

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2012 MTWCC 9

WCC No. 2010-2606

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TROY BAKER

Petitioner

vs.

FIREMAN'S FUND INS. CO.

Respondent/Insurer.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** Petitioner attempts to reopen a settlement agreement based on a mutual mistake of fact. Petitioner's counsel entered into settlement discussions with Respondent. Respondent contends that the parties reached a binding settlement agreement closing all benefits. Petitioner argues that his counsel did not have authority to settle his claim and maintains he has always intended to reopen the settlement.

**Held:** Petitioner entered into a binding settlement agreement. Petitioner authorized his counsel to negotiate and settle his claim. The parties reached an agreement after several offers and counteroffers. Petitioner's unvoiced intention to not be bound to the terms of the agreement until reviewed in writing does not prevent the formation of a binding agreement.

**Topics:**

**Settlements: Contracts.** Petitioner gave his attorney authority to negotiate and finalize a settlement agreement. The contract became binding when the parties mutually agreed to its material terms, notwithstanding the absence of Department of Labor and Industry approval. Petitioner never expressed or conditioned his acceptance upon his review and approval of a written agreement. Petitioner later tried to repudiate the agreement based upon an unarticulated condition, but his latent intent not to be bound did not prevent the formation of a valid contract and Petitioner is bound by it.

**Contracts: Generally.** Petitioner gave his attorney authority to negotiate and finalize a settlement agreement. The contract became binding when the parties mutually agreed to its material terms, notwithstanding the absence of Department of Labor and Industry approval. Petitioner never expressed or conditioned his acceptance upon his review and approval of a written agreement. Petitioner later tried to repudiate the agreement based upon an unarticulated condition, but his latent intent not to be bound did not prevent the formation of a valid contract and Petitioner is bound by it.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-2907.** The insurer agreed to pay certain medical bills in the settlement agreement, yet those bills remained unpaid for months after the agreement was reached despite repeated requests to pay them. The inexplicable delay was unreasonable, and Petitioner is entitled to a penalty on the value of the medical bills pursuant to § 39-71-2907, MCA.

**Penalties: Insurers.** The insurer agreed to pay certain medical bills in the settlement agreement, yet those bills remained unpaid for months after the agreement was reached despite repeated requests to pay them. The inexplicable delay was unreasonable, and Petitioner is entitled to a penalty on the value of the medical bills pursuant to § 39-71-2907, MCA.

**Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated. 39-71-611.** In order to award attorney fees and costs pursuant to § 39-71-611, MCA, there must be an adjudication of compensability. At trial, the Court bench ruled on the issue of compensability of certain medical bills, but neither party could advise the Court whether the bills remained unpaid. The Court reserved ruling on the issue of fees and costs until the parties conferred and determined whether the medical bills were paid before or after the bench ruling.

**Attorney Fees: Unreasonable Denial or Delay of Benefits.**

In order to award attorney fees and costs pursuant to § 39-71-611, MCA, there must be an adjudication of compensability. At trial, the Court bench ruled on the issue of compensability of certain medical bills, but neither party could advise the Court whether the bills remained unpaid. The Court reserved ruling on the issue of fees and costs until the parties conferred and determined whether the medical bills were paid before or after the bench ruling.

¶ 1 The trial in this matter was held on June 7, 2011, in the Elk meeting room at the C'Mon Inn in Missoula, Montana, and continued and concluded on June 14, 2011, at the office of Charles Fisher Court Reporting in Helena via videoconference. Petitioner Troy Baker (Baker) attended the June 7 proceedings and was represented by Laurie Wallace. On June 14, 2011, Baker did not attend, but was represented again by Laurie Wallace. Joe C. Maynard represented Respondent Fireman's Fund Ins. Co. (Fireman's).

¶ 2 **Exhibits:** I admitted Exhibits 1 through 82 without objection. Although noted as admitted in Minute Book Hearing No. 4279, the parties did not provide Exhibits 83 and 84 to the Court for inclusion in the trial Exhibit Book. I admitted Exhibit 85 over Respondent's objection on June 14, 2011. I admitted Exhibit 86 without objection on June 14, 2011.

¶ 3 **Witnesses and Depositions:** The parties agreed that the depositions of Troy Baker, Eric Rasmusson,<sup>1</sup> and Connie Wellington would be considered part of the record. On June 7, 2011, Troy Baker, Connie Wellington, and Elenya Gallegos were sworn and testified at trial. On June 14, 2011, Gallegos' testimony resumed, and Susan Lake was sworn and testified at trial.

¶ 4 **Issues Presented:** The Pretrial Order states the following contested issues of law:<sup>2</sup>

Issue One: Whether Petitioner's claim was settled for \$40,000 in July 2010.

Issue Two: Whether Petitioner is entitled to payment of outstanding medical bills for his medical treatment pursuant to § 39-71-704, MCA.

Issue Three: Whether Petitioner is entitled to a 20% increase of award for unreasonable delay or refusal to pay benefits pursuant to § 39-71-2907, MCA.

Issue Four: Whether Petitioner is entitled to reasonable attorney fees and costs pursuant to § 39-71-611 and § 39-71-612, MCA.

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<sup>1</sup> The deposition of Eric Rasmusson was taken before this Court on March 30, 2011, to preserve his trial testimony.

<sup>2</sup> Pretrial Order at 4, Docket Item No. 34. The Court has reordered these issues.

## FINDINGS OF FACT

¶ 5 Petitioner Troy Baker testified at trial. I did not find Baker's testimony credible. I believe he has exaggerated or inconsistently described his conversations and interaction (or lack thereof) with his previous counsel, Eric Rasmusson. Rasmusson provided trial testimony at a deposition which I attended. I found Rasmusson credible.

¶ 6 On September 18, 2006, Baker was injured while in the course and scope of his employment with Gensco Inc. Baker pulled on the rear door of a delivery truck when it recoiled, injuring his right shoulder.<sup>3</sup>

¶ 7 On June 6, 2008, the parties first agreed to settle Baker's entitlement to indemnity benefits, including vocational rehabilitation, for \$45,100.<sup>4</sup> At the time, attorney Morgan Modine represented Baker.<sup>5</sup> On June 10, 2008, the Department of Labor and Industry approved the settlement.<sup>6</sup> A check was tendered and cashed. Baker had no family conversations or meetings to discuss settling his claim in 2008.<sup>7</sup>

¶ 8 After settling his indemnity benefits, Baker began to see Alan R. Shear, PA-C, of the Clark Fork Valley Hospital for chronic right shoulder and right neck pain.<sup>8</sup> Baker continued to complain of shoulder issues, and in July 2009 Fireman's authorized a second opinion with Dr. Nick DiGiovine in Butte.<sup>9</sup> Fireman's agreed to cover the cost of the visit, but not Baker's travel expenses to Butte because Baker had requested the trip and similar shoulder specialists were available in Missoula and Kalispell.<sup>10</sup> Dr. DiGiovine preliminarily diagnosed Baker with a long thoracic nerve palsy<sup>11</sup> and on November 5, 2009, with sick scapula syndrome or scapular dyskinesis with secondary impingement syndrome, as well as chronic pain.<sup>12</sup>

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<sup>3</sup> Trial Test; Ex. 10 at 38.

<sup>4</sup> Ex. 33 at 2-3.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Trial Test.

<sup>8</sup> See, e.g., Ex. 10 at 77.

<sup>9</sup> Ex. 38 at 3.

<sup>10</sup> Trial Test.

<sup>11</sup> Trial Test.

<sup>12</sup> Ex. 82 at 21.

¶ 9 After visiting Dr. DiGiovine, Baker told Fireman's that he believed his medical treatment had been misguided since the very beginning.<sup>13</sup> Baker requested mediation and sought to reopen his previously settled indemnity benefits. He alleged a mutual mistake of fact due to a misdiagnosis of his shoulder condition.<sup>14</sup>

¶ 10 While the parties' initial June 2008 settlement discussions were occurring, Baker was also in the process of applying for Social Security Disability Insurance (SSDI) benefits.<sup>15</sup> Rasmusson represented Baker for his Social Security claim. Baker first discussed his workers' compensation claim with Rasmusson at his Social Security hearing.<sup>16</sup> Baker's application for SSDI benefits was eventually denied.<sup>17</sup>

¶ 11 In January 2010, after filing for mediation, Baker retained Rasmusson to represent him in his workers' compensation claim.<sup>18</sup> On January 21, 2010, Rasmusson informed Fireman's counsel, Joe C. Maynard, of his retention as counsel and requested that Maynard assist with producing Baker's claim file.<sup>19</sup> Rasmusson also indicated Baker's interest in listening to any settlement proposals if Fireman's wanted to settle the claim.<sup>20</sup> Baker testified at trial that although he would listen to settlement offers, his real goal was to obtain benefits so that he could see a specialist, get better, and be able to return to work.<sup>21</sup> Rasmusson noted that Baker wanted a permanent total disability-type settlement.<sup>22</sup> However, Rasmusson advised Baker that the facts of his claim did not support a permanent total disability-type settlement and that Fireman's would not pay that type of settlement.<sup>23</sup> At trial, Baker denied wanting benefits until he could draw social security.<sup>24</sup>

¶ 12 Baker stated in his deposition that Rasmusson had authority to discuss settlement from the day Baker retained him.<sup>25</sup> Baker testified at trial, however, that

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<sup>13</sup> Baker Dep. 34:24 - 35:22; Ex. 39.

<sup>14</sup> Baker Dep. 34:22-23.

<sup>15</sup> Ex. 5.

<sup>16</sup> Trial Test.

<sup>17</sup> Ex. 16.

<sup>18</sup> Ex. 1.

<sup>19</sup> Ex. 4.

<sup>20</sup> *Id.*

<sup>21</sup> Trial Test.

<sup>22</sup> Rasmusson Dep. 42:14-17.

<sup>23</sup> Rasmusson Dep. 42:22 - 43:2.

<sup>24</sup> Trial Test.

<sup>25</sup> Baker Dep. 65:14-19.

because of his pain medication, he could not understand offers made over the phone and that these settlement conversations were merely proposals that needed to be put into writing so that Baker could discuss them with his family before reaching a decision.<sup>26</sup> I find that Baker authorized Rasmusson to discuss settlement and no condition required Baker to review an agreement in writing before Rasmusson could agree to it on Baker's behalf.

¶ 13 Connie Wellington, Baker's mother, testified at trial. Although I found Wellington credible, I find that she testified from very limited information. Wellington repeatedly testified at trial that Baker was unable to make decisions on his own due to his medications, so they needed to make decisions about his case as a family.<sup>27</sup> Wellington never mentioned that Baker was too medicated to make decisions during her deposition because she was never explicitly asked.<sup>28</sup>

¶ 14 Baker insisted that Rasmusson knew that he only had authority to make proposals to Maynard, but that nothing would be binding until Baker could talk it over with his family.<sup>29</sup> Rasmusson testified that Baker never told him that there would be no deal until an offer had been seen in writing or put any restrictions or conditions on Rasmusson's ability to tender an offer<sup>30</sup> I do not find Baker's contentions credible.

¶ 15 On January 23, 2010, Maynard expressed via e-mail that Fireman's would be interested in settling Baker's previously reserved medical benefits, but that Fireman's had no interest in reopening the previous settlement.<sup>31</sup> On January 25, 2010, Maynard followed up in a letter to Rasmusson.<sup>32</sup> Baker told Rasmusson that any settlement would have to be "substantial and reasonable,"<sup>33</sup> but testified at trial that he could have possibly been mistaken about his position on settlement when deposed.<sup>34</sup>

¶ 16 In April 2010, the parties were scheduled to mediate reopening Baker's claim for the entitlement benefits of his prior settlement.<sup>35</sup> However, prior to mediation, Rasmusson requested an additional 15 to 20 days to work with Maynard to resolve the

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<sup>26</sup> Trial Test.

<sup>27</sup> Trial Test.

<sup>28</sup> Trial Test.

<sup>29</sup> Trial Test.

<sup>30</sup> Rasmusson Dep. 41:5-8; 45:2-4.

<sup>31</sup> Ex. 5 at 1.

<sup>32</sup> Ex. 6.

<sup>33</sup> Baker Dep. 59:4-13.

<sup>34</sup> Trial Test.

<sup>35</sup> Exs. 7 and 8.

matter.<sup>36</sup> Rasmusson sent copies of these letters to Baker.<sup>37</sup> Baker testified in his deposition that he could remember seeing different parts of a letter like the one referred to, but further testified that he did not think he had seen the part of the letter regarding Rasmusson's efforts to resolve the matter with Maynard.<sup>38</sup> At trial, Baker testified that he did not know that Rasmusson was referring to settlement when he said "resolve this matter."<sup>39</sup>

¶ 17 On March 26, 2010, Rasmusson requested that the mediation be rescheduled for sometime in April.<sup>40</sup> He sent a copy of this letter to Baker.<sup>41</sup> Prior to mediation, both parties wrote to Dr. DiGiovine seeking to clarify Baker's condition and to ascertain whether Dr. DiGiovine's diagnosis represented a new and material diagnosis compared to the conditions described by Baker's doctors in 2007 and 2008.<sup>42</sup> Baker understood that Dr. DiGiovine was providing a second medical opinion and was not a treating physician.<sup>43</sup> Dr. DiGiovine's response indicated that he could not answer any of the questions posed by Rasmusson with any degree of medical certainty.<sup>44</sup> Dr. DiGiovine cited the "chronology of [his] interaction with Mr. Baker being so remote to his injury and [previous] treatment."<sup>45</sup> Although Rasmusson thought that Dr. DiGiovine's refusal to give a medical opinion was fatal to Baker's case, Baker remained confident in his case and felt that he simply had not had enough interaction with Dr. DiGiovine for him to render a medical opinion.<sup>46</sup>

¶ 18 Following receipt of Dr. DiGiovine's diagnosis, Fireman's indicated that it would obtain a Medicare Set-Aside (MSA).<sup>47</sup> Rasmusson informed the Department mediator that the parties had agreed to stay mediation and toll the two-year statute of limitations

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<sup>36</sup> *Id.*

<sup>37</sup> Ex. 7; Rasmusson Dep. 12:25 - 13:6.

<sup>38</sup> Baker Dep. at 60:20 - 61:10.

<sup>39</sup> Trial Test.

<sup>40</sup> Ex. 8.

<sup>41</sup> *Id.*

<sup>42</sup> Exs. 9 and 10.

<sup>43</sup> Trial Test.

<sup>44</sup> Ex. 11.

<sup>45</sup> *Id.*

<sup>46</sup> Trial Test.

<sup>47</sup> Ex. 13.

to allow for the receipt of the MSA and further settlement discussions.<sup>48</sup> Once again, Baker received a copy of Rasmusson's correspondence with the Department mediator.<sup>49</sup>

¶ 19 On June 22, 2010, Rasmusson wrote to Maynard and explained that Baker did not currently receive Medicare, and therefore he believed an MSA was unnecessary unless Fireman's would be willing to resolve the claim for more than \$250,000.<sup>50</sup> Baker received a copy of this correspondence.<sup>51</sup>

¶ 20 On June 23, 2010, Baker received an unfavorable decision from the Social Security Administration.<sup>52</sup> The Social Security Administration determined that Baker was not credible regarding his symptomology, and following review of the evidence presented, concluded that Baker had the capacity to perform light work and therefore was not disabled.<sup>53</sup>

¶ 21 Following receipt of the unfavorable decision, Rasmusson provided Maynard with a copy of the decision and informed him that Baker had no "reasonable expectation" of Medicare entitlement within the next 30 months necessary to invoke the Medicare Secondary Payer Recovery Act.<sup>54</sup> Rasmusson indicated that he was interested in opening up settlement discussions in the near future.<sup>55</sup> Baker received a copy of this correspondence<sup>56</sup> and did not object to opening settlement discussions.<sup>57</sup> In July 2010, Baker agreed to reconvene mediation to "get the case resolved."<sup>58</sup> Mediation was rescheduled for July 29, 2010.<sup>59</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> Ex. 13; Baker Dep. 65:22 - 66:6.

<sup>50</sup> Ex. 14.

<sup>51</sup> Ex. 14; Baker Dep. 74:3-9.

<sup>52</sup> Ex. 16.

<sup>53</sup> Ex. 16 at 14, 19.

<sup>54</sup> Ex. 15.

<sup>55</sup> *Id.*

<sup>56</sup> Ex. 15; Baker Dep. 76:1-4.

<sup>57</sup> Rasmusson Dep. 33:11-13.

<sup>58</sup> Rasmusson Dep. 36:18 - 37:4.

<sup>59</sup> Ex. 57 at 16.



¶ 22 On July 25, 2010, Fireman's provided the MSA to Rasmusson.<sup>60</sup> The MSA calculated Baker's future medical expenses in excess of \$47,500.<sup>61</sup> The present value cost to fund the MSA was \$27,241.<sup>62</sup>

¶ 23 On July 27, 2010, Rasmusson spoke with Baker regarding settlement figures and possible attorney fees.<sup>63</sup> Rasmusson informed Baker as to what his (Baker's) take-home amount would be for various settlement figures.<sup>64</sup> During this conversation, Baker authorized an offer to settle his claim for more than \$55,000 "new money," payment of certain outstanding medical bills, and no requirement of an MSA.<sup>65</sup> In responding to Rasmusson's handwritten notes memorializing their previous phone conversation authorizing a settlement for \$55,000 or more, Baker testified that he did not think that he was giving Rasmusson authority to settle, but merely to talk with Fireman's and to make or present proposals.<sup>66</sup> Baker never stopped Rasmusson during the settlement negotiations or insisted that reopening his previous settlement was the only option.<sup>67</sup>

¶ 24 On July 27, 2010, Rasmusson offered to settle Baker's claim for \$57,500 "new money."<sup>68</sup> Rasmusson informed Maynard that it was "extremely important to us that the insurer not insist upon an MSA and that this settlement be a closure in the traditional sense in that funds are remitted directly to the claimant."<sup>69</sup> The offer mentioned nothing about Baker having to review the final settlement documents in writing with his family prior to agreeing to be bound to its terms.<sup>70</sup> Baker received a copy of this letter,<sup>71</sup> but alleged that he did not receive it until after July 29, 2010, when the settlement had allegedly been reached.<sup>72</sup> Baker indicated that any letter that Rasmusson sent would

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<sup>60</sup> Ex. 18.

<sup>61</sup> Ex. 19 at 1.

<sup>62</sup> Ex. 59 at 9.

<sup>63</sup> Rasmusson Dep. 44:2 - 45:1; 120:8-17.

<sup>64</sup> Rasmusson Dep. 44:7-15.

<sup>65</sup> Rasmusson Dep. 44:16-21; Ex. 57 at 19.

<sup>66</sup> Trial Test.

<sup>67</sup> Trial Test.

<sup>68</sup> Ex. 19 at 2.

<sup>69</sup> Ex. 19 at 1.

<sup>70</sup> Ex. 19; Rasmusson Dep. 45:2-4.

<sup>71</sup> Ex. 19 at 2; Baker Dep. 89:2-4.

<sup>72</sup> Trial Test.

take 2 to 3 days to get to his post office box and that he did not check his post office box every day.<sup>73</sup>

¶ 25 At 10:52 a.m. on July 28, 2010, Maynard e-mailed Rasmusson with a counteroffer of \$25,000 to “close everything,” and use his “standard forms” which included a provision that the claimant would indemnify Fireman’s if Medicare asserted its second payer rights.<sup>74</sup> Rasmusson understood that Maynard’s \$25,000 offer would close everything, including Baker’s entitlement to additional medical benefits, indemnity benefits, and any claim for reopening his previous settlement.<sup>75</sup> Rasmusson also understood what Maynard implied by his request to use his “standard forms.”<sup>76</sup>

¶ 26 Rasmusson communicated Maynard’s \$25,000 offer to Baker via telephone.<sup>77</sup> At trial, Baker denied receiving this offer.<sup>78</sup> Despite Baker’s testimony, I find that Baker received Maynard’s \$25,000 offer and discussed a counteroffer with Rasmusson. After discussing Maynard’s offer, Rasmusson and Baker agreed to respond with a counteroffer of \$49,000 “new money” to close everything.<sup>79</sup> Rasmusson testified that, when he made a demand of \$49,000 new money, he had authority and permission from Baker.<sup>80</sup> Baker claimed at trial to have been unaware that Rasmusson had offered to settle his claim for \$49,000.<sup>81</sup>

¶ 27 Rasmusson responded to Maynard’s counteroffer via e-mail at 4:33 p.m. Rasmusson countered with an offer to close everything for \$49,000 “new money.”<sup>82</sup>

¶ 28 Maynard responded to Rasmusson’s \$49,000 offer via e-mail at 4:43 p.m.<sup>83</sup> Maynard countered with an offer to settle for \$30,000 “new money.”<sup>84</sup>

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<sup>73</sup> Trial Test.

<sup>74</sup> Ex. 20 at 1.

<sup>75</sup> Rasmusson Dep. 47:20 - 48:6.

<sup>76</sup> *Id.*

<sup>77</sup> Rasmusson Dep. 43:16-20; 135:21 - 138:6.

<sup>78</sup> Trial Test.

<sup>79</sup> Rasmusson Dep. at 48:16-24.

<sup>80</sup> Rasmusson Dep. at 48:21-24.

<sup>81</sup> Trial Test.

<sup>82</sup> Ex. 21 at 1.

<sup>83</sup> Ex. 22 at 1.

<sup>84</sup> *Id.*

¶ 29 Rasmusson communicated Maynard's \$30,000 offer to Baker via a telephone conversation.<sup>85</sup> Baker knew that Maynard's offer contemplated a closure of all benefits.<sup>86</sup>

¶ 30 After discussing Maynard's \$30,000 offer, Rasmusson and Baker agreed to respond with a counteroffer of \$45,000.<sup>87</sup> Rasmusson responded via e-mail at 5:10 p.m. with a counteroffer of \$45,000.<sup>88</sup> As all other offers before, this contemplated a complete closure of Baker's workers' compensation claim.<sup>89</sup>

¶ 31 Maynard responded via e-mail at 5:23 p.m. with a counteroffer of \$35,000.<sup>90</sup>

¶ 32 Rasmusson communicated Maynard's \$35,000 offer to Baker via a telephone conversation.<sup>91</sup> After discussing the offer with Rasmusson, Baker decided to think about the offer overnight.<sup>92</sup> Baker testified at trial that he did not tell Rasmusson that he wanted to think about the offer overnight.<sup>93</sup> Wellington knew that Baker had had a phone conversation with Rasmusson on July 27<sup>th</sup> or 28<sup>th</sup> regarding a proposal, but she had only heard Baker's end of the conversation.<sup>94</sup> Wellington admitted to operating on limited information because she had only met Rasmusson once, only overheard one phone conversation and only from Baker's side, and had not seen the majority of letters sent or copied to Baker.<sup>95</sup>

¶ 33 At 6:16 p.m., Rasmusson e-mailed Maynard, stating that Baker "wants to think about [the \$35,000 offer] overnight."<sup>96</sup> Rasmusson further indicated that one issue had not been addressed: Baker's outstanding medical bills.<sup>97</sup>

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<sup>85</sup> Rasmusson Dep. 49:5-7; 136:14 - 138:6.

<sup>86</sup> Rasmusson Dep. at 49:8-10.

<sup>87</sup> Ex. 23 at 1.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Rasmusson Dep. 138:21 - 139:3.

<sup>92</sup> Rasmusson Dep. 49:21 - 50:6.

<sup>93</sup> Trial Test.

<sup>94</sup> Trial Test.

<sup>95</sup> Trial Test.

<sup>96</sup> Ex. 23 at 1; Rasmusson Dep. at 49:21 - 50:6.

<sup>97</sup> Ex. 23 at 1; Rasmusson Dep. at 50:7-10.

¶ 34 On either July 28, 2010, or July 29, 2010, the string of July 28, 2010, e-mail offers was forwarded by Rasmusson to Baker via U.S. Mail.<sup>98</sup> Rasmusson testified that he spoke with Baker on the phone regarding each offer and counteroffer.<sup>99</sup>

¶ 35 Baker stated that on July 28, 2010, he and Rasmusson argued about whether the settlement discussions were only proposals or final or official settlements.<sup>100</sup> At trial, Baker repeatedly insisted that Rasmusson only had authority to listen to offers and to then relay those offers to him in writing.<sup>101</sup> There is no evidentiary support for Baker's contention. Conversely, considerable documentary evidence supports Rasmusson's testimony regarding his communications with Baker. I do not find Baker's contention credible.

¶ 36 On the morning of July 29, 2010, Rasmusson spoke with Baker regarding Fireman's outstanding offer to settle "everything" for \$35,000.<sup>102</sup> After this discussion, Baker authorized a counteroffer of \$40,000 to close everything, in addition to the payment of certain outstanding medical bills from visits to Butte.<sup>103</sup> Baker expressly agreed to assume the bills related to Clark Fork Valley Hospital and the Hot Springs Clinic.<sup>104</sup> Baker did not condition this counteroffer upon his review of the agreement in writing.<sup>105</sup>

¶ 37 After speaking with Baker on July 29, 2010, Rasmusson wrote to Maynard and stated that Baker "would agree to a total closure, including all indemnity and medical benefits" for \$40,000 "new money."<sup>106</sup> Rasmusson noted that Baker would assume responsibility for medical bills associated with Clark Fork Valley Hospital and the Hot Springs Clinic, and Fireman's would agree to pay for any bills associated with treatment by Dr. DiGiovine, St. James Healthcare, and any other bills associated with related treatment.<sup>107</sup> Rasmusson further noted that any prescriptions accepted by Fireman's would continue to be paid by Fireman's until approval of the settlement by the Employment Relations Division (ERD), but any prescriptions denied would be Mr.

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<sup>98</sup> Ex. 45; Rasmusson Dep. 50:13-21.

<sup>99</sup> Ex. 45; Rasmusson Dep. 50:15 - 51:2; 138:17 - 138:11.

<sup>100</sup> Trial Test.

<sup>101</sup> Trial Test.

<sup>102</sup> Rasmusson Dep. at 146:11 - 147:13.

<sup>103</sup> Ex. 57 at 21; Rasmusson Dep. 48:21-24; 139:12 - 140:14; 146:7-10.

<sup>104</sup> Ex. 57 at 21; Ex. 24; Rasmusson Dep. 145:2-10.

<sup>105</sup> Rasmusson Dep. at 60:23 - 61:8; 147:14-22.

<sup>106</sup> Ex. 24 at 1.

<sup>107</sup> *Id.*

Baker's responsibility.<sup>108</sup> Rasmusson made this offer with Baker's knowledge, consent, and authority. The offer covered all material issues between the parties.<sup>109</sup> As with previous correspondence, Baker received a copy of this letter.<sup>110</sup>

¶ 38 At 11:24 a.m. on July 29, 2010, Maynard informed Rasmusson via e-mail that Fireman's accepted Rasmusson's \$40,000 offer.<sup>111</sup> Both Rasmusson and Maynard understood that Fireman's acceptance created a binding settlement agreement.<sup>112</sup>

¶ 39 Baker testified that Rasmusson never called to say that he had settled the case.<sup>113</sup> Regarding the phrase "sign if you agree" in Rasmusson's instructions, Baker testified that he understood that the settlement was not binding until signed.<sup>114</sup> Baker claimed that he never orally accepted the settlement offer.<sup>115</sup> Baker testified that the settlement offers were always discussed as mere proposals and that he does not remember being relayed any specific settlement numbers.<sup>116</sup> I do not find Baker's statements in this regard credible.

¶ 40 Later that day, Rasmusson notified Baker that Fireman's had accepted the \$40,000 offer and that the only task remaining was to prepare and sign the settlement documents.<sup>117</sup> At no time during negotiations did Baker indicate that he did not approve of the settlement, that he did not agree to settle his claim, or that Rasmusson lacked actual authority to settle the claim.<sup>118</sup> Baker's post-settlement statements to the contrary lack credibility.

¶ 41 Maynard and Rasmusson prepared the Supplemental Petition for Full and Final Compromise Settlement and Release (Supplemental Petition for Settlement) and Settlement/Advance Recap Sheet memorializing the agreement reached by the parties

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<sup>108</sup> *Id.*

<sup>109</sup> Rasmusson Dep. 52:11-22.

<sup>110</sup> Ex. 24 at 1; Baker Dep. 101:5-14.

<sup>111</sup> Ex. 25 at 1.

<sup>112</sup> Rasmusson Dep. 53:3-25.

<sup>113</sup> Trial Test.

<sup>114</sup> Trial Test; Ex. 57 at 23.

<sup>115</sup> Trial Test.

<sup>116</sup> Trial Test.

<sup>117</sup> Rasmusson Dep. 53:20 - 54:3.

<sup>118</sup> Rasmusson Dep. at 41:5-8; 52:14-16; 60:23 - 62:12.

using Maynard's standard forms.<sup>119</sup> Rasmusson had authority to finalize the specific terms of the settlement agreement.<sup>120</sup>

¶ 42 The Supplemental Petition for Settlement provided that the parties had agreed to settle "any and all claims (Baker) may possess under the Workers' Compensation and/or Occupational Disease Acts while Fireman's Fund Insurance Company was at risk. Except to the extent herein provided, past, present, and future medical benefits are closed."<sup>121</sup> The settlement also included the following "Special Provisions":

4. With respect to unpaid medical bills, the Insurer shall pay for Petitioners' treatment with Dr. DiGiovine and related treatment in Butte, Montana, on a disputed liability basis. In addition, the Insurer shall pay authorized, routine prescription costs until ERD approval of this settlement. Petitioner shall be responsible for medical care associated with the Clark Fork Valley Hospital and the Hot Springs Clinic. All other past, present, and future medical and hospital benefits are closed.
5. All indemnity and rehabilitation benefits are closed.
6. Petitioner stipulates and agrees that the Insurer has acted reasonably.<sup>122</sup>

¶ 43 On July 30, 2010, Rasmusson wrote to Maynard regarding the written memorialization of the settlement agreement and requested a few changes.<sup>123</sup> Rasmusson asked that Maynard change the language regarding indemnity benefits so that the Social Security Administration could not claim an offset later.<sup>124</sup> On August 2, 2010, Maynard agreed to Rasmusson's proposed changes via e-mail, but insisted that that Fireman's not pay for medical marijuana.<sup>125</sup> Rasmusson agreed.<sup>126</sup>

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<sup>119</sup> Ex. 57 at 24-26.

<sup>120</sup> See Ex. 24 ("You and I will hammer out the specific language regarding the MSA in the future.")

<sup>121</sup> Ex. 57 at 24.

<sup>122</sup> Ex. 57 at 25.

<sup>123</sup> Ex. 29 at 1.

<sup>124</sup> *Id.*

<sup>125</sup> Ex. 28 at 1.

<sup>126</sup> *Id.*

¶ 44 On August 2, 2010, Rasmusson forwarded the finalized settlement documents to Baker.<sup>127</sup> Baker never signed and returned the documents.<sup>128</sup> Baker testified at trial that he first learned that Fireman's had offered \$40,000 when he received the settlement documents.<sup>129</sup> I do not find this testimony credible.

¶ 45 On August 5, 2010, after receiving the documents, Baker informed Rasmusson that he was no longer interested in the settlement.<sup>130</sup> In an e-mail to Rasmusson, Baker stated that the agreement "verbally sounds good." Baker stated, "Unfortunately after being able to see the settlement agreement on paper I am unable to accept this arrangement."<sup>131</sup> Baker testified that his August 5, 2010, e-mail was the first time that he was able to tell Rasmusson that the settlement was unacceptable.<sup>132</sup> Baker informed Rasmusson that he conditioned settlement on his review of the documents, that he thought the MSA was incorrect, and that the settlement would "disqualify (his) family from the programs that are currently sustaining us."<sup>133</sup> Baker conveyed all of this information to Rasmusson after Baker had orally approved the settlement.<sup>134</sup>

¶ 46 When I questioned Baker at trial regarding what he meant when he stated the agreement "verbally sounds good," I found Baker's responses evasive. Ultimately, Baker stated that he was referring only to no longer dealing with the claims representative as "verbally sound[ing] good," but that he needed to see all other portions of the settlement agreement in writing.<sup>135</sup> Baker admitted at trial, however, that no e-mail or letter indicates the existence of his purported condition that the settlement agreement would not be final until he received it in writing and had a family meeting to discuss it.<sup>136</sup>

¶ 47 On August 12, 2010, Rasmusson responded via letter to Baker's August 5, 2010, e-mail.<sup>137</sup> Rasmusson stated that he was surprised that Baker had a "change of heart"

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<sup>127</sup> Ex. 46; Rasmusson Dep. 58:1-5.

<sup>128</sup> Rasmusson Dep. at 59:5-7.

<sup>129</sup> Trial Test.

<sup>130</sup> Ex. 57 at 27.

<sup>131</sup> *Id.*

<sup>132</sup> Trial Test.

<sup>133</sup> Ex. 57 at 27; Rasmusson Dep. 61:1 - 62:8.

<sup>134</sup> Rasmusson Dep. 60:23-25.

<sup>135</sup> Trial Test.

<sup>136</sup> Trial Test.

<sup>137</sup> Ex. 57 at 28-30.

about the settlement Baker had previously authorized and agreed upon.<sup>138</sup> Rasmusson's letter reflects that he and Baker had discussed settlement "at length on many occasions."<sup>139</sup> Rasmusson felt that Baker fully "understood the ramifications of settlement negotiations and what transpired."<sup>140</sup> Rasmusson stated that he "would not have handled the case the way I did without your (Baker's) full knowledge and consent."<sup>141</sup> Rasmusson stated that the "deal on paper is the same one made [orally] with the insurer. There are no changes."<sup>142</sup>

¶ 48 At trial, Baker adamantly disagreed with the statements made in Rasmusson's August 12, 2010, letter.<sup>143</sup>

¶ 49 On August 19, 2010, Baker terminated his attorney-client relationship with Rasmusson.<sup>144</sup> On the same day, Baker e-mailed Maynard, informing him that Rasmusson was no longer his attorney and that he did "not intend to settle [his] medical."<sup>145</sup> Baker also stated, "If you would like to talk about this I could be interested."<sup>146</sup> Baker claims that although he intended to reopen his case based upon a mutual mistake of fact, he was willing to consider a reasonable settlement offer.<sup>147</sup>

¶ 50 On September 24, 2010, Baker again e-mailed Maynard, indicating that he would like to talk with him "instead of having to give up a bunch more money" by hiring another attorney.<sup>148</sup> Baker expressed interest in resolving his claim, noting, "It would be nice to work this out . . . ."<sup>149</sup>

¶ 51 On October 10, 2010, Baker proposed settling his claim for \$300,000.<sup>150</sup> On October 14, 2010, Baker again e-mailed Maynard that "\$300,000 is a good place for us to start," and indicated that he would "rather not have to hire another attorney . . . . I

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<sup>138</sup> Ex. 57 at 28.

<sup>139</sup> Ex. 57 at 30.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Ex. 57 at 28.

<sup>143</sup> Trial Test.

<sup>144</sup> Ex. 57 at 37.

<sup>145</sup> Ex. 47.

<sup>146</sup> *Id.*

<sup>147</sup> Trial Test.

<sup>148</sup> Ex. 48.

<sup>149</sup> *Id.*

<sup>150</sup> Ex. 53.



could use those funds to live on rather than contribute them.”<sup>151</sup> Baker testified that he made his \$300,000 demand in response to Maynard’s demand for a firm number.<sup>152</sup>

¶ 52 Elenya Gallegos, the original claims examiner on Baker’s file, testified at trial. I found Gallegos credible. Gallegos denied several of Baker’s medical bills and emergency room visits because they did not appear to be related to his right shoulder claim.<sup>153</sup> Gallegos made these decisions based upon the treating doctor’s assessments that the injuries did not appear shoulder-related.<sup>154</sup> Gallegos did not pay bills dated after July 2010 since the settlement agreement indicated that Baker would assume responsibility for all future medical costs.<sup>155</sup>

¶ 53 Susan Lake, Gallegos’ successor, testified at trial. I found Lake credible. Lake had called the medical providers about the unpaid bills and requested a bill with tax identification information necessary to issue a check.<sup>156</sup> Lake issued payment for the unpaid bills, but could not recall exactly when.<sup>157</sup> The outstanding St. James Healthcare bill had received a zero balance response so Lake thought that bill had already been paid.<sup>158</sup> However, the St. James Healthcare bill had actually been sent to collections as it was over a year delinquent.<sup>159</sup>

¶ 54 As of March 29, 2011, Fireman’s had not paid these balances.<sup>160</sup> Despite authorizing these visits and tests, Fireman’s delayed payment of these bills for over a year. On October 4, 2010, Baker first sent the bills to Maynard attached to an e-mail.<sup>161</sup> On January 17, 2011, Baker’s counsel sent the bills to Maynard with evidence that the charge for \$165.90 had been turned over to collection.<sup>162</sup> On February 2, 2011, and February 11, 2011, Baker again demanded payment.<sup>163</sup> After Fireman’s claimed that the

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<sup>151</sup> Ex. 54.

<sup>152</sup> Trial Test.

<sup>153</sup> Trial Test.

<sup>154</sup> Trial Test.

<sup>155</sup> Trial Test.

<sup>156</sup> Trial Test.

<sup>157</sup> Trial Test.

<sup>158</sup> Trial Test; Ex. 77.

<sup>159</sup> Ex. 75; Ex. 78.

<sup>160</sup> Trial Test; Ex. 78.

<sup>161</sup> Ex. 49 at 1-2.

<sup>162</sup> Ex. 72 at 1-3, 61, 62.

<sup>163</sup> Ex. 73; Ex. 75.

bills had been paid on September 30, 2010, Baker's counsel provided Fireman's with still more proof that both accounts remained delinquent.<sup>164</sup>

¶ 55 On April 26, 2011, Maynard sent a letter showing a receipt for checks issued April 15 for the full amounts of \$165.90 to St. James Healthcare and \$33.00 to Montana Interventional and Diagnostic.<sup>165</sup> Lake had to issue manual checks for these bills because they did not have fee schedules as a result of their age.<sup>166</sup> Lake called and verified with patient accounts that each outstanding bill had been received.<sup>167</sup> Lake acknowledged that the collection agency had not been paid, but rather, payment had been sent directly to the medical providers.<sup>168</sup> To the best of Lake's knowledge, all other bills had been paid.<sup>169</sup>

¶ 56 I find that Baker authorized Rasmusson to settle his case. The documentary evidence, taken as a whole, shows a protracted course of settlement negotiations and regular communication between Baker and Rasmusson. Specifically, on July 28<sup>th</sup>, Baker told Rasmusson that he wanted to consider Fireman's \$35,000 offer overnight. Rasmusson informed Maynard of Baker's request. Rasmusson then spoke with Baker on the morning of July 29, 2011, and counteroffered \$40,000. Baker's statements that Rasmusson acted on his own accord without authority are not credible. Rasmusson testified that it is his practice to contact clients and discuss settlement offers proposed by insurers.<sup>170</sup> He further testified that it is his practice to propose settlement offers only when he has authority delegated to him by the client.<sup>171</sup> I find that Rasmusson engaged in these practices in this instance. Baker's statements that he did not receive the offers, that he did not authorize Rasmusson to respond with counteroffers, and that any settlement was conditioned upon his review of the agreement "in writing,"<sup>172</sup> lack credibility.

¶ 57 I find that, at all times material hereto, Rasmusson ensured that Baker was informed of the developments of his case, provided him with copies of correspondence, and ensured that Baker understood the ramifications of settlement. Upon seeing the memorialized agreement in writing, Rasmusson and Baker discussed and insisted that

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<sup>164</sup> Ex. 78; Ex. 81.

<sup>165</sup> Trial Test; Ex. 79.

<sup>166</sup> Trial Test.

<sup>167</sup> Trial Test.

<sup>168</sup> Trial Test.

<sup>169</sup> Trial Test.

<sup>170</sup> Rasmusson Dep. at 48:7-15.

<sup>171</sup> Rasmusson Dep. at 137:2-5.

<sup>172</sup> Baker Dep. 64:18-21.

certain changes be made in Maynard's standard forms. At no point did Baker dispute Rasmusson's actions or admonish his counsel for engaging in settlement discussions. Baker orally agreed to settle his claim. Baker never mentions any discrepancies between what had been orally agreed to and what appeared in the written agreement. I find that Baker did in fact settle his claim for \$40,000.

### **CONCLUSIONS OF LAW**

¶ 58 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Baker's industrial accident.<sup>173</sup>

¶ 59 Baker bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks<sup>174</sup> Baker has not met this burden.

#### **Issue One: Whether Petitioner's claim was settled for \$40,000 in July 2010.**

¶ 60 The parties' dispute pertains to whether Rasmusson had authority to enter into -- and if so, whether Rasmusson did enter into -- a binding agreement to settle and close Baker's workers' compensation claim. As noted above, I have found that Baker did settle his claim, closing all benefits.

¶ 61 A settlement agreement is a contract, and contract law must be applied to determine whether an agreement is valid and enforceable.<sup>175</sup> Where the parties reach an express, complete, and unconditional settlement agreement, the agreement is enforceable.<sup>176</sup> Whether there was a meeting of the minds is determined by considering both the parties' words and actions.<sup>177</sup>

¶ 62 Baker authorized Rasmusson to engage in settlement negotiations with Fireman's. On July 27, 2010, after discussing the merits, weaknesses, and potential take-home amount with Rasmusson, Baker authorized Rasmusson to settle for \$57,500 "new money." Rasmusson timely informed Baker of the multiple offers and counteroffers exchanged with Maynard. Baker's awareness of and participation in

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<sup>173</sup> *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

<sup>174</sup> *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).

<sup>175</sup> *Kruzich v. Old Republic Ins. Co.*, 2008 MT 205, ¶ 24, 344 Mont. 126, 188 P.3d 983 (citing *Gamble v. Sears*, 2007 MT 131, ¶ 24, 337 Mont. 354, 160 P.3d 537).

<sup>176</sup> *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 849 P.2d 1039 (1993).

<sup>177</sup> *Bitterroot Int'l Systems, Ltd. v. Western Star Trucks, Inc.*, 2007 MT 48, ¶ 33, 336 Mont. 145, 153 P.3d 627.

negotiations is best evidenced by the fact that Baker requested time to consider Fireman's July 28, 2010, \$35,000 offer overnight. The following morning on July 29, 2010, Baker authorized Rasmusson to offer \$40,000. Later that day, Rasmusson informed Baker that Fireman's had accepted their \$40,000 offer to settle. At that time, Baker did nothing to indicate his disapproval, dispute the existence of an agreement, or rescind Rasmusson's settlement authority. Baker had agreed to the settlement and first attempted to repudiate the agreement several days later after receiving the settlement documents. Baker's statements to the contrary lack credibility.

¶ 63 A contract is formed when the parties mutually assent to its material terms, at which point it becomes binding notwithstanding the absence of Department of Labor and Industry approval.<sup>178</sup> After accepting Baker's \$40,000 offer to "close everything," Maynard drafted the Supplemental Petition for Settlement. This document was drafted after the parties agreed in principal to the \$40,000 settlement, and while Rasmusson had authority to finalize the specific terms of the agreement on Baker's behalf. The document is unconditional and unambiguous, and provides a clear statement of the parties' intent to settle the claim. On July 30, 2010, Rasmusson wrote to Maynard requesting a few changes to the written settlement. On August 2, 2010, Maynard e-mailed Rasmusson indicating that the "[s]uggested changes are fine as long as it is understood that the insurer isn't paying anything having to do with medical pot."<sup>179</sup> Rasmusson responded: "Agreed N[o] medical pot."<sup>180</sup> This offer and acceptance contained all material terms representing the necessary "meeting of the minds" and created a binding contractual agreement. Baker cannot thereafter unilaterally repudiate its validity.

¶ 64 Baker made several contentions in an attempt to avoid being bound to the agreement. First, Baker insists that he never wanted to settle, but that he only wanted to reopen his case. No evidence supports this contention. Baker's desire to settle is substantiated by the extensive settlement negotiations that occurred over several days, the documentary evidence, and Rasmusson's credible testimony. Specifically, Baker wanted a permanent total disability-type settlement.<sup>181</sup> When Rasmusson informed him that the merits of his claim did not support a permanent total disability-type settlement, and that Fireman's would not pay that type of settlement,<sup>182</sup> Baker's interest in settlement was undeterred. Baker is familiar with the settlement process, having initially settled his case in 2008 for \$45,100 and leaving medical benefits open. Baker

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<sup>178</sup> *Murer v. Montana State Fund*, 2006 MTWCC 32, ¶ 8.

<sup>179</sup> Ex. 28 at 1.

<sup>180</sup> *Id.*

<sup>181</sup> Rasmusson Dep. 42:14-17.

<sup>182</sup> Rasmusson Dep. at 42:22 - 43:2.

authorized Rasmusson to make multiple offers and counteroffers in an effort to settle his claim. After dismissing Rasmusson as his counsel, Baker told Maynard that \$300,000 was a “good place to start” settlement discussions. Further, Baker testified at trial that although his goal was to reopen his claim, he was always open to reasonable settlement offers.

¶ 65 In *Hetherington v. Ford Motor Co.*, the plaintiffs met with their counsel, agreed to the defendants’ settlement proposal, and delegated their counsel unconditional authority to accept.<sup>183</sup> After this meeting, the Hetheringtons’ counsel sent a letter which stated: “Please be advised that my clients have decided to accept your clients’ combined offer of settlement . . . .”<sup>184</sup> Four days after their counsel sent this letter, the Hetheringtons wrote a letter discharging their counsel and indicating that they were not interested in the settlement.<sup>185</sup> When the defendants sought to enforce the agreement, the Hetheringtons alleged that they had intended not to be bound by the settlement until it was reduced to writing, and they had reviewed and signed it.<sup>186</sup> The Montana Supreme Court applied the rule that a party’s latent intent not to be bound does not prevent the formation of a binding contract and that such condition must be part of the agreement between the parties.<sup>187</sup> The Supreme Court concluded that because the Hetheringtons did not disclose the condition to their attorney, it was not part of the settlement agreement to which they were bound.<sup>188</sup> The Supreme Court noted that neither the attorney’s letter to the defendants accepting the settlement offer, nor the conference between the Hetheringtons and their attorney, disclosed any “conditions or manifestations of conditional intent.”<sup>189</sup> Since the Hetheringtons did not advise their attorney of their desire to read and sign the agreement before it became final, the attorney’s letter was considered an unconditional acceptance of an unconditional offer.<sup>190</sup>

¶ 66 The facts and circumstances surrounding Baker’s settlement agreement are comparable to *Hetherington*. Baker authorized Rasmusson to settle his claim. Baker never expressed or conditioned his acceptance upon his review and approval of a written agreement. Baker later tried to repudiate the agreement based upon an

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<sup>183</sup> *Hetherington*, 257 Mont. at 397, 849 P.2d 1041.

<sup>184</sup> *Id.*

<sup>185</sup> *Hetherington*, 257 Mont. at 397-98, 849 P.2d at 1041.

<sup>186</sup> *Hetherington*, 257 Mont. at 398, 849 P.2d at 1041.

<sup>187</sup> *Hetherington*, 257 Mont. at 399, 849 P.2d at 1042.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

unarticulated condition, but his latent intent not to be bound did not prevent the formation of a valid contract. Baker is bound by the agreement Rasmusson reached.

¶ 67 Baker delegated unconditional authority to settle his claim for \$40,000. Rasmusson conveyed an unconditional offer and Maynard accepted. It does not matter that Baker never signed the agreement. Upon Maynard's acceptance, the parties formed a binding agreement and they are bound by its terms.

**Issue Two: Whether Petitioner is entitled to payment of outstanding medical bills for his medical treatment pursuant to § 39-71-704, MCA.**

¶ 68 Baker's July 29, 2010, settlement agreement expressly resolved all outstanding medical bills. Baker agreed to be responsible for medical bills associated with Clark Fork Valley Hospital and the Hot Springs Clinic. Fireman's agreed to pay any bills associated with treatment by Dr. DiGiovine, St. James Healthcare, and any bills coupled with related treatment. Baker assumed responsibility to pay for all future medical expenses. The terms of the settlement agreement resolve Baker's claims for compensation for outstanding medical expenses and he is entitled to payment of outstanding medical bills in accordance with the terms of the agreement.

**Issue Three: Whether Petitioner is entitled to a 20% increase of award for unreasonable delay or refusal to pay benefits pursuant to § 39-71-2907, MCA.**

¶ 69 Baker contends that this Court should award him a penalty against Fireman's for its delay or refusal to pay certain benefits. Section 39-71-2907, MCA, states, in pertinent part:

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 . . . .

¶ 70 Baker's entitlement to outstanding medical bills was expressly resolved in the settlement agreement. Fireman's would remain liable for bills associated with Dr. DiGiovine and St. James Healthcare. Baker contends that there are still outstanding medical bills associated with these providers that have not been paid: a visit with Dr. Smith requested by Dr. DiGiovine at St. James Healthcare dated March 2, 2010, for \$165.90 and a chest x-ray requested by Dr. Smith at Montana Interventional and Diagnostic dated March 2, 2010, for \$33.00.

¶ 71 Despite Fireman's express agreement to pay for these medical bills, Fireman's did not issue payment checks until at least April 15, 2011, more than a year after Baker's visit. During that time, Fireman's ignored repeated demands for payment. This inexplicable delay in paying bills for which Fireman's was undisputedly liable is unreasonable. Baker is entitled to a penalty on the St. James Healthcare bill for \$165.90 and the Montana Interventional and Diagnostic bill for \$33.00 as agreed to in the settlement, and pursuant to § 39-71-2907, MCA.

**Issue Four: Whether Petitioner is entitled to reasonable attorney fees and costs pursuant to § 39-71-611 and § 39-71-612, MCA.**

¶ 72 Under § 39-71-611, MCA, a claimant is entitled to his costs related to any issues upon which he has prevailed.<sup>191</sup> However, in order to recover attorney fees Baker must also show that Fireman's conduct was unreasonable. I have concluded that Fireman's unreasonably delayed payment for certain medical bills. Nonetheless, under § 39-71-611, MCA, there must be an adjudication of compensability before an award of attorney fees and costs is authorized.<sup>192</sup>

¶ 73 At the time of trial, neither party was able to establish whether Fireman's paid the disputed medical bills before or after I issued a bench ruling on the issue of compensability. Some evidence indicated that Fireman's mailed checks for these bills directly to the medical providers. Other evidence indicated that the medical providers turned these bills over to a collection agency and that Fireman's has not paid the collection agency. Prior to trial and in spite of making significant effort to do so, the parties were unable to ascertain whether there was simply a miscommunication between the medical providers and the collection agency or whether Fireman's has not paid these medical bills. As noted above, if Fireman's paid these bills prior to my bench ruling, Baker is not entitled to attorney fees or costs. However, if Fireman's did not pay these bills until after my bench ruling, Baker is entitled to attorney fees and costs.

¶ 74 I will retain jurisdiction of this matter for 30 days and suspend all deadlines during this period for the parties to confer and conclusively determine whether these bills were paid before or after my bench ruling. The parties may contact the Court and schedule a post-trial hearing on the matter if necessary.

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<sup>191</sup> See *Porter v. Liberty Northwest Ins. Corp.*, 2008 MTWCC 12, ¶¶ 6, 9.

<sup>192</sup> *Arneson v. Travelers Property Casualty*, 2006 MTWCC 7, ¶ 25 (citing *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 427, 742 P.2d 1020, 1022 (1987); *Yearout v. Rainbow Painting*, 222 Mont. 65, 719 P.2d 1258 (1986)).

## JUDGMENT

¶ 75 The parties entered into a binding settlement agreement on July 29, 2010.

¶ 76 Fireman's shall pay a sum of \$40,000 in a full and final compromise and release settlement of Baker's workers' compensation claim. Past, present, and future medical and hospital benefits not otherwise specified shall be closed. All indemnity and vocational rehabilitation benefits are closed.

¶ 77 With respect to unpaid medical bills, Fireman's shall pay for Baker's treatment with Dr. DiGiovine and related treatment in Butte on a disputed liability basis. In addition, Fireman's shall pay authorized, routine prescription costs through the date of the parties' agreement, July 29, 2010. Baker shall be responsible for medical care associated with the Clark Fork Valley Hospital and the Hot Springs Clinic.

¶ 78 The parties' agreement settles Baker's September 18, 2006, workers' compensation claim in its entirety.

¶ 79 Fireman's shall pay Baker a statutory 20% penalty for the medical bills that have been paid late. Those bills total \$198.90 for a penalty of \$39.78.

¶ 80 Baker's entitlement to attorney fees and costs will be determined after the parties have met and conferred to determine when Fireman's paid Baker's disputed medical bills.

DATED in Helena, Montana, this 22<sup>nd</sup> day of March, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA  
JUDGE

c: Laurie Wallace  
Joe C. Maynard  
Submitted: June 14, 2011