

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2022 MTWCC 8

WCC No. 2021-5445

CONTESSA BRYER, GUARDIAN AND CONSERVATOR FOR
JOHNNY LEE SHELDON

Petitioner

vs.

ACCIDENT FUND GENERAL INS. CO.

Respondent/Insurer.

**APPEALED TO MONTANA SUPREME COURT – (DA 22-0590) 10/18/22
AFFIRMED 2023 MT 104 06/06/23**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT AND ORDER

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

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

¶ 1 The trial in this matter was held on October 5, 6, and 7, 2021, in Billings, Montana. Petitioner Contessa Bryer, Guardian and Conservator for Johnny Lee Sheldon, was present and was represented by Sydney E. McKenna, Justin Starin, and Steven S. Carey. Respondent Accident Fund General Ins. Co. (Accident Fund) was represented by Jon T. Dyre and Montana L. Funk.

¶ 2 Exhibits: This Court admitted Exhibits 1, 2, 5 through 7, 9, 11, 14 through 34, 36 through 38, 44, and 46 without objection. Over Accident Fund's objections, this Court admitted Exhibits 3, 4, 8, 10, 12, 13, with pages 667, 668, 692, 693, and 694 withdrawn, and 45. Over Bryer's objections, this Court admitted Exhibits 35, 40 through 43, and 47. Accident Fund withdrew Exhibit 39.

¶ 3 Witnesses and Depositions: This Court admitted the deposition of Alan H. George, PhD, PE, into evidence. Nicole Palagi; Mark L. Sanz, MD, FACC; Kevin Atkins; Dr. George; John C. Schumpert, MD, MPH, FACOEM; Wynn Mader; Scott Adam Sample, DO; John M. Freeman, Jr., MS, PE, CFEI; Charlene Kananen; and Michael Lee Miller were sworn and testified at trial.

¶ 4 Issues Presented: This Court restates the issues in the Pretrial Order as follows:

¶ 4a Issue One: Did Sheldon suffer a compensable injury?

¶ 4b Issue Two: Is Bryer entitled to costs, attorney fees, and a penalty?

FINDINGS OF FACT

¶ 5 This Court finds the following facts by a preponderance of the evidence.¹

Sheldon's Work for American Welding & Gas, Inc.

¶ 6 Johnny Lee Sheldon began working as a plant technician for American Welding & Gas, Inc. (American Gas) in 2010. Sheldon's job duties included making specialty gas mixtures, which are precise mixes of gases. Sheldon made the mixtures in the specialty gas room, which measures approximately 22 feet by 11 feet and has a roll-up garage door to the outdoors, an interior window to a small room, and a door-sized opening leading to a small lab, which has a door to a hallway.

¶ 7 American Gas stores liquid argon and liquid nitrogen in bulk tanks, which are outside its buildings. Each bulk tank is plumbed to its own vaporizer, which turns the liquid to gas. From the argon and nitrogen vaporizers, American Gas runs gas lines to two separate places: to the high-pressure fill room and to storage cylinders, which sit just outside the specialty gas room.

¶ 8 For the high-pressure fill room, American Gas runs the lines for argon and nitrogen from the vaporizers to a panel that has valves for dispensing those gases, and valves for dispensing oxygen, carbon dioxide, and helium. On the panel, each valve and its control

¹ Ordinarily, the claimant bears the burden of proving by a preponderance of the evidence that he is entitled to the benefits he seeks. *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 201, 598 P.2d 1099, 1105-06 (1979) (citations omitted).

knob, and the other controls, are permanently labeled with a black label, affixed to the panel, with white text.

¶ 9 For the specialty gas room, American Gas runs the lines for argon and nitrogen from the storage cylinders to a CryoVation machine, a machine that pumps gases into cylinders at high pressures. The CryoVation machine has control valves for dispensing hydrogen, carbon dioxide, helium, argon, nitrogen, and oxygen. On the front of the CryoVation machine, each valve and its control knob, and the other controls, are permanently labeled with black labels with white text, which are permanently affixed to the machine, with the sole exception of the valve and control knob for hydrogen, which is labeled with a white label with black text.

¶ 10 The CryoVation machine has a precise scale, as the amount of each gas needed for a specialty gas mixture is determined by weight, to the tenth of a gram. The scale is so sensitive that any air movement inside the room causes fluctuations of the weight, even when the plexiglass door in front of the scale is closed. Thus, when making a mixture, Sheldon would completely close the garage door, the window, and the door in the lab to the hallway and place a sign on the lab door stating, “Do Not Enter Pumping in Progress.”

¶ 11 American Gas sells more than 115 specialty gas mixtures. The “Mixture Recipe” for each mixture lists the amount of each gas by weight to be dispensed into the cylinder. Each recipe is printed on a letter-sized piece of paper and placed into a clear plastic sleeve. American Gas stores the recipes in a binder in the specialty gas room.

¶ 12 To make a specialty gas mixture, Sheldon would connect an empty cylinder to a gas line from the CryoVation machine and place it on the scale. If Sheldon were going to make more than one cylinder of the gas mixture, he would attach the additional empty cylinders to the gas lines on a radial manifold that is plumbed to the CryoVation machine, which is designed to make duplicate cylinders of the gas mixture. Each cylinder has a safety valve that is designed to burst at a pressure lower than the pressure that would cause the cylinder to burst.

¶ 13 After connecting the empty cylinders, Sheldon would attach a coupler on a swing arm to the valve on the CryoVation machine for the first gas he needed to pump. He would then use the control knob to control the amount of gas being pumped into the cylinders. If the Mixture Recipe called for a relatively large amount of a gas, Sheldon would fully open the valve to quickly dispense the gas. Sheldon would watch the readout from the scale. As the weight of the gas dispensed started approaching the amount needed for the mixture, Sheldon would use the control knob to reduce the amount of gas being pumped until it was just a trickle and then turn the valve off when the precise amount of gas had been dispensed. The process is similar to filling a car with gasoline and stopping the flow of gasoline at an even dollar amount. Sheldon would then remove the coupler from the valve for the first gas and attach it to the valve for the next gas for which

the recipe called and dispense the correct amount of that gas, and repeat the step if he were making a mixture of more than two gases.

Sheldon's Industrial Accident

¶ 14 On July 3, 2017, Sheldon started his workday around 6:30 a.m.

¶ 15 Around 8:00 a.m., he began filling orders for specialty gas mixtures.

¶ 16 He clipped three Mixture Recipes to a cylinder next to the CryoVation machine.

¶ 17 At 8:15 a.m., Sheldon began working on an order for four cylinders of a mix that contained argon, which is odorless, tasteless, and colorless. Although air is approximately 0.9% argon, argon is classified as a hazardous material because it is much denser than air and, as stated on its Safety Data Sheet, it “[m]ay displace oxygen and cause rapid suffocation.”

¶ 18 Sheldon walked into the specialty gas room and completely closed the door in the lab, the window, and the garage door.

¶ 19 He attached a cylinder to the CryoVation machine, placed it on the scale, and attached three empty cylinders to the lines at the radial manifold. He attached the coupler on the swing arm on the CryoVation machine to the argon valve and began dispensing argon into the cylinders.

¶ 20 Before 8:21 a.m., a 3,000 pound per square inch (psi) safety valve burst on one of the cylinders attached at the radial manifold.² When a safety valve bursts, it sounds like, and is as loud as, a gunshot and, like a gunshot, causes a shockwave. As a result of the burst safety valve, Sheldon was knocked over backwards. He was knocked unconscious when the back of his head hit the concrete floor.

¶ 21 The CryoVation machine was still pumping argon at more than 3,500 psi and argon was fiercely blowing out of the ports on the safety valve, which created a loud, hissing sound, and caused turbulence in the middle and upper portions of the specialty gas room. Because argon is much denser than air, which is approximately 21% oxygen and approximately 79% nitrogen, and because argon does not readily mix with air, a large amount of the argon descended, displacing the air near the floor.³

² To give perspective on this level of pressure, the air pressure in the tire of a semitruck is around 100 psi.

³ This Court gave considerable weight to the testimony and opinions of Alan H. George, PhD, PE, who persuasively and convincingly explained what occurred when the safety valve burst and why a large amount of argon descended to floor level. This Court gave no weight to the testimony and opinions of John M. Freeman, Jr., MS, PE, CFEI, who, based on experiments, opined that the oxygen level in the specialty gas room would have dropped after the safety valve burst but not to dangerously low levels. However, his experiments did not come even remotely close to replicating the conditions at the time of Sheldon's accident, as he released much less nitrogen and argon into the specialty gas room than the amount of gas that was released at the time of Sheldon's accident and did so while the

¶ 22 As Sheldon lay unconscious, he inhaled a large amount of argon. Because of the substantially reduced amount of oxygen in his lungs, Sheldon quickly went into cardiopulmonary arrest, i.e., his heart stopped beating, and he stopped breathing.⁴

¶ 23 Wynn Mader, the plant manager, heard the safety valve burst and a gas blowing into the specialty gas room. He knew that a safety valve had burst because it frequently happens and “it always sounds the same.” At that time, Mader did not think it was an emergency. Thus, he did not immediately go from his office to the specialty gas room to investigate.

¶ 24 After hearing the gas blowing into the specialty gas room for several seconds, Mader walked from his office to the specialty gas room to investigate. Mader opened the door from the hallway to the lab, walked into the specialty gas room, and saw Sheldon lying on his back. Because Mader knew that Sheldon was being exposed to the gas that was fiercely blowing into the specialty gas room, he fully opened the garage door for ventilation and closed the valve to the cylinder which had the burst safety valve. Mader then ran back to the front desk area and told Robert Lynn to call 911 and request an ambulance.

¶ 25 Lynn called 911 and told the dispatcher, “There was a gas leak, or one of the cylinders went off and somebody’s hurt.” In response to the dispatcher’s question of whether the gas could have injured Sheldon, Lynn responded in the affirmative. Lynn called 911 a second time and assured the dispatcher that the gas had been shut off.

¶ 26 While Lynn was calling 911, Mader ran back to the specialty gas room and shook Sheldon. It had been about a minute since the safety valve had burst. Mader did not get a response and did not detect a heartbeat. Thus, Mader started chest compressions.

¶ 27 Although Mader had fully opened the garage door, at which point the argon began dispersing to the outdoors, Sheldon still had argon in his lungs because, once an inert gas enters the lungs, it stays there until it is flushed out. Because Sheldon was in cardiopulmonary arrest, he developed hypoxemic hypoxia, meaning that he had low oxygen in his blood, and hypovolemic hypoxia, meaning that he had low blood flow. At

specialty gas room was well-ventilated. The only conclusion to be drawn from Freeman’s experiments is that the level of oxygen decreases when nitrogen and argon are released into the specialty gas room.

⁴ This Court gave considerable weight to the testimony and medical causation opinions of John C. Schumpert, MD, MPH, FACOEM; and Mark L. Sanz, MD, FACC. Dr. Schumpert persuasively explained the reasons for his opinion that Sheldon fell backwards and hit his head and was knocked unconscious, and for his opinion that Sheldon went into cardiopulmonary arrest as a direct result of inhaling argon and being deprived of oxygen. Dr. Sanz persuasively explained the reasons for his opinion that Sheldon went into cardiac arrest as a direct result of inhaling argon and being deprived of oxygen and for his opinion that Sheldon’s exposure to argon was far more than 51% of the cause of Sheldon’s cardiac arrest. This Court gave less weight to the testimony and opinion of Scott Adam Sample, DO, who testified that Sheldon suffered idiopathic sudden cardiac arrest, i.e., it is Dr. Sample’s opinion that, for an unknown reason, Sheldon had an electrical disturbance in his heart, which put him into ventricular fibrillation, which caused him to lose consciousness and fall to the floor. Dr. Sanz also persuasively explained why it was unlikely that Sheldon suffered an idiopathic sudden cardiac arrest.

that time, Sheldon's only source of oxygen was the oxygen that was in his blood when he stopped breathing air. Because his heart was not pumping oxygenated blood, Sheldon developed chronic anoxic encephalopathy, meaning that the lack of oxygen began causing damage throughout his brain.

¶ 28 The paramedics arrived approximately 12 minutes after the first 911 call. They found Sheldon to be in cardiopulmonary arrest with ventricular fibrillation, meaning that he was not breathing, and his heart was just "quivering." To get Sheldon's heart beating normally, they administered medications and alternated between shocks from a defibrillator and chest compressions. The paramedics put in an oral airway and, 8 minutes later, intubated Sheldon and dispensed oxygen, which started flushing the argon out of his lungs. Around 8:51 a.m., while enroute to the hospital, Sheldon regained a heartbeat and began breathing.

¶ 29 At the hospital, the physicians expected to find a blocked artery, i.e., they expected to find that Sheldon was having a myocardial infarction, a "heart attack" in lay terms, as that was the most likely cause of Sheldon's cardiac arrest. However, they did not find a blockage. Sheldon's toxicology screen did not reveal any illicit drugs, which is another potential cause of cardiac arrest. Sheldon's physicians did not know that Sheldon had been exposed to argon; indeed, one of his physicians noted, "there [was] no gas leaking or anything like that when someone heard a loud sound and rushed in there and he was found on the ground." Therefore, their records indicate that they did not know what had caused Sheldon to go into cardiopulmonary arrest.

¶ 30 From the Emergency Room, Sheldon was placed in the Intensive Care Unit in a coma.

¶ 31 As a direct effect of being knocked over backwards and hitting the back of his head on the concrete floor when the safety valve burst, Sheldon suffered a concussion with loss of consciousness. As a direct and primary effect of inhaling argon, i.e., more than 51% of the cause,⁵ Sheldon suffered other injuries, including: (1) cardiopulmonary arrest with ventricular fibrillation; (2) moderate spasm of his proximal right coronary artery; (3) severe spasm of his mid right coronary artery; and (4) anoxic encephalopathy, i.e., a brain injury caused by the lack of oxygenated blood.

¶ 32 Sheldon has been mentally incompetent since July 3, 2017, as a direct effect of his injuries.

American Gas's Response to Sheldon's Accident

¶ 33 While the paramedics were tending to Sheldon, Andreas Boone, American Gas's safety manager, started photographing the scene. He took 37 photographs. Shortly after the ambulance left, Boone took a photograph of the front of the CryoVation machine,

⁵ § 39-71-119(5)(b), MCA.

which shows the coupler connected to the valve that was labeled “ARGON.” The pressure at the valve was nearly 4,000 psi.

¶ 34 Mader, Boone, Kevin Atkins, a vice president at American Gas, and Charles Beal, an attorney for American Gas, anticipated that there was going to be an outside investigation into Sheldon’s accident. Because they knew that nitrogen is not as hazardous as argon when released into an enclosed room, Mader was instructed to write an incident report to say that Sheldon was exposed to nitrogen, which they would thereafter use as their account of what occurred.

¶ 35 On July 3, 2017, at 6:27 p.m., Mader emailed Atkins and Boone his first draft. Mader’s first draft was not entirely accurate, but he generally recounted that he heard the safety valve burst and then found Sheldon lying unresponsive on the floor. Although Sheldon had the coupler connected to the valve labeled, “ARGON,” Mader wrote, “The nitrogen gauge . . . was at 4000 psi on the spec gas manifold.” Mader noted that when the ambulance crew moved Sheldon, “he was bleeding from the back of his head.” Mader thought that one of two things happened in the specialty gas room; he wrote: “We were unable to determine if John had a medical emergency while the pump was running and the safety blew because it was over pressurized or if the safety blew which caused John to fall over and hit his head.”

¶ 36 On July 5, 2017, Mader, Atkins, and Boone revised Mader’s first draft. They worked backwards from the conclusion they wanted to reach, which was that Sheldon had a medical emergency, unrelated to his work, and that the safety valve burst because he was already unconscious and unable to tend to the CryoVation machine. Thus, they changed Mader’s initial report to include only evidence supporting that conclusion, some of which was false. They wanted the reader to think that Sheldon did not have a heartbeat when he fell to the floor, and could not have been heavily bleeding, as they thought that supported the conclusion that Sheldon had a medical emergency before he fell. Thus, they changed the sentence stating that Sheldon was bleeding from the back of his head to say that he was “lightly bleeding.” They wanted the reader to think that Sheldon could not have been exposed to a gas because the room was ventilated. Thus, they added a sentence stating, “We also noted that the fill room door was halfway open, the window was all of the way open, the garage door was open and the ambient air ceiling vent was open.” Although Mader knew that a gas was fiercely blowing into the specialty gas room from the burst safety valve, they also added a sentence stating that he “did not notice any adverse atmospheric conditions when [he] entered the room.” They did not want the reader to think that the burst safety valve could have caused Sheldon to fall backwards and hit his head. Thus, they deleted the phrase “or if the safety blew which caused John to fall over and hit his head.” They rewrote the conclusion section to state: “Our investigation leads us to believe that John had a medical emergency while the pump was running and the safety blew because it was over-pressurized.”

¶ 37 While they were revising Mader's first draft of the incident report, Mader relabeled the valves for argon and nitrogen on the CryoVation machine. Mader stuck a white label with black text stating "Nitrogen" over the affixed "ARGON" label and stuck a white label with black text stating "Argon" over the affixed "NITROGEN" label.

¶ 38 Mader and Atkins testified that Mader relabeled the valves because American Gas was replacing its bulk argon tank and had connected the temporary argon tank to what had been the nitrogen vaporizer and connected the temporary nitrogen tank to what had been the argon vaporizer. Thus, Mader and Atkins testified that, at the time of Sheldon's accident, the valve and control knob labeled "ARGON" were actually the valve and control knob for nitrogen and the valve and control knob labeled "NITROGEN" were actually the valve and control knob for argon. However, for three main reasons, Mader's and Atkins's testimony was not credible.

¶ 39 *First*, they could not offer a sound reason why American Gas would make that switch rather than just connect the temporary nitrogen tank to the existing nitrogen vaporizer and connect the temporary argon tank to the existing argon vaporizer. Charlene Kananen, who worked for American Gas for 18 years and who was knowledgeable with the gas plant's operations at the time of Sheldon's accident, credibly testified that it would not have made sense to connect the temporary nitrogen tank to the argon vaporizer and that it would have been much simpler to connect the temporary nitrogen tank to the existing nitrogen vaporizer.⁶ Moreover, Mader admitted that to switch the vaporizers, American Gas would have had to purge the vaporizers and the lines to the high-pressure fill room and to the CryoVation machine, a task that would have taken at least a full day. He also admitted that American Gas had many problems when it did this in 2015 because "it's very difficult to purge them enough to make sure that you don't have contaminants. What they consider a contaminant is in parts per million, so it's very little." When asked why American Gas would switch the vaporizers instead of just connecting the temporary nitrogen tank to the existing nitrogen vaporizer, Mader was initially evasive. When pressed, he tried to explain why but, because he could not think of a plausible reason as he testified, he eventually gave up and testified, "I don't recall why we would have done it that way. It's just that's what we chose to do." This Court is convinced that if American Gas had switched the vaporizers, Mader would have been able to provide a sound reason for doing so.

¶ 40 *Second*, Mader's and Atkins's testimony was completely undercut by other credible evidence. Mader admitted that if American Gas had attached the temporary nitrogen tank to what had been the argon vaporizer and had attached the temporary argon tank to what

⁶ Accident Fund argues that Kananen testified that American Gas had connected the temporary nitrogen tank to the argon vaporizer. However, it was evident to this Court that Kananen did not intend to testify that American Gas had done that. She first credibly testified that it did not make sense to do so. And when asked if she agreed that if American Gas had connected the temporary nitrogen tank to the argon vaporizer whether the gas would come out of the valve on the CryoVation machine labeled "ARGON," she testified, "Yes. *If* that's the way they had it set up." (Emphasis added).

had been the nitrogen vaporizer, then the valve labeled “Nitrogen” in the high-pressure fill room would dispense argon and the valve labeled “Argon” would dispense nitrogen. Mader also admitted that if the employee in the high-pressure fill room did not know about the switch, then it would create a dangerous situation. However, it was evident that Michael Lee Miller, an American Gas employee who filled cylinders in the high-pressure fill room at the time of Sheldon’s accident, did not think that the nitrogen and argon had been switched. In addition, Miller, who took over Sheldon’s duty of making specialty gas mixtures within days after OSHA completed its second visit to the gas plant on July 11, 2017, credibly testified that he had never seen the labels that Mader had stuck on the CryoVation machine.

¶ 41 *Third*, and most importantly, Mader and Atkins proved to be untruthful, which caused this Court to distrust their testimony. There are several examples in which they were untruthful, either by intentionally making false statements or by withholding evidence, including the following three.

¶ 42 As a first example, they did not tell the OSHA investigators the truth. When Mader and Atkins first showed an OSHA investigator the specialty gas room on July 6, 2017, they did not tell her that Mader had relabeled the nitrogen and argon valves the previous day. Instead, Atkins told the OSHA investigator that other than moving the cylinders that they had moved for the paramedics back to where they had been, they had “left [the room] like it was.” Mader did not interpose and tell her that he had relabeled the nitrogen and argon valves the previous day. And, when Mader showed the investigator the CryoVation machine, he pointed to the swing arm that was still attached to the valve that was labeled “ARGON” at the time of Sheldon’s accident, but which he had relabeled as “Nitrogen,” and told her that Sheldon was pumping nitrogen at the time of his accident.

¶ 43 When the OSHA investigators visited the specialty gas room on July 11, 2017, Mader and Atkins were again untruthful. Immediately after the OSHA investigators started videotaping, Mader volunteered to them:

So, ***we haven’t changed anything***. The only thing was stuff that I had already told you, that we had to move [the cylinders connected to the radial manifold] when the ambulance people were here. They asked me to move these cylinders and we put them back similar to where they were.

Um, the only other time we’ve been in here was, I had to analyze some cylinders so I just hooked up a run and ran it through here into the lab there, but that’s it. ***Otherwise, nothing has been touched.***⁷

Atkins then interposed and said that they had also closed the garage door and reduced the pressure on the “nitrogen” valve to a safe pressure. Later, when Mader was

⁷ Emphasis added.

explaining how the CryoVation machine worked, he again pointed to the white “Nitrogen” label he had stuck over the affixed “ARGON” label and stated that Sheldon was pumping nitrogen when the safety valve burst. Mader’s claim at trial that he did not tell the OSHA investigators that he had relabeled the nitrogen and argon valves and control knobs because he was just trying to be “concise” and did not want to burden them with “extra information” strained credulity beyond the breaking point. This Court is convinced that if Mader and Atkins had nothing to hide, they would have told the OSHA investigators the truth.

¶ 44 As a second example, Mader and Atkins withheld evidence from OSHA. When the OSHA investigator asked Mader what “would have hurt Sheldon,” Mader did not tell her that he had initially thought that it was possible that the blast from the safety valve had knocked Sheldon over. Instead, Mader told her that he had concluded that Sheldon had a medical emergency before the safety valve burst. And, in response to the OSHA investigator’s request for the photographs of the specialty gas room from the day of Sheldon’s accident, Mader and Atkins gave OSHA only 6 of the 37 photographs from the morning of the accident. Notably, they did not send the photograph showing that the coupler was connected to the valve that was then labeled, “ARGON.”

¶ 45 As a third example, Mader and Atkins willfully testified falsely in parts of their testimony. In support of their claim that Sheldon was pumping nitrogen, they testified that the only Mixture Recipe that was near the CryoVation machine at the time of Sheldon’s accident was the recipe for a mixture of 1% oxygen and 99% nitrogen. However, one of OSHA’s videos shows that Sheldon had clipped three Mixture Recipes to a cylinder next to the CryoVation machine. As one of the OSHA investigators flipped through the three Mixture Recipes, he asked Mader, “Is this how it [was] at the time of the incident?” Mader responded, “Yes . . . nothing has been changed.” Moreover, although Mader initially thought that the blast from the burst safety valve could have knocked Sheldon over, and although Mader told the OSHA investigator that the blast could have knocked him “back,” he testified that the blast could not have knocked Sheldon over or back; instead, he testified that the blast could have only startled Sheldon.

¶ 46 In sum, because Mader and Atkins were not credible witnesses, this Court is convinced that American Gas had not connected the temporary nitrogen tank to the existing argon vaporizer and the temporary argon tank to the existing nitrogen vaporizer. Thus, at the time of his accident, Sheldon was pumping argon.

Sheldon’s Claim and Accident Fund’s Investigation

¶ 47 Accident Fund insured American Gas. Accident Fund hired Gallagher Bassett to adjust Sheldon’s claim, which assigned the claim to Ashley Davis, an out-of-state claims examiner, and to Nicole Palagi, a Montana claims examiner. Palagi hired Tanya R. Helvik, RN, BAN, a nurse case manager, to help her with Sheldon’s claim.

¶ 48 On July 7, 2017, Davis briefly spoke to Mader, who told her that Sheldon was filling cylinders in a room that was well ventilated, work that was not strenuous. Mader told Davis that he was not sure what had happened, but that Sheldon may have suffered a heart attack and a concussion. Davis did not ask Mader any follow-up questions and did not learn that a safety valve had burst, nor that Sheldon had been exposed to the gas that was blowing into the specialty gas room.

¶ 49 On July 7, 2017, Helvik spoke to one of Sheldon's sisters. As set forth in Helvik's claim note, Sheldon's sister told Helvik that "her brother was at work in a room alone filling a nitrogen cylinder when a co-worker heard the sound of the safety/pop-off valve. [The] [c]o-worker rushed into [the] room and found [Sheldon] on [the] floor not breathing with no pulse" Sheldon's sister also told Helvik that OSHA was investigating. Helvik told Palagi what Sheldon's sister had told her.

¶ 50 Helvik obtained Sheldon's medical records from the hospital and forwarded them to Palagi.

¶ 51 On July 25, 2017, Palagi sent an email to Helvik, asking several questions about Sheldon's medical records. In her response, Helvik summarized Sheldon's medical records, noted that the physicians stated that they did not know the cause of his cardiac arrest but that there was an unanswered question as to "whether or not the nitrogen he was handling could possibly cause an artery to spasm." Helvik's email states, in relevant part, as follows:

Acute STEMI=(ST (certain part of an EKG) Elevation Myocardial Infarction)

– term used to alert hospital staff of a heart attack "in progress"

- patient goes to the "cath lab" to have heart artery opened (with a stent) to restore blood flow to heart muscle
- it's always assumed there is a blockage in a main heart artery

-- blockage is almost always caused by CAD (coronary artery disease=plaque (i.e. cholesterol) build-up in blood vessel) ("heart disease")

In Mr. Sheldon's case, it initially appeared that this was happening; when they went to put a stent in, however, there was no blockage

So, his heart was deprived of oxygen (because he did have EKG abnormalities,) but they don't know why.

He technically did not have a heart attack (MI.)

ETOH use/abuse = alcohol use/abuse

Hypoxic-ischemic encephalopathy: simply put, this means his brain has swelling caused by lack of oxygen.

It's seen sometimes in those who've had cardiac arrest & prolonged CPR. His brain was deprived of blood/oxygen long enough to cause damage.

More than likely, this is the reason Mr. Sheldon has remained unresponsive.

I don't see anything abnormal in his lab results. It appears that the doctors are not able to determine why he went into cardiac arrest. From his records, it also appears they suspect a heart artery "spasm," but they don't have an explanation for why this happened.

As I mentioned previously, John's sister told me OSHA is investigating at his workplace. There was some question about whether or not the nitrogen he was handling could possibly cause an artery to spasm. At this point, there is no clear indication one way or the other.⁸

¶ 52 On July 27, 2017, Accident Fund denied liability for Sheldon's claim, at which time Palagi stopped her investigation. In her denial letter, Palagi explained that Sheldon's physicians "provide a diagnosis of cardiac arrest but do not provide a primary cause of the diagnosis." She further explained that "there was no accident/incident that caused or contributed to this diagnosis(es)"

Reasonableness Findings

¶ 53 Accident Fund's denial of liability was unreasonable. This Court makes this finding for two reasons.

¶ 54 *First* and foremost, Accident Fund did not conduct an adequate investigation before it denied liability for Sheldon's claim. The Montana Supreme Court has "repeatedly held that insurers have an affirmative duty to investigate workers' compensation claims and that absent such an investigation, the denial of a claim for benefits is unreasonable."⁹ The court has also explained that, after the investigation, the insurer must make "a reasoned review of all available evidence in the case . . . followed by an impartial evaluation of the evidence reviewed."¹⁰

¶ 55 The Montana Supreme Court and this Court have ruled that an insurer's denial of liability is unreasonable when the claims examiner does not follow obvious leads and, as a result, relies on only a portion of the evidence that was available to deny liability.¹¹

⁸ Emphasis in original.

⁹ *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 50, 303 Mont. 364, 15 P.3d 948 (citations omitted). See also *Gaumer v. Mont. Dep't of Highways*, 243 Mont. 414, 421, 795 P.2d 77, 81 (1990); *Lovell v. State Comp. Mut. Ins. Fund*, 260 Mont. 279, 288, 860 P.2d 95, 101 (1993); *Stevens v. State Comp. Mut. Ins. Fund*, 268 Mont. 460, 467, 886 P.2d 962, 966 (1994), *overruled on other grounds by Kloepfer v. Lumbermens Mut. Cas. Co.*, 272 Mont. 78, 899 P.2d 1081 (1995); *Marcott v. La. Pac. Corp.*, 275 Mont. 197, 210, 911 P.2d 1129, 1137 (1996).

¹⁰ *Stevens*, 268 Mont. at 470, 886 P.2d at 968.

¹¹ See, e.g., *Gaumer*, 243 Mont. at 420-21, 795 P.2d at 81 (holding, in case in which the claimant inhaled an unknown substance and suffered lung injury, that the insurer's denial was unreasonable on the grounds that it did not conduct an adequate investigation because, *inter alia*, the insurer did not obtain the treating physician's medical records nor ask him whether inhaling the unknown substance was the primary cause of the claimant's injury); *Lovell*, 260 Mont.

¶ 56 This case falls squarely under this precedent. Palagi did not follow obvious leads and, consequently, did not obtain the available evidence before denying liability for Sheldon’s claim. Before Accident Fund denied liability, Helvik had notified Palagi that OSHA was investigating, which was a lead that there may have been an unsafe condition at American Gas that caused Sheldon’s injuries. Helvik had also notified Palagi that an American Gas employee had heard the sound of a “safety/pop-off valve,” and that there was an unanswered question of whether the nitrogen Sheldon was handling could have caused his artery to spasm, which was a lead that a gas exposure may have been the cause of his injuries. Palagi should have followed these obvious leads, e.g., she should have contacted Mader and asked what had occurred and whether Sheldon had been exposed to nitrogen, or any other gas, before he was found unconscious. Palagi should have also asked Mader what evidence was available to him concerning the incident, and asked him to provide her with that evidence, including his incident reports, the photographs, and the videos from the gas plant. Because Mader had readily admitted to the OSHA investigators that a safety valve had burst, and because American Gas had a legal duty to cooperate with Accident Fund, and assist in its investigation,¹² Palagi’s failure to discover that a safety valve had burst and that a gas was blowing into the specialty gas room — which Palagi acknowledged at trial was a “critical” piece of evidence that she did not have before she denied liability for Sheldon’s claim — is inexplicable. Palagi, who acknowledged that there was no indication that Sheldon’s physicians knew he had been exposed to a gas, could have, and should have, then informed Sheldon’s physicians that a safety valve had burst and that Sheldon had been exposed to a gas and asked whether his gas exposure was the cause of his cardiopulmonary arrest. If the physicians needed additional information, she could have, and should have, taken reasonable steps to obtain that information for them. She could have then made a reasoned and an impartial evaluation of the available evidence and determined whether Sheldon suffered compensable injuries.¹³ This Court is convinced that Palagi did not follow the obvious

at 288-89, 860 P.2d at 101-02 (holding, in case in which the insurer terminated claimant’s benefits because he began receiving social security benefits, that the insurer’s termination of benefits was unreasonable on the grounds that it did not conduct an adequate investigation “because the claims examiner had not investigated, in even a cursory fashion, the basis upon which Lovell received Social Security benefits”); *Stevens*, 268 Mont. 460, 886 P.2d 962 (holding, in case in which insurer terminated benefits because claimant’s disgruntled ex-wife told the insurer that he was not injured at work, that the insurer’s denial was unreasonable on the grounds that it did not conduct an adequate investigation because the claims examiner did not interview any other witnesses nor read the investigative reports he had ordered and that even a “cursory investigation” would have revealed that there was “bad blood” between the ex-wife and the claimant and his family and revealed that several other witnesses had seen the claimant before his work shift and reported that he appeared pain-free and injury-free); and *McClanahan v. State Comp. Ins. Fund*, 1996 MTWCC 50, ¶ 36 (finding, in case in which insurer did not interview all the available witnesses, that insurer’s denial of liability was unreasonable because, “It had an independent duty to investigate this claim, instead it took the employer’s word at face value and failed to investigate.”).

¹² ARM 24.5.301(4). See also *Asurion Servs., LLC v. Mont. Ins. Guar. Ass’n*, 2017 MT 140, ¶ 8, 387 Mont. 483, 396 P.3d 140 (citing *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 2012 MT 61, ¶ 13, 364 Mont. 299, 280 P.3d 240) (noting that employers have a basic duty to cooperate and assist its workers’ compensation insurer).

¹³ At trial, Palagi testified that she was still the responsible claims examiner and could accept liability for the claim if she were convinced by the evidence that Sheldon suffered compensable injuries. However, Palagi was the first witness to testify and then left and did not watch the rest of the trial via the videoconference. Although Bryer did not introduce sufficient evidence to convince this Court that Davis was actually the responsible claims examiner, in

leads because she was solely focused on finding a basis for denying liability for Sheldon's "catastrophic" claim, which is unreasonable.¹⁴

¶ 57 *Second*, Accident Fund did not keep its claim file in accordance with § 39-71-107(3), MCA, which states, in relevant part, that a claims examiner must keep her claim file in Montana and "in a manner that allows the documents to be retrieved from that office and copied at the request of the claimant or the department." When Bryer requested a copy of Accident Fund's file, Palagi did not send a complete copy, excluding her denial letter, her claim notes, and Helvik's notes. It is evident that the reason she did not send a complete copy of her claim file was that she did not keep the documents together. To get a complete copy of Accident's Fund's claim file, Bryer was forced to subpoena it, and Helvik's file, during this litigation. Even then, Accident Fund did not produce a copy of Palagi's denial letter because it was not part of its claim file. This Court has previously warned that an insurer's failure to provide a complete copy of its claim file at the claimant's request would be a factor it considered when deciding whether an insurer was reasonable.¹⁵

¶ 58 Accident Fund argues that the fact that OSHA ultimately determined that there was insufficient evidence to prove that Sheldon's work caused his cardiopulmonary arrest is proof that if Palagi had conducted a thorough investigation, she would have obtained evidence on which she could have reasonably relied to deny liability for Sheldon's claim. Notwithstanding, this Court does not speculate as to what evidence the claims examiner would have discovered if she had conducted an adequate investigation, nor what decisions she would have made if she had made a reasoned and impartial review of that evidence. This Court has explained, "The lack of a reasonable investigation is in itself sufficient to impose the penalty."¹⁶

¶ 59 Relying on *Gonzales et al. v. Montana Power Co.*,¹⁷ Accident Fund also argues that the fact that Sheldon's temporary guardian's lawyers did not challenge its denial in

violation of § 39-71-107(2), MCA, which provides that claims must be examined and managed by a Montana claims examiner, Palagi's failure to attend the trial after she testified — which is very unusual if not unprecedented, as claims examiners typically attend trials — raised the question of whether she was the claims examiner who had the authority to manage Sheldon's claim and determine whether Sheldon suffered compensable injuries.

¹⁴ See, e.g., *Delaney v. Hartford Accident & Indem. Co.*, 2001 MTWCC 10, ¶ 61 (finding that denial of liability for rehabilitation benefits was unreasonable because the claims examiner did not conduct a reasoned review of all available evidence and "was more focused upon finding a basis for denying benefits than on the merits of the claim.").

¹⁵ See *Porter v. Liberty Nw. Ins. Corp.*, 2007 MTWCC 42, ¶ 53 (stating, "I would caution insurers that there is also a point at which, if a claimant is forced to file a petition in this Court simply to receive a copy of his claims file, this fact would certainly be among the issues taken into consideration in determining whether an insurer acted reasonably in its adjustment of the claim."). See also *Marcott*, 275 Mont. at 205, 911 P.2d at 1134 (holding that an insurer is unreasonable if it does not follow established Montana law).

¹⁶ *Ardesson v. Legion Ins.*, 1998 MTWCC 2, ¶ 65.

¹⁷ 2001 MTWCC 19.

2017 is proof that its denial was reasonable.¹⁸ In *Gonzales*, while defining the duties that an insurer has in advising a claimant of his entitlement to an impairment award, this Court explained that the fact that a claimant is represented is a factor to be considered when determining the reasonableness of the insurer's decision to deny liability for an impairment award.¹⁹ This Court rhetorically asked: "If a competent lawyer does not identify a claimant's entitlement to an impairment award, how can it be said that the insurance adjuster should have done so?"²⁰

¶ 60 However, *Gonzales* does not support Accident Fund's argument. This Court did not rule that an insurer's duty to investigate is abrogated when the claimant hires an attorney. In fact, quoting the Montana Supreme Court's decision in *Lovell*, this Court reiterated that an insurer's "duty to investigate is 'independent of, and unrelated to, any action by a claimant.'" ²¹ Thus, even though Sheldon's temporary guardian hired lawyers on July 24, 2017, three days before Accident Fund denied liability, Accident Fund still had the duty to investigate Sheldon's claim and conduct a reasoned and impartial review of the available evidence before making a decision on liability.

CONCLUSIONS OF LAW

¶ 61 This case is governed by the 2015 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Sheldon's industrial accident.²²

Issue One: Did Sheldon suffer a compensable injury?

¶ 62 Section 39-71-119, MCA, states, in relevant part:

Injury and accident defined. (1) "Injury" or "injured" means:

(a) internal or external physical harm to the body that is established by objective medical findings;

. . . .

(2) An injury is caused by an accident. An accident is:

(a) an unexpected traumatic incident or unusual strain;

(b) identifiable by time and place of occurrence;

(c) identifiable by member or part of the body affected; and

¹⁸ As set forth in *Bryer v. Accident Fund Gen. Ins. Co.*, 2021 MTWCC 13, ¶¶ 8-12, Sheldon had a temporary guardian from July 24, 2017, to January 24, 2018, who retained two lawyers to pursue a workers' compensation claim on Sheldon's behalf. As set forth in ¶¶ 11 and 12, the lawyers withdrew when the temporary guardianship lapsed by operation of law.

¹⁹ *Gonzales*, ¶¶ 13, 16.

²⁰ *Gonzales*, ¶ 16.

²¹ *Gonzales*, ¶ 10 (quoting *Lovell*, 260 Mont. at 289, 860 P.2d at 102).

²² *Ford v. Sentry Cas. Co.*, 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

(d) caused by a specific event on a single day or during a single work shift.

.....
(5)(a) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the primary cause of the physical condition in relation to other factors contributing to the physical condition.

(b) “Primary cause”, as used in subsection (5)(a), means a cause that, with a reasonable degree of medical certainty, is responsible for more than 50% of the physical condition.

¶ 63 Section 39-71-407, MCA, states, in relevant part:

(3)(a) An insurer is liable for an injury, as defined in 39-71-119, only if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

(i) a claimed injury has occurred; or
(ii) a claimed injury has occurred and aggravated a preexisting condition.

(b) Proof that it was medically possible that a claimed injury occurred or that the claimed injury aggravated a preexisting condition is not sufficient to establish liability.

.....
(10) An employee is not eligible for benefits payable under this chapter unless the entitlement to benefits is established by objective medical findings that contain sufficient factual and historical information concerning the relationship of the worker’s condition to the original injury.

¶ 64 In *Ford v. Sentry Casualty Co.*, the Montana Supreme Court ruled that, under these statutes, a claimant has the burden of proving an injury, which must be established with objective medical findings, and that the industrial accident caused the injury, which includes the aggravation of a preexisting condition, with medical expertise or opinion.²³

¶ 65 In *Cheetham v. Liberty Northwest Ins. Corp.*,²⁴ this Court explained that under § 39-71-119(5)(b), MCA, the claimant must prove with a physician’s “apportionment opinions” that the accident contributed at least 51% to the condition.²⁵

¶ 66 Here, Bryer met her burden of proving that Sheldon suffered an accident during his July 3, 2017, work shift and that his accident was the primary cause of his injuries,

²³ *Ford*, ¶¶ 44-49.

²⁴ 1997 MTWCC 37.

²⁵ *Cheetham*, Conclusions of Law, 2.

which are established by many objective medical findings. Dr. Schumpert and Dr. Sanz provided the required medical causation opinions and, to the extent that Bryer needed an apportionment opinion, Dr. Sanz persuasively and convincingly testified that Sheldon's exposure to argon was "far more" than 51% of the cause of Sheldon's cardiac arrest.²⁶

Issue Two: Is Bryer entitled to costs, attorney fees, and a penalty?

¶ 67 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

(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.

¶ 68 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.

¶ 69 Because Bryer prevailed, she is entitled to her costs under § 39-71-611, MCA.

¶ 70 This Court has found that American Fund's denial of liability was unreasonable. Therefore, Bryer is entitled to her attorney fees under § 39-71-611, MCA, and a 20% penalty under § 39-71-2907(1)(b), MCA.

JUDGMENT AND ORDER

¶ 71 Sheldon suffered compensable injuries on July 3, 2017.

¶ 72 Because Bryer prevailed, she is entitled to her costs under § 39-71-611, MCA.

²⁶ This Court need not decide the parties' dispute over whether § 39-71-119(5)(b), MCA, applies in this case, as it is clear that the industrial accident was the primary cause of Sheldon's cardiopulmonary arrest.

¶ 73 Because American Fund's denial of liability for Sheldon's claim was unreasonable, Bryer is entitled to her attorney fees under § 39-71-611, MCA, and a 20% penalty under § 39-71-2907(1)(b), MCA.

¶ 74 This Court recognizes that ARM 24.5.343 conflicts with M.R.App.P. 4(1)(a). This Court will follow M.R.App.P. 4(1)(a) and will not enter final judgment until it determines the amount of Bryer's costs and attorney fees. Accordingly, IT IS ORDERED that Bryer file her application for taxation of costs and all supporting exhibits and her claim for attorney fees and all supporting exhibits on or before **Friday, July 1, 2022**. Accident Fund shall have 20 days after service of Bryer's application of costs and her claim for attorney fees to file any objections. The parties shall have 10 days after service of any objection to request a hearing on either Bryer's application for taxation of costs and/or her claim for attorney fees.

¶ 75 After awarding Bryer her costs and attorney fees, this Court will certify this Judgment as final.

DATED this 8th day of June, 2022.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Sydney E. McKenna, Justin Starin, and Steven S. Carey
Jon T. Dyre and Montana L. Funk

Submitted: October 25, 2021