IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2020 MTWCC 10

WCC No. 2018-4387

AMBRONINE BERRY

Petitioner

vs.

MID CENTURY INSURANCE COMPANY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

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

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

¶ 1 The first day of trial was held on April 16, 2019, in Kalispell. Petitioner Ambronine "Amber" Berry was present and represented by Miva VanEngen. Respondent Mid Century Insurance Company ("Mid Century") was represented by Mark W. Buckwalter. Erin Mustoe, claims adjuster for Mid Century, was also present.

¶ 2 On April 24, 2019, before the second day of trial, Mid Century notified this Court "of its continued acceptance of medical benefits for Petitioner Amber Berry's lower back and acceptance of medical benefits for Petitioner's hip condition." Because the only dispute over benefits was "Petitioner's entitlement to medical benefits through the date of hearing," the parties did not call any other witnesses.

¶ 3 On May 7, 2019, the parties gave closing arguments on the remaining issues, i.e., whether Berry is entitled to a penalty under § 39-71-2907, MCA, and whether she is entitled to her attorney fees and costs under §§ 39-71-611 or -612, MCA. This Court allowed post-trial briefing on the issue of whether there was still a justiciable controversy over Berry's claim for medical benefits.

¶ 4 Exhibits: This Court admitted Exhibits 1 through 4, 7 through 24, 30 through 32, and 35 through 40. The parties did not offer exhibits 5, 6, 25, 26 through 29, and 41 through 44. This Court did not admit Exhibits 33 and 34.

¶ 5 Witnesses and Depositions: Steven R. Biggs, DC, MD, DABCO; Mary Jane Barrett, RN; Mustoe; and Berry were sworn and testified at trial. No depositions were taken.

¶ 6 Issues Presented: The Pretrial Order sets forth the following issues:

Issue One: Petitioner's entitlement to medical benefits through the date of hearing.

Issue Two: Whether Respondent's failure and refusal to cover Berry's medical expenses after July 22, 2017, was reasonable.

Issue Three: Petitioner's entitlement to a penalty, reasonable attorney fees and costs for each delay and refusal of liability by Respondent which this Court finds unreasonable.

FINDINGS OF FACT

¶ 7 The following facts are established by a preponderance of the evidence.

¶ 8 On February 9, 2017, Berry had the sudden onset of low-back pain, with pain radiating into her right leg, while shoveling snow in the course of her employment.

¶ 9 Berry's employer sent her for treatments with Dr. Biggs, who practices under his chiropractic license. Berry complained of bilateral low-back pain with pain radiating into her right leg. Dr. Biggs diagnosed, "Segmental and somatic dysfunction" of the lumbar and sacral regions, and "Sacroiliac joint dysfunction."

¶ 10 After Dr. Biggs recommended an MRI to rule out a herniated disc, Berry completed a First Report of Injury or Occupational Disease. In the "Description of Accident" box,

Berry wrote, “3.5 hrs of snow removal – hurt my L4 + L5.” Berry’s employer also completed a First Report of Injury or Occupational Disease, stating that Berry “strained” her back.

¶ 11 On March 28, 2017, Berry saw Ned A. Wilson, MD, complaining of “acute onset back and bilateral lower extremity pain while shoveling snow February 9, 2017.” Berry also complained of “upper extremity dysesthesia with radiation into the hands bilaterally,” which began four days before her appointment. Dr. Wilson made two diagnoses. First, Dr. Wilson diagnosed Berry with “back and bilateral lower extremity pain status post work-related injury February 9, 2017.” For this diagnosis, Dr. Wilson stated:

> I’d recommend lumbar MR scan for further evaluation. Treatment recommendations will follow. I will allow her to return to work with 10 pound lifting restriction. I cannot determine when she’ll reach maximum medical improvement or what other treatments can be indicated at this time.

Dr. Wilson also diagnosed “upper extremity dysesthesia” but stated, “I do not think that the upper extremity symptoms are work-related [and] therefore would be under liability other than Workers’ Compensation.”

¶ 12 On March 29, 2017, Mid Century accepted liability for Berry’s lumbar-spine injury.

¶ 13 The MRI of Berry’s lumbar spine revealed, a “[b]road-based disc bulge and annular fissure eccentric to the right at L4-L5 with a shallow right posterolateral disc protrusion which abuts the descending right L5 nerve root,” and a “[s]hallow right posterolateral disc protrusion and annular fissure at L5-S1 which abuts the descending right S1 nerve root.”

¶ 14 Berry returned to Dr. Wilson on April 10, 2017. Dr. Wilson determined that the MRI showed: “mild desiccation L4-5, L5-S1 with right-sided annular tears L4-5 and L5-S1. No significant disc herniation. No significant canal or foraminal compromise.” Dr. Wilson diagnosed Berry with “discogenic spinal pain.” Dr. Wilson told Berry that the symptoms of discogenic spinal pain typically improve over time, but that he could not predict when. Dr. Wilson did not think that Berry was a candidate for a spinal injection or surgery. Dr. Wilson prescribed a course of physical therapy for his diagnosis of “annular tear L4/5 and L5-S1.” Dr. Wilson stated, “When she plateaus with regard to progress in physical therapy, I believe she’ll be at maximum medical improvement and she will likely require a functional capacity exam.”

¶ 15 Mid Century authorized the course of physical therapy. Mary Jane Barrett, the nurse case manager Mid Century had assigned to Berry’s claim, notified the physical therapist that, “Ms. Berry is authorized for physical therapy for lumbar spine [condition] deemed work related by Dr. Ned Wilson.”

¶ 16 Berry was still treating with Dr. Biggs. In his treatment note dated June 21, 2017, Dr. Biggs noted for the first time that Berry complained of bilateral hip pain, left greater than right.

¶ 17 Berry had an appointment with Dr. Wilson on July 17, 2017. In the waiting area, Berry spoke with Barrett, who was there to attend the appointment. Berry told Barrett that she was frustrated with Dr. Wilson because she did not think he was providing adequate care and because she felt that he was dismissive of her and her complaints of pain. Berry told Barrett that she was going to "confront" Dr. Wilson.

¶ 18 During the appointment, Dr. Wilson recommended that Berry continue with physical therapy and, thereafter, transfer to either a primary care physician or a pain management clinic. Berry became angry. Thus, Dr. Wilson recommended that she transfer to another treating physician. Barrett told Dr. Wilson and Berry that she would "facilitate" the transfer of care. Dr. Wilson's record states:

> Patient comes in today for followup regarding work-related back pain. It appears that she started physical therapy June 20, 2017. She's had 11 visits and she indicates there [has] been some improvement. I discussed continuing physical therapy until she plateaus in this regard.
>
> She seems frustrated by my recommendation.
>
> She requested a prescription for [a] lidocaine patch.
>
> I think . . . given her symptoms and marginal progress it's likely that she'll be looking at medical pain management. I explained that I did not provide medical pain management and would recommend referral to either primary care or pain management clinic to facilitate this.
>
> She became angry with my answer out [sic] and felt I was not providing the care that she expected.
>
> Therefore, at this time I would recommend that her care be transferred to the physician that she feels provides the care that she is looking for.
>
> Mary Jane Barrett, case manager was present for the entire visit and confirm[ed] that she would facilitate transfer.

Barrett had Dr. Wilson sign a form, and then spoke with Berry. Barrett told Berry to call Mustoe to get authorization to transfer to a new treating physician.

¶ 19 However, Barrett, who acted as an advocate for Mid Century throughout Berry's claim, had no intention of facilitating Berry's transfer to a new treating physician. Thus,

after this appointment, Barrett sent an email to Mustoe and Victor Frech, the claims examiners at Mid Century, stating:

> Erin and Victor, If this woman/IW contacts you to request authorization for anything. [D]o not. We saw the doctor today. She has had 11 therapy visits. There are no medications and no objective clinical exam findings which is a necessary criteria [sic] in Montana. Her diagnosis is back pain which is a diagnosis of subjective report of back pain. I will call you tomorrow, Erin.

¶ 20 In their telephone conversation, Barrett and Mustoe discussed how to proceed. Rather than transfer Berry to another treating physician, they decided to schedule an independent medical examination (IME) with John Vallin, MD.

¶ 21 Barrett surmised that Berry would object to attending an IME rather than an appointment with a new treating physician. Thus, Barrett intentionally misled Berry as to the purpose and nature of Dr. Vallin's examination by intimating that Dr. Vallin was going to be her new treating physician. On July 22, 2017, Barrett sent a letter to Berry, stating: "Ms. Mustoe has requested that I coordinate medical evaluation for you with a specialist." Barrett's letter also stated that the "evaluation" was with Dr. Vallin for "Physical Medicine & Rehabilitation; Pain Medicine Evaluation." Thereafter, Berry and Barrett had a conversation in which Barrett told Berry that Dr. Vallin was an "SI joint specialist" who was going to "help [her] find some relief."

¶ 22 Because Barrett stated that she would "facilitate" the transfer of care to a new treating physician and because Barrett told Berry that she was sending Berry to a specialist to "help" her, Berry justifiably thought that she was scheduled to see Dr. Vallin for treatment.

¶ 23 Barrett wrote Dr. Vallin a letter to summarize the "facts" of Berry's claim. However, Barret's letter was slanted and misleading. For example, Barrett emphasized that Dr. Wilson had diagnosed "back pain," but she left out the fact that, based on Berry's lumbar MRI, Dr. Wilson had diagnosed "discogenic spinal pain." Barrett stated that Dr. Wilson had told her that he was not sure that the annular tears were causing Berry's low-back pain, but left out the facts that Dr. Wilson had prescribed physical therapy for "annular tear L4/5 and L5-S1," that she had told the physical therapist that Berry had a "lumbar spine [condition] deemed work related by Dr. Ned Wilson," and that in the record from her last visit, Dr. Wilson himself had stated that Berry had "work-related back pain."

¶ 24 On August 1, 2017, Berry underwent the IME with Dr. Vallin. Berry became angry when Dr. Vallin informed her that he was not going to provide any treatment and that, as

an IME physician, he was not even allowed to suggest that she take an aspirin. However, Berry stayed for the 20-minute examination.[1]

¶ 25 Berry moved from Kalispell to Missoula in August 2017.

¶ 26 On September 6, 2017, Mustoe wrote a letter to Berry informing her that, "Per the IME report, further medical treatment is denied as being not related to your 2/9/2017 worker's [sic] compensation injury."[2]

¶ 27 On November 13, 2017, Berry called Mustoe and demanded that Mid Century reopen her claim and continue to pay for her medical treatment. Mustoe declined to reopen Berry's claim but stated that she would send Berry's medical records to Dr. Vallin for his opinion as to whether the treatment was "related" to her workers' compensation injury.

¶ 28 On November 17, 2017, Berry began treatment at Missoula Bone & Joint for her lumbar-spine injury.

¶ 29 On November 27, 2017, Berry underwent another lumbar-spine MRI. The MRI showed a "broad-based disc bulge without [focal] protrusion at L5-S1," and an annular tear at L4-5.

¶ 30 On December 5, 2017, Missoula Bone & Joint billed Mid Century for Berry's treatment and MRI. Mustoe cursorily reviewed Berry's medical records and determined that Mid Century was not liable for the medical benefits because, although the records documented chronic low-back pain, the providers did not "directly" say that Berry's low-back pain was related to her industrial accident. Mustoe did not send Berry's medical records to Dr. Vallin. Instead, on December 22, 2017, Mustoe sent a fax to Missoula Bone & Joint stating that Berry had been at maximum medical improvement (MMI) since September 7, 2017, that Mid Century denied liability for medical benefits after that date and, therefore, that Berry was responsible for her medical bills.

¶ 31 On March 30, 2018, Berry saw Stella L. Selden, MD, at Partnership Health Center. Berry complained of hip pain. Dr. Selden referred Berry back to Missoula Bone & Joint for further evaluation and treatment.

¶ 32 On April 10, 2018, Berry returned to Missoula Bone & Joint. Based on the results of a diagnostic SI joint injection, Joan Bond-Deschamps, PA-C, diagnosed sacroiliitis. Based on the results of Berry's MRIs, Bond-Deschamps diagnosed low-back pain, noting that it was "[p]ossibly discogenic at L4-5." Bond-Deschamps also noted that Berry complained of left-hip pain. Bond-Deschamps stated that Berry's hip pain was "[o]f

[1] Dr. Vallin's report did not come into evidence.

[2] Emphasis in original.

unknown etiology with significant symptom magnification." Bond-Deschamps ordered an MRI of Berry's hip.

¶ 33 On April 12, 2018, Berry saw Daniel A. McCarthy, DO, at Partnership Health Center, for osteopathic manipulative treatment for her low-back pain. Berry continued with osteopathic manipulative treatment through the fall of 2018.

¶ 34 On April 17, 2018, Berry underwent a hip MRI. The radiologist read the MRI as showing impingement syndrome and a small labral tear.

¶ 35 On April 20, 2018, Berry began treatment at the Advanced Pain & Spine Institute in Missoula for her low-back pain.

¶ 36 On May 1, 2018, Steve Kemple, DO, performed a bilateral L4 selective nerve root block.

¶ 37 On May 9, 2018, Berry returned to Advanced Pain & Spine Institute. Dr. Kemple noted, "Recall that she has a history of low back pain that tends to radiate into her left hip, left lateral thigh, and over to the top of the left knee." Dr. Kemple noted that Berry's diagnoses were bilateral sacroiliitis and annular tear of intervertebral disc. Berry agreed to continue with osteopathic manipulation treatment and physical therapy.

¶ 38 On June 1, 2018, Berry returned to Missoula Bone & Joint and saw Michael Wright, MD, for her hip pain. Dr. Wright noted, "The patient has had hip pain for about a year and a half since she sustained a work-related injury shoveling snow." Dr. Wright reviewed Berry's hip MRI but did not think it conclusively showed a labral tear. Dr. Wright diagnosed, "Femoral Acetabular Impingement Syndrome, Left." Dr. Wright did not think Berry was a surgical candidate and recommended a steroid injection.

¶ 39 On June 11, 2018, Berry returned to Dr. Selden. At Berry's request, Dr. Selden requested a second opinion on Berry's left-hip pain from Daniel Whiting, MD, at Northern Rockies Orthopedics.

¶ 40 On June 25, 2018, Berry's attorney sent a demand letter to Mid Century, stating, in relevant part, that: "As the enclosed records reflect, Ms. Berry's care providers relate her ongoing back and hip problems to her February 9, 2017, injury. Please accept ongoing liability for Ms. Berry's back injury and provide payment for these expenses as soon as possible."

¶ 41 On July 2, 2018, Berry's attorney sent another demand letter, again asserting that Berry's providers "relate her ongoing back and hip problems to her February 9, 2017, injury."

¶ 42 On July 13, 2018, Berry saw Dr. Whiting for her hip pain, which Berry attributed to her industrial accident of February 9, 2017. Dr. Whiting noted that he did not see an

"obvious labral tear" on Berry's hip MRI. Dr. Whiting thought that Berry had impingement syndrome.

¶ 43 Berry returned to Dr. Whiting on July 20, 2018. Dr. Whiting noted that a CT scan confirmed impingement syndrome. Given that she had other pain generators, such as her SI joint, Dr. Whiting recommended a diagnostic left-hip injection.

¶ 44 Dr. Whiting performed the hip injection on July 27, 2018.

¶ 45 On August 20, 2018, Berry returned to Dr. Whiting. Berry reported a significant decrease in her hip pain after the injection. Thus, Dr. Whiting recommended surgery.

¶ 46 On August 28, 2018, Berry filed a Petition for Hearing, alleging that on February 9, 2017, she "injured her back when she was shoveling snow from the employer's parking lot after a winter storm." Berry alleged that the dispute over benefits was as follows:

> Respondent accepted Petitioner's claim for her back injury and paid medical benefits for February [2017] through early July 2017, then terminated them. Petitioner continues to have ongoing problems and medical care related to her accepted back injury and has submitted the charges to the insurer. Respondent disputes liability for Petitioner's ongoing medical care and has refused to pay any ongoing medical expenses.

Berry also asserted that Mid Century's denial of liability for her medical benefits was unreasonable and, therefore, that she was entitled to her attorney fees under §§ 39-71-611 or -612, MCA, and a penalty under § 39-71-2907, MCA.

¶ 47 On September 25, 2018, Mid Century filed its Response to Petition. Mid Century acknowledged that it had accepted liability for Berry's claim, but raised several defenses based on the IME report, including that there were no objective medical findings supporting Berry's claim that she suffered a lumbar-spine injury on February 9, 2017. It also alleged that "there is no objective medical bas[i]s to support the need for [Berry] to receive any additional medical interventions of any kind."

¶ 48 On October 10, 2018, Dr. Whiting surgically repaired Berry's hip, including a torn labrum.

¶ 49 On January 14, 2019, Dr. Biggs sent a letter to Berry's attorney in which he stated that he did not agree with Dr. Vallin's opinions. Dr. Biggs opined that Berry suffered annular tears, explaining that Dr. Vallin was unable to come up with a diagnosis and that he disregarded Berry's reports of pain, which were consistent with the objective findings on her MRI. Dr. Biggs stated that Berry had bilateral-hip pain that was "related to her injury," but did not identify a separate hip injury.

¶ 50 On April 16, 2019, the parties signed the Pretrial Order. The parties stipulated that Berry suffered an industrial injury on February 9, 2017. Berry contended that she suffered "back, bilateral hip and arm/elbow/hand problems." Mid Century acknowledged that it had accepted liability for Berry's claim but asserted "that there were no objective medical findings demonstrating ongoing medical treatment related to such injury."

¶ 51 Also on April 16, 2019, this Court held the first day of trial.

¶ 52 At the beginning of trial, this Court ruled on Berry's Motion in Limine, in which she argued that Dr. Vallin should not be allowed to testify because he refused to answer discovery about his IME practice, which a claimant is allowed to discover.[3] This Court ruled that Dr. Vallin could testify but that it would take his refusal to answer discovery into account when assessing his credibility and the weight to give his opinions.

¶ 53 On April 24, 2019, before the second day of trial, Mid Century notified this Court "of its continued acceptance of medical benefits for Petitioner Amber Berry's lower back and acceptance of medical benefits for Petitioner's hip condition." Mid Century explained that there was no need for additional testimony:

> As the lower back and hip condition are no longer contested, there should be no need for further testimony, as Counsel for Respondent has conferred with Counsel for Petitioner who has indicated that neither Dr. Daniel Whiting nor Joan Bond-Deschamps, PA-C would be testifying as to the hand/elbow/arm condition. Consequently, this would leave Petitioner's hand/elbow/arm condition, and Petitioner's claims for a penalty and attorney fees/costs . . . as the only issues left for the Court to address.

¶ 54 On April 25, 2019, this Court and the attorneys had a conference to discuss the status of this case. Berry's attorney acknowledged that Berry had not made a claim to Mid Century for her alleged hand, arm, and elbow injuries and, consequently, that Mid Century had not made any decision on liability for those alleged injuries. Thus, she conceded that this Court did not have jurisdiction to decide whether Mid Century was liable for those alleged injuries. The attorneys confirmed that they were not going to call any more witnesses and agreed that they were resting their cases. The attorneys agreed that the only issues left for this Court to decide were whether Berry was entitled to her attorney fees under §§ 39-71-611 or -612, MCA, or a penalty under § 39-71-2907, MCA.

¶ 55 The parties gave closing arguments on May 7, 2019. This Court granted Berry's request for post-trial briefing on the issue of whether there was still a justiciable controversy over Berry's claim for medical benefits.

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[3] *See, e.g.*, *Vulk v. Employers Comp. Ins. Co.,* 2014 MTWCC 13, ¶ 20 (ruling that, under *Hegwood v. Mont. Fourth Jud. Dist. Ct.*, 2003 MT 200, ¶ 17, 317 Mont. 30, 75 P.3d 308, a claimant may investigate an IME physician's potential bias by conducting discovery into the physician's IME practice, including the number of IMEs the physician has performed and the amount earned for IMEs for the preceding three years).

Resolution

¶ 56 The issue of whether an insurer's denial of liability, refusal to pay benefits, or delay in paying benefits was reasonable is an issue of fact.[4]

¶ 57 This Court finds that Mid Century's denial of liability for medical benefits for Berry's lumbar-spine injury from July 22, 2017, to April 24, 2019, was unreasonable for three reasons.

¶ 58 First, Mid Century was unreasonable because it obtained its IME under false pretenses and then used Dr. Vallin's opinions as the sole basis to deny liability for Berry's lumbar-spine claim. This Court faced a similar situation in *Gryttenholm v. Fremont Industrial Indemnity Co*.[5] Gryttenholm's treating physician and her first IME physician recommended that she see a neurosurgeon.[6] However, the insurer did not authorize her to see a neurosurgeon; instead, it scheduled an IME with a physician who specialized in occupational medicine.[7] The insurer sent a letter to Gryttenholm informing her of the appointment but did not explain that it was an IME.[8] Thus, Gryttenholm justifiably thought she was going to see a neurosurgeon.[9] The IME physician determined that Gryttenholm was at MMI.[10] Relying on his opinion, the insurer terminated her temporary total disability benefits.[11]

¶ 59 Gryttenholm asserted that she was "tricked" into attending the IME and that she would not have attended had she known that she was not going to see a neurosurgeon.[12] This Court explained that, by failing to disclose that it was sending her to an IME, the insurer did not comply with § 39-71-605, MCA, nor obtain Gryttenholm's informed consent for the evaluation.[13] This Court explained:

> Accurate information concerning a proposed IME is essential to the claimant's rights under the IME provisions. A claimant cannot intelligently exercise her rights or resist an improper examination where the insurer misleads her as to the nature of the examination or the

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[4] *See Marcott v. La. Pac. Corp*., 275 Mont. 197, 203, 911 P.2d 1129, 1133 (1996) (citing *Stordalen v. Ricci's Food Farm*, 261 Mont. 256, 258, 862 P.2d 393, 394 (1993)).

[5] 2002 MTWCC 24.

[6] *Gryttenholm,* ¶ 2.

[7] *Gryttenholm*, ¶ 3.

[8] *Gryttenholm*, ¶¶ 3-5.

[9] *Gryttenholm*, ¶ 6.

[10] *Gryttenholm*, ¶ 6.

[11] *Gryttenholm*, ¶ 6.

[12] *Gryttenholm*, ¶ 6.

[13] *Gryttenholm*, ¶¶ 7-14.

> specialty of the examiner. In the present case the claimant was misled as to the specialty of the examining physician and probably his role.[14]

This Court concluded that the appropriate remedy was to exclude all evidence from the IME physician.[15]

¶ 60 As in *Gryttenholm*, Mid Century "tricked" Berry into attending the IME with Dr. Vallin. Rather than transferring Berry from Dr. Wilson to another treating physician under § 39-71-1101, MCA, as Barrett said she would, Barrett sent Berry to an IME under the guise that Dr. Vallin was going to be her new treating physician. Barrett's behavior, which is attributable to Mid Century, was obviously inappropriate and inconsistent with reasonable claims handling. Pursuant to *Gryttenholm*, Mid Century should not have considered or used Dr. Vallin's opinions. Under these circumstances, Mid Century's reliance on and use of Dr. Vallin's opinions to deny liability for Berry's lumbar-spine injury was unreasonable.

¶ 61 Second, Mid Century's denial of liability was unreasonable because it accepted liability for Berry's lumbar-spine injury and then rescinded its acceptance based on Dr. Vallin's opinion. This Court faced a similar situation in *Narum v. Liberty Northwest Ins. Corp*.[16] Liberty accepted liability for Narum's hip injury.[17] After disputes arose, Narum and Liberty then settled his claim, leaving medical benefits open with a provision stating that Narum "may require a total hip replacement in the future."[18] Three years later, Narum had a hip replacement.[19] However, relying upon the opinion of an IME physician, Liberty denied liability on the grounds that Narum did not actually suffer a compensable hip injury in his industrial accident.[20] This Court found that Liberty's denial was unreasonable, explaining that Liberty "has provided this Court with no persuasive explanation as to how it could justify stopping payment for the ongoing treatment of Petitioner's hip condition for which it had accepted liability."[21] This Court explained that an insurer "cannot accept liability for a claim, settle the claim, and then un-accept the claim at a later date because it has changed its mind about whether it should have accepted liability in the first place."[22]

¶ 62 In its decision affirming this Court's finding that Liberty's denial of liability for Narum's hip replacement was unreasonable, the Montana Supreme Court explained, in

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[14] *Gryttenholm*, ¶ 9.

[15] *Gryttenholm*, ¶ 15.

[16] 2008 MTWCC 30, *aff'd*, 2009 MT 127, 350 Mont. 252, 206 P.3d 964.

[17] *Narum*, 2008 MTWCC 30, ¶ 10.

[18] *Narum*, 2008 MTWCC 30, ¶¶ 31, 41.

[19] *Narum*, 2008 MTWCC 30, ¶ 36.

[20] *Narum*, 2008 MTWCC 30, ¶ 39.

[21] *Narum*, 2008 MTWCC 30, ¶ 44.

[22] *Narum*, 2008 MTWCC 30, ¶ 42.

relevant part, that although Liberty based its denial on the opinion of its IME physician, the IME physician's opinion did not give it grounds to deny liability because "it suddenly stopped paying Narum benefits for . . . his hip after initially accepting liability."[23]

¶ 63 Here, Mid Century engaged in the same misconduct. It accepted liability for Berry's lumbar-spine injury, thereby conceding that Berry suffered a compensable lumbar-spine injury. However, upon receipt of Dr. Vallin's report, Mid Century then asserted that it was not liable for Berry's lumbar-spine condition on the grounds that her low-back pain was not "related" to her industrial accident. However, Berry had the same symptoms from the date of her industrial accident to the date of her IME, without any interruption. If her low-back pain at the time of the IME was not "related," then Mid Century was asserting that her low-back pain while she saw Dr. Wilson, which Dr. Wilson determined was the result of an industrial injury, was not related; i.e., Mid Century was denying liability on the grounds that Berry did not suffer an injury in her industrial accident.

¶ 64 Moreover, there is no merit to Mid Century's claim that it did not rescind its acceptance and that it actually meant that Berry was not entitled to additional medical benefits under § 39-71-704, MCA. Although Mid Century confused the standards for proving an injury under § 39-71-119(1), MCA, with the standards for determining whether a claimant is entitled to medical benefits under § 39-71-704, MCA,[24] and also argued that Berry was not entitled to additional medical benefits, Mid Century clearly rescinded its acceptance of liability. An insurer has an ongoing duty to investigate an accepted-liability claim to determine whether it owes additional benefits, including after the claimant reaches MMI,[25] but Mid Century did not consider Berry's medical records generated after her IME, thereby proving that its position was that it had no liability whatsoever for Berry's lumbar-spine injury. Moreover, in its Response to Petition, Mid Century specifically alleged "that there was no objective medical evidence that Petitioner sustained a new and/or permanent injury to her lumbar spine due to the incident on February 9, 2017." Finally, during opening statements, Mid Century's attorney stated that Mid Century would prove that Berry did not have objective medical evidence of an injury, which is one of the elements to prove a compensable injury[26] but not one of the elements to determine whether the claimant is entitled to medical benefits under § 39-71-704, MCA.

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[23] *Narum*, 2009 MT 127, ¶ 35.

[24] *Compare Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶¶ 44-49, 282 P.3d 687 (holding that, under the 1995-present version of §§ 39-71-119 and -407, MCA, claimants have the burden of proving an injury with objective medical findings and causation with medical expertise or opinion) *with Hiett v. Missoula Cnty. Pub. Sch.*, 2003 MT 213, ¶¶ 35, 38, 317 Mont. 95, 75 P.3d 341 (holding that claimant was entitled to prescription pain medication after reaching MMI because, under §§ 39-71-116(25) and -704(1)(f), MCA (1995), "a claimant is entitled to such 'primary medical services' as are necessary to permit him or her to *sustain* medical stability" (emphasis in original)).

[25] *See Purkey v. AIG and Liberty Mut. Fire Ins. Co.*, 2005 MTWCC 2 , ¶ 51 (citations omitted) ("An insurer has a duty to promptly and reasonably investigate claims for benefits. The duty extends to a decision to reduce or terminate benefits with respect to an accepted claim, and by analogy to any denial of particular benefits with respect to an accepted claim.").

[26] §§ 39-71-119(1)(a), -407(3), MCA.

¶ 65 Third, Mid Century's denial was unreasonable because it refused to consider any evidence other than Dr. Vallin's opinions. This Court has explained:

> [W]hile conflicting medical opinions ordinarily raise issues of fact which are appropriately submitted to the Workers' Compensation Court for resolution, the fact that the insurer has obtained an IME opinion supporting its denial does not preclude a finding that its denial was unreasonable. An insurer must fairly and reasonably evaluate all facts and opinions with respect to medical issues.[27]

¶ 66 Here, it is evident that Mid Century intended to rely solely on Dr. Vallin's opinions to determine its liability. Indeed, in closing arguments, Mid Century's attorney acknowledged that it was Mustoe's intention to rely on Dr. Vallin's recommendation for further treatment. This Court has explained that it is unreasonable for an insurer to decide ahead of time that it is going to only accept the opinions of an IME physician.[28] Mid Century should have evaluated all of the facts and opinions, including Dr. Wilson's opinions and the opinions from the providers at Missoula Bone & Joint. Mid Century should have assessed whether Dr. Vallin's opinions were entitled to weight, including whether Dr. Vallin was unduly influenced by Barrett's letter[29] and whether Dr. Vallin's refusal to answer discovery about his IME practice would negatively impact his credibility. Even if it were not already improper, as described above, Mid Century's reliance on Dr. Vallin's opinions was unreasonable because Mid Century offered no reason why it accepted Dr. Vallin's opinions over those of the other medical providers, including Dr. Wilson, who opined that Berry suffered a compensable injury and, at her last appointment, recommended pain management.

¶ 67 There is no merit to Mid Century's claim that it had reasonable grounds to deny liability because, according to Barrett, Dr. Wilson told her that Berry merely had subjective back pain with no objective findings. At Berry's first appointment, Dr. Wilson differentiated between Berry's low-back injury, which he opined was a compensable injury, and her upper-extremity dysesthesia, which he opined was not a compensable injury, thereby demonstrating that Dr. Wilson generally understands the Montana workers' compensation system. After Berry's lumbar MRI, Dr. Wilson diagnosed "discogenic spinal pain" and prescribed physical therapy for "annular tear L4/5 and L5-S1." Dr. Wilson's

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[27] *Doubek v. CNA Ins. Co.*, 2004 MTWCC 76, ¶ 59.

[28] *See Floyd v. Zurich Am. Ins. Co. of Ill.*, 2017 MTWCC 4, ¶ 61 (finding that insurer's denial of liability for medical benefits was unreasonable because the adjuster "blindly" accepted the IME physician's opinion "because, by her own admission, she accepts the IME physician's opinion in every claim, a practice that is unreasonable since 'unless there are cogent reasons for preferring the opinions of non-treating physicians, the treating physician's opinions will prevail.' ").

[29] *See Davis v. Credit Gen. Ins. Co.*, 2000 MTWCC 48, "Held" paragraph, ¶ 59 (condemning the "use of argumentative and slanted introductory letters to IME physicians," warning that "[s]uch letters may undermine the credibility of the IME," and explaining, "The more slanted the presentation of so-called 'factual' material, the less confidence the Court is likely to have in the expert's opinion. The hazard is greater where the facts are misstated or mischaracterized.").

records convincingly show that he thought that Berry suffered a lumbar-spine injury while shoveling snow. Barrett herself told the physical therapist that Dr. Wilson had concluded that Berry's lumbar-spine condition was "work related." At Berry's last appointment, Dr. Wilson did not document that he had withdrawn his diagnosis. In fact, in his record, Dr. Wilson again stated that Berry had "work-related back pain" and recommended pain management. Under these circumstances, Barrett's assertions that Dr. Wilson withdrew his diagnosis of "discogenic spinal pain" and stated he could not explain Berry's back pain are not credible.[30]

¶ 68 For these reasons, this Court finds that Mid Century's denial of liability for Berry's medical benefits for her lumbar-spine injury from July 22, 2017, to April 24, 2019, was unreasonable. Mid Century should have transferred Berry to a new treating physician under § 39-71-1101, MCA. If Mid Century wanted another opinion as to the medical benefits to which Berry was entitled under § 39-71-704, MCA, it could have also obtained an evaluation under § 39-71-605, MCA, without misleading Berry. It could have then made a reasonable determination of its liability for additional benefits for Berry's lumbar-spine injury.

¶ 69 This Court finds that Mid Century did not unreasonably delay its acceptance of liability of Berry's hip injury, i.e., the hip injury verified by Berry's hip MRI of April 17, 2018, and for which Berry sought treatment from Dr. Wright and Dr. Whiting. When Berry filed her claim, she asserted only a lumbar-spine injury. In her Petition for Hearing, Berry only alleged that she suffered a "back" injury; she did not allege that she suffered a separate hip injury in her industrial accident, nor that Mid Century was denying liability for her hip injury. Although Berry subjectively complained of hip pain, she did not assert that she suffered a separate hip injury, as opposed to pain radiating into her hips from her lumbar-spine injury, until the summer of 2018. However, at that time, Berry did not provide sufficient evidence to prove that her industrial accident caused her hip injury.[31] Although Berry told her providers that *she* attributed her hip pain to her industrial accident, neither Bond-Deschamps, Dr. Wright, nor Dr. Whiting documented that they thought that her industrial accident caused her hip impingement syndrome, her torn labrum, nor any other hip injury. Because Mid Century ultimately accepted liability for Berry's hip injury, it must have obtained a credible medical causation opinion at some point. However, Berry did not produce sufficient evidence to prove when she first made her claim that she suffered a separate hip injury to Mid Century nor when she provided a medical causation opinion that her hip injury, verified with objective medical findings, was caused by her industrial accident. Moreover, on this record, it is evident that Mid Century had a legitimate defense to liability for Berry's claim that she suffered a separate hip injury in her industrial

[30] Barrett was not a credible witness at trial because of her obvious bias toward Mid Century and her contradictory testimony.

[31] *See Ford,* ¶¶ 44-49 (holding that, under the 1995-present version of §§ 39-71-119 and -407, MCA, claimants have the burden of proving an injury with objective medical findings and causation with medical expertise or opinion). *See also Marcott,* 275 Mont. at 212, 911 P.2d at 1138 (internal citation omitted) (stating, "In the final analysis, it remains the claimant's burden to prove the compensability of his injury by a preponderance of the evidence.").

accident.[32] Thus, Berry did not prove that Mid Century unreasonably delayed its acceptance of liability for her hip injury.

CONCLUSIONS OF LAW

¶ 70 This case is governed by the 2015 version of the Montana Workers' Compensation Act (WCA) because that was the law in effect at the time of Berry's injuries.[33]

Issue One: Petitioner's entitlement to medical benefits through the date of hearing.

¶ 71 In the middle of trial, Mid Century re-accepted liability for medical benefits for Berry's lumbar-spine injury and accepted liability for her hip injury, thereby admitting that it was liable for medical benefits for Berry's lumbar-spine injury and her hip injury through the date of trial. At the hearing on April 25, 2019, Berry's attorney acknowledged that this issue is "over in the sense that Respondent has accepted liability." And, Mid Century's attorney tacitly agreed that this Court did not need to adjudicate this dispute because Mid Century had accepted liability and thereby admitted it was liable for the medical benefits for Berry's lumbar-spine injury and for her hip injury through the date of trial. Thus, this issue is now moot.[34]

Issue Two: Whether Respondent's failure and refusal to cover Berry's medical expenses after July 22, 2017, was reasonable.

¶ 72 As set forth above, the issue of whether an insurer was reasonable is an issue of fact.[35] This Court has found that Mid Century's denial of liability for Berry's medical benefits for her lumbar-spine injury from July 22, 2017, to April 24, 2019, was

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[32] *See Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (citations omitted) (explaining that § 39-71-2907, MCA, "was never intended to eliminate the assertion of a legitimate defense to liability"). *See also Neisinger v. New Hampshire Ins. Co*., 2020 MTWCC 4 (ruling that claimant did not meet his burden of proving that his industrial accident caused his lumbar spine condition because the onset of his symptoms was approximately ten months after his industrial accident).

[33] *Ford*, ¶ 32 (citation omitted); § 1-2-201, MCA.

[34] *See Thompson v. Liberty Nw. Ins. Corp*., 2002 MTWCC 34, ¶ 61 (ruling, "Claimant's request for vocational job assistance is moot since Liberty has agreed to provide such assistance and it is in fact being provided."); *Johnson v. Transp. Ins. Co*., 1998 MTWCC 88, ¶¶ 2, 6 (ruling that once claimant agreed to submit to IME, her appeal of the Department of Labor & Industry's order directing her to attend the IME was moot because, "Courts do not review judgments or administrative orders for the mental exercise or recreation. They do so only where the appellant seeks and can be afforded meaningful relief from the judgment or order. Appellant in this case has agreed to submit to the IME and therefore agreed to comply with the Department's Order; thus, she is no longer seeking to nullify the Order."); *Manning v. Pierce Packing Co*., WCC No. 8412-2761, 1985 WL 57230 (Order Adopting Findings of Fact and Conclusions of Law of Hearing Examiner and Judgment (Apr. 12, 1985) (ruling, "At the time of trial, the claimant stated, and the defendant agreed, that the defendant had paid the travel expenses that were the basis for issue number one; that issue is now moot.")).

[35] *Marcott*, 275 Mont. at 203, 911 P.2d at 1133 (citation omitted).

unreasonable. However, this Court has found that Mid Century did not unreasonably delay acceptance of liability for Berry's hip injury.

Issue Three: Petitioner's entitlement to a penalty, reasonable attorney fees and costs for each delay and refusal of liability by Respondent which this Court finds unreasonable.

¶ 73 Section 39-71-2907(1), MCA, states:

> 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:
>
> . . . .
>
> (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.

This Court does not need to adjudicate the dispute over benefits to assess a penalty under § 39-71-2907, MCA.[36]

¶ 74 Here, this Court has found that Mid Century unreasonably delayed and refused to pay Berry's medical benefits for her lumbar-spine injury from July 22, 2017, to April 24, 2019. Thus, Berry is entitled to recover from Mid Century a 20% penalty on the medical benefits for which it is obligated to pay under § 39-71-704, MCA, for Berry's lumbar-spine injury from July 22, 2017, to April 24, 2019.

¶ 75 However, this Court has found that Mid Century did not unreasonably delay or refuse to pay Berry's medical benefits for her hip injury. Thus, Berry is not entitled to recover a penalty on the medical benefits Mid Century paid for her hip injury.

¶ 76 Section 39-71-611(1), MCA, states:

> 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

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[36] *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 52, 303 Mont. 364, 15 P.3d 948 (citing *Lovell v. State Comp. Mut. Ins. Fund*, 260 Mont. 279, 289, 860 P.2d 95, 102 (1993)) ("We have held that [p]ayment of unreasonably withheld benefits on the courthouse steps does not negate the insurer's potential liability for a penalty for unreasonable delay of benefits. To conclude otherwise would render the unreasonable delay provisions of the penalty statute moot." (internal quotation marks omitted)).

(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.

¶ 77 Section 39-71-612, MCA, states, in relevant part:

> (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.

¶ 78 Here, Berry is not entitled to her attorney fees under either §§ 39-71-611 or -612, MCA, because this Court did not adjudicate her "entitlement to medical benefits through the date of [trial]," which was the issue the parties asked this Court to decide.[37] Rather, after the first day of trial, Mid Century re-accepted liability for Berry's medical benefits for her lumbar-spine injury from July 22, 2017, to April 24, 2019, and accepted liability for her hip injury. The Montana Supreme Court has held and this Court has ruled that under the plain language of these statutes, a claimant cannot recover her attorney fees unless this Court actually adjudicates the dispute over benefits.[38] This Court has explained, "case

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[37] Pretrial Order at 2.

[38] *Yearout v. Rainbow Painting*, 222 Mont. 65, 68, 719 P.2d 1258, 1259 (1986) (holding, "the statute authorizing attorney's fees, § 39-71-611, MCA, is clear and unambiguous. If an insurer denies liability for a claim for compensation, the insurer is liable for attorney's fees if the claim is later *adjudged* compensable by the Workers' Compensation judge. It is clear from the language of the statute that there must be an adjudication of compensability before an award of attorney's fees is authorized."); *Cosgrove v. Indus. Indem. Co.*, 170 Mont. 249, 552 P.2d 622 (1976) (even when the WCA is construed liberally in favor of the claimant, no attorney fees are available under § 92-616, RCM — the predecessor to § 39-71-611, MCA — unless the claim is adjudicated); *Arneson v. Travelers Prop. Cas.*, 2006 MTWCC 7 (ruling that this Court could not award attorney fees where insurer paid outstanding, undisputed medical bills after claimant petitioned this Court, but prior to adjudication); *McNeel v. Holy Rosary Hosp.*, 228 Mont. 424, 742 P.2d 1020 (1987) (where insurer accepted the claim the day before trial, no attorney fees could be awarded under § 39-71-611, MCA, because no adjudication occurred); *Vanbouchaute v. Mont. State Fund*, 2007 MTWCC 37 (at the close of evidence at trial, this Court indicated that it intended to rule in the claimant's favor regarding authorization of surgery, and the insurer authorized the surgery prior to this Court's formal ruling, therefore, this Court could not award the claimant her attorney fees because the insurer authorized the surgery before the claim was adjudged compensable); *Stevens v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1997 MTWCC 45, Conclusions of Law, ¶ 2 (although pre-1987 version of § 39-71-612, MCA, and its predecessor § 92-618, RCM, allowed attorney fees where a case resulted in a "settlement," the legislature removed the "settlement" language, thereby allowing an award of attorney fees only when a case is adjudicated) (citing *Madill v. State Comp. Ins. Fund*, 280 Mont. 450, 930 P.2d 665 (1997)); *S.L.H.* ¶¶ 51, 53

law establishes that this Court cannot award attorney fees even in cases where the insurer accepted liability the day before trial, at the beginning of trial, or after the close of evidence."[39]

¶ 79 Berry, however, asserts that she is entitled to her attorney fees for four reasons. However, none has merit under established Montana law.

¶ 80 First, Berry cites *Galetti v. Montana Power Co.*[40] and asserts that she is entitled to her attorney fees under § 39-71-612, MCA. In *Galetti*, Montana Power accepted liability for his back injury, which he suffered in 1983, but denied liability for medical benefits for a flare-up that occurred in 1994.[41] However, at the trial, Montana Power conceded that the 1994 flare-up was related to his injury and accepted liability for his medical expenses.[42] The court held that Galetti was not entitled to his attorney fee under § 39-71-611, MCA, because this Court did not adjudicate the dispute over his medical benefits, but that Galetti was entitled to his attorney fees under the 1983 version of § 39-71-612, MCA, which states:

> If an employer or insurer pays or tenders payment of compensation . . . but controversy relates to the amount of compensation due and the ***settlement*** or award is greater than the amount paid or tendered by the employer or insurer, a reasonable attorney's fee . . . based solely upon the difference between the amount ***settled*** for or awarded and the amount tendered and paid, may be awarded in addition to the amount of compensation.[43]

The court reasoned that by accepting liability for Galetti's injury, Montana Power paid benefits and that by denying liability for his flare-up, they had a controversy over the amount of compensation due.[44] The court then explained, "By accepting liability, Montana Power conceded that Galetti was due more workers' compensation than it had previously paid."[45] Thus, the court held that Galetti was "entitled to attorney fees based on the difference between the amount of the settlement and the amount of compensable benefits arising from his back injury which Montana Power had previously paid."[46]

(for a claimant to receive attorney fees, § 39-71-612, MCA (1987-present) requires that the issue be brought before the court for adjudication, and the judge must award more compensation than that offered by the insurer).

[39] *Sikkema v. Liberty Nw. Ins. Co.*, 2017 MTWCC 16, ¶14 (citations omitted).

[40] 2000 MT 234, 301 Mont. 314, 8 P.3d. 812.

[41] *Galetti*, ¶¶ 5, 6.

[42] *Galetti*, ¶ 8.

[43] *Galetti*, ¶ 18 (emphasis added).

[44] *Galetti*, ¶¶ 21, 22.

[45] *Galetti*, ¶ 24.

[46] *Galetti*, ¶ 25.

¶ 81 However, *Galetti* does not apply to this case because the 1987 Legislature removed the words "settlement" and "settled" from § 39-71-612, MCA. In *S.L.H. v. State Compensation Mutual Ins. Fund*,[47] the Montana Supreme Court recognized that, because of the 1987 amendment, this Court cannot award attorney fees under § 39-71-612, MCA (1987-present), unless it adjudicates the dispute and awards more than the insurer offered:

> [Section 39-71-612, MCA (1987-present)] however has two specific requirements that differ significantly from the penalty statute: 1) the issue must be brought before the court for adjudication; and 2) the judge must make an award of compensation greater than that offered by the insurer. In 1987, the legislature excised the word "settlement" from the attorney fee statutes, so that an award for fees is now precluded, despite potentially burdensome legal fees, if the insurer agrees to settle, even "on the courthouse steps."[48]

The court also rejected S.L.H.'s policy argument that a claimant whose benefits have been unreasonably denied should be able to recover her attorney fees if the insurer accepts liability at trial, explaining, "the explicit language of the statute precludes such a reading."[49]

¶ 82 Here, Mid Century accepted liability for the benefits at issue before the trial ended. Thus, this Court did not adjudicate the dispute over medical benefits, nor award Berry any medical benefits. As the court recognized in *S.L.H.*, this Court cannot award attorney fees under the plain language of § 39-71-612, MCA (1987-present) unless it awards the benefits that were in dispute.

¶ 83 Second, Berry cites *Hilbig v. Central Glass Co.*,[50] and asserts that even though Mid Century accepted liability for her medical benefits, this Court can award her attorney fees under § 39-71-612, MCA, because, according to Berry, Mid Century was not obligated to pay her medical benefits. In *Hilbig*, State Fund had accepted liability for his head injury, but denied liability for his domiciliary care benefits.[51] After the trial, State Fund offered to pay some of Hilbig's domiciliary care benefits in exchange for a dismissal of the litigation.[52]

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[47] 2000 MT 362, 303 Mont. 364, 15 P.3d 948.

[48] *S.L.H.*, ¶ 53 (emphasis added). *See also, S.L.H.*, ¶ 51 (stating that under § 39-71-612, MCA (1991), "Costs and attorney fees may be assessed against an insurer by a workers' compensation judge when: 1) there is a payment or written offer of payment; 2) there is a controversy relating to the amount of compensation due; 3) the claim is brought before the court for adjudication; and 4) the judge's award is greater than that offered by the insurer.").

[49] *S.L.H.*, ¶ 53.

[50] 249 Mont. 396, 816 P.2d 1037 (1991).

[51] *Hilbig*, 249 Mont. at 398, 816 P.2d at 1038.

[52] *Hilbig*, 249 Mont. at 401, 816 P.2d at 1040.

Hilbig rejected State Fund's disputed-liability settlement offer.[53] Although this Court ruled that Hilbig was entitled to 24-hour-a-day domiciliary care benefits and this Court's rulings were affirmed,[54] State Fund asserted that Hilbig was not entitled to his attorney fees under § 39-71-612, MCA (1983), because it voluntarily paid the benefits.[55] In the alternative, State Fund argued that it was not liable for attorney fees on the amount it offered to pay to settle on a disputed liability basis.[56] The Supreme Court rejected State Fund's arguments and held that State Fund was liable for Hilbig's attorney fees on the full amount of the domiciliary care benefits because this Court awarded the benefits and because State Fund's offer to pay was conditional, as its offer was to settle the dispute on a disputed liability basis.[57]

¶ 84 *Hilbig* does not support Berry's claim for attorney fees under § 39-71-612, MCA, because, like *Galetti*, it was decided under the 1983 version of the statute. It is also distinguishable. In *Hilbig*, State Fund did not unconditionally accept liability for Hilbig's domiciliary care benefits; rather it made a conditional offer to settle on a disputed liability basis; i.e., State Fund offered to pay Hilbig an amount less than its total exposure for domiciliary care benefits in exchange for Hilbig's dismissal of his claim for such benefits. In contrast, Mid Century unconditionally accepted liability for Berry's medical benefits; i.e., it agreed to pay Berry's medical benefits without any concession from her. Moreover, Hilbig was entitled to attorney fees because this Court awarded the domiciliary care benefits. In contrast, this Court has not awarded Berry her medical benefits. Again, Berry is not entitled to her attorney fees under the 2015 version of § 39-71-612, MCA, because this Court did not award her any benefits.

¶ 85 Third, Berry argues that although Mid Century accepted liability, this Court must still adjudge that it is liable for her medical benefits, and rule that it is liable for "ongoing" medical benefits. Berry moved this Court to issue an Order and Judgment stating, *inter alia*, that Mid Century was liable for the medical benefits for her lumbar-spine and hip injuries. She asserts that she will be entitled to her attorney fees under §§ 39-71-611 and -612, MCA, after this Court issues such an order because the order will serve as an adjudication and an award of her medical benefits.

¶ 86 However, this Court does not have jurisdiction to decide Berry's claim for medical benefits because once Mid Century accepted liability, there was no longer a justiciable controversy, as there was no longer a dispute over Berry's medical benefits.[58] In short, Berry asserted that she was entitled to medical benefits and, after the first day of trial, Mid

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[53] *Hilbig*, 249 Mont. at 401, 816 P.2d at 1040.

[54] *Hilbig*, 249 Mont. at 398-99, 816 P.2d at 1038-39.

[55] *Hilbig*, 249 Mont. at 399, 816 P.2d at 1039.

[56] *Hilbig*, 249 Mont. at 406-07, 816 P.2d at 1043-44.

[57] *Hilbig*, 249 Mont. at 407-09, 816 P.2d at 1044-45.

[58] *See, e.g.*, cases cited *supra* note 34.

Century unconditionally agreed that she was entitled to those medical benefits. Therefore, the issue of Berry's entitlement to the medical benefits became a moot question — i.e., "one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual controversy."[59] This Court does not have jurisdiction to decide moot questions, which includes deciding whether an insurer is liable for benefits for which it has accepted liability.[60]

¶ 87 Moreover, even if this Court issued an order stating that Mid Century was liable for Berry's medical benefits, it would not be adjudicating the dispute nor awarding Berry any medical benefits. This Court would merely be stating that Mid Century was liable for medical benefits for which it had already accepted liability. This Court will not do so because, "[t]he law neither does nor requires idle acts."[61] There is no merit to Berry's contention that this Court must rule that Mid Century is liable for the medical benefits for its acceptance to be binding. The Montana workers' compensation system is intended to be "primarily self-administrating" and designed "to minimize reliance upon lawyers and the courts to obtain benefits and interpret liabilities."[62] As in the thousands of claims filed each year in which the insurer accepts liability, Mid Century's acceptance of liability was and is binding without action from this Court and it could not rescind its acceptance without legal justification.[63] As a final point, this Court has no jurisdiction to decide Mid Century's liability for "ongoing" medical benefits because the parties did not ask this Court to decide that issue in the Pretrial Order.[64]

¶ 88 Fourth, for the first time in her closing argument, Berry asserted that if she is not entitled to her attorney fees under §§ 39-71-611 or -612, MCA, then this Court should sanction Mid Century's attorney and award her attorney fees under § 39-71-2914, MCA,

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[59] *Alexander v. Bozeman Motors, Inc*., 2012 MT 301, ¶ 28, 367 Mont. 401, 291 P.3d 1120 (citations omitted).

[60] *See, e.g.*, *Stewart v. Liberty Nw. Ins. Corp*., 2012 MTWCC 11, ¶¶ 26-27, *aff'd* 2013 MT 107, 370 Mont. 19, 299 P.3d 820 (explaining that there is no justiciable controversy over medical benefits during the time that the insurer had accepted liability and was paying medical benefits and that the justiciable controversy did not arise until the insurer denied liability for additional medical benefits); *Hernandez v. ACE USA*, 2003 MTWCC 47, ¶ 4 (citation omitted) (explaining, "Courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions."). *See also supra* ¶ 71, note 34.

[61] § 1-3-223, MCA.

[62] § 39-71-105(4), MCA.

[63] *See, e.g.*, *Narum*, 2008 MTWCC 30, ¶ 42. *See also Leys v. Liberty Mut. Ins*., 2019 MTWCC 10, ¶¶ 161, 164 (citations omitted) (explaining the general rule that "once an insurer accepts liability it may not thereafter argue that the injury or condition for which liability has been accepted was not caused by the industrial accident or disease," but that an insurer may rescind its acceptance of liability if it thereafter discovers that the claimant engaged in fraud or if the parties were operating under a mutual mistake of fact). Because this Court need not issue an order for Mid Century's acceptance of liability to be binding, Berry's Motion for Order and Judgment for Acceptance of Petitioner's Back and Bilateral Hip Issues, Docket Item No. 51, is **denied**.

[64] *See, e.g.*, *Morse v. Liberty Nw. Ins. Corp*., 2012 MTWCC 24, ¶ 11 (refusing to address an issue because "it goes beyond the scope of the issue the parties asked the Court to determine at trial"); *Feather v. Uninsured Employers' Fund*, 2005 MTWCC 15, ¶ 41 (refusing to address issue that was not included in Pretrial Order).

which provides that this Court shall sanction an attorney who files a pleading that is not well grounded in fact or warranted by existing law.[65] Berry argued that Mid Century's attorney did not have a legal basis to assert throughout this litigation that Mid Century was not liable for her medical benefits.

¶ 89 However, Berry's request is untimely because she did not move for sanctions shortly after Mid Century filed its Response to Petition, when the issue was ripe. Moreover, Berry's request for sanctions is outside of the issues raised in the Pretrial Order. This Court has explained, "The purpose of pretrial orders is to simplify issues, prevent surprise and allow counsel to prepare their cases for trial based on the pretrial order."[66] Because Berry did not raise this issue in the Pretrial Order, this Court will not consider it.[67]

¶ 90 Accordingly, Berry is entitled to a penalty on her medical benefits for her lumbar-spine injury from July 22, 2017, to April 24, 2019, but not her attorney fees nor costs.

JUDGMENT

¶ 91 Berry is entitled to a 20% penalty under § 39-71-2907, MCA, on her medical benefits for her lumbar-spine injury from July 22, 2017, to April 24, 2019.

¶ 92 Berry is not entitled to a penalty under § 39-71-2907, MCA, on the medical benefits for her hip injury.

¶ 93 Berry is not entitled to her attorney fees or her costs under §§ 39-71-611 or -612, MCA.

¶ 94 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.

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[65] *See also* ARM 24.5.306(2)(i).

[66] *Kilgore v. Transp. Ins. Co*., 2008 MTWCC 47, ¶ 5 (citation omitted).

[67] *See, e.g.*, *Siegler v. Liberty Ins. Corp*., 2001 MTWCC 23, ¶ 68 (ruling, "Claimant's request for temporary partial disability benefits is outside the issues raised in the Pretrial Order and is not properly before the Court. I therefore do not consider the request." (emphasis omitted)). This Court notes that if it were to sanction Mid Century's attorney under § 39-71-2914, MCA, it would also consider sanctioning Berry's attorney. Berry's attorney acknowledged at the hearing on April 25, 2019, that she did not have a factual or legal basis to assert that Berry suffered compensable hand, arm, and elbow injuries in her industrial accident. Moreover, Berry's attorney's reliance on *Galetti* was unwarranted under the plain language of § 39-71-612, MCA (1987-present) and *S.L.H.* Finally, Berry's attorney did not prepare the exhibits in accordance with ARM 24.5.318(3).

DATED this 29th day of May, 2020.

/s/ DAVID M. SANDLER
JUDGE

c: Miva VanEngen
Mark W. Buckwalter

Submitted: June 4, 2019