which she resided.[28]

¶ 14 In reply, Dostal argues that no comparable medical treatment was available to her in the community in which she resided, and that the travel expenses she incurred were for medically necessary treatment and, in one instance, to attend an impairment evaluation requested by the UEF.[29] Dostal further argues that the UEF is reading requirements into § 39-71-704, MCA (1991), and ARM 24.29.1409 which do not exist

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[25] Opening Brief at 6.

[26] Response to Petitioner's Motion for Partial Summary Judgment and Uninsured Employers' Fund's Cross Motion for Partial Summary Judgment and Brief in Support Thereof (Response Brief), Docket Item No. 28, at 2-3.

[27] Response Brief at 3-4.

[28] *Id.*

[29] Petitioner's Reply Memorandum in Support of Motion for Partial Summary Judgment and Answer Memorandum Opposing UEF's Cross Motion for Partial Summary Judgment (Reply Brief), Docket Item No. 38, at 2-3.

when it insists that travel is only reimbursed if no comparable care is available near where the claimant resides or in her community.[30]

¶ 15 Dostal further noted that the UEF, in its response brief to her motion, claimed for the first time that it did not pay Dostal's requested travel expenses because she did not request the reimbursement as set forth in ARM 24.29.1409. Dostal alleges that when she inquired of the UEF regarding its form for travel pay reimbursement, she was informed that the UEF had no form and that it did not pay travel expenses. Dostal later submitted travel reimbursement requests to the UEF using forms she obtained from Montana State Fund.[31]

¶ 16 Dostal acknowledges that the version of ARM 24.29.1409 which was in effect at the time of her industrial injury contained the 90-day time limit the UEF cites, although she further notes that the 1991 version of § 39-71-704, MCA, did not contain a 90-day time limit and the statute did not do so until 2001. Dostal argues that the time limitation found in the applicable version of ARM 24.29.1409 is invalid because an administrative rule cannot be more restrictive than the statutory language it implements.[32]

¶ 17 Dostal draws the Court's attention to three Montana Supreme Court decisions to support her position. In *Bell v. Dep't of Licensing*, the court invalidated an administrative rule which purported to set instructor requirements in order for a barber college to be approved by the applicable licensing board where the related statutes made no such requirements. Citing previous cases, the court set forth the following rule:

> [A]dministrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute" or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature.

In considering the challenge to the rule in *Bell*, the court concluded that while the rule did not contradict any statutes, it engrafted additional requirements which were not envisioned by the legislature. Therefore, the court held that the rule was void and unenforceable.[33]

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[30] Reply Brief at 4.

[31] *Id.*

[32] *Id.*

[33] *Bell*, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979). (Internal citations omitted.)

¶ 18 In *Michels v. Dep't of Soc. and Rehab. Serv.*, the court invalidated a rule which set a five-day time limit on applying for certain medical benefits where the enacting statute had no time limit. The court held that an administrative regulation which added a five-day time limit to an application for benefits "changes the statute" and it further held that the district court had erred in concluding that the five-day rule did not engraft an additional requirement on the statutory provision.[34]

¶ 19 Finally, in *McPhail v. Mont. Bd. of Psychologists*, the court held that a rule was "out of harmony" with its enacting statute and therefore invalid where the rule imposed an additional requirement for licensure which, the court noted, the legislature "chose not to impose" when it drafted the statute.[35]

¶ 20 The challenge Dostal makes to the validity of ARM 24.29.1409 is clearly in line with the cases she cites. Most pertinently, *Michels* dealt with a time limitation which was set forth in a rule but not in the enacting statute. In that case, the Montana Supreme Court held that adding a time limitation engrafts an additional requirement onto a statutory provision, thereby invalidating the rule. In the case of ARM 24.29.1409, if the legislature had envisioned a time limitation, it would have included it in § 39-71-704, MCA (1991). The fact that the legislature later added a time limitation to the 2001 version of the statute further demonstrates that when the legislature decided that a time limit should be included in the statute, it did so. I therefore conclude that the version of ARM 24.29.1409 which was in effect at the time of Dostal's industrial injury is invalid insofar as it attempts to change § 39-71-704, MCA (1991), by engrafting a time limitation upon it.

¶ 21 As to the UEF's argument that Dostal's requested travel reimbursement is not a "reasonable" reimbursement under the statute, the fact remains that the UEF authorized the treatment Dostal received for which she has requested travel expense reimbursement. Surely if the treatment itself was reasonable, then the travel necessary for obtaining this treatment was reasonably undertaken. I therefore conclude Dostal is entitled to the reimbursement of the travel expenses she seeks.

<u>Whether the UEF's Denial of Dostal's Travel Expenses Was Unreasonable</u>

¶ 22 While I have concluded the UEF is liable for payment of the travel expenses Dostal has claimed, Dostal further asks the Court to find that the UEF's denial of these expenses was unreasonable.

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[34] *Michels*, 187 Mont. 173, 177-78, 609 P.2d 271, 273-74 (1980).

[35] *McPhail*, 196 Mont. 514, 516-17, 640 P.2d 906, 907-08 (1982).

¶ 23 As Dostal has alluded to in her briefs, the UEF's justification for its denial has been a moving target. I have found none of the UEF's arguments persuasive. Although I can readily envision situations in which reasonable minds can differ on the applicability or interpretation of case law, such is not the situation in the present case. UEF's argument regarding the applicability of *Fleming* is neither a correct nor a reasonable interpretation of applicable case law.[36] Furthermore, there is no indication that the UEF offered any other bases for its denial of Dostal's request until after I denied its motion for summary judgment on this issue. Certainly, an insurer may have more than one basis for a denial, and an insurer is not necessarily expected to set forth each and every one of its potential justifications for denial at the time that it denies a claim. However, in the present case, the facts indicate that the sole reason for the UEF's denial of Dostal's requested travel reimbursement at the time that it denied Dostal's request was the UEF's reliance on the incorrect version of the Workers' Compensation Act. Given the unambiguity of *Fleming*, I found the UEF's defense in arguing that *Fleming* was somehow inapplicable in this particular instance to be a thin defense at best. Applying the wrong year of the Workers' Compensation Act is not a reasonable error, and the unreasonableness of the UEF's decision is not erased by its subsequent search for alternate justifications for the denial. I therefore conclude the UEF was unreasonable when it refused to reimburse Dostal for the travel expenses she incurred in obtaining her medical treatment.

JUDGMENT

¶ 24 Petitioner's motion for reconsideration is **GRANTED**.

¶ 25 Respondent's motion to strike is **GRANTED**.

DATED in Helena, Montana, this 5th day of November, 2012.

JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: February 24, 2012

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[36] *See Dostal*, 2010 MTWCC 38.

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 45

WCC No. 2011-2772

GINGER DOSTAL

Petitioner

FILED
DEC - 4 2012
OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

vs.

UNINSURED EMPLOYERS' FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner and Respondent disagree regarding what amount constitutes a reasonable fee to charge for photocopying certain documents. Respondent has also refused to authorize certain medical treatment, including referral to a specific orthopedist who performed previous surgeries on Petitioner's back; referral to a pain management specialist; and a lumbar spine MRI. Petitioner contends that Respondent has acted unreasonably in the adjustment of her claim, and argues that she should receive her attorney fees and a penalty.

Held: Based on the evidence presented, the Court concluded that the parties may reasonably charge each other 10 cents per page plus $25 per hour of labor for photocopying these documents. Petitioner is entitled to referral to the orthopedist she requested and is also entitled to referral to a pain management specialist. Petitioner is not entitled to a lumbar MRI. Respondent was unreasonable in refusing the referrals and Petitioner is entitled to her attorney fees and a penalty relative to those two issues.

¶ 1 The trial in this matter began on October 17, 2011, in Great Falls, Montana, and resumed and concluded on October 20, 2011, at the Workers' Compensation Court in Helena. Petitioner Ginger Dostal was present and was represented by J. Kim Schulke. Leanora O. Coles represented Respondent Uninsured Employers' Fund (UEF). Bernadette Rice, claims examiner for the UEF, also attended.

¶ 2 Exhibits: I admitted Exhibits 1 through 22 without objection. I overruled Petitioner's relevancy objections and admitted Exhibits 23 through 33. I excluded Exhibit 34. I admitted pages 1, 6, 7, and the top of page 2 of Exhibit 35. I excluded

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pages 3, 4, 5, and the bottom of page 2 of Exhibit 35. Pursuant to Petitioner's request, I took judicial notice of Exhibits 20 and 24 from a previous case involving these parties: WCC No. 2010-2598. Respondent offered a cleaner copy of Exhibit 4, page 20, which I admitted as Exhibit 4, page 20(a).

¶ 3 Witnesses and Depositions: The parties agreed that the depositions of Rosemary Youderian, FNP, Steve Davison, and Toni Broadbent can be considered part of the record. During trial, I took judicial notice of the March 16, 2011, deposition of Alan K. Dacre, taken in WCC No. 2010-2598. On October 17, 2011, Petitioner Ginger Dostal, Bernadette Rice, and Karla K. Kyweriga were sworn and testified at trial. On October 20, 2011, Rice was recalled and testified.

¶ 4 Issues Presented: The Pretrial Order sets forth the following issues:[1]

Issue One: Whether Respondent should have to reimburse Petitioner's counsel's firm for copying charges totaling $214.40.

Issue Two: Whether Petitioner's counsel must reimburse Respondent $1,012 for copy charges.

Issue Three: Whether Respondent should authorize an MRI of Petitioner's lumbar spine.

Issue Four: Whether Respondent should authorize a referral to Dr. Dacre.

Issue Five: Whether Respondent should authorize a referral to a pain management specialist.

Issue Six: Whether Respondent has acted unreasonably in its handling of Petitioner's claim such that Petitioner is entitled to attorney fees and penalties.

FINDINGS OF FACT

¶ 5 Dostal testified at trial. I found her to be a credible witness. Dostal resides in Stanford, Montana.[2]

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[1] Pretrial Order, Docket Item No. 30, at 9-10.

[2] Trial Test.

¶ 6 On May 24, 1993, Dostal suffered an industrial injury to her ankles and her back when she fell off a roof while performing her job duties as a roofer for Randy Crowley Construction in Harlowton, Montana.[3]

¶ 7 Dostal's employer was uninsured at the time of her industrial injury and therefore the UEF administers her claim. The UEF accepted liability and has paid medical benefits relating to Dostal's right foot and ankle, left ankle, and lumbosacral spine.[4]

The parties' disputes regarding Dostal's medical treatment

¶ 8 In August 2004, Dostal began treating with Alan K. Dacre, M.D.[5] Dr. Dacre has performed three surgeries on Dostal's back. He performed each surgery in Billings.[6] The first, an anterior lumbar interbody fusion, occurred on December 7, 2004.[7] However, Dr. Dacre regularly saw Dostal in Lewistown when he traveled there to see patients.[8]

¶ 9 On April 12, 2006, Dr. Dacre sent a letter to the patients he treated in Lewistown and stated that he would no longer conduct bimonthly clinics in Lewistown. Dr. Dacre explained that Gregory S. McDowell, M.D., would conduct monthly clinics in Lewistown and would be available to provide spine care. Dr. Dacre further stated that he would continue to treat patients who were able to travel to Billings for treatment.[9]

¶ 10 On July 18, 2006, Dr. Dacre performed a second surgery on Dostal's spine – a posterior spinal instrumented fusion with posterolateral decompression at L5-S1 – because of a non-union.[10]

¶ 11 On April 9, 2009, Dr. Dacre operated on Dostal for a third time to remove some of the hardware associated with her 2006 fusion surgery and to explore her lumbar fusion.[11]

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[3] Pretrial Order, Uncontested Facts, at 1.

[4] Pretrial Order, Uncontested Facts, at 1-2.

[5] Pretrial Order, Uncontested Facts, at 2; Trial Test.

[6] *Id.*

[7] Pretrial Order, Uncontested Facts, at 2; Ex. 3 at 33-35.

[8] Trial Test.

[9] Ex. 3 at 74.

[10] Pretrial Order, Uncontested Facts, at 2; Ex. 3 at 80-82.

[11] Pretrial Order, Uncontested Facts, at 2; Ex. 3 at 154-55.

¶ 12 In his deposition, Dr. Dacre testified that at some point, he and Dostal discussed the possibility of her treating with either Dr. McDowell or Steven Rizzolo, M.D., who were available for appointments closer to Stanford, but Dostal preferred to continue treating with Dr. Dacre.[12] Dr. Dacre added that it is not always easy to transfer a patient, and it is "generally frowned upon" to transfer a patient who is in the midst of treatment. He explained:

> So patients don't – number one, they've established a provider that they either get along with or feel is treating them appropriately, and it becomes very difficult for them to, number one, wish to switch.
>
> And number two, another physician may have a bit of a different plan. It may not always necessarily agree with what you've done. And it makes them hard to take – take the liability for that.
>
> . . . .
>
> [F]rom my perspective as a treating physician, I have initiated treatment; it's my duty to carry that through. . . .[13]

¶ 13 Dr. Dacre testified that it is appropriate practice for him to follow patients whom he has operated on and he would generally not transfer a patient to another physician, even one within his practice, barring extraordinary circumstances. He explained that the operating physician would have the best knowledge of the patient's condition.[14] Dr. Dacre further testified that patients in the midst of treatment are not generally transferred among surgeons.[15]

¶ 14 On February 1, 2010, Dr. Dacre found that Dostal had a solid fusion, but that she needed to continue using prescription medications. Dr. Dacre opined that Dostal could return to some form of work with a lifting restriction. Dr. Dacre recommended that Dostal follow up with her primary care physician for her prescriptions, but noted he would continue to see her on an as-needed basis.[16] At the time of trial, Dostal had not treated with Dr. Dacre since the February 1, 2010, appointment.[17]

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[12] Dacre Dep. 75:19 – 76:3.

[13] Dacre Dep. 76:19 – 77:15.

[14] Dacre Dep. 30:14 – 31:9.

[15] Dacre Dep. 70:2-13.

[16] Ex. 3 at 206.

[17] Trial Test.

¶ 15 On April 29, 2010, Dostal began to treat for her low back with Rosemary Youderian, FNP, a nurse practitioner who practices in Stanford.[18] Dostal testified that since she last saw Dr. Dacre in February 2010, her pain has increased and has spread from her low back down into her legs and higher into her back.[19] She has also experienced an increased burning sensation in her feet.[20] Dostal reported these symptoms to Youderian.[21]

¶ 16 In her deposition, Youderian testified that she asked William Holmes, M.D., to review Dostal's chart to help Youderian make some decisions regarding Dostal's care. On March 30, 2010, Dr. Holmes recommended that Youderian refer Dostal to a pain management specialist.[22] However, the UEF did not authorize the referral.[23]

¶ 17 On June 22, 2010, Youderian noted that Dostal reported increasing back pain. Dostal requested an MRI and Youderian noted that she would seek authorization for it. However, she later amended her medical note, stating:

> After reviewing the lumbar myelogram report from Billings dated 1-22-2009, it would be in her best interest to have Dr. Dacre re-evaluate before any imaging studies are ordered. We will try to get authorization for her to see Dr. Dacre again.[24]

¶ 18 Youderian believed Dostal's MRI request was appropriate because of her change in back pain.[25] However, Youderian testified that she did not believe she should order this test without having Dostal evaluated by someone with more expertise, so she recommended that Dostal return to Dr. Dacre.[26] Youderian further noted that in reviewing Dostal's medical records, she realized Dostal would need a myelogram rather than an MRI because Dostal has hardware in her back.[27]

¶ 19 On August 19, 2010, Youderian examined Dostal and found muscle spasm just above her surgical incision, limited lateral movement and twisting, and diminished

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[18] Youderian Dep. 6:9-14; Trial Test.

[19] Trial Test.

[20] Trial Test.

[21] Trial Test.

[22] Youderian Dep. 8:6-21.

[23] Youderian Dep. 9:12-14.

[24] Ex. 4 at 9.

[25] Youderian Dep. 14:10-20.

[26] Youderian Dep. 15:4-9.

[27] Youderian Dep. 15:1-6.

reflexes. Youderian noted, "I feel the best option would be to get her back to the orthopedic surgeon (Dr. Dacre) for a re-evaluation."[28]

¶ 20 Youderian also noted during the August 19, 2010, visit that Dostal was reporting worsening back pain.[29] Youderian observed evidence of muscle spasm and diminished DTRs, or deep tendon reflexes.[30] Youderian again suggested that Dostal return to Dr. Dacre for reevaluation.[31] Youderian sent a request for authorization to the UEF, but Rice denied the authorization.[32]

¶ 21 On August 23, 2010, Youderian sent a request for authorization to the UEF asking for authorization for a referral to Dr. Dacre to evaluate Dostal's back and neck pain. Rice denied the authorization the same day.[33]

¶ 22 On September 21, 2010, Youderian wrote a letter to Rice, which said:

> I am writing to request authorization for Ms. Ginger Dostal to be seen by Dr. Dacre or another orthopedic specialist for reevaluation of her back.
>
> Ms. Dostal has increased pain and disability, potentially related to instability and strain at the level above her fusion. Increased pain is resulting in decreased physical activity, decreased conditioning and co-morbid health conditions.
>
> Due to previous surgeries I recommend that she been [sic] seen by Dr. Dacre who will be able to most efficiently and economically evaluate her complaints and recommend treatment.
>
> Please grant this request so Ms. Dostal can receive appropriate care for her back injury.[34]

¶ 23 Youderian testified that she remains of the opinion she expressed to Rice in her September 21, 2010, letter: that Dr. Dacre is the best referral for Dostal due to his

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[28] Ex. 4 at 15.

[29] Youderian Dep. 16:13 – 17:7.

[30] Youderian Dep. 17:8-17.

[31] Youderian Dep. 17:21-24.

[32] Youderian Dep. 18:3-13.

[33] Ex. 4 at 16.

[34] Ex. 4 at 18.

previous experience in Dostal's case.[35] Youderian testified that the only reason Rice ever gave for refusing to authorize treatment with Dr. Dacre was that the UEF would not cover Dostal's mileage.[36]

¶ 24 On October 12, 2010, Youderian noted that she was again recommending to the UEF that Dostal begin physical therapy and receive a referral to an orthopedic or neurology specialist for an evaluation of her back pain.[37] On October 12, 2010, Rice approved a referral for one month of physical therapy.[38] On October 21, 2010, Youderian noted that she spoke with Rice and that Rice "will let us know when and where appointment is made for Ginger with orthopedic or neuro specialist. Their office is setting up that appointment."[39]

¶ 25 On February 18, 2011, Youderian wrote to Rice and explained that Dostal had been reporting increased back pain and that the best way to objectively assess her symptoms was "through certain imaging studies which have been denied." Youderian further stated that she was unable to assess the effectiveness of Dostal's medications because Dostal was only authorized for appointments every six months. Finally Youderian opined that a pain specialist might be the best solution to manage Dostal's condition and she asked Rice to respond "if that would be an acceptable solution to your concerns."[40]

¶ 26 Youderian testified that she wrote to Rice on February 18, 2011, and requested that Dostal receive authorization for a referral to a pain specialist because, "I was running into a brick wall in trying to get her to the orthopedic people. So a pain specialist was her next option."[41] Youderian testified that she was seeking a referral for Dostal because Dostal "continued to have pain that I didn't feel I was managing well for her."[42]

¶ 27 On May 2, 2011, a handwritten note in Youderian's medical records for Dostal states that Rice called to discuss a recent approval for laboratory testing, which Rice approved in writing. Rice informed Youderian's office that she would approve a referral

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[35] Youderian Dep. 19:8-18.

[36] Youderian Dep. 29:16-24.

[37] Ex. 4 at 20.

[38] Ex. 4 at 19.

[39] Ex. 4 at 20.

[40] Ex. 4 at 26.

[41] Youderian Dep. 23:6-21.

[42] Youderian Dep. 23:22-24.

to Dr. McDowell. The note further states, "Will not approve Dr. Dacre because will not cover mileage."[43]

¶ 28 Youderian testified that she repeatedly stated that Dostal needed more evaluation and treatment than Youderian could offer. Youderian testified that she felt like she made no progress in Dostal's care for a year, so she had been requesting follow-up care.[44] Youderian testified that her further treatment recommendation for Dostal is that Dostal be seen by a specialist.[45]

¶ 29 On August 24, 2011, Dostal's counsel wrote to the UEF and stated that Dostal was willing to see Dr. McDowell, noting, "The reason for this is that the UEF has denied her medical treatment with any other provider, including her treating medical provider, nurse Youdarian [sic] and her treating surgeon, Dr. Dacre."[46]

¶ 30 On September 6, 2011, Dostal's counsel repeated her request as the UEF had not responded to her August 24, 2011, letter.[47]

¶ 31 On September 20, 2011, the UEF indicated in a discovery response that the UEF had called Dr. McDowell's office on September 1, 2011, to schedule an appointment, had followed up with additional phone calls on September 6 and 8, 2011, and was still awaiting a response from Dr. McDowell's office.[48]

¶ 32 On September 27, 2011, the UEF informed Dostal's counsel that the UEF had set an appointment with Dr. McDowell for November 8, 2011.[49] Dostal testified that the UEF has denied her further treatment with Youderian.[50] Dostal testified that she agreed to attend an appointment with Dr. McDowell because that was the only treatment the UEF would authorize.[51]

¶ 33 Bernadette Rice testified at trial. I found her to be a credible witness. Rice has worked as a workers' compensation claims examiner for the UEF since 1993. Rice's job duties include adjudicating workers' compensation claims, authorizing indemnity

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[43] Ex. 4 at 30.

[44] Youderian Dep. 79:6-15.

[45] Youderian Dep. 80:4-5.

[46] Ex. 16.

[47] Ex. 17.

[48] Ex. 18.

[49] Ex. 19.

[50] Trial Test.

[51] Trial Test.

payments, and testifying in court. Rice determines whether the UEF accepts or denies a claim.[52]

¶ 34 Rice acknowledged that Dostal had a "long standing" relationship with Dr. Dacre, and that she treated with him for six years, including three surgeries.[53]

¶ 35 Rice testified that she authorized Dostal to treat with Youderian, but she did not authorize a referral to Dr. Malters or to a pain management specialist.[54] Rice testified that, although Youderian mentioned in her treatment notes that she wanted to refer Dostal to Dr. Dacre, Youderian never sent a request for authorization to the UEF, and therefore Rice did not grant or deny a referral.[55] However, Rice also testified that when she received Youderian's request for authorization for a referral to Dr. Dacre on August 23, 2010, she denied the request. Rice did not provide Youderian with a reason for her denial.[56]

¶ 36 Rice testified that on October 12, 2010, she received a request from Youderian to authorize referral to a physical therapist. Rice approved one month of physical therapy. However, Youderian's subsequent treatment notes indicate that Dostal's condition did not improve after physical therapy.[57]

¶ 37 Rice testified that her practice is to require a request for authorization in writing from a medical provider and she will then either approve or deny the authorization and fax the request back to the provider. Rice testified that if she reviewed a medical note where a provider referenced the need for a procedure, Rice would wait for a written request for authorization and would not treat the medical note as a request for authorization. Rice testified that she does not know of any doctors who do not send in requests for authorization.[58] Rice further testified that she does not recall ever having a situation where she has gotten a request for authorization from a medical provider that was not written on an authorization form, but she believes she would need to have a written request for authorization before she would consider authorizing a medical treatment.[59] Rice further testified that there is no statute which requires the UEF to only consider requests for authorization that are submitted in writing on a form to the UEF,

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[52] Trial Test.

[53] Trial Test.

[54] Trial Test.

[55] Trial Test.

[56] Trial Test.

[57] Trial Test.

[58] Trial Test.

[59] Trial Test.

and she is not aware of any administrative rule or written policy at the department or at the UEF that requires this. She further testified that the UEF does not have a written authorization form of its own.[60] Rice testified that if a medical provider sent a request for authorization in the form of a letter rather than on a form, she might consider that sufficient if the letter is specific enough in its request. However, the letter would need to come from the treatment provider; Rice testified that a letter from a claimant's attorney pointing out a referral for treatment in a provider's medical record would be insufficient for her to consider it as a request for authorization.[61]

¶ 38 Rice testified that on several occasions, she reviewed Youderian's medical notes and saw that Youderian believed Dostal should see an orthopedist. However, Rice did not act upon the recommendation because Youderian did not send in a form requesting authorization for the referral. Rice testified that, if the UEF discovers a recommendation in a treatment note, it is not the UEF's policy to contact providers and inform them that they must send in a separate, written request for authorization in order for the UEF to consider authorizing the treatment. Rice testified that there is no indication that she or anyone at the UEF ever informed Youderian's office that Youderian would need to submit a written request for authorization form in order to have the UEF consider Youderian's treatment recommendations.[62]

¶ 39 Rice admitted that she based her May 3, 2011, letter to Youderian in which she agreed to authorize Dostal's referral to Dr. McDowell on Youderian's October 12, 2010, request for a referral to an orthopedist – which she found in Youderian's treatment note of that date and for which Youderian did not send a separate, written request for authorization.[63] Rice offered no explanation for why she chose to deviate from her usual practice in this particular instance, but not in other instances, while adjusting Dostal's claim.

¶ 40 Rice testified that on August 10, 2011, she denied a request for Dostal to see Youderian after Dostal reported increased back pain. Rice stated that she did so because in May 2011, Youderian stated that she did not have other treatment to offer Dostal at that time. While Rice acknowledged that it is possible that Dostal's condition may have changed between May and August 2011, she still refused to allow Dostal to return to Youderian.[64]

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[60] Trial Test.

[61] Trial Test.

[62] Trial Test.

[63] Trial Test.

[64] Trial Test.

¶ 41 Although Rice testified that she did not intend to refuse to authorize any medical treatment for Dostal until Dostal agreed to see Dr. McDowell, Rice did in fact refuse to authorize all other medical treatment Dostal requested from the time Dostal refused to see Dr. McDowell until Dostal agreed to see him. Rice then scheduled an appointment with Dr. McDowell for November 8, 2011. Rice testified that she did not characterize Dr. McDowell's pending examination as an independent medical examination (IME), but rather as the orthopedic referral Youderian had requested.[65]

¶ 42 Rice testified that the UEF would not object to Dostal treating with Dr. Dacre if Dr. Dacre resumed travelling to Lewistown, and that the sole objection the UEF has to Dostal treating with Dr. Dacre is the travel to Billings.[66]

¶ 43 Rice admitted that it would not entail any significant travel expense to allow Dostal to treat with Dr. Dacre in Billings.[67] Rice testified that she was concerned about Dostal traveling to Billings to see Dr. Dacre since she had reported that driving in a car aggravated her condition. However, she never asked Youderian or Dr. Dacre if it would be appropriate for Dostal to travel to Billings for medical appointments.[68]

The parties' disputes regarding photocopy charges

¶ 44 On March 3, 2010, Megan Miller, a paralegal at Dostal's counsel's firm, wrote to Rice and requested a copy of Dostal's claim file. Miller asked Rice to contact the firm prior to providing the copy if the charge for the copying was expected to exceed $100.[69] Rice informed Miller that the charge would exceed $100. Miller confirmed that the firm still wanted a complete copy of the file.[70]

¶ 45 Rice testified that since the UEF is not an insurer, she does not believe the UEF is obligated to make copies of its claims files available to claimants. However, the UEF copies files upon request.[71] On April 15, 2010, Rice provided Dostal's counsel's firm with a copy of the claim file, along with a bill for $1,012 for 2024 photocopies – a rate of

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[65] Trial Test.

[66] Trial Test.

[67] Trial Test.

[68] Trial Test.

[69] Ex. 6.

[70] Ex. 7.

[71] Trial Test.

$.50 per page.[72] Rice testified that Dostal's claim file was "several feet thick" and that it took a UEF employee over 40 hours to copy it.[73]

¶ 46 On May 27, 2010, Dostal's counsel wrote to Rice and disputed the UEF's fee of $.50 per page for photocopies. Dostal's counsel, relying on *Stewart v. MACo Workers' Compen. Trust,*[74] contended that copies of claims files should be provided at the prevailing rate for copies in the community where the claim file is maintained. Dostal's counsel stated that her office had called several copy shops and determined that the prevailing cost for photocopies was $.10 per copy. Dostal's counsel further noted that of the 2024 pages provided, 252 were duplicates. Dostal's counsel enclosed a check for $177.20 for 1,772 copies at $.10 per page.[75]

¶ 47 Rice acknowledged that Dostal's counsel returned 252 pages as duplicates and tendered a check for $177.20. Rice testified that she did not contact Dostal's counsel to inform her that the reduced payment was unacceptable because Dostal's counsel was aware that the reduced payment was unacceptable.[76]

¶ 48 Rice testified that the UEF charges $.50 per page for copies because the Secretary of State's office charges $.50 per page. Rice did not investigate what charge would be sufficient to recover the cost of the material and time expended to make the copies.[77] Rice testified that no written policy states that the UEF's or the department's copy charge is $.50 per page. Rice further testified that she did not investigate how much it would cost to have the claim file copied by a private copy shop. She stated that no statute or rule either prohibits or permits having a private copy shop copy a claims file. However, the UEF is required to maintain confidentiality.[78]

¶ 49 On July 8, 2010, Dostal's counsel wrote to Rice about new developments in the dispute between her firm and the UEF regarding the UEF's copy charges for Dostal's claim file. She stated:

> Recently, you refused payment for services related to another claim for another worker, which is being handled by my partner, Stacy Tempel-

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[72] Ex. 8.

[73] Trial Test. Considering that a ream of photocopy paper consists of 500 pages and is approximately 2" thick, if Rice's estimate is accurate, I can only surmise that Dostal's file was either carved upon clay tablets or maintained in very, very thick folders.

[74] 2008 MTWCC 22.

[75] Ex. 9.

[76] Trial Test.

[77] Trial Test.

[78] Trial Test.

> St. John, in lieu of the remaining balance you feel is still owed on the bill for Ms. Dostal's claim file. We have received no correspondence from you in response to the payment we submitted indicating payment was not accepted or sufficient.[79]

¶ 50 Rice acknowledged that another UEF claimant who is represented by an attorney in the same firm as Dostal's counsel was denied reimbursement of a test fee because of the dispute over the copy fees in Dostal's case.[80] However, the UEF reimbursed the test fee in the other claim after Tempel-St. John filed a petition for mediation.[81]

¶ 51 On April 13, 2011, Dostal's counsel sent the UEF a bill for $214.40 and a letter requesting payment for copying documents in response to a subpoena duces tecum.[82] The invoice reflected three copies of a 200-page document ($60), one copy of a 944-page document ($94.40), and a $60 fee for "excess time."[83] Rice admitted that the UEF received the bill and has refused to pay it.[84]

¶ 52 In the Pretrial Order, the UEF contended that the amount billed for the copies it requested is incorrect. The UEF contends it agreed to pay $.10 per page, but the firm billed it for more copies than the UEF received, and further added a handling charge which the UEF did not agree to. The UEF explained:

> The photo copy bill from Petitioner's counsel's firm reflects that there were three copies of 200 pages; however this was a copy of Exhibit No. 52 in WCC No. 2010-2598, which was 190 pages, not 200 pages. The bill also reflects that there was one copy of 944 pages at .10 [sic] cents for an amount of $94.40. However, this was a copy of Exhibit No. 57 in WCC No. 2010-2598, which was 878 pages, not 944. The bill also included an amount of $60.00 for a copy time fee, which the UEF did not agree to pay. Thus, the UEF contends that the actual photo copy amount owing for the copies provided by Petitioner's counsel's firm is: $144.80, not $214.40.[85]

¶ 53 Karla K. Kyweriga testified at trial. I found her to be a credible witness. Kyweriga owns a print shop in Great Falls. Kyweriga has been in the photocopying business for

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[79] Ex. 10.

[80] Trial Test.

[81] Trial Test.

[82] Ex. 13.

[83] Ex. 13 at 2.

[84] Trial Test.

[85] Pretrial Order at 7-8.

approximately 35 years. She testified that her shop typically charges $.10 per page for one-sided, black-and-white copies on 8.5" by 11" paper. Additional charges apply for larger sheets and color copies. For complicated jobs, her shop adds a surcharge of $20 per hour in addition to the per-page copy charge. Kyweriga testified that she recently copied a complex job which took approximately three hours to copy 944 pages. She further testified that she would consider the claim file in this case to be a complex job and she would charge the $20 per hour surcharge in addition to the per-page fee to reproduce it.[86]

¶ 54 Steve Davison, the owner and manager of Action Print in Helena, testified via deposition.[87] Davison testified that he has been involved in the copying business in Helena for 20 years.[88] His business occasionally makes photocopies for state agencies.[89] Davison testified that for a job which consists of multiple boxes of documents and requires removing staples and restapling documents, he would typically charge $.10 per copy plus $30 per hour of time.[90] Davison testified that for his business to copy files at its Helena location, the files need to be allowed to leave the state agency for copying purposes.[91] However, on occasion, his company has taken a photocopier to an agency and made the copies onsite.[92]

¶ 55 Toni Broadbent, the owner of Allegra Marketing Print and Web (Allegra), testified via deposition.[93] Allegra performs commercial and digital printing services, including photocopying.[94] Broadbent testified that Allegra regularly makes photocopies for state agencies.[95] Broadbent testified that for a complex job that requires "special handling" – including unstapling and restapling documents, removing and replacing documents in binders, and dealing with different sizes of original documents – Allegra typically charges between $.15 and $.25 per copy, plus a $100 per hour handling fee.[96]

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[86] Trial Test.

[87] Davison Dep. 4:14-22.

[88] Davison Dep. 5:2-4.

[89] Davison Dep. 5:5-6.

[90] Davison Dep. 6:2-11.

[91] Davison Dep. 7:22-24.

[92] Davison Dep. 8:7-15.

[93] Broadbent Dep. 4:13-18.

[94] Broadbent Dep. 4:19-25.

[95] Broadbent Dep. 5:4-6.

[96] Broadbent Dep. 5:12 – 6:5.

Post-Trial Developments

¶ 56 As noted in the findings above, at the time of trial, Rice had scheduled an appointment for Dostal to be seen by Dr. McDowell. On November 4, 2011, I convened a conference call with the parties to make an oral ruling concerning Dostal's ongoing medical treatment.

¶ 57 During the conference call, I granted Dostal's request to continue treating with Dr. Dacre. I noted that Dr. Dacre might be able to address two issues: Whether the UEF should authorize referral to a pain management specialist, and whether the UEF should authorize a lumbar spine MRI. I ordered the parties to provide a status report regarding these issues to the Court following Dostal's appointment with Dr. Dacre. I further ordered the November 8, 2011, appointment with Dr. McDowell cancelled.[97]

¶ 58 On November 22, 2011, the UEF notified the Court that Dr. Dacre had refused to see Dostal, stating that he had nothing further to offer Dostal and suggesting that Dostal seek another opinion.[98]

¶ 59 On January 24, 2012, the UEF informed the Court that Dostal would be seen by a neuro-specialist on March 1, 2012, to seek the opinion recommended by Dr. Dacre.[99] On January 26, 2012, Dostal's counsel informed the Court that Dostal would obtain a CT lumbar/myelogram on January 27, 2012, and was scheduled to see Dr. John VanGilder on March 1, 2012.[100]

¶ 60 On March 22, 2012, the UEF informed the Court that Dr. VanGilder had recommended that Dostal receive L4-5 bilateral facet joint injections, and that the UEF had authorized the treatment. The UEF contended that the issue of whether it should authorize a referral to Dr. Dacre was now moot.[101]

¶ 61 The UEF further contended that the issue of whether it should authorize a lumbar MRI was also moot because both Dr. VanGilder and Youderian had indicated that Dostal could not undergo an MRI because of hardware in her back.[102]

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[97] *See* Minute Book Hearing No. 4342, Docket Item No. 34.

[98] Nov. 22, 2011, Letter From Coles to Clara Wilson, Clerk of Court, Docket Item No. 35.

[99] E-Mail From Coles to Jackie Poole, Deputy Clerk of Court, Docket Item No. 36.

[100] Status Report, Docket Item No. 37

[101] E-Mail From Coles to Wilson, Docket Item No. 42.

[102] *Id.*

¶ 62 The UEF further contended that the issue of whether it should authorize a referral to a pain management specialist was moot because Dr. VanGilder had not recommended a referral.[103]

¶ 63 On March 29, 2012, Dostal filed a status report in which she stated that the issues regarding the referral to Dr. Dacre and authorization for a lumbar MRI were resolved. Dostal maintains that the issue of whether she was entitled to referral to a pain management specialist remains an issue for determination. Dostal noted that while Dr. VanGilder did not recommend a referral to a pain management specialist, he was not asked whether he believed such a referral was necessary.[104]

¶ 64 On August 10, 2012, the UEF filed a status report with the Court in which it stated:

> Based on Dr. VanGilder's recommendations, the UEF has authorized a CT Lumbar/Myelogram, L4-5 bilateral facet joint injections, and a referral for psychological counseling. Additionally, since Dr. VanGilder has indicated that Ms. Dostal is again not at MMI for her industrially related back condition, the UEF has started payment of TTD benefits.[105]

CONCLUSIONS OF LAW

¶ 65 This case is governed by the 1991 version of the Workers' Compensation Act (WCA) since that was the law in effect at the time of Dostal's industrial accident.[106]

¶ 66 Dostal bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.[107] Dostal has met her burden of proof.

Issue One: Whether Respondent should have to reimburse Petitioner's counsel's firm for copying charges totaling $214.40.

Issue Two: Whether Petitioner's counsel must reimburse Respondent $1,012 for copy charges.

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[103] *Id.*

[104] Petitioner's Status Report to Court, Docket Item No. 43.

[105] Uninsured Employers' Fund's Status Report, Docket Item No. 44.

[106] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

[107] *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

¶ 67 Both parties allege that the other party charged them an unreasonable amount for photocopies. Dostal contends that she was incorrectly charged for duplicate copies. The UEF contends that it was charged for more copies than it received. Neither party has provided any evidence to dispute the other's contentions regarding the number of copies each should have been respectively charged for: Dostal does not argue that the UEF's count of 1,068 photocopies is inaccurate and the UEF does not dispute Dostal's contention that, excluding duplicates, she received 1,772 copies from the UEF – nor does the UEF dispute Dostal's contention that she should not be held liable for payment for duplicative copies.

¶ 68 Therefore, I conclude that Dostal is liable to the UEF for the cost of 1,772 photocopies while the UEF is liable to Dostal for the cost of 1,068 photocopies. However, I now must determine what constitutes a reasonable charge for the copies.

¶ 69 In *Stewart v. MACo Workers' Compen. Trust*, I was faced with a dispute regarding the charges an insurer levied against a claimant for a copy of his claim file.[108] In *Stewart*, the insurer argued:

> Montana law recognizes the charging for copies in a number of statutory references, including the State Auditor's office, which is required to charge 50¢ per page for furnishing photostatic copies of securities information (§ 30-10-107, MCA); clerks of district courts are required to charge $1 per page for the first ten pages and 50¢ for each additional page for copies of papers on file in the clerks' offices (§ 25-1-201, MCA); and the Secretary of State's office, which charges $1 per page for copies of information from the Secretary's office, with a minimum of $5 due (ARM 1.2.104).[109]

¶ 70 I rejected the use of the insurer's proposed "guidelines," concluding instead that an insurer may charge a "reasonable amount" – the same amount as is commonly charged by businesses in the community which offer photocopy services to the public where the claim file is maintained.[110]

¶ 71 Rice testified that she does not believe *Stewart* applies to the UEF because the UEF is not an insurer.[111] As set forth above, Rice testified that she believes that WCA

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[108] 2008 MTWCC 22.

[109] *Stewart*, ¶ 5 (footnote deleted).

[110] *Stewart*, ¶ 11.

[111] I note that the UEF further argued that it has no obligation to provide a claimant with a copy of her claim file under § 39-71-107(3), MCA, because it is not an insurer. Section 39-71-107, MCA, did not exist in the 1991 WCA and therefore the question of whether this statute now applies to the UEF is not relevant to Dostal's case and I do not consider that argument here.

statutes which refer to "the department" are applicable to the UEF because the UEF is a part of the Department of Labor and Industry.

¶ 72 Section 39-71-205(1), MCA, provides that "the department" shall have power and authority to charge and collect a fee for copies of papers and records sufficient to recover the cost of the material and the time expended, as fixed by the department. By Rice's own testimony, however, the UEF did not set its fee for copies based on the cost of material and time expended. Rather, the UEF used as a "guideline" that which I rejected in *Stewart*. Rice has provided no evidence as to the cost of material nor the cost of the time expended. Since it is clear that the UEF did not set its copying fees based upon § 39-71-205(1), MCA, I find its argument that the Court should do so to be unpersuasive.

¶ 73 The parties presented the testimony of three business owners who provide photocopying services to the public. Each testified that, in addition to a per-page copying charge, they would charge an hourly rate for a complex copying job – one which required stapling and unstapling, and other "special handling." Given the size and age of Dostal's claim file, I find it reasonable to infer that her file would be considered "complex" or require "special handling" if it had been taken to any of these three businesses for copying. Likewise, I find it reasonable to infer that the documents Dostal copied for the UEF in response to a subpoena duces tecum required similar "special handling."

¶ 74 Therefore, I conclude that an hourly fee, in addition to a per-page charge for copies, is reasonable in the present case. While Rice contends that it took a UEF employee forty hours to copy Dostal's claim file, I find that time estimate excessive. As noted above, Kyweriga testified that she recently copied a complex job which took approximately three hours to copy 944 pages – or, approximately 315 pages per hour. I therefore conclude that it is more probable than not that the 1,772 non-duplicated pages of Dostal's claim file could have been copied in six hours. I further conclude that it is more probable than not that Dostal could have copied 1,068 pages for the UEF in three and one-half hours.[112]

¶ 75 In considering the amounts each copy shop owner testified he or she would charge for these kinds of copying charges, I note that Kyweriga and Davison would charge similar amounts while Broadbent's hypothetical charges would be significantly higher. I therefore have split the difference between Kyweriga's and Davison's estimates for the present case: I hold that a reasonable amount for the parties to charge each other for these photocopies is $.10 per page plus $25 per hour for

[112] I have rounded up the estimates in both instances to the nearest half-hour increment.

handling. Therefore, the UEF owes Dostal $194.30 for photocopying charges[113] and Dostal owes the UEF $327.20 for photocopying charges.[114]

Issue Three: Whether Respondent should authorize an MRI of Petitioner's lumbar spine.

Issue Four: Whether Respondent should authorize a referral to Dr. Dacre.

¶ 76 As indicated in the findings above, these issues have been resolved to the satisfaction of both parties and therefore I need take no further action.

Issue Five: Whether Respondent should authorize a referral to a pain management specialist.

¶ 77 Dostal argues that she is entitled to referral to a pain management specialist, as recommended by Youderian, her treating physician. The UEF states that Youderian became Dostal's treating physician sometime on or after March 30, 2010.[115] However, in spite of Youderian's repeated requests for referral to a pain management specialist, the UEF has refused to authorize the referral. It is not entirely clear to the Court on which specific grounds the UEF bases this denial. The UEF has contended that under § 39-71-605, MCA, it is entitled to refuse to authorize any further treatment for Dostal until she submits to an evaluation with Dr. McDowell.[116] However, it does not appear from the record that the UEF requested Dostal to attend an evaluation with Dr. McDowell until May 3, 2011.[117] Therefore, this cannot be the grounds upon which the UEF denied the referral to a pain management specialist from March 30, 2010, until May 3, 2011 – over a year later.

¶ 78 The UEF further contends that it need not provide "services and treatment" to Dostal unless the request is supported by objective medical findings. However, the UEF acknowledges that, unlike its present-day counterpart, § 39-71-704, MCA (1991), did not require objective medical findings.[118] The UEF argues, however, that Youderian's initial request for authorization for referral to a pain specialist was properly

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[113] *(1,068 x $.10) + (3.5 x $25) = $194.30.*

[114] *(1,772 x $.10) + (6 x $25) = $327.20.*

[115] Pretrial Order at 7.

[116] Pretrial Order at 8.

[117] *See* Ex. 4 at 32.

[118] Although the UEF maintains that "the term was used in case law at that time," it does not cite a single example nor does it allege that, simply because the term "was used" that it was used in any manner applicable to supporting the UEF's position in this instance.

denied because it was not supported by any objective medical findings.[119] The UEF maintains that Dr. Holmes needed to have provided objective medical findings to support his recommendation that Dostal see a pain management specialist.[120] The UEF further argues that Youderian testified that she was unsure what treatment she could offer Dostal other than referral to a specialist, but that Youderian's basis for recommending a referral was because of Dostal's worsening pain and not due to objective medical findings.[121]

¶ 79 As I noted in previous litigation regarding Dostal's claim, the 1991 statutes control this case, and the UEF cannot read into the 1991 statutes additional requirements which the legislature added in later years.[122] Therefore, the UEF cannot require that the request for a pain management referral be supported by objective medical findings. Regardless, Youderian did make objective medical findings which would support her referral requests. During the same time period as Youderian repeatedly requested referral to a pain management specialist, she noted objective medical findings including muscle spasm and diminished reflexes.

¶ 80 Additionally, the UEF has also argued that it need not consider Youderian's referral requests which she made in her chart notes if she did not also submit a separate request for authorization form. As the record indicates, from Youderian's perspective, her referral requests fell upon deaf ears. She had no way of knowing that Rice was withholding the referral because Youderian did not specifically tie the request to the objective medical findings she made. She further had no way of knowing that Rice was ignoring referral recommendations which Youderian had written into her medical notes – even though Rice reviewed those treatment notes – because Youderian had not submitted a separate, written request for referral, preferably on a form (although the UEF offered no such form) but possibly acceptable if in the form of a letter written by the provider and not by the claimant's attorney. As Rice further noted, this is her practice and she is aware of no statute or rule which requires requests for authorization to be submitted in this manner in order to be considered. It is patently absurd that, apparently, several of Youderian's requests for referral went unheeded because Youderian did not know that she was supposed to create a "Request for Authorization" form in addition to requesting the referral within the body of her treatment notes.

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[119] Uninsured Employers' Fund's Trial Brief (UEF's Trial Brief), Docket Item No. 29, at 1-2.

[120] UEF's Trial Brief at 5.

[121] UEF's Trial Brief at 9.

[122] *See, e.g.*, 2010 MTWCC 38, ¶ 21.

¶ 81 I find that the UEF has presented no plausible basis for denying the referral to a pain management specialist requested by Youderian. Therefore, I conclude Dostal is entitled to authorization for this referral.

Issue Six: Whether Respondent has acted unreasonably in its handling of Petitioner's claim such that Petitioner is entitled to attorney fees and penalties.

¶ 82 Section 39-71-611(1), MCA, provides:

> The insurer shall pay reasonable costs and attorney fees as established by the workers' compensation court if:
>
> (a) the insurer denies liability for a claim for compensation or terminates compensation benefits;
>
> (b) the claim is later adjudged compensable by the workers' compensation court; and
>
> (c) in the case of attorneys' fees, the workers' compensation court determines that the insurer's actions in denying liability or terminating benefits were unreasonable.

Section 39-71-2907(1), MCA, provides:

> The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:
>
> (a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or
>
> (b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

¶ 83 Dostal argues that the UEF has acted unreasonably in handling her claim and that she is entitled to an attorney fee and penalties, while the UEF denies that it acted unreasonably and further argues that it is not subject to the attorney fee and penalty statutes within the WCA.[123]

¶ 84 As to the specific issues before the Court, I do not see any evidence that Dostal's benefits were delayed, denied, terminated, or affected in any way by the dispute over the photocopy charges, nor do I conclude that the photocopy charges owed to Dostal's counsel's firm constitute a "benefit" under § 39-71-2907, MCA. Therefore, it is immaterial whether the UEF acted unreasonably or not regarding the photocopy charge

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[123] See *Dostal v. UEF*, 2012 MTWCC 42, in which I held that the UEF could be held liable for attorney fees and a penalty in Dostal's case.

disputes as it would not be statutorily liable for attorney fees or a penalty for the photocopy charge disputes.

¶ 85 As to Issue Three, the medical evidence presented clearly indicates that Dostal was ineligible for an MRI because of the existing hardware in her back; therefore, the UEF cannot have unreasonably denied treatment which Dostal would never have been able to receive.

¶ 86 As to Issue Four, I find that the UEF unreasonably delayed and denied a referral to Dr. Dacre. Dr. Dacre had treated Dostal over a long period of time and had performed multiple surgeries on her back. Dr. Dacre testified that, barring extraordinary circumstances, he would not transfer care of such a patient to another physician, even one within his own practice. The evidence further indicates that as Dostal's complaints increased, Youderian repeatedly requested a referral to Dr. Dacre. However, the UEF would not authorize the referral. Rice testified that the UEF refused to authorize the referral solely because it would have required Dostal to travel to Billings to be seen by Dr. Dacre. However, the UEF had previously authorized Dostal to travel to Billings to be seen by Dr. Dacre, and her back surgeries were performed by Dr. Dacre in Billings. The UEF offered no plausible explanation as to why it had suddenly decided it was no longer going to authorize Dostal for any medical treatment in Billings when it had been authorizing medical treatment in Billings since 2004.

¶ 87 In order to recover attorney fees pursuant to § 39-71-611, MCA, a party must have her denied claim adjudged compensable by this Court. If benefits are paid prior to an adjudication, attorney fees are not available.[124] However, an adjudication of compensability is not a prerequisite for a penalty.[125]

¶ 88 In *Vanbouchaute v. Montana State Fund*, I held that I could not award the claimant his attorney fees where, at the close of trial, I advised the parties as to how I intended to rule on the compensability of the claim but did not actually issue a ruling prior to the insurer's accepting and paying the claim.[126] The situation in *Vanbouchaute* is distinguishable from the present case as I orally ruled regarding the referral to Dr. Dacre on November 4, 2011. I therefore conclude that both attorney fees and a penalty are available to Dostal regarding this issue and she is entitled to both.

¶ 89 As to Issue Five, I have concluded that Dostal is entitled to the referral she has sought to a pain management specialist. As the pertinent findings and conclusions

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[124] *Vanbouchaute v. Montana State Fund*, 2007 MTWCC 37, ¶ 39.

[125] *Vanbouchaute*, ¶ 40.

[126] *Vanbouchaute*, ¶ 39.

indicate, I am not entirely certain as to the specific grounds upon which the UEF based its refusal to refer Dostal. Since the UEF has failed to enunciate a clear, defensible reason for denying Dostal this referral, I find that it has been unreasonable in denying Dostal this benefit. I therefore conclude Dostal is entitled to her attorney fees and a penalty on this issue.

JUDGMENT

¶ 90 Respondent shall reimburse Petitioner's counsel's firm for copying charges totaling $194.30.

¶ 91 Petitioner's counsel shall reimburse Respondent $327.20 for copying charges.

¶ 92 Issues Three and Four have been resolved, as set forth above.

¶ 93 Respondent shall authorize referral to a pain management specialist.

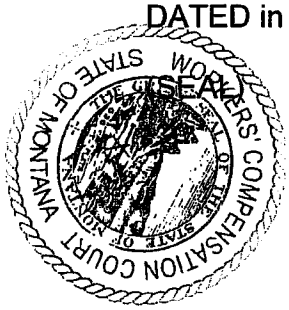
¶ 94 Petitioner is not entitled to her attorney fees or a penalty regarding Issues One, Two, and Three.

¶ 95 Petitioner is entitled to her attorney fees and a penalty regarding Issues Four and Five.

¶ 96 Petitioner shall have 10 days from the date of this Judgment to submit a verified statement of costs and attorney fees.

¶ 97 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 4th day of December, 2012.



SEAL

JUDGE

c: J. Kim Schulke
Leanora O. Coles
Submitted: November 4, 2011